



Kofi Annan  
FOUNDATION

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**THE KENYA  
NATIONAL  
DIALOGUE AND  
RECONCILIATION:  
ONE YEAR LATER**

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**Geneva, 30-31 March 2009**

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**Report of  
The Meeting**

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# Introduction

**The Kofi Annan Foundation, an independent non-profit organization based in Geneva, Switzerland, convened a meeting on “The Kenya National Dialogue and Reconciliation (KNDR): One Year Later”, at the Intercontinental Hotel in Geneva from 30 to 31 March 2009.** The purpose of the meeting was to bring together all relevant actors who had taken part in the mediation effort in Kenya in early 2008 as well as academics and practitioners who had since analysed the effort to (i) assess the mediation process and implementation of the KNDR Agreements; and (ii) derive important lessons and strategies which might be applied in similar situations in the future by local, regional and international actors.<sup>2</sup>

The meeting was attended by over 250 participants, including the Hon. Musalia Mudavadi, Deputy Prime Minister of Kenya, who was accompanied by four Kenyan Ministers, Hon. Martha Karua, Hon. Dr. Sally Kosgei, Hon. James Orengo, Hon. Moses Wetang’ula and Attorney-General Amos Wako. Also in attendance were three former Heads of State, one former Prime Minister and three former Foreign Ministers. Representatives of civil society organizations in Kenya, international NGOs, United Nations agencies, academic institutions, the Kenyan and international media were also present, as well as members of the diplomatic corps in Nairobi and Geneva.<sup>3</sup>

The meeting was held under the Chatham House Rule, except for the opening and closing sessions, the proceedings of which were open to the international press and broadcast live to Kenya.

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2 The agenda of the meeting can be found on pages 6-8 of this Report.

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3 The participants list can be found on pages 62-74 of this Report.

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# Agenda:

## Monday 30 March 2009

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### 14.30: Opening Plenary

Welcoming Remarks by Kofi Annan, Chairman of the African Union Panel of Eminent African Personalities

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Followed by:

### Panel One: Mediation During the Kenya Crisis (closed meeting)

#### Moderator:

**Martin Griffiths**, Director,  
Centre for Humanitarian Dialogue, Geneva

#### Speakers:

**Abbas Gullet**, Secretary General of Kenya Red Cross, Kenya

**James Orengo**, Minister for Lands, Kenya

**Haile Menkerios**, Assistant Secretary-General,  
UN Department of Political Affairs, New York

**L. Muthoni Wanyeki**, Executive Director,  
Kenya Human Rights Commission

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### 17.30: Panel ends

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### 18.30 - 20.00: Reception hosted by Kofi Annan

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## Tuesday 31 March 2009

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### 09.00:

### Panel Two: Implementation of the Kenya National Dialogue and Reconciliation Agreements

(closed meeting)

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#### Moderator:

**Hans Corell**, Former Under-Secretary-General for Legal Affairs  
and Legal Counsel, United Nations, Sweden

#### Speakers:

**Martha Karua**, Minister of Justice and Constitutional  
Affairs, Kenya

**Horacio Boneo**, Commissioner, Independent Review  
Commission, Argentina

**Yash Pal Ghai**, Constitutional Expert, Kenya

**Binaifer Nowrojee**, Director, Open Society Institute  
for East Africa, Kenya

**Karuti Kanyinga**, Director, South Consulting, Kenya

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### 10.45: Coffee-tea break

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11.00:

## Part II

### Moderator:

**Bethwel Kiplagat**, Executive Director, Africa Peace Forum, Kenya

### Speakers:

**Musalia Mudavadi**, Deputy Prime Minister, Kenya

**Philip Waki**, Chair,

Commission of Inquiry into Post-Election Violence, Kenya

**Priscilla Hayner**, Director, Peace and Justice Programme,

the International Center for Transitional Justice, Geneva

**Ndung'u Wainaina**, Executive Director,

International Center for Policy and Conflict, Kenya

13.00: Lunch

14.30:

## Panel Three: Lessons Learned

### Moderator:

**Nana Effah-Apenteng**, Chief-of-Staff,

Coordination and Liaison Office, African Union,

Panel of Eminent African Personalities, Kenya

### Speakers:

**Elisabeth Jacobsen**, Ambassador of Norway to Kenya

**Johann Kriegler**, Chair,

Independent Review Commission, South Africa

**Haile Menkerios**, Assistant Secretary-General,

UN Department of Political Affairs, New York

**Bethwel Kiplagat**, Executive Director,

Africa Peace Forum, Kenya

16.30: Coffee-tea break

16.45: Closing Remarks by **Musalia Mudavadi**  
and **Kofi Annan**

17.30: Press Conference

# Executive Summary

The purpose of the meeting was to review the strengths and weaknesses of the Kenya National Accord and the implementation status of the agreements reached by the Parties one year earlier. In doing so, the meeting helped to identify ways in which further progress in Kenya could be achieved and drew important lessons that could be applied in conflict situations in Africa and beyond.

While recognizing that some progress had been made, participants acknowledged that the momentum for reform had slowed. Many speakers described the obstacles, such as corruption, the politicization of ethnicity, impunity and inequality, which were impeding progress towards the goals enshrined in the Kenya National Accord.

Despite the pessimistic analysis of the current situation in Kenya, the meeting succeeded in bringing together actors from different sectors of Kenyan society to discuss the key issues and measures needed to move the country forward.

The lessons learned and ways forward which emerged from the two-day meeting are summarized below:

## The Mediation Process

The Kenya National Dialogue and Reconciliation (KNDR) process was a positive example of rapid response to a crisis. It represented a “ceasefire” allowing a restoration of calm and an opportunity to address the fundamental problems in Kenya. That space was shrinking and needed to be restored for the implementation to succeed.

There was confidence in the mediation process, yet that mirrored, inversely, the overwhelming lack of confidence in the public institutions in Kenya as a cause of the crisis. The Accord was a platform to begin those reforms, but greater political will was needed to see that through.

The issues of impunity and accountability had not been dealt with as extensively as they could have been during the mediation, and that remained the key underlying issue constraining the implementation of the agreements today.

A key achievement of the mediation process had been the combination of domestic support and pressure, lending credibility to the international and regional pressures to resolve the crisis. While Kenyan political leadership was essential for implementation, the engagement of the international community – in partnership with Kenyans – needed to be welcomed and the goodwill and focus from the mediation process had to be reinvigorated.

The level and intensity of the violence had not been anticipated. That was a key lesson: Kenya needed to recognize and address the underlying tensions that remained in order to ensure longer-term peace and stability. Investing in national conflict resolution capabilities would be prudent.

The Coalition Government provided an opportunity to achieve much-needed institutional reforms in the country. However, many people had the feeling that the Coalition had become an end in itself. Caution needed to be exercised when looking at Kenya as an example of a power-sharing model.

## Implementation of the KNDR Agreements

Progress had been made in the implementation of the four agenda items over the last year. Those gains were in danger of reversal, however, and there was an urgent need for vigilance by the Kenyan people. In going forward, the focus should be on actual results. All efforts should be judged by their implementation and the reality on the ground.

Urgent steps needed to be taken to regenerate a sense of common national purpose. Regrettably, the Coalition Government was perceived as neither implementing reforms nor prioritizing Kenyans' basic needs, such as job creation, poverty reduction and healthcare provision.

One of Kenya's greatest assets is the richness of civil society. Civil society in its broadest and most inclusive sense can and must create the momentum to restore a sense of common national purpose.

The international community can continue to play an important, if limited, supporting role. The African Union (AU) intervention led by former United Nations Secretary-General Kofi Annan had undoubtedly saved many lives and created a breathing space for political progress. Notwithstanding this, the primary responsibility for achieving progress had to lie with Kenyans.

The deteriorating economic situation and growing cynicism regarding the motives of the ruling class made the need for a sustained multi-stakeholder dialogue on the future of Kenya all the more urgent. The constitutional reform process can provide the basis for multi-stakeholder engagement, but such an exercise will not work if the political class continued to undermine respect for existing constitutional provisions, respect for human rights and the rule of law.

An immediate imperative had to be to address the security situation – security sector reform, police reform and the culture of impunity. Failure to take decisive action in that respect would undermine the credibility of all other reform efforts and the search for peace.

Another priority was root-and-branch reform of the electoral system. The reputation, capacity, integrity and competence of the electoral management body in Kenya had to be restored. Otherwise, the next elections in 2012 would be the occasion for renewed violence and ethnic discord rather than a means to legitimize authority.

It was not too late for Kenya's political leadership to lead. Statesmanlike determination to work together to support, if not initiate, actions to implement the recommendations

of the Waki and Kriegler Commissions and some of the ideas emerging from that consultation could have a dramatic, positive effect. But at a time when there is growing skepticism about the behaviour and motives of the ruling elite, the window of opportunity was closing.

There was a need to move beyond criticism and blame games. Every element of Kenyan society had a role to play in moving the country forward and Kenyans should take individual responsibility to contribute to that process. The Kenyan Parliament was a decisive factor in the implementation of all ongoing reforms. As such, parliamentarians had a special responsibility and should engage with and mobilize the Kenyan people and find ways to ensure their participation in the reform process.

Looking ahead, the focus should not be restricted to past issues. A strategy needed to be developed to look at emerging issues which retained the capacity to trigger an even greater crisis.

## Lessons Learned

The early and timely intervention of the African Union, and particularly President Kufuor, in mandating the Panel of Eminent African Personalities to mediate the crisis, had been a very positive development. The intervention of his successor, President Jakaya Kikwete of Tanzania, at a decisive moment in the negotiations, had also been critical. The Kenyan crisis provided an eloquent example of how the African Union can have a comparative advantage in such mediation processes if it remained proactive.

The strong and united support of the international community and the effective coordination between stakeholders had also been important. By speaking out with one voice and placing its confidence, trust and political will at the service of the Panel's mediation efforts, the international community had been able to maximize its leverage over the parties. The close collaboration between the African Union, the United Nations and other organizations had also facilitated the rapid establishment of an impartial and fully functioning Secretariat to support the Panel and service a single mediation process.

The significant role of Parliament as the legislative arm of Government should not be overlooked. Unless MPs bought into the reforms, it would be difficult, if not impossible, to enact the necessary legislation and move forward with the reform agenda.

The active role of civil society had been invaluable to the process, as its analyses and strategies had placed great pressure on the parties to reach an agreement. The lesson there was that while it might not be possible for civil society to be a party at the actual negotiating table, it was nevertheless important for mediators to involve it in some way and ensure that civil society remained a strong ally. The engagement of stakeholders during the implementation phase was equally crucial.

The dangers of ethnic affiliation in politics can create enormous problems. The Kenyan crisis had revealed how quickly close friends and neighbours turned against one another and fell victim to the instinctive tribalism hidden much deeper within them. That underscored the urgent need to take measures to promote national healing and reconciliation. The establishment of the Truth, Justice and Reconciliation Commission (TJRC) and the promulgation of the National Cohesion and Integration Act will, hopefully, contribute to that process.

Transparency had been another crucial factor in the negotiations. It was an important strategy to gain the trust and continued support of civil society and the international community.

It was evident from the Kenyan crisis that, although the flawed elections had been the immediate cause of the violence, there were long-term political, social and economic issues such as constitutional and institutional reform, land reform, and youth unemployment and regional imbalances that needed to be addressed urgently. Unless the package of reforms was implemented, it was feared that Kenya might witness violence on a larger scale in later years. The lesson learned was that a conflict could not really be solved without dealing with its root causes; any agreement reached would otherwise be a mere palliative or at best seen as a ceasefire.

Finally, reform is a process, not an event. It is a long-term process that will go beyond the life of the Coalition Government. It was difficult for any government to maintain the momentum at a higher level for long-term reforms. There was therefore a need to continue to exert pressure on political leadership to expedite the pace of reforms with a greater sense of urgency while also managing public expectations and promoting patience.

## Opening Session

**In his opening remarks, Kofi Annan, former United Nations Secretary-General and Chairman of the African Union Panel of Eminent African Personalities, clarified the objectives of the meeting and recalled the events that led to the Kenya National Dialogue and Reconciliation process. In his view, it was time, one year later, to take stock and assess progress and consider how the reform agenda could be given new impetus.**

Kofi Annan welcomed all participants as “members of an extended family” united in Kenya’s peace-building endeavours. He recalled how the sudden eruption of post-election violence in Kenya and the need for swift action had compelled him to agree to help mediate the crisis when called upon by President Kufour of Ghana, then Chairman of the African Union. Together with Mr. Benjamin Mkapa, former President of Tanzania, and Mrs. Graca Machel, the Panel of Eminent African Personalities had been established by the African Union (AU) to help find a peaceful resolution to the crisis.

Upon its arrival in Kenya, the Panel had agreed on the urgency of the situation and its approach. Strong and coordinated international support from the AU, the UN, the EU, the US and others had been essential so that the international community would act in unison and speak with one voice. The Panel had also recognized the need to ensure that Kenyan stakeholders, such as civil society organizations and the media, were given a real say in the mediation process. To ensure public confidence in and support for the process, the Panel had published all agreements reached by the parties.

Mr Annan noted that the rapid and effective response to violence by the international community showed that the responsibility to protect could work. The political leadership in Kenya had understood what was at stake and had pulled the country back from the brink of ethnic conflict by agreeing to settle the dispute through dialogue and compromise. The resulting National Accord had paved the way for the establishment of a Coalition Government and a framework for far-reaching reforms to address the root causes of the conflict.

The momentum for reform had waned because of infighting and disagreements between Coalition partners. Public anger at widespread corruption and impunity was growing. But the tensions could be eased if the Government were to act swiftly on constitutional, parliamentary, electoral, judiciary, police and land reforms. In his view, power-sharing should not be a panacea for disputed elections. However, the situation in Kenya was unique, as the other options available to resolve the disputed elections were not viable and would have risked more people being killed.

The long-standing issues which had triggered the post-election violence needed to be addressed. Those included the politicization of ethnicity; non-adherence to the rule of law; reliance on centralized and highly personalized forms of governance; inequitable development; corruption and abuse of power; a winner-takes-all form of political victory; and a perception that certain groups were not receiving a fair share of resources. Lack of political will and a tendency to put partisan interests of the elite above the interests of the nation had resulted in widespread disillusionment on the part of ordinary Kenyans for the reform process.

## Panel One: Mediation During the Kenya Crisis

**The purpose of Panel One was to review the mediation process itself: the 41 days spent at the Serena Hotel during which the mediation teams and the principals had negotiated the issues contained in Agenda Items 1 through to 4.<sup>4</sup>**

The first speaker gave an overview of the humanitarian crisis as it had unfolded soon after the elections. While many agencies within Kenya had been prepared for some violence – as had been seen during previous elections in 1992 and 1997 – they had not been prepared for the intensity of the violence. The State had been overwhelmed by the escalation and levels of the violence. Early signs had begun appearing in Nyanza, Eldoret and Nairobi on 28 and 29 December. The ethnic nature of the violence had been apparent early on and had remained a challenge for the humanitarian response. For example, the Red Cross had faced ethnic identification as early as 29 December, making it difficult for its staff to access all affected areas. By 31 December, more than 100,000 displaced persons had moved to Eldoret town. On 1 January 2008, the Red Cross had brought back photographic evidence to show the population the scale of the violence and the humanitarian crisis engulfing the country. The ethnic nature of the violence had been apparent very early on and had been a key challenge in terms of organizing an adequate humanitarian response.

<sup>4</sup> For details of the mediation process and the Kenya National Accord, see the Background Paper on pages 52-61 of this Report.

The visit by Panel members to see for themselves the scale of the displacement and the impact of the violence in affected areas had helped to galvanize critical public support and confidence in the mediation process led by Kofi Annan.

Both parties had agreed very quickly on the need to address the humanitarian situation and to take measures to end the violence, despite their disagreements on the political issues. That had been particularly important in giving the people confidence to lay down their weapons and in creating a space for dialogue.

The challenge to meet the humanitarian needs of affected populations remained. The vast majority were still on food aid and only one tenth of the internally displaced persons had received government assistance in rebuilding their homes.

The next speaker said it was important to critically examine what had happened in order to learn the lessons for Kenya and for other countries. For example, was the National Accord comprehensive enough? It was also important to consider the wider issues leading to the crisis; those beyond the violence and resolution of the short-term crisis.

It was clear that the State and its organs had been totally unable to deal with the post-election violence. That important point needed to be recognized. If not, sight would be lost of the importance of having reached an agreement as quickly as it had happened. The violence had been so widespread that areas of the country had been ungovernable. Because of the nature of the violence, the State itself had engaged in sponsored violence; instead of protecting civil liberties, the State had violated civil liberties. As a result, many no-go areas had emerged in the country where there had been no adequate response.

The crisis had also highlighted the lack of confidence in Kenyan institutions, beginning with the judiciary. The dispute during the elections could and should have been dealt with by the courts, but there was no confidence that the courts could have done so fairly. Similarly, there was a lack of confidence in the Electoral Commission that had ruled out the possibility of a national re-run.

It was also important to highlight that the State had failed to respond appropriately to the emerging humanitarian crisis. Without organizations such as the Red Cross, many affected areas would not have been reached.

An additional indicator that external help had been required to deal with the crisis had been the State's inability to deal with general law and order issues – thefts, rapes, and extra-judicial killings proliferated with impunity.

The polarization of the political parties after the election had also left a vacuum, which meant that there was no internal mechanism for dialogue to resolve the dispute. Although that had been attempted by several key individuals in the country, it had been extremely difficult to create a domestic mechanism for dialogue. All that had been taking place within the context of ethnic mobilization and cycles of violence between ethnic groups alongside an electoral process. The longer-term issues of social exclusion, land disputes, gender inequalities and the need for constitutional reform had also provided a backdrop.

The intervention by the international community and the AU had been very important because of all of these factors, and the Panel had been immediately accepted by both sides of the political divide.

The impact of the Panel had also been evidenced by its rapid mobilization. The Panel had immediately established mechanisms and structures, including an effective secretariat which had kept almost verbatim records of the dialogue sessions. Kofi Annan believed that it was critical to capture in writing every little progress that the negotiations made, and he had ensured that the parties signed up to it to prevent backsliding.

It was also important to note that the two principals had showed extreme goodwill during the process. They could have argued that Kenya was a sovereign country that did not need outside intervention, but they had accepted international help. After all, when the negotiating teams could no longer find agreement on contentious issues, it had taken President Kibaki and Hon. Raila Odinga only two hours, with Kofi Annan, to remove all the brackets from the negotiating draft.

The Panel had also played a valuable role in consulting widely with civil society, religious groups, business and the media. Critically, if the Panel had not gone directly to Parliament and addressed an informal session (Kamukunji), the National Accord would not have been achieved. The media had played a significant role by keeping the pressure on the parties to find a resolution to the conflict. There had been instances when they had opted for the sensational, but without the media the task of the negotiators would have been harder.

It was also important to remember that the Accord was a ceasefire document. It did not address everything, but at the time, without a ceasefire, Kenya would have continued to burn and all would be talking about a different country today. The Accord set out a road map for fundamental long-term reform – judiciary, land, police constitutional, etc.

The problem of Kenya had always been the State, which had remained virtually unchanged for forty years. It had been the largest violator of human rights. Not enough had been done to address the nature of the State and how it should be transformed. It was essential to come together to truly reform the institutions of the State. For example, the respective roles and responsibilities of the Prime Minister and the civil service needed to be dealt with properly. Another issue that had not been sufficiently addressed during the mediation process was the issue of portfolio balance within Cabinet, and how to form a Coalition Government. Likewise, the issues of corruption and impunity had not been adequately dealt with.

An important strategy deployed during the mediation process had been the Kilaguni Retreat, which had allowed the teams to escape the crowds and deal with contentious issues. When the teams had been left on their own and had sat together in Kilaguni, they had decided to look at the issue of the composition of government; the lawyers in the team had been tasked with coming up with a proposal on the issue of the Prime Minister. By the end of the discussion, although there had not been any agreement on entrenching the post of Prime Minister within the Constitution, a consensus had by and large emerged on the need for the post of Prime Minister. The retreat had thus helped to make headway on thorny issues.

In terms of how things could have been improved, it might have been important to have had Kibaki and Raila more directly involved in some of the dialogue sessions. The distance had kept an artificial boundary between the teams and the principals. Kofi Annan had made it clear that he was not going to allow the teams to make him a messenger between them and their principals. However, compared with other processes where the principals had been more closely involved – for example South Africa – that might have been a factor that could have sped up the process.

Finally, there had to be a critical engagement between civil society and government before the cycle of the next elections took place. There had to be a new constitutional order in place prior to those elections. Some people had asked if the mediation process should have continued in its “Serena form” to address Agenda Item 4 issues, but the reality was that no one wanted to hear from the Serena Team now. There was a feeling that there was too much intervention in every reform process. The nature of Agenda Item 4 required political commitment and a long-term process of engagement with all sectors of Kenyan society. If political leadership and goodwill were present, progress could be made on Agenda Item 4, but there would always be resistance.

The next speaker reflected on the role of the international community in the mediation process, particularly that of the African Union and the United Nations. It was important to assess the international community’s level of preparation prior to the crisis. Violence had occurred in Kenya on previous occasions, but the incidents had been “manageable”. In the case at hand, the international community had been taken by surprise. One reason might have been that the Kenyan elite had been perceived as homogenous and cohesive and would therefore not “permit” the country to descend into such violence.

Initially, given the rigid positions of the parties to the dispute, some international actors had supported one side or the other. That had encouraged the parties to entrench their rigid positions further. Subsequently, the escalating violence, loss of life and complete incapacity of those responsible to stop the crisis had led to more concerted international support to resolve the crisis peacefully through a mediation process.

There had been many attempts at the beginning but those had not worked as there had not been any clear strategy with regard to the election dispute, i.e. whether to propose a recount, re-run or re-tally. The scenes that the world had seen on TV – of police beating people, streets ablaze, continuing violence and squabbling political leaders – had put great pressure on the parties to find a solution. They had been told that they had to bear responsibility for what was happening to their people, and they had understood that they could not go it alone.

Timing had been important. Once the AU Panel had arrived in Nairobi, strong and cohesive international support had emerged for the single track of mediation. The United Nations had provided technical support for the mediation process from the very beginning. It had participated as members of Kofi Annan's Secretariat drawn from various organizations.

Another important feature in the mediation process had been the inclusion of stakeholders. The voices of the elites were often louder than those of the have-nots and therefore heard better. Very often, there was no strong mechanism to consult and involve wider sectors of society in the process. And determining how best to include stakeholders in the implementation of agenda item issues remained a difficult issue. Parliament should be the institution where stakeholders are represented and therefore serve as a vehicle for inclusion. However, various conflict situations in Africa have demonstrated that Parliament is often not used in this way, as members tend to be drawn from the same group of elites. One should also consider including stakeholders in the negotiation through a parallel process – a watchdog mechanism to ensure that implementation was not ignored.

The magnitude of the Kenyan mediation process and the results it had achieved meant that it was being considered as a model for various difficult political issues that had arisen elsewhere. Some had asked whether the Kenyan power-sharing model should be applied to other contested elections, while others had questioned what the implications for democracy and for free and fair elections on the continent would be.

The next speaker reflected on whether civil society had been adequately involved in the process and what might have been done differently, highlighting the fact that the mediator and his team had responded to the readiness of civil society rather than having to reach out to civil society. That proactive approach had been an important characteristic of civil society involvement in the mediation process.

Kenyan civil society had played five roles during the mediation process: first, it had responded to the emerging humanitarian crisis by ensuring domestic contributions to assistance that was channeled through the Red Cross with the support of the United Nations. The face of the humanitarian response had been Kenyan, a unique and unusual feature.

Second, Kenyan civil society had generated the internal demand for peace – citizens' gatherings such as the Concerned Citizens for Peace and the Concerned Kenyan Writers had created the space and enabled the initial brokering between the parties. Seasoned domestic negotiators had begun to "break the ice" between the parties, laying an important foundation for the Panel's work.

Third, Kenyan civil society had helped to generate the internal demand for truth and justice as preconditions for a sustainable peace – electoral truth as well as accountability for the violence. That had been a difficult challenge given the assumptions around the political affiliations of civil society organizations. Civil society had also worked to monitor and document the elections and the violence. As a result, one private prosecution was currently under way on the basis of such monitoring. Civil society had provided important analysis on the patterns of the violence. The protection of human rights workers had become a serious issue and several had been obliged to flee as a result of their work.

Fourth, civil society had generated domestic pressure for a political settlement by disseminating its data and analysis to the Kenyan public through the media. Civil society had also organized regular briefings with the diplomatic corps, members of the AU Panel, the Africa Leaders Forum, etc., helping to provide a degree of "domestic legitimacy" for the international positions on the crisis.

Fifth, civil society had provided recommendations to the Panel on the various agenda items, with inputs from other regional experts. Those had been shared with the private sector and other stakeholder groups, thereby providing a united portrayal of shared concerns and possible recommendations. The mediation process had been extremely open to civil society. There had been regular opportunities to make representations directly to the Panel. Civil society had further addressed some members of the parties, but not everyone had been open to dialogue.

There were important implications of those roles and lessons for other situations, though not all of these were replicable. The speed of the violence had not been anticipated: therefore, civil society actors had still been in Kenya; in Zimbabwe, on the other hand, there had been a slow exodus of civil society, making it more of a challenge for it to engage in the mediation process.

There was diversity, strength and strong public policy capacity within Kenyan civil society that were not typical of other conflict situations. There was knowledge of the regional and international advocacy options and experience with advocating at those levels. Many civil society leaders had had individual contacts with eminent AU and UN figures.

Graça Machel's request to set up a women's reference group for the mediation process had been very important. As a result, a bipartisan group known as the women's consortium was working with the Executive and Parliament on the issues contained in Agenda Item 4.

The Chief Mediator, Kofi Annan, had a unique blend of carrots and sticks at his disposal – good domestic analysis to draw on and the legitimacy of regional and international pressure. Internally generated pressure that was supported externally provided a model to return to if the crisis in the country were to continue.

Some of the issues that civil society would have liked to have seen more focus on included a commitment on the disarmament, demobilization and reintegration of armed groups and militias; youth; better analysis of the forms of violence and categories of internally displaced; legal protection

for ethnic discrimination and means for addressing competing claims to land; measures to end impunity; and legal and political accountability for the elections and the violence.

Civil society had urged that the Coalition be transitional and limited in mandate to address the necessary reforms. However, it was now clear that those not interested in reforms had been able to slow down the process. In addition, the issue of ethnic tensions had to be tackled more decisively.

Civil society had predicted that alliances within the grand coalition would shift through the Coalition's lifetime – particularly with the peace versus truth and justice tension – a process which lent itself to political polarization. That had made it very difficult for civil society to access certain parts of Government – especially security services. As a result, there were now ongoing threats to human rights defenders and a feeling of equal paralysis among the civil servants and civil society pushing for reform.

## Discussion

Panel One stimulated a wide range of perspectives and views from the floor. Many participants voiced concern about the slow pace of reform: “Why had so little been done to promote reconciliation and healing in the post-crisis period?” Others highlighted the fact that despite the Government's agreement to implement the findings of the Kriegler and Waki Reports, there was little political will to do so. One of the Ministers conceded that enthusiasm for constitutional reform was flagging and that the enthusiasm for change evident during the crisis had given way to stagnation.

Several speakers highlighted the root causes of the crisis which still needed to be addressed: “We need to have a frank discussion about the ethnic dimensions in our country – all ethnic groups feel marginalized”. The unequal distribution of economic resources was also a factor. Likewise, the conditions under which the elections had taken place did not help. The “winner-takes-all” approach to elections in Africa needed to be redressed – a code of conduct should be imposed on candidates and political parties before elections took place.

One participant remarked that Kenya had been brought to the brink of disaster by politicians and greed for power.

Others commented on the lack of preparedness in Kenya and on the part of the international community. Why had the early warning systems failed, and to what degree had that been due to a lack of confidence in national institutions? The Kenyan crisis illustrated the need for stronger analysis and better conflict prevention strategies, as well as investment in national capacities for conflict management.

One participant remarked that “in many ways we are still in the same situation in Kenya. We must be honest with ourselves so that we do not give ourselves false hope or perceptions. Those of us following the tribal clashes since 1992 knew that we were sitting on an explosive bomb of ethnic violence. There was impunity in 1992. There was impunity in 1997. So when it happened in 2007 – it was only surprising in its intensity and the inability of the State to stop it – the tension had accumulated to such an extent that the State could not control it”. That view was echoed by another participant, who cautioned against self-congratulation, as Kenya was on the brink of renewed and much worse conflict because of the lack of progress on practically all agenda items. “The country is angry and that is palpable”.

Others noted that the mediation process had been a successful example of an African solution to an African problem. The African Union had been fortunate indeed to be able to call upon individuals such as Kofi Annan, Benjamin Mkapa and Graça Machel to assist. The continent should have at its disposal more such individuals, who could be relied upon in times of crisis.

Several speakers highlighted the issues that had not yet been addressed, such as the return of thousands of internally displaced persons to their farms who feared retribution from their neighbours; extrajudicial killings that were being committed but not punished; illegal militias continuing to operate with impunity; and a lack of accountability in the security services. Tackling impunity was repeatedly mentioned as a matter for urgent attention.

With regard to progress on the reform agenda, one speaker underlined the critical role of the politicians. Others emphasized that all members of Kenyan society had to play their part, including the media, which had not always acted responsibly. Whereas the main responsibility for implementing agenda items 1 to 4 lay with the principals and the political class, one participant remarked that the process needed to add Agenda Item 5 – citizen empowerment – to help move the process forward.

Others felt that it was essential to retain the support of the international community. “We need to remember that international focus is not intervention, it is an important partnership that we need”.

One speaker described how the lessons of Kenya’s political crisis had been heeded by Ghana. The political elite in Ghana did not request a recount – despite the closeness of the vote – because it had understood the potential for violence and military intervention. The professionalism and integrity of Ghana’s Electoral Commission had saved the country from a crisis.

In response to the question whether power-sharing could serve as a panacea for contested elections in Africa, it was noted that the situation in Kenya was unique and the country faced a difficult choice. It had become clear that all options to resolve the electoral dispute were not viable: there was total political gridlock and people were being killed. In the speaker’s view, if the parties came together, they had the collective power to push through serious reforms – that was the opportunity in the crisis. The formula would not work in every situation, such as in Zimbabwe or Ghana. Leaders needed to remember that they could be voted in and they could be voted out. Unfortunately, many leaders tended to feel that they should lead forever once they were in power.

One observer pointed out that mediation had limited powers: its purpose was to unblock a situation, not to solve all problems. It was up to the Kenyans to take the KNDR agreement and turn it into a sustainable peace. “If the Kenyans can manage on their own, good; but if not they should ask for help from their friends in the region or internationally”.

## Panel Two, Part I: Implementation of the Kenya National Dialogue and Reconciliation Agreements

Panel 2 was divided into two parts and examined the implementation of the KNDR Agreements. Part I reviewed the work and recommendations of the Independent Review Commission (IREC) as well as other measures taken by the Kenyan authorities to address long-term issues such as constitutional reform, land reform, equitable distribution of resources, regional imbalances, poverty and youth unemployment.

The first speaker observed that the search for a new Constitution had a long and arduous history. Politicians had scuppered progress repeatedly. In his view, the very rudiments of constitutional integrity were missing in Kenya, as was underlined in the Waki Commission report. A sense of common purpose was lacking in Kenya; “nation-building” was not being actively supported and furthered by the Kenyan political class.

The essential principles, institutions and constitutional procedures were already in place in the existing Constitution of Kenya. The urgent issues that needed reform, such as fundamental change in the political system, impunity and greater transparency, did not depend upon a new Constitution; rather, they required abiding by the rule of law.

Furthermore, a highly centralized political system in a multi-ethnic society was “a recipe for disaster”. Many were pessimistic about the prospects for reform, given that the new generation of leaders was only emerging through political parties which were fundamentally corrupt.

The second speaker provided an overview of the Commission’s findings:

- The integrity of the 2007 electoral process was impaired at every level, rendering actions at the centre of partial relevance only.
- The credibility of the Electoral Commission of Kenya (ECK) was gravely and irreversibly impaired and it was incapable of discharging its responsibilities.
- The electoral environment had been polluted by the conduct of political parties.
- Electoral organization was fundamentally flawed. Stakeholders’ confidence in the electoral system was low. Apart from the Chairman, confidence in the Commissioners was low.
- Electoral managers lacked competence. Commissioners did not have relevant experience yet involved themselves in day-to-day management.

The Kenyan experience clearly showed that elections could be the trigger that unleashed violence stemming from pre-existing political tensions. In his view, a successful electoral commission needed to be underpinned by six principles:

- Promote transparency.
- Be participative and involve stakeholders.
- Spend as much time as possible to build political consensus.

- Try to solve problems quickly and as close to the source as possible.
- Plan and prepare rather than being reactive.
- Avoid last-minute changes.

The speaker remarked that efforts to take stock of the implementation of the National Accord should not confuse action with achievement. Achievement should result in genuine reform and restoration of national cohesion. Until that took place, the country remained very vulnerable. “We have brokered a temporary national calm with national and international support”. Kenya had had plenty of experience of commissions of inquiry but they did not become motors for real change. In the speaker’s view, IREC had opted for a non-threatening, forward-looking, non-accusatory approach, and had sidestepped some key issues by not placing blame on certain individuals or organizations. By contrast, CIPEV had not dodged difficult issues and had tackled the issue of criminal responsibility. There could be little progress on reforms while politicians actively continued to secure power at all costs. In addition, there were signs that the authoritarian State was re-emerging, as evidenced by entrenchment of army and police impunity, condoning of torture, media gagging and the suppression of fundamental rights, such as the freedom of association and speech.

Several recommendations were made for the way forward:

- The institutions of State should not be allowed to undermine the division of responsibility between different branches of Government.
- Future legislation should provide an opportunity to include everyone in the future of the State.
- Restore faith in the electoral system.
- Fix the security sector; ensure independence and capacity of the judicial system.
- End threats against individuals and organizations working to uphold and protect human rights and the rule of law.

The next speaker remarked that the long-term reforms contained in Agenda Item 4 comprised issues that had been long neglected because of efforts to secure political power. Reflecting on the current situation, the speaker said that Coalition Governments were usually a means to an end while the Kenyan Coalition Government seemed to be an end in itself.

There was no room for complacency: Agenda Item 4 had to be linked to progress on items 1, 2 and 3. For example, the militias were dormant, not dissolved. Politicians needed to pursue national reconciliation in a more concerted fashion, an approach that would have profound implications at the local level.

Reform required leadership which was lacking. The Coalition Government was seen as “two governments in one”, with unequal power between them. Political divisions were spilling over into all the reform and review efforts. Popular confidence in public institutions (for example, police, judiciary and anti-corruption efforts) had vanished. Civil society was not setting the pace or supporting a national dialogue. What was needed was a critical mass of reform champions. A new culture of norms and behavior, including greater transparency and accountability, had to be accompanied by institutional reform.

In his view, the pace of reform was flagging. Unless efforts were made to reinvigorate it quickly, the country would face a major crisis: the window of opportunity was closing and incentives for reform were evaporating.

The next speaker reaffirmed that the sole purpose of the Coalition Government was to institute reform. While cessation of violence had been achieved and the Government had provided assistance to IDPs, challenges remained. Progress had also been made on Agenda Item 3 but “we are too comfortable” and “we are fixing the politics so we can get on with business”. The Government was working to implement electoral reform through the complete reconstruction of Electoral Commission of Kenya. The implementation of the Waki report had failed its first test – to set up a Special Tribunal to try those responsible for violence. That showed that parliamentarians did not have faith in the country’s criminal justice system. To move forward, the political class needed support from Kenyans.

It was important to examine whether civil society and the international community had taken sides and made judgments too quickly. It was very difficult to pass laws that would adversely affect the people immediately. Unless there was consensus on the need for reform, both inside and outside government, the reform agenda would not succeed.

The international community could provide moral and logistical support, but the responsibility belonged to Kenyans. Political will needed to be generated from outside the system (as in 1992) but a “holier-than-thou” attitude would not be helpful.

## Discussion

One speaker referred to the report of the Africa Peer Review Mechanism (APRM), which had provided a good early warning for Kenya but had not been heeded. Another summarized Agenda Item 4 as reform, reconciliation and reconstruction, without which the process would have no credibility.

Several speakers deplored the failure of Ministers to take sufficient action. It was incomprehensible how political leaders could say they did not have the power to affect change. “If they cannot lead, then resign”.

One participant pointed out that the National Accord had saved many lives and that should not be forgotten. Yet politicians had a responsibility for moving forward. The purpose of the Coalition Government was to seek compromise for the better good of all. The Government had to address the main needs of the people: poverty, jobs, health and education. If those were not addressed, frustration would increase and result in instability.

One intervention raised the need to address the Constitution as the basis for all other reforms and fundamental issues. Another emphasized that police reform was key: “no government has legitimacy if it condones extra judicial killings and does not act decisively to end them”. Respect for human life had to be the basis for a Government’s legitimacy. Until those addressing impunity could do their work, nothing else would work.

There was little effort to address unemployment: with 70 per cent of Kenyans under 30 years of age and 8 million unemployed, the Government should demonstrate self-sacrifice. A member of the governmental delegation agreed that a new Constitution was the key to progress and that police reform was fundamental. However, prosecution depended upon proper investigations and there needed to be more prosecutorial capacity and professional criminal investigations.

Another participant drew attention to important lessons: the absence of the people of Kenya in the elections; they needed to be included. Statesmanship was missing – Kenya should learn from the example of Mandela. There was also a lesson to be drawn from Europe, in that when the Berlin Wall had come down, the top priority of governments had been the protection of minorities. In his view, if the two principals could join hands, good proposals could be taken to Parliament for adoption and implementation. The success of the Kenyan crisis had been due to the AU decision to engage a Panel of Eminent African Personalities.

## Panel Two, Part II: Implementation of the Kenya National Dialogue and Reconciliation Agreements

The Panel reviewed the work and recommendations of the Commission of Inquiry into Post-Election Violence as well as the proposed terms of reference, objectives and mechanisms of the Truth, Justice and Reconciliation Commission (TJRC), which was in the process of being set up.

The first speaker gave a brief presentation on the work of CIPEV, its recommendations and their implementation to date. His assessment was that progress had been made but that Kenya was not yet out of the woods and there was an urgent need for vigilance. Citing recent monitoring reports, he also warned that the modest gains made were in danger of reversal.

It was noted that, judging from the public response, it appeared as though CIPEV had made only one recommendation: the establishment of a Special Tribunal to hold to account those most responsible for post-election violence. The Tribunal and

contents of the sealed envelope had overshadowed debate on the CIPEV report as a whole. That was unfortunate as the report contained many recommendations, including post-election issues, IDPs, sexual violence, and police and other institutional reforms, all of which had yet to be seriously debated.

The speaker provided some context to the defeat in Parliament of the Constitutional Amendment Bill for the establishment of a Special Tribunal. He said that those in favour of and against the Bill had put forth many competing arguments in support of their views, ranging from fears that national sovereignty was at stake to concerns about an increase in tribalism. He underlined that the CIPEV knew that Parliament was the determining factor in the establishment of the Tribunal, but that there was no way of anticipating the views of the MPs before the vote. Impunity, the bane of Kenya, had to be tackled urgently and people needed to be held to account according to the rule of law.

With regard to the future, the setback on the Special Tribunal was not the end of the road. The Kenyan people, civil society and media were urged to work together to exert pressure on those in Parliament who were confusing personal interests with national interests. The judiciary needed to be strengthened, starting with the criminal justice system. Condemnation alone would not help. Above all, a sober approach towards the reform process was needed.

The next speaker spoke on the various features that could be construed as a “Kenyan model” to advance justice and promote reconciliation. Although the legal frameworks and mechanisms were still being worked out, the Serena talks had provided a clear approach:

- To establish CIPEV, which would have a short-term mandate to investigate the two-month period of violence and would have a criminal justice focus;
- To create a Truth, Justice and Reconciliation Commission that would have a longer-term mandate and a much broader focus.

With regard to the CIPEV recommendation to set up a national Special Tribunal versus the ICC approach, there were two possible explanations as to why the Bill had been defeated in

Parliament. One focused on the alleged weaknesses of the draft Bill and how the Tribunal would not have been effective enough, while the other view held that the proposed Tribunal would have been too effective and that might have worried some people.

While the Special Tribunal was preferable as it would entail national responsibility and could strengthen the national judicial system, a key question was whether its work would be trusted by the Kenyan people.

In that regard, the International Criminal Court, which had confirmed that it had jurisdiction, could be asked to come in, but that would imply that the Kenyan justice system was insufficient.

It would be possible to pursue a two-track solution, with the Special Tribunal covering those less responsible for the post-election violence and the ICC investigating those most responsible for the post-election violence. Either way, the goal should be to strengthen national accountability in the long term.

The speaker cautioned against a hybrid tribunal as opposed to the proposed Special Tribunal for Kenya, noting that the former was not rooted in societies where it operated, was very expensive, did not cover too many people and failed to strengthen national systems. It was suggested, however, that if a Special Tribunal were not established in Kenya, the country needed to have an inclusive discussion on the best approach to follow.

The Truth, Justice and Reconciliation Act, passed in Parliament in 2008, contained some weaknesses, perhaps as a result of insufficient consultation with civil society. Nevertheless, what was important was the selection of Commissioners. Two important issues remained with regard to the TJRC: the size of the budget (who would be responsible for funding the Commission and the proportion of the Kenyan Government's contribution); and timing. If the TJRC worked over the next two years, a period which was already earmarked for a variety of reforms, there was a risk that the many difficult issues raised before the Commission might fracture Kenyan society further. Therefore, one needed a sober reflection on how the work of the TJRC could potentially affect the rest of the reform agenda.

The next speaker noted that a sense of despair and lack of confidence prevailed in Kenya. He said that many were now asking whether they had actually been ready for mediation in 2008 and whether the mediation had been sought or imposed.

The Waki report had frightened many MPs. Those, together with elements in the police force and the private sector, were a powerful group that had then lobbied and worked hard to ensure the Special Tribunal Bill was not passed. The Bill would continue to face the same fate. A fundamental issue was whether to proceed with the Waki report or to just sit back.

The speaker recommended that the Waki report be implemented, stressing that the defeat in Parliament should not distract from that effort. The report had been adopted in Parliament in its entirety and the recommendation on the Special Tribunal was only one among many on a wide range of issues. There needed to be a renewed focus on the report's other equally important recommendations.

There were serious contradictions in Parliament, with much competition for space and executive power. One example was Parliament's rejection of suggested names for the Interim Independent Electoral Commission.

There was a need to discuss whether it was going to be possible to address and deliver on the Tribunal as well as other potentially explosive issues such as constitutional reforms and the Boundary Commission. The speaker wondered whether the timeframe was feasible and whether the system was being overloaded. Regrettably, some politicians had already declared their candidacy for the presidency in 2012.

Finally, there was a danger that Kenyans were becoming cynical about international intervention. It was to be feared that if Kenyans lost all faith, no one would respond to international intervention again in the face of another crisis.

The next speaker outlined some of the main factors affecting the implementation of the CIPEV report, including cynicism among Kenyans that the report's recommendations would be implemented. Given the fate of seven previous commissions of inquiry, the fact that Kenya had not yet undergone a real political transition to date and the current culture of impunity

in the country did not offer a conducive environment for the report's implementation.

Looking forward, it was important to ensure the participation of Kenyans in the reform process. Sufficient political will was needed to tackle the infrastructure of corruption and the culture of impunity in Kenya. In the speaker's view, the relationship between the TJRC and the Special Tribunal, including their respective mandates and objectives, needed to be clarified. Complementarity between them would be critical. The prime suspects in the post-election violence should be dealt with immediately and in accordance with the rule of law.

## Discussion

One speaker welcomed the fact that the TJRC would be going forward but stressed that its progress would depend on the courage and integrity of its Commissioners. He doubted that Kenya's politicians were courageous enough to focus the country on national reconciliation and feared that momentum would be lost.

Referring to the role played by the international community after the outbreak of the crisis in 2008 and the synergy between its efforts and that of the African Union in support of Kenya, one participant recalled how the two principals, President Kibaki and Prime Minister. Raila Odinga, had been prepared to take steps to end the crisis in 2008. The same sense of urgency and purpose was needed now. That should be a demand-driven process by the Kenyan people, with only a limited role for the outside world.

Another speaker cautioned that emerging issues, such as those relating to the Boundary Commission, Census and the International Criminal Court, could trigger another crisis in Kenya, and called for the formulation of a strategy to deal with them.

One participant clarified that the ICC was not a foreign court but one created by Member States, including Kenya. The basis of the Rome Statute, the Court's founding treaty, was complementarity, that is, the ICC was designed to

complement national institutions. Thus, all issues were first the primary responsibility of the national justice system and the ICC was only a court of last resort. However, the ICC could act independently, was ready to do so, and could act quickly once called upon.

One participant called on Kenyans to try and influence what was happening in their country. Blame games should be avoided, as everyone had a role to play in moving the country forward. Civil society should continue to influence Members of Parliament to work in the interests of the nation. Another participant suggested that sequencing and prioritizing of issues was important, as was a sustained and coordinated dialogue, with everyone assuming their own responsibility to contribute.

Yet another speaker called attention to the role played by the Kenyan private sector in offering options to both sides to resolve the crisis in 2008. He noted that at the present time, the Government needed capacity and to be presented with options to carry forward the reform process, emphasizing that in a multi-party democracy like Kenya, that required a joint effort by all concerned. Economic development, youth empowerment, micro-enterprise development, food security, land policy and environmental issues were some of the major issues that needed to be addressed.

Referring to the defeat in Parliament of the Special Tribunal Bill, one participant questioned whether the State had the required commitment and willingness to implement the proposed reform measures and wondered if a Special Court along the lines of the Court for Sierra Leone could be contemplated for Kenya. Another commented that there had been no timeframes and no concerted efforts by politicians to mobilize people on the Special Tribunal. It was not clear who was leading on the different processes currently under way.

Others pointed out that the same politicians who were in power five years ago were leading the country today. Kenyans should continue to demand that the Accord be implemented; otherwise they would find the same politicians in power in 2012. One participant suggested the way to overcome the "selective amnesia" in Kenya, was for the media to relate the stories of those who had been affected, injured or died in the crisis.

## Panel Three: Lessons Learned

The first speaker explained that Panel Three needed to take into account the discussions of the earlier groups in order to identify lessons from both the mediation and implementation phases of the Kenya National Dialogue and Reconciliation.

He remarked that every conflict was *sui generis*, but it was equally true that there were similarities and common features in most conflicts in Africa. Therefore, while it was necessary to highlight the unique features of the Kenyan crisis, the task of this Panel was to identify in general the lessons learned, not only for the benefit and guidance of the stakeholders in Kenya but also for Africa in particular and the international community at large.

That might not be an easy undertaking for the simple reason that the KNDR process was still ongoing and some of the major elements of the agreements were still being implemented, while others had yet to be implemented. The speaker urged the participants to think “outside the box” and look at the methods and practices that had been tried and tested elsewhere and that could be adapted to suit Kenya in its continued search for lasting peace, good governance and sustainable development.

The next speaker remarked that as a sponsor of many mediation processes around the world, Norway was keen to see what could be learned from Kenya and to see how the discussions could be fed back to Kenya with a view to giving more impetus to the implementation process there.

Two aspects of lessons learned from the mediation were highlighted. The first was that everyone, including the international community, had been shocked by the outbreak of the violence after the 2007 elections. The scale and intensity of the violence had taken everyone by surprise. The perception of Kenya as a stable country in an unstable region and as a supplier of United Nations peacekeeping troops for other countries had been severely shaken. Donors had realized that they had been providing technical capacity-building assistance to Kenya without paying sufficient attention to the political environment. That was one reason why the international community had quickly united and rallied behind the mediation process led by Kofi Annan, under AU auspices. The international support had been political, financial and moral.

The second aspect was that, once the mediation process had got under way, great pressure had been exerted by various Kenyan stakeholders, with the backing of the international community, to encourage a peaceful resolution of the crisis. Stakeholder pressure had contributed significantly to the conclusion of an agreement. Kofi Annan deserved much credit for his negotiation skills and for keeping the public well-informed through the media and by engaging with civil society, faith-based groups, the private sector and other stakeholders. That engagement had given Kenyan stakeholders space to express their views and provide inputs into the process. The openness was appreciated by all and provided a platform for international support to the Kenyan process.

With regard to the implementation of the National Accord, many studies had shown that peace agreements had a high risk of reverting into new conflict. A lot of attention was paid during the negotiation stage, but once an agreement was signed, attention faded and mandates remained unclear, often giving rise to frustration. That was exemplified by the seriousness of the current situation in Kenya. The country was currently balancing on a knife's edge. There was growing mistrust between the political elite and the population. Yet that was no reason to give up. There was still a window of opportunity for Kenya to get back on track. Civil society and NGOs had a lot to contribute and should be properly consulted.

It was suggested that the same sense of urgency that had guided the mediation phase should now be brought to bear on the implementation phase. The establishment of a mechanism in which the various stakeholders could play their part so that the international community could better support Kenyans was suggested.

The next speaker saw the meeting as part of an exercise in socio-political pathology and a close examination of a violent convulsion of unforeseen depth, duration and cost. In hindsight, there was often a temptation to focus on the negative, but that was self-defeating. It was more important to look at the positive lessons gained from the Kenyan experience, of which there were many.

For the first time, Kenyans had seen themselves as being not that much better than some of their neighbours, where ethnic violence had claimed so many lives. It had been a sobering disclosure of their fallibility, providing Kenyans with an opportunity for a healthy reappraisal of themselves. Kenyans had also come to realize more fully than before how important they were to the sub-region.

The experience was a reminder not only for Kenyans but for many others of just how dangerous it was when a society failed to address a systemic disease in its body politic. The thinking community in Kenya had preferred to ignore the ills and pretended that there was no problem. Today, while the fires might have been put out, the dead buried and IDPs resettled, Kenya was still the same society that it had been on 28 December 2007. It was still on the edge of a precipice, with the prospect of a repetition of the crisis. Kenya had also learned the positive lesson of hope, in that Kenyans had proved to themselves that notwithstanding the violence, their leaders could actually work together to restore peace and save lives.

The speaker stated that although a good election could not always prevent the eruption of violence in an unstable social environment, a bad election was almost certain to cause violence. A good electoral management system was therefore essential, though not a conclusive safeguard against violence. A good electoral system could not be established overnight. In his opinion, the ultimate lesson learned was that a

competent electoral dispute-resolution mechanism, broader than the electoral body itself, and respect for the rule of law, were absolute pre-requisites for successful elections.

The next speaker noted that most mediation processes in the world started only once violence had erupted, so the first priority was usually to stop the violence. This sometimes resulted in insufficient time for the mediation process to deal with the root causes of a crisis.

He noted that the political elite in developing countries could not be counted on to guide social development for the benefit of the people, citing the example of the Democratic Republic of Congo, where many of the elite had dual citizenship and educated their children abroad. One could therefore not expect them to guide the national education system in their country. In Kenya, however, there were real State institutions, as opposed to Zimbabwe, where a liberation movement had transformed itself into a government and there was no real distinction between party institutions, the Government and State institutions.

Returning to the Kenyan mediation experience, the speaker explained that the extensive consultations undertaken with different stakeholders had enabled the mediation to come up with the proposed agenda, including Agenda Item 4, for dealing with the root causes of the Kenyan crisis. Kenya therefore provided a good example of how it was possible for a mediation process to address longer-term issues even while the priority was on putting out the fires.

Each conflict had its own particularities, which had to be taken into account. But that did not nullify the existence of general mediation principles. One such principle was that both negotiation and implementation required the participation of stakeholders. In Kenya today, it was important to reflect on whether the different stakeholders could be more directly engaged in the implementation process, perhaps as part of a watchdog mechanism. For example, a stakeholders' forum could be set up to exert pressure on the politicians. Whereas monitoring of implementation processes were generally externally driven, it could possibly be more internally driven in the case of Kenya.

In conclusion, it was stressed that implementation required continued assessment and that the present meeting in Geneva was an excellent example of such an exercise. The continued engagement of the mediators during the implementation phase was one of the lessons that should be applied to similar situations elsewhere.

The next speaker said that Kenya was a lucky country. He had been involved in dealing with conflicts in the sub-region and beyond for decades and had found that the world did not step in until the media started covering a conflict. In the case of Kenya, the international community had taken immediate notice and acted quickly. Kenya should not take that attention for granted.

Prior to the 2007 election, civil society groups had gotten caught up in their own parties and ethnic groups and had therefore become compromised. The speaker hoped that others could follow the example of Kenya's religious leaders, who had acknowledged their mistakes and had asked Kenyans for forgiveness. It was vital that civil society serve as a bridge across different groups in order to stop people from retreating into their own ethnic communities.

Another lesson learned was that, three to six months before the elections, many Kenyans had become caught up in the language of ethnicity. People had become frightened to even speak out against the tendency to link security with ethnic identity. The problem of ethnicity remained the crux of the problem that Kenyans now had to face. One's ethnic identity still seemed to take precedence over all other identities, including national identity.

Kenyans were urged to tackle the country's problems as one people and to go back home to continue the dialogue there. They needed to drive the agenda so that the international community could support the internal efforts made.

## Discussion

Several participants agreed that it was essential for the government, civil society, religious leaders and others to sit

down together and seriously discuss how to resolve the country's problems, including how to break the barrier of ethnicity. Sequencing of actions was also important. Expansion of democratic space and addressing security should be priorities. It was also important to start discussing census plans, given the ethnic divisions in the country.

Another added that until the country's middle class shook itself out of its inertia, political leaders would not feel they had to change their ways. He, however, remained optimistic because Kenya had a blueprint for change. It was a young country with a global perspective and would undergo many positive developments in the next ten to fifteen years.

Yet another participant said that the Coalition Government should not be blamed collectively. Analysis and criticism should be more nuanced so that pockets of reform could be sought out. Blanket condemnation of ethnic groups or the Coalition Government was counterproductive. Kenyans needed to address environmental issues, including protecting the forests and stopping soil erosion. Equitable distribution of resources and sustainable management of resources were central to Kenyans' ability to live in peace with each other.

Summarizing the main conclusions of the discussions, one participant said that some progress had been made since the National Accord had been signed but the promise of major reform had not taken root in Kenya. There was a sense of calm, but it could not be said that there was peace. There were tensions in the Coalition Government and within the parties and a mistrust of national institutions, particularly the very institutions that were meant to protect civilians, such as the police. He stressed the need to bring back a sense of urgency in order to address Agenda Item 4. The United Nations system in Kenya remained available, along with other multilateral and bilateral organizations, to support Kenyans in expediting the needed reforms, including in the constitutional review, electoral reform, TJRC, and security sector reform. However, the United Nations could only complement, not replace national initiatives.

Some civil society representatives proposed the adoption of a three-month plan of action, in which civil society would engage constructively with Government to push forward the reforms

and break the political deadlock on the Special Tribunal. They encouraged the international community to use its leverage to ensure accountability in the Government and the security forces. In addition, they welcomed the readiness of the ICC to play its part, urging partners with universal jurisdiction to act if no concrete action were taken in three months. Finally, they also called for the appointment of a special rapporteur on sexual and gender-based violence, as recommended by the Waki Commission.

On constitutional reform, one participant proposed that a rule be instituted whereby all those involved in the making of the new Constitution would not be allowed to hold office for five years after its enactment. Another speaker suggested leaving land reform out of the current debate on a new Constitution, as the issue would politicize and block the review process. He further expressed concern that, once the participants landed back in Kenya, they would disperse and it would be difficult to get everyone to come together to a meeting to pursue the discussions started in Geneva.

Another speaker differed on the land reform issue, stating that the new constitutional dispensation had to address the land problem, central to so many conflicts in Kenya. In any case, the issue of land had been broadly resolved in the Bomas and Wako drafts. The draft national land policy was scheduled to be taken up by Cabinet on 9 April. It was important to move slowly and carefully on the land issue, as it was a very emotive issue in Kenya.

In concluding remarks, the Kenyan participants were urged not to forget what they had said during the meeting. Words alone were not a solution, and the issues were too important to be left to Government alone. Another speaker hoped that the discussions could lead to a lowering of the barriers between Government and civil society. Closer consultations were required, and it was important to raise awareness of the urgency of the situation. The need to work together to solve the country's problems was reiterated.

In summarizing the lessons that had been identified during the panel discussion, it was remarked that the first lesson learned had been the importance of the early and timely intervention of the African Union, and particularly President Kufuor in his capacity as the Chairperson, in mandating the Panel of Eminent

African Personalities to mediate the crisis. The intervention of President Jakaya Kikwete of Tanzania at a decisive moment in the negotiations had also been critical.

The Kenyan crisis was an eloquent example of how the AU could have a comparative advantage in such mediation processes if it remained proactive. It also underscored the significant and effective role that regional organizations could and should be encouraged to play in the maintenance of international peace and security in accordance with Chapter VIII of the United Nations Charter.

The strong and united support of the international community and the effective coordination between the stakeholders in the Kenyan process was also noted. By speaking out with one voice and placing its confidence, trust and political will at the service of the Panel's mediation efforts, the international community had been able to maximize its leverage over the parties, and prevent a proliferation of mediation efforts. The close collaboration between the AU, the UN and other organizations had also facilitated the rapid establishment of an impartial and fully functioning Secretariat to support the Panel and service the mediation process.

The selection of a mediator in conflict situations must also be done carefully. The need for an honest broker and the stature of the mediator could not be overlooked. The mediator had to be someone who had moral authority, credibility, neutrality, and the means to apply both carrots and sticks.

It was also important to note the wisdom, statesmanship and courage of the political leaders, who had agreed to put aside their entrenched and parochial positions in the wider interests of the nation, and the quality of the negotiators on both sides of the Serena team.

The significant role of Parliament as the legislative arm of Government should not be overlooked. Unless MPs bought into the reforms, it would be difficult, if not impossible, to enact the necessary legislation and carry forward the reform agenda. The defeat of the Special Tribunal Bill spoke volumes. The debating forum provided by the informal session of Parliament (Kamukunji) on 12 February 2008 had allowed the Panel an opportunity to inform and update the Kenyan public on the mediation process.

It was stressed that the active role of civil society, in its broadest sense, with its sustained calls for peace, had been invaluable and had placed great pressure on the parties to reach an agreement. The lesson here was that, while it might not be possible for civil society to be a party at the actual negotiating table, it was nevertheless important for mediators to involve it in some way, to ensure that civil society remained a strong ally.

Another lesson was that the dangers of ethnic affiliation in politics continued to create problems for societies. Tribalism was not confined to politicians but was widespread across all classes and groups. The Kenyan tragedy had revealed how quickly close friends and neighbours can turn against one another and fall victim to the instinctive tribalism hidden much deeper within themselves, underscoring the imperative need for measures to promote national healing and reconciliation.

Transparency had been another crucial factor in the negotiations and a strategy to gain the trust and continued support of civil society and the international community. Apart from convening briefing sessions for the diplomatic community, the private sector, civil society and the media, some of the key agreements signed in the course of the negotiations had been published in the main daily newspapers in both English and Kiswahili. In a ground-breaking practice for Kenya, both the IREC and CIPEV reports had been made public not long after their submission to the principals and the Panel.

It was said that Coalition Governments were generally fragile, even if necessary in times of crisis. Unless there was cohesion and unity of purpose, it would be difficult for a Coalition Government to undertake and achieve fundamental reforms of the type envisaged in Kenya.

Stemming from that was the observation that reaching an agreement might be easier than implementing it. There was an implementation deficit in Kenya, due, inter alia, to the financial cost of implementation. Nevertheless, there was a need to implement what had been agreed upon and to prioritize. As that was not only the responsibility of politicians, it was hoped that others would convene meetings of other stakeholders in Kenya to take the implementation process forward.

## Closing Session

**In his closing remarks, Hon. Musalia Mudavadi, Deputy Prime Minister, Republic of Kenya, thanked the Kofi Annan Foundation and in particular, Kofi Annan himself for having assembled such a large and diverse group to assess the mediation process that had taken place in Kenya just over a year previously.** Hon. Mudavadi also expressed his appreciation to the other Members of the African Union Panel of Eminent African Personalities; H.E. President Mkapa (Ret.) and Mme Graça Machel. In addition, he acknowledged the efforts made by former Presidents Quett Masire, Kenneth Kaunda and Joachim Chissano to encourage dialogue. On those lines, he also stated that Kenya valued the support that had been provided by the international community based in Kenya and all the people who had participated in one way or the other in trying to make sure that dialogue was the way forward.

Hon. Mudavadi clarified that, contrary to the belief of many people, the Kenyan Government had not disengaged with Kofi Annan and that the Kofi Annan Foundation would continue to play a role. Similarly, the Panel of Eminent African Personalities Coordination and Liaison Office in Nairobi continued to be engaged on a number of issues, particularly sourcing and providing expertise on some of the commissions that would be established and helping to move forward some constitutional issues.

The fact that such a large delegation of Kenyan officials and particularly those who participated in the Serena process were present was perceived as a testament to the importance of that process.

Hon. Mudavadi stated that if indeed there was a perception that Government had not sufficiently engaged with civil society, Government would increase its efforts to enhance such collaboration.

Hon. Mudavadi appreciated the high-level presence of the media while recognizing their important role and responsibility to provide coverage, appealing to the journalists present to remain engaged with the process and to ensure fair and constructive coverage.

In closing, Mr Annan recalled the primary purpose of the meeting, namely, to draw lessons that could be used in similar situations in Africa and around the world as well as to inform all actors in Kenya of ideas and suggestions on the way forward.

The deliberations had provided an opportunity to review the strengths and weaknesses of the KNDR Agreements and implementation. Some progress had been made but the momentum had slowed. Kenya was at a crossroads: there could be no further prevarication or postponement of full implementation of the reforms that all sections of Kenyan society agreed were necessary to move the country forward.

Mr Annan summarized the main conclusions of the meeting:

- 1: The KNDR process was a positive example of rapid response to crisis – it represented a ceasefire allowing a restoration of calm and space to address fundamental problems in Kenya. That space was shrinking and needed to be restored for the implementation to succeed.
- 2: There was confidence in the mediation process yet there was overwhelming lack of confidence in the Kenyan public institutions which were seen as a cause of the crisis. Greater political will was needed to see the reforms through.
- 3: Impunity and accountability were not dealt with as extensively as they could have been during the mediation, and that remained the major issue constraining the implementation of agreements today.
- 4: The Coalition Government was perceived as neither implementing agreements, pursuing reforms nor prioritizing Kenyan's basic needs.

5: One of Kenya's greatest assets was the richness of civil society. Civil society had to create the momentum to restore a sense of common national purpose. That required engagement with all sections of society, including the grass-roots level. Basic rights, such as freedom of association, freedom of assembly and freedom of speech, should be safeguarded.

6: The international community could play an important, if limited, supporting role. International intervention had created a breathing space for political progress, but primary responsibility for moving forward lay with Kenyans.

7: The deteriorating economic situation, absence of progress and growing cynicism regarding the motives of the ruling class made the need for a multi-stakeholder dialogue on the future of Kenya all the more urgent. A process of constitutional reform could provide the framework and basis for this engagement, but the window of opportunity was closing.

8: Immediate priorities included security sector and police reform, tackling the culture of impunity, and reforming the judiciary and the penal system. Failure here would undermine the credibility of all other reform efforts and the search for lasting peace.

Mr Annan emphasized that it was not too late for Kenya's political leadership to take the lead. It would require statesmanlike determination, moving beyond criticisms and blame games and ensuring that every sector of Kenyan society had a role to play in moving the country forward. He reaffirmed the readiness and commitment of the Panel of Eminent African Personalities to assist Kenyans in that critical endeavour.

## Annex I

# Background paper

## The Kenya National Dialogue and Reconciliation: One Year Later

### Overview of Events

**1:** The objective of this paper is to provide an overview of events leading to the establishment of the KNDR and the implementation of its various agreements. The paper is not intended to describe every detail of the process but to provide a chronological summary of the process to date.

**2:** In December 2007, Kenya held what by all accounts were historic and peaceful presidential, parliamentary and local elections. The presidential elections, the fourth since the re-introduction of multi-party politics in 1992, pitted President Mwai Kibaki and his Party of National Unity (PNU) against Hon. Raila Odinga, the leader of the Orange Democratic Party (ODM), Mr. Kalonzo Musyoka, head of ODM-Kenya, and six other candidates.

**3:** Soon after the announcement of the presidential election results by the Electoral Commission of Kenya (ECK), declaring President Kibaki the winner, the country was engulfed in violence, resulting in loss of life, destruction of property and displacement of populations. While election violence had occurred in Kenya during previous elections in 1992, 1997 and 2002, it had never reached such catastrophic levels, with about 1,200 killed and over 600,000 displaced.

**4:** Various national, regional and international efforts were organized to promote a cessation of violence and foster dialogue between the opposing sides. Among these initiatives was the visit, from 8-10 January 2008, of His Excellency John Agyekum Kufuor, President of Ghana, in his capacity as the then Chairman of the African Union (AU). The two principals President Kibaki and Hon. Odinga agreed that the mediation process initiated by President Kufuor would be continued by a three-member Panel of Eminent African Personalities, under the Chairmanship of Kofi Annan, former Secretary-General of the United Nations. The other two members of the Panel are former President of Tanzania, Mr. Benjamin Mkapa, and former Mozambican Minister and First Lady, Mrs. Graça Machel.

**5:** The Panel arrived in Kenya on 22 January 2008. It spent the first week holding consultations with various national and international stakeholders on the way forward. The first major breakthrough in the mediation process came on 24 January 2008 when the Panel brokered a face-to-face meeting between President Kibaki and Hon. Odinga. The Kenya National Dialogue and Reconciliation (KNDR) was formally launched in a meeting of the two principals with the Panel at County Hall on 29 January 2008. On 12 February 2008, the Panel held an informal three-hour session with Parliament, a “Kamukunji”, to brief its members on the status of the mediation process. During the meeting, the Panel urged the MPs to play a role in urging their representatives in the National Dialogue to reach a comprehensive political agreement, to implement those agreements that had already been concluded, and to promote reconciliation among their constituencies. The MPs thanked the Panel for this initiative to engage them and committed themselves to ensuring the speedy implementation of the political agreements. The KNDR negotiation team comprised: Ministers Martha Karua (team leader), Sam Ogeri, and Moses Wetang’ula and Mr. Mutula Kilonzo for the Government/PNU, with Mr. Gichira Kibara as their liaison officer; and Messrs. Musalia Mudavadi (team leader), James Orengo, William Ruto, and Ms. Sally Kosgei, for the ODM, with Mr. Caroli Omondi as their liaison officer.

**6:** The Panel drew on expertise and support from a variety of sources such as the United Nations (UN), the Centre for

Humanitarian Dialogue (HDC) and a number of independent experts. From the outset, the Panel adopted a communications strategy aimed at ensuring transparency and instilling public confidence in the process, including through regular consultations with different sectors of Kenyan society and the creation of a website (<http://www.dialoguekenya.org>) on which all the KNDR agreements were posted. Donors supported the work of the Panel through generous voluntary contributions.

**7:** On 1 February 2008, the KNDR Team agreed on an annotated agenda and a timetable for implementation. The annotated agenda comprised four basic items: i) immediate action to stop the violence and restore fundamental rights and liberties; ii) immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration of calm; iii) how to overcome the political crisis; and iv) addressing long-term issues and solutions. The parties agreed to conclude agreements on Agenda Items 1 to 3 within four weeks, and to address the long-term issues within one year. The negotiations continued for 41 days and broke off only when the parties needed to consult among themselves.

## Agenda Item One

**8:** On 1 February 2008, the KNDR issued a signed public agreement on the post-election violence, under Agenda Item 1 of the Dialogue. The statement proposed immediate measures to stop the violence, including that the Police act in accordance with the constitution, and observe impartiality in the execution of their functions. In addition, all leaders were challenged to embrace peace and promote peaceful coexistence of communities by acting responsibly. The statement called for the demobilization and disbandment of illegal armed militia and appealed to the youth not to participate in acts of lawlessness.

**9:** The statement further underscored the entitlement of all Kenyans to civil and political rights. It called for upholding freedom of expression, press freedom and the right to peaceful assembly. It also called for expeditious, impartial and effective investigation of all cases of crime, police brutality

and excessive use of force, while at the same time ensuring enforcement of law and order to protect life and property.

## Agenda Item Two

**10:** On 4 February 2008, under Agenda Item 2 of the Dialogue, the KNDR issued a public agreement on immediate measures to address the humanitarian crisis and promote reconciliation, healing and restoration of stability. The signed public agreement committed the parties to ensuring that displaced persons were assisted to return to their homes or other safe areas and that they were provided with adequate security and protection.

## Agenda Item Three

**11:** On 14 February 2008, the parties agreed to establish an independent body that would be mandated to investigate all aspects of the 2007 presidential election and make findings and recommendations to improve the electoral process for the future. They also agreed that a political settlement to the crisis would inform broader reforms to address the root causes of the crisis.

**12:** The talks then proceeded to the thorniest part of the KNDR negotiations – the governance structure. By 26 February 2008, the discussions on this issue had degenerated into such acrimony that the mediators decided to suspend the talks temporarily, and to engage directly with the two principals. On 28 February, following a five-hour meeting between the two principals, the mediators and President Kikwete of Tanzania, the then Chairperson of the African Union, an agreement called “Acting Together for Kenya” was signed on the steps of Harambee House, outlining the principles of partnership for a Coalition Government.

**13:** It was on the basis of the principles of partnership of a Coalition Government that the National Accord and Reconciliation Act 2008 was drafted and presented to Parliament for debate. The Act was passed by Parliament on

18 March 2008. According to the Act, the Prime Minister would be the parliamentary leader of the largest party or coalition of Parties in the National Assembly. The Prime Minister would be charged with “coordinating and supervising the execution of the functions and affairs of Government”. ODM and PNU would each nominate one person to be a Deputy Prime Minister. The creation of the Cabinet would take into account the principle of portfolio balance and would reflect the parliamentary strength of the parties in the coalition. The removal of any Minister of the Coalition would be subject to consultation and concurrence in writing by the leaders. The Prime Minister and Deputy Prime Ministers could only be removed through a motion of no-confidence passed in Parliament by a majority of MPs.

**14:** The Act provided substantial powers for the Prime Minister, and also a large measure of protection from arbitrary dismissal. At the same time, it allowed the parties to move beyond partisan considerations, and to take into account the higher interests of the nation. The parties also agreed that the Act would be anchored in the Constitution, through an amendment thereto, which was passed by Parliament on 18 March 2008. As expected, Hon. Odinga was appointed Prime Minister, assisted by a Deputy Prime Minister from his own party, Hon. Musalia Mudavadi, and a Deputy Prime Minister from the PNU, Hon. Uhuru Kenyatta. For the second time in the history of the country, the post of Prime Minister was created. On 17 April 2008, in the presence of Kofi Annan, the President of Uganda H.E. Yoweri Kaguta Museveni and other international dignitaries, Prime Minister Raila Odinga and the other members of the Coalition Cabinet were sworn in.

## Agenda Item Four

**15:** Following the signing of the 28 February power-sharing agreement, the Panel appointed Session Chair Ambassador Oluyemi Adeniji, former Minister of Foreign Affairs of Nigeria, to conclude negotiations on Agenda Item 4 - Long-term Issues and Solutions.

On 4 March 2008, the Negotiating Team signed the following four agreements:

- **General principles and parameters for the Independent Review Commission on the 2007 Elections (IREC).** As a result of this agreement, IREC was established with the mandate to investigate all aspects of the 2007 elections and make findings and recommendations to improve the electoral process in the future. The seven-member Commission, composed of four Kenyan and three international experts including the IREC Chairman, Judge Johann Kriegler of South Africa, submitted its report to the two principals and the Panel on 17 and 18 September 2008, respectively. IREC concluded that the conduct of the 2007 elections was so materially defective that it was impossible to establish true or reliable results. IREC identified serious weaknesses and deficiencies in a wide range of areas and recommended, inter alia, that a thorough review of a new or transformed ECK be undertaken as a matter of urgency. Implementation of aspects of the report has already been initiated, including the dissolution of the ECK and the start of the selection process for the members of the Interim Independent Electoral Commission (IIEC).
- **General principles and parameters for the Commission of Inquiry into the Post-Election Violence (CIPEV).** Based on this agreement, CIPEV was created with the mandate to investigate the facts and circumstances related to the post-election violence, including actions or omissions of State security agents, that took place between 28 December 2007 and 28 February 2008, to make recommendations on criminal accountability, reconciliation and on how to prevent such acts in the future, and to make recommendations, as it deems appropriate, to the Truth, Justice and Reconciliation Commission CIPEV, composed of two international experts and the Kenyan Chair, Justice Philip Waki, started its work in May 2008 and submitted its final report to the two principals on 15 October 2008, and to the Panel on 17 October 2008.

CIPEV found, inter alia, that the root causes of the violence included the growing personalization of power around the Presidency, the perceived historical inequities concerning allocation of land and other resources, and the culture of impunity in the country; and that the violence was

spontaneous in some areas and planned in other areas, often with the involvement of politicians and business leaders. It recommended that a Special Tribunal in Kenya be established to seek accountability from persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the post-election violence. The report further stated that, if the Special Tribunal was not established as contemplated in the recommendations, including, within defined timelines for the creation of such tribunal, a list containing names and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal, be forwarded to the Prosecutor of the International Criminal Court. The Panel is the sole custodian of the sealed envelope containing the list and accompanying sealed materials. Other recommendations in the report include: comprehensive reform of the Kenya Police service and the Administration Police, the establishment of an Independent Police Conduct Authority, the establishment under Kenyan law of an office of rapporteur on sexual violence; and the enactment of a clear policy and legal framework for dealing with internally displaced persons (IDPs). The Coalition Cabinet has adopted an implementation plan for the CIPEV report. However, a Constitutional Amendment Bill that would have paved the way for the establishment of the Special Tribunal was defeated in Parliament on 12 February 2009. It is the declared intention of the Kenyan leadership to continue efforts to obtain parliamentary approval of the Bill.

- **General principles and parameters for the Truth, Justice and Reconciliation Commission (TJRC).** As a result of this agreement, the Truth, Justice and Reconciliation Act was elaborated by the KNDR Team and then passed by the National Assembly on 23 October. It received presidential assent on 28 November and its commencement date was published in the Kenya Gazette as 9 March 2009. The TJRC will, inter alia, inquire into human rights violations, including those committed by the State, groups or individuals, as well as major economic crimes and historical injustices, including those related to land, which took place between 12 December 1963 and 28 February 2008. The Commission, which will be composed of six Kenyans and three non-

Kenyans, has been given a mandate of two years, with the possibility of an extension not to exceed six months. The nomination of candidates for the Commission is proceeding.

- **Roadmap for a comprehensive constitutional review process.** This roadmap led to the elaboration of the Constitution of Kenya Review Act 2008, which came into force on 25 December 2008. The Act provides for the establishment of a Committee of Experts, composed of six Kenyans and three non-Kenyans, to examine previous constitutional drafts, receive inputs from the public, propose compromises for contentious issues and present a new draft Constitution for the consideration of Parliament and the Kenyan people through a referendum. The constitutional review is to be completed within 12 months from the date of the coming into force of the Act. The Committee of Experts was appointed on 23 February 2009.

On 23 May 2008, the Negotiating Team signed a Statement of Principles on Long-Term Issues and Solutions, reaffirming the parties' commitment to address the issues of Agenda Item 4. This was followed on 30 July 2008 by the adoption of an implementation framework on the long-term issues, which contains a series of actions, timelines and focal points for each of the six sub-themes under Agenda 4: constitutional and institutional reforms; land reform; poverty, inequity and regional development imbalances; unemployment, particularly among the youth; consolidating national cohesion and unity; and transparency, accountability and impunity. The agreement on the implementation framework marked the formal conclusion of the mediation phase of the KNDR.

## Implementation Phase

**16:** On 14 March 2008, the AU Peace and Security Council adopted a decision which, inter alia, commended the two principals for the wisdom, leadership and courage shown in ending the crisis in the country, and also commended the Panel for its efforts. The AU Peace and Security Council requested the Panel to "continue to support the Kenyan parties in the

implementation of these Agreements, including support to the various Committees and Commissions provided therein, as well as in the follow-up to the recommendations emanating from them”. The Council further requested the Panel to “provide all the necessary support to the Coalition Government and other stakeholders in the Constitutional Review Process”.

**17:** To facilitate implementation of the agreements and ensure the continued engagement of the Panel during the post-mediation phase, a scaled-down Panel Secretariat is being maintained in Nairobi, called the Coordination and Liaison Office (CLO), which is currently located at the AU offices and has the general responsibility of assisting in the implementation of the KNDR Agreements and supporting the Coalition Government as it seeks to address the long-term issues addressed in Agenda Item 4. To track progress and constraints in the implementation of the KNDR agreements, the Panel, with the concurrence of the Coalition Government, has entered into a partnership with South Consulting, a local research firm, to independently monitor and evaluate the implementation process. South’s reports are shared with the Coalition Government and, at the discretion of the Panel, with the general public. The reports also form the basis for periodic meetings with the Dialogue Team to review the status of implementation, identify weaknesses and propose corrective measures where necessary. The first such review meeting with the Dialogue Team was held on 30 January 2009.

**18:** South’s first progress report<sup>1</sup> concluded that while some progress had been achieved under each Agenda Item, implementation had been slow or insufficient. It stressed that a lack of cohesion within the Coalition Government – with the coalition partners holding differing interpretations of the principles in the National Accord – was negatively impacting implementation of the KNDR agreements, particularly the envisaged reforms. The report further stressed that progress on Agenda Item 4, which was central to the future of Kenya as a united nation-state, had thus far been inadequate to prevent the country from slipping into another crisis. Consequently, there was a growing erosion of public confidence in the Coalition Government’s commitment to addressing the fundamental issues affecting the Kenyan

<sup>1</sup> See: <http://www.dialoguekenya.org/sreport.aspx>

people (see summary of the South Consulting report included in the information folder).

**19:** The Panel remains fully engaged in monitoring the implementation of the National Accord, prodding, encouraging and reminding the Kenyan political leadership, when required, of the responsibilities undertaken by them to implement fully the Accord. The Panel intends vigorously to maintain this overseeing role with the support of the AU, UN and the international community as was amply demonstrated during the mediation phase of the crisis.

**18 March 2009**

## Annex II

# List of Participants

**Kofi ANNAN**  
Chairman, Kofi Annan  
Foundation  
and African Union Panel of  
African Eminent Personalities

**Mustafa ABBANI**  
Attaché, Permanent Mission  
of Algeria, Geneva

**Nuria Abdullahi ABDI**  
Programme Officer,  
Interpeace, Kenya

**Oluyemi ADENIJI**  
Former Session Chair, Kenya  
National Dialogue  
and Reconciliation, Nigeria

**Rebecca AFFOLDER**  
Head, Executive Office, GAVI  
Alliance, Geneva

**Joseph AGEYO**  
News Editor, Nation Media  
Group, Kenya

**Ben AGINA**  
Editor, The Standard  
Newspapers Group, Kenya

Ulla Helena AIRAKSINEN  
Director of Unit, Department  
for Africa and the Middle East,  
Ministry for Foreign Affairs  
of Finland, Helsinki

**Faisal Abdullah AL HENZAB**  
Permanent Representative  
of Qatar, Geneva

**Thomas ALBERT**  
Director for Africa and the  
Middle East, Federal Ministry  
for Economic Cooperation  
and Development, Germany

**Bente ANGELL-HANSEN**  
Permanent Representative  
of Norway, Geneva

**Anarfi ASAMOA-BAAH**  
Deputy Director-General,  
World Health Organization,  
Geneva

**Francis ATWOLI**  
Secretary General,  
The Central Organization  
of Trade Unions, Kenya

**Kwabena BAAH-DUODU**  
Permanent Representative  
of Ghana, Geneva

**Elisabeth BARBIER**  
Ambassador of France, Kenya

**Peter BATCHELOR**  
Chief, Conflict Prevention  
and Recovery Team, United  
Nations Development  
Programme, Geneva

**James BAXENDALE**  
Counsellor, United Kingdom  
Permanent Mission, Geneva

**Jan BEAGLE**  
Deputy Director-General,  
United Nations Office at  
Geneva

**Zuzana BELUSKA**  
Assistant, Media Tenor  
International, Zurich

**Gerald BENNETT**  
Political Officer, Coordination  
and Liaison Office, African  
Union Panel of Eminent  
African Personalities, Kenya

**Eric BERMAN**  
Managing Director, Small  
Arms Survey, The Graduate  
Institute of International and  
Development Studies, Geneva

**Miguel BERMEO**  
Senior Deputy Director,  
United Nations Development  
Programme, Geneva

**Simon BLAND**  
Counsellor, United Kingdom  
Permanent Mission, Geneva

**Kjell Magne BONDEVIK**  
President, The Oslo Center  
for Peace and Human Rights,  
Norway

**Horacio BONEO**  
Commissioner, Independent  
Review Commission (IREC),  
Argentina

**Alistair BOYD**  
Vice Chairman, Royal African  
Society, London

**Lakhdar BRAHIMI**  
Member of the Elders, Algeria

**Anna BRANDT**  
Ambassador of Sweden,  
Kenya

**Philippe BURRIN**  
Director, The Graduate  
Institute of International  
and Development Studies,  
Geneva

**Andy CARL**  
Executive Director,  
Conciliation Resources,  
London

**Sean CARROLL**  
Director of Programs,  
Club of Madrid, Spain

**Annar CASSAM**  
Tanzania

**Mary CHINERY-HESSE**

Former Chief Advisor to  
President Kufuor, Ghana

**Robin CHRISTOPHER**

Secretary General, Global  
Leadership Foundation,  
London

**Aeneas CHUMA**

United Nations Resident and  
Humanitarian Coordinator,  
Kenya

**Martin CHUNGONG**

Director, Inter-Parliamentary  
Union, Geneva

**Caty CLEMENT**

Course Director, Geneva  
Centre for Security Policy

**Hans CORELL**

Former Under-Secretary-  
General for Legal Affairs  
and Legal Counsel, United  
Nations, Sweden

**Philippa CROSLAND-TAYLOR**

Country Director, Kenya  
Programme, Oxfam GB

**Hans DAHLGREN**

Permanent Representative  
of Sweden, Geneva

**Arcanjo Maria DO**

**NASCIMENTO**  
Permanent Representative  
of Angola, Geneva

**Mohamed Siad DOUALEH**

Permanent Representative  
of Djibouti, Geneva

**Frederic ECKHARD**

Former Spokesman of the  
United Nations Secretary-  
General, France

**Elizabeth EDELSTEIN**

Columbia University,  
New York

**Nana EFFAH-APENTENG**

Chief of Staff, Coordination  
and Liaison Office, African  
Union Panel of Eminent  
African Personalities, Kenya

**Peter EIGEN**

Founder and former Chair,  
Transparency International,  
Germany

**Abdulghafur EL-BUSAIDY**

National Chairman, Supreme  
Council of Kenyan Muslims

**J Christer ELFVERSON**

Senior Diplomatic Adviser,  
Concordia 21, Spain

**Anna ERIKSSON**

Adviser, European  
Commission, Brussels

**Comfort ERO**

Director, South Africa Office,  
The International Center for  
Transitional Justice

**Ellen FADNES**

Higher Executive Officer,  
Norwegian Ministry of  
Foreign Affairs, Oslo

**Domingos FERNANDES**

Director, SADC National  
Contact Point, Ministry  
of Foreign Affairs and  
Cooperation, Mozambique

**Jean FEYDER**

Permanent Representative  
of Luxembourg, Geneva

**Macharia GAIHO**

Managing Editor for Special  
Projects, Nation Media Group,  
Kenya

**Ulrich GARMS**

Associate Human Rights  
Officer, Office of the United  
Nations High Commissioner  
for Human Rights, Geneva

**Jomo GECAGA**

Ministry of Foreign Affairs,  
Kenya

**Yash Pal GHAI**

Constitutional Expert, Kenya

**Julie GICHURU**

Reporter, Citizen TV, Kenya

**Linus GITAHU**

Head of Nation Media Group,  
Kenya

**John GITHONGO**

Chairman, Zinduko Trust,  
Kenya

**Anne GLOOR**

Peace Nexus Foundation,  
Geneva

**Peter GOODERHAM**

Permanent Representative of  
the United Kingdom, Geneva

**Christine GOY**

Deputy Permanent  
Representative of  
Luxembourg, Geneva

**Caroline GRANDJEAN**

Human Rights Counsellor,  
Office of the High  
Commissioner for Human  
Rights, Geneva

**Martin GRIFFITHS**

Executive Director, Centre  
for Humanitarian Dialogue,  
Geneva

**Abbas GULLET**

Secretary-General, Kenyan  
Red Cross Society

**Im HAN-TAEK**

Deputy Permanent  
Representative of South  
Korea, Geneva

**Priscilla HAYNER**

Director, Peace and Justice  
Programme, International  
Center for Transitional Justice,  
Geneva

**Peter HERTEL-RASMUSSEN**

Deputy Permanent  
Representative of Denmark,  
Geneva

.....  
**Marie HEUZÉ**  
 Director, United Nations  
 Information Service, Geneva  
 .....

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**Silvia HIDALGO TURULLOLS**  
 Director, DARA, Spain  
 .....

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**Omar HILALE**  
 Permanent Representative  
 of Morocco, Geneva  
 .....

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**Hannu HIMANEN,**  
 Permanent Representative  
 of Finland, Geneva  
 .....

.....  
**Joelle HIVONNET**  
 Head of the United  
 Nations Section, European  
 Commission, Brussels  
 .....

.....  
**Jack HJELT**  
 Senior Advisor for Africa,  
 Interpeace, Kenya  
 .....

.....  
**Bård HOPLAND**  
 Senior Adviser, Norwegian  
 Ministry of Foreign Affairs,  
 Oslo  
 .....

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**Rogier HUIZENGA**  
 Programme Officer, Inter-  
 Parliamentary Union, Geneva  
 .....

.....  
**Tomá HUSÁK**  
 Permanent Representative of  
 the Czech Republic, Geneva  
 .....

.....  
**Dekha IBRAHIM**  
 Technical Advisor-Peace  
 Program, PACT, Kenya  
 .....

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**Seif A. IDDI**  
 Deputy Foreign Minister,  
 Tanzania  
 .....

.....  
**Olatokunbo IGE**  
 Human Rights Adviser, Office  
 of the High Commissioner for  
 Human Rights, Geneva  
 .....

.....  
**Shoshana ITEN**  
 Program Coordinator,  
 Institute for Historical Justice  
 and Reconciliation,  
 The Netherlands  
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**Elisabeth JACOBSEN**  
 Ambassador of Norway,  
 Kenya  
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**Moses Benjamin JALLOW**  
 Permanent Representative  
 of Gambia, Geneva  
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**Bo JENSEN**  
 Ambassador of Denmark,  
 Kenya  
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**Anders B. JOHANSSON**  
 Secretary-General, Inter-  
 Parliamentary Union, Geneva  
 .....

.....  
**Njeri KABEBERI**  
 Director, Center for  
 Multiparty Democracy, Kenya  
 .....

.....  
**Michelle KAGARI**  
 Deputy Director of Africa  
 Programme, Amnesty  
 International, London  
 .....

.....  
**Linus KAIKAI**  
 Managing Editor, Kenya  
 Television Network TV  
 .....

.....  
**Jean N. KAMAU**  
 Country Director,  
 Action Aid, Kenya  
 .....

.....  
**Yata Mboup KANDE**  
 Columbia University,  
 New York  
 .....

.....  
**Kyung-wha KANG**  
 Deputy High Commissioner  
 for Human Rights, Office  
 of the United Nations High  
 Commissioner for Human  
 Rights, Geneva  
 .....

.....  
**Karuti KANYINGA**  
 Director, South Consulting,  
 Kenya  
 .....

.....  
**Martha KARUA**  
 Minister for Justice, National  
 Cohesion and Constitutional  
 Affairs, Kenya  
 .....

.....  
**Hemant KATOCH**  
 Project Manager, Centre  
 for Humanitarian Dialogue,  
 Geneva  
 .....

.....  
**Michael KEATING**  
 Director, Africa Progress  
 Panel, Geneva  
 .....

.....  
**Tom G. KESSINGER**  
 General Manager, Aga Khan  
 Foundation, Geneva  
 .....

.....  
**Divya KHOSLA**  
 Columbia University,  
 New York  
 .....

.....  
**Maina KIAI**  
 Former Chairperson,  
 Kenya National Commission  
 on Human Rights  
 .....

.....  
**Martin KING'ASIA**  
 Reporter, Kenya Broadcasting  
 Corporation  
 .....

.....  
**Bethwel KIPLAGAT**  
 Executive Director, Africa  
 Peace Forum, Kenya  
 .....

.....  
**Anders KOMPASS**  
 Director, Field Operations  
 and Technical Cooperation  
 Division, Office of the High  
 Commissioner for Human  
 Rights, Geneva  
 .....

.....  
**Sally KOSGEI**  
 Minister for Higher Education,  
 Science and Technology,  
 Kenya  
 .....

.....  
**Johann KRIEGLER**  
 Chairman, Independent  
 Review Commission (IREC),  
 South Africa  
 .....

.....  
**Nazeer LADHANI**  
 Senior Advisor, Aga Khan  
 Foundation, Geneva  
 .....

.....  
**Jens LAERKE**  
 Regional Public Information  
 Officer, United Nations Office  
 for the Coordination of  
 Humanitarian Affairs, Kenya  
 .....

.....  
**Marie-Noelle LAFOREST**  
 Permanent Mission of  
 Canada, Geneva  
 .....

.....  
**David LAMBO**  
 Senior Africa Advisor, Centre  
 for Humanitarian Dialogue,  
 Kenya

.....  
**Beatrice LE FRAPER DU  
 HELLEN**  
 Special Advisor of the  
 Prosecutor, International  
 Criminal Court, The Hague

.....  
**Bernardino LEÓN GROSS**  
 Secretary-General, Presidency  
 of the Government, Spain

.....  
**Elisabeth LINDENMAYER**  
 Board Member, Kofi Annan  
 Foundation, New York

.....  
**Salim LONE**  
 Former ODM Spokesperson,  
 Kenya

.....  
**Carlos LOPES**  
 Board Member, Kofi Annan  
 Foundation, Geneva

.....  
**Baraka LUVANDA**  
 First Secretary, Permanent  
 Mission of Tanzania, Geneva

.....  
**Wangari MAATHAI**  
 Founder, Green Belt  
 Movement, Kenya

.....  
**Rob MACAIRE**  
 British High Commissioner,  
 Kenya

.....  
**Olivier MACH**  
 Board Member, Kofi Annan  
 Foundation, Geneva

.....  
**Enos MAFEMBA**  
 Deputy Permanent  
 Representative of Zimbabwe,  
 Geneva

.....  
**Harriet MARTIN**  
 Centre for Humanitarian  
 Dialogue, Geneva

.....  
**Quett Ketumile Joni MASIRE**  
 Former President of Botswana

.....  
**Khadija Rachida MASRI**  
 Permanent Observer of the  
 African Union, Geneva

.....  
**Tom O. MBOYA**  
 Deputy Permanent  
 Representative of Kenya,  
 Geneva

.....  
**Ruth McCOY**  
 Chief of Staff, Kofi Annan  
 Foundation, Geneva

.....  
**Dennis McNAMARA**  
 Humanitarian Adviser, Centre  
 for Humanitarian Dialogue,  
 Geneva

.....  
**Haile MENKERIOS**  
 Assistant Secretary-General,  
 UN Department of Political  
 Affairs, New York

.....  
**Murezi MICHAEL**  
 Programme Officer,  
 Mediation and  
 Constitutionalism, Federal  
 Department of Foreign  
 Affairs, Political Division IV,  
 Bern

.....  
**Nicolas MICHEL**  
 International Lawyer,  
 University of Geneva

.....  
**Øistein MJÆRUM**  
 Special Advisor, The Oslo  
 Center for Peace and Human  
 Rights, Norway

.....  
**Thandika MKANDAWIRE**  
 Director, United Nations  
 Research Institute for Social  
 Development, Geneva

.....  
**Benjamin MKAPA**  
 Former President of Tanzania,  
 Member of African Union  
 Panel of Eminent African  
 Personalities

.....  
**Eli MOEN**  
 Senior Adviser, Norwegian  
 Ministry of Foreign Affairs,  
 Oslo

.....  
**Cécile MOLINIER**  
 Director, United Nations  
 Development Programme,  
 Geneva

.....  
**Michael MØLLER**  
 Executive Director, Kofi  
 Annan Foundation, Geneva

.....  
**Corinne MOMAL-VANIAN**  
 Senior Political Adviser,  
 United Nations Office at  
 Geneva

.....  
**Mabedi MOTLHABANI**  
 First Secretary, Permanent  
 Mission of Botswana, Geneva

.....  
**Nader MOUSAVIZADEH**  
 Goldman Sachs International,  
 London

.....  
**Florence MPAAYEI**  
 Executive Director, Nairobi  
 Peace Initiative

.....  
**Glaudine J. MTSHALI**  
 Permanent Representative  
 of South Africa, Geneva

.....  
**Musalia MUDAVADI**  
 Deputy Prime Minister, Kenya

.....  
**Betty MURUNGI**  
 Executive Director, Urgent  
 Action Fund-Africa, Kenya

.....  
**Caroline MUTOK50**  
 Radio Show Host, Kiss FM,  
 Kenya

.....  
**Bernard NAMUNANE**  
 Parliamentary Reporter,  
 The Daily Nation, Kenya

.....  
**Haron M. NDUBI**  
 Human Rights Lawyer,  
 Kenyans for Peace with Truth  
 and Justice

.....  
**Radek NEDVED**  
 Southern Africa Desk Officer,  
 Ministry of Foreign Affairs of  
 the Czech Republic, Prague

.....  
**Anund Priyay NEEWOOR**  
 Secretary for Foreign Affairs,  
 Republic of Mauritius

.....  
**Randy NEWCOMB**  
 President, Humanity United,  
 USA

.....  
**Namanga NGONGI,**  
 President, Alliance for Green  
 Revolution in Africa, Kenya

.....  
**Timothy NIELANDER**  
 General Counsel, GAVI  
 Alliance, Geneva

.....  
**Binaifer NOWROJEE**  
 Director, Open Society  
 Initiative for East Africa,  
 Kenya

.....  
**Gloria NWABUOGU**  
 Africa Unit, Office of the High  
 Commissioner for Human  
 Rights, Geneva

.....  
**Kenneth Mbeka ONACHA**  
 Principal Liaison Officer,  
 Office of the Deputy Prime  
 Minister, Kenya

.....  
**Felix ODHIAMBO OWUOR**  
 Deputy Country Director,  
 National Democratic  
 Institute, Kenya

.....  
**Ozonnia OJIELO**  
 Senior Peace & Development  
 Officer, United Nations  
 Development Programme,  
 Kenya

.....  
**Luc-Joseph OKIO**  
 Permanent Representative  
 of Congo, Geneva

.....  
**Ory Ateka OKOLLOH**  
 Executive Director, Ushahidi,  
 Kenya

.....  
**Hassan OMAR HASSAN**  
 Deputy Chairperson, Kenya  
 National Commission on  
 Human Rights

.....  
**Geoffrey OMONDI**  
 Counsellor, Permanent  
 Mission of Kenya, Geneva

.....  
**Daniel OPANDE**  
 Co-Founder, Concerned  
 Citizens for Peace, Kenya

.....  
**Sergei ORDZHONIKIDZE**  
 Director-General, United  
 Nations Office, Geneva

.....  
**James ORENGO**  
 Minister for Lands, Kenya

.....  
**Louis OTIENO**  
 Talk Show Host, Citizen TV,  
 Kenya

.....  
**Gladwell OTIENO**  
 Executive Director, Africa  
 Centre for Open Governance,  
 Kenya

.....  
**Mohamed Ali OULD SIDI**  
 Adviser for Africa and the  
 Arab States, International  
 Labour Organization, Geneva

.....  
**Marie-Louise OVERVAD**  
 Permanent Representative of  
 Denmark, Geneva

.....  
**Philip Richard O. OWADE**  
 Chargé d'affaires a.i.,  
 Permanent Mission of Kenya,  
 Geneva

.....  
**Katia PAPAGIANNI**  
 Head of Programme,  
 Mediation Support, Centre  
 for Humanitarian Dialogue,  
 Geneva

.....  
**Meredith PRESTON-MCGHIE**  
 Acting Regional Director,  
 Centre for Humanitarian  
 Dialogue, Africa Regional  
 Office, Kenya

.....  
**Gerhard J.W. PUTMAN-  
 CRAMER**  
 Deputy Director, United  
 Nations Office for the  
 Coordination of Humanitarian  
 Affairs, Geneva

.....  
**Michael E. RANNEBERGER**  
 Ambassador of the United  
 States of America, Kenya

.....  
**Ben RAWLENCE**  
 Kenya Researcher, Human  
 Rights Watch, London

.....  
**Marie RIPERT**  
 Second Secretary, Permanent  
 Mission of France, Geneva

.....  
**Mary ROBINSON**  
 Former President of Ireland,  
 Founder, Realizing Rights,  
 New York

.....  
**Frances RODRIGUES**  
 Permanent Representative  
 of Mozambique, Geneva

.....  
**Emeric ROGIER**  
 International Criminal Court,  
 The Hague

.....  
**Mohamed SAHNOUN**  
 President, Initiatives of  
 Change International, Geneva

.....  
**Neha SANGHRAJKA**  
 Liaison Officer, Coordination  
 and Liaison Office, African  
 Union Panel of Eminent  
 African Personalities, Kenya

.....  
**Pierre SCHORI**  
 Director-General, FRIDE,  
 Spain

.....  
**Venetia SEBUDANDI**  
 Permanent Representative  
 of Rwanda, Geneva

.....  
**Florence SIMBIRI-JAOKO**  
 Chairperson, Kenya National  
 Commission on Human  
 Rights

.....  
**Heli Annikki SIRVE**  
 Ambassador of Finland, Kenya

.....  
**Lamin SISE**  
 Senior Adviser, Kofi Annan  
 Foundation, Geneva

.....  
**Henrik SLOTTE**  
 Head of Post-Conflict and  
 Disaster Management  
 Branch, United Nations  
 Environment Programme,  
 Geneva  
 .....  
**Patrick SMITH**  
 Editor, The Africa Report,  
 London  
 .....  
**Steven G. SMITH**  
 Chairman, Kenya Private  
 Sector Alliance  
 .....  
**Jenö C. STAEHELIN**  
 Board Member, Kofi Annan  
 Foundation, Geneva  
 .....  
**Daniel STAUFFACHER**  
 Chairman, ICT for Peace  
 Foundation, Geneva  
 .....  
**Matthias STIEFEL**  
 Founder and Vice Chairman,  
 Interpeace, Geneva  
 .....  
**Lazarus SUMBEIYWO**  
 Co-Founder, Concerned  
 Citizens for Peace, Kenya  
 .....  
**Yasushi TAKASE**  
 Minister, Permanent Mission  
 of Japan, Geneva  
 .....  
**Yash TANDON**  
 Former Executive Director,  
 South Centre, Geneva  
 .....  
**Tesfai TECLE**  
 Special Advisor to the  
 Chairman, Alliance for Green  
 Revolution in Africa, Geneva  
 .....

.....  
**John TESHA**  
 Secretary General, Africa  
 Forum, South Africa  
 .....  
**Bjarte TORA**  
 Senior Programme Manager,  
 International IDEA,  
 Stockholm  
 .....  
**Jon Martin TRONDALEN**  
 Chairman, Compass  
 Foundation, Geneva  
 .....  
**John Ukec Lueth UKEC**  
 Permanent Representative  
 of Sudan, Geneva  
 .....  
**Laetitia VAN DEN ASSUM**  
 Ambassador of the  
 Netherlands, Kenya  
 .....  
**Erik VAN DER LINDEN**  
 Head, Delegation of the  
 European Commission in  
 Kenya  
 .....  
**Mabel VAN ORANJE**  
 Chief Executive Officer,  
 The Elders, London  
 .....  
**Nick VAN PRAAG**  
 Geneva  
 .....  
**Lucie VIERSMA**  
 Rule of Law Unit, Office of  
 the High Commissioner for  
 Human Rights, Geneva  
 .....  
**Prosper VOKOUMA**  
 Permanent Representative  
 of Burkina Faso, Geneva  
 .....

.....  
**George WACHIRA,**  
 Senior Research and Policy  
 Advisor, Nairobi Peace  
 Initiative  
 .....  
**Ndung'u WAINAINA**  
 Executive Director,  
 International Center for Policy  
 and Conflict, Kenya  
 .....  
**Philip WAKI**  
 Chair, Commission of Inquiry  
 into Post –Election Violence  
 (CIPEV), Kenya  
 .....  
**Amos WAKO**  
 Attorney-General, Kenya  
 .....  
**William WALLIS**  
 International Affairs Editor,  
 The Financial Times  
 .....  
**Rosaline WANGUI**  
 International Criminal Court,  
 The Hague  
 .....  
**L. Muthoni WANYEKI**  
 Executive Director, Kenya  
 Human Rights Commission  
 .....  
**Wachira WARURU**  
 Group Managing Director,  
 Royal Media, Kenya  
 .....  
**Thomas G. WEISS**  
 Director, Ralph Bunch  
 Institute for International  
 Studies, New York  
 .....  
**Moses WETANG'ULA**  
 Minister for Foreign Affairs,  
 Kenya  
 .....

.....  
**Adam WOOD**  
 Director for Africa, Foreign  
 and Commonwealth Office,  
 United Kingdom  
 .....

## Meeting Support Staff

.....  
**Laurence ATTOUZ**  
 Destination and Resources  
 Management, Geneva  
 .....  
**Fiona BERNARD**  
 Kofi Annan Foundation,  
 Geneva  
 .....  
**Diana CUNNINGHAM**  
 Kofi Annan Foundation,  
 Geneva  
 .....  
**Nicole De GROOT**  
 Kofi Annan Foundation,  
 Geneva  
 .....  
**Alain DICK**  
 Destination and Resources  
 Management, Geneva  
 .....  
**Benedikt FRANKE**  
 Africa Progress Panel, Geneva  
 .....  
**Abdelmajid HADDAD**  
 Kofi Annan Foundation,  
 Geneva  
 .....  
**Diana JACKSON**  
 Portland, London  
 .....  
**Dawda JOBARTEH**  
 Africa Progress Panel, Geneva  
 .....

.....  
**Allan KAMAU**

Portland, London  
 .....

**Kathryn KIRK**

Kofi Annan Foundation,  
 Geneva  
 .....

**Julie MANDOYAN**

Africa Progress Panel, Geneva  
 .....

**Li Ling LOW**

Kofi Annan Foundation,  
 Geneva  
 .....

**Carlos OLIVER CRUZ**

Kofi Annan Foundation,  
 Geneva  
 .....

**Temitayo OMOTOLA**

Africa Progress Panel, Geneva  
 .....

**Carolina RODRIGUEZ**

Africa Progress Panel, Geneva  
 .....

**Clélia ROMY**

Destination and Resources  
 Management, Geneva  
 .....

**Daphné ROMY**

Destination and Resources  
 Management, Geneva  
 .....

**Lwiise SWAI**

ICVolunteers, Geneva  
 .....

**Katie THOMPSON**

Portland, London  
 .....

**Judit VADLÖVÖ**

Destination and Resources  
 Management, Geneva  
 .....

**Robert WATKINSON**

Portland, London  
 .....

## Annex III

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# Biographical Notes of Speakers

## Keynote Speakers

### Kofi Annan

**Chairman of the Kofi Annan Foundation and  
the African Union Panel of Eminent African Personalities**

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Kofi Annan of Ghana, the seventh Secretary-General of the United Nations, served from 1997 to 2006 and was the first to emerge from the ranks of United Nations staff. Kofi Annan was awarded the 2001 Nobel Prize for Peace jointly with the United Nations. One of Kofi Annan's main priorities as Secretary-General was a comprehensive programme of reform aimed at revitalizing the United Nations and making the international system more effective. He was a constant advocate for human rights, the rule of law, the Millennium Development Goals and Africa, and sought to bring the organization closer to the global public by forging ties with civil society, the private sector and other partners.

At Kofi Annan's initiative, UN peacekeeping was strengthened in ways that enabled the United Nations to cope with a rapid rise in the number of operations and personnel. It was also at Kofi Annan's urging that, in 2005, member States established two new intergovernmental bodies: the Peacebuilding Commission and the Human Rights Council.

Since leaving the United Nations, Kofi Annan has continued to advocate for better policies to meet the needs of the poorest and most vulnerable, particularly in Africa. Kofi Annan serves as the President of the Global Humanitarian Forum and chairs several other initiatives: the Africa Progress Panel, the Alliance for a Green Revolution in Africa and the Prize Committee of the Mo Ibrahim Foundation. Mr Annan is a member of the Elders, serves as the Chancellor of the University of Ghana and is a Board member of various charitable Foundations.

## Musalia Mudavadi

### Deputy Prime Minister, Kenya

Hon. Mudavadi is the Deputy Prime Minister and Minister for Local Government, an elected Member of Parliament for Sabatia Constituency, the Chairman of Party of the Orange Democratic Movement Kenya in 2005, chairman of the Mudavadi Memorial Foundation and Member of the Kenya National Dialogue Reconciliation Team. Hon. Mudavadi was the Vice President of the Republic of Kenya and Minister for Transport and Communication in December 2002, Minister for Transport and Communication from July 2001 to December 2002. He was also the Minister for Information, Transport and Communication from September 1999 to 2001, the Minister for Agriculture from January 1999 to September 1999, re-elected Member of Parliament for Sabatia Constituency in 1997 and served as Minister for Finance from January 1993 to December 1997. Hon. Mudavadi holds a Bachelor of Arts, Land Economics (Hons.) M.I.S. K. (RV) from Nairobi University, Kenya.

## Master of Ceremonies

### Michael Møller

#### Executive Director of the Kofi Annan Foundation

Michael Møller (Denmark) is the Executive Director of the Kofi Annan Foundation. Prior to assuming this position, he served for 30 years with the United Nations. He was the Secretary-General's Special Representative for Cyprus from 2006 till 2008 and Director for Political, Peacekeeping and Humanitarian Affairs in the Office of the Secretary-General from 2001 till 2006, serving concurrently as Deputy Chief of Staff for the last 2 years of that period. Between 1997 and 2001, he was the Head of the Office of the Under-Secretary-General for Political Affairs at UN headquarters in New York. He served in different capacities in Iran, Mexico, Haiti and Geneva where he started his career in 1979 with the United Nations High Commissioner for Refugees.

## Moderators

### Hans Corell

#### Former Under-Secretary-General for Legal Affairs and the Legal Counsel, United Nations, Sweden

Hans Corell (Sweden) was Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations from March 1994 to March 2004. From 1962 to 1972, he served in the Swedish judiciary. In 1972, he joined the Ministry of Justice where he became Director of the Division for Administrative and Constitutional Law in 1979. In 1981, he was appointed Chief Legal Officer of the Ministry. He was Ambassador and Under-Secretary for Legal and Consular Affairs in the Ministry for Foreign Affairs from 1984 to 1994. He is involved in the work of the International Bar Association, the International Center for Ethics, Justice and Public Life at Brandeis University

and the Hague Institute for the Internalisation of Law. He is Chairman of the Board of Trustees of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University, Sweden.

## Nana Effah-Apenteng

**Chief-of-Staff, Coordination and Liaison Office, African Union Panel of Eminent African Personalities, Kenya**

Ambassador Nana Effah-Apenteng is chief of staff of the Kenya National Dialogue and Reconciliation. Prior to this, he was the Special Advisor to the Chairman of the African Union, President John A. Kufuor of Ghana. He served as Ghana's Permanent Representative to the UN (2000-2007) and represented Ghana on the UN Security Council (2006), including serving as President of the Council. Until 2000, he was Supervising Director of Administration in Ghana's Foreign Ministry and was the Ghanaian Deputy Chief of Mission (1993-1997) in Washington. He was the Director of the Estates and General Services Bureau in the Foreign Ministry (1992-1993) and served as Assistant Director of the International Conference Centre in Accra (1991-1993). He was Deputy Director of the Non-Aligned Movement Secretariat (1990-1991). He joined the Ghana Foreign Service in 1970, and has held high-level positions in embassies abroad, including Moscow and Rome. Amb. Effah-Apenteng is a traditional ruler.

## Martin Griffiths

**Director, Centre for Humanitarian Dialogue, Geneva**

Martin Griffiths is the founding director of the Centre for Humanitarian Dialogue, a Swiss foundation specialising in conflict mediation and related policy issues. From 1994 to 1999, he was an official in the UN Secretariat, principally in the Department of Humanitarian Affairs (later OCHA). He served in Geneva, New York and the Great Lakes. His last assignment was in the Balkans, both as UN Coordinator based in Skopje and later as Deputy to Sergio Vieira de Mello in Kosovo. Prior to those years in the UN, Martin Griffiths worked for UNICEF (in Asia), for Save the Children Fund (UK) and Action aid (as

Director), and for the British Diplomatic Service. He is a Lawyer by training, and has worked as an attorney in Portland, Oregon.

## Bethwel Kiplagat

**Executive Director, Africa Peace Forum, Kenya**

Ambassador Kiplagat was born on 28th November 1936 and is married with 3 children. He attended Alliance High School after which he proceeded to Makerere University where he graduated in Physics and Chemistry. He worked for the Government of Kenya as a Permanent Secretary and also as Ambassador to France and Britain. In February 2003, he was appointed Kenya's Special Envoy for the Somalia National Reconciliation Conference. Presently he is an Eminent Person of Africa Peer Review Mechanism which is evaluating governance in a holistic way covering both government and private sector with a strong emphasis on democratic values and human rights. Amb. Kiplagat is also the Chancellor of Egerton University and Chairman of the first Micro Credit Finance Bank in Africa (K-Rep). He was appointed as Chairman of the Committee of Eminent Persons on the Constitution Review Process. He is currently the Executive Director of Africa Peace Forum, and a Patron of Concerns Citizens for Peace.

## Speakers

### Horacio Boneo

**Commissioner, Independent Review Commission, Argentina**

Horacio Boneo has been involved in electoral assistance and observation in more than 40 countries, including in Latin America and the Caribbean, Asia and Africa. Between 1988 and 1999, he was deputy chief of mission for the UN Electoral Observation Missions in Nicaragua, Haiti, and El Salvador; director of the Electoral Assistance Division of the United Nations; director of Programs at International IDEA and Interregional Adviser in Democratic Governance at the UN

Secretariat. Since 2000, Mr. Boneo has served as a democratic governance and elections consultant for the United Nations, the United Nations Development Program (UNDP), the Swedish International Development Agency, the National Democratic Institute, the Organization for Security and Cooperation in Europe, and the International Foundation for Electoral Systems. From March through September 2008, he was an International Commissioner at the Independent Review Commission. He has a Ph.D. in economics from the Maxwell School of Citizenship and Public Affairs at Syracuse University.

## Yash Pal Ghai

### Constitutional Expert, Kenya

Yash Ghai, a Kenyan, recently retired after 40 years of university law teaching, including in Hong Kong, Tanzania, the UK and Sweden, as well as being visiting professor at many universities. He has been involved in constitution making for over thirty years, from being a consultant on the independence constitutions of Papua New Guinea (1973-5) to, in recent years, East Timor, Afghanistan and Iraq. Most recently, he headed a unit in UNDP Nepal to advise on the constitution making process there. From 2000-2004, he was the Chair of the process of reviewing the Constitution in Kenya – heading the Constitution of Kenya Review Commission and chairing the National Constitutional Conference. He is the author of many books and articles, on constitution making, human rights, ethnicity and other topics, including the co-authored Public Law and Political Change in Kenya (1971).

## Abbas Gullet

### Secretary General of the Kenya Red Cross Society, Kenya

Mr Abbas Gullet is the Secretary General of the Kenya Red Cross Society (KRCS). He started his career working at the Kenya External Telecommunications Company and the Kenya Posts and Telecommunications Corporation (1978-1984). He then worked at the Kenya Red Cross as a National First Aid Officer (1985-1988). In 1991, he was a Youth Officer at the Youth Department International Federation of Red Cross/

Red Crescent Societies (IFRC) in Geneva. He worked as Relief Coordinator with IFRC in Malawi (1992-1993). Between April and June 1993, he was the Acting Head of Delegation for IFRC, Malawi. From June to September 1993 and he was the Head of Sub-delegation, IFRC in Malawi. He also worked as IFRC's Head of Delegation in Uganda, Head of Youth Department, Head of sub-delegation in Niagara, Tanzania, Deputy Head of Regional Delegation for East Africa, Nairobi in Kenya, Head of Delegation Sudan, Head of Delegation, Pacific Region, Secretary General and Director of Operations IFRC, Treasurer of KRCS – elected by the Council of Delegation.

He was recognized as the UN Person of the Year in 2007. He holds an honorary of Order of the Golden Warrior from the Kenya Government. In June 2009, the Kenya National Commission on Human Rights (KNCHR) conferred to him the Utetezi Award (Civil Society) in recognition of his contribution in humanitarian activities. He holds an MBA in Practising Management from INSEAD.

## Priscilla Hayner

### Director, Peace and Justice Programme, the International Center for Transitional Justice, Geneva

Priscilla Hayner is the co-founder of the International Center for Transitional Justice, Director of the Center's Peace and Justice Program; as of July 2007, Director of the ICTJ Geneva office; and also manages the Center's Liberia program. She has recently undertaken in-depth research into past peace negotiations and how justice issues are handled therein, with publications forthcoming. She is an expert on truth commissions around the world and is the author of *Unspeakable Truths* (2001), which explores the work of more than 20 truth commissions worldwide. Prior to founding the ICTJ, she was a consultant at the Ford Foundation, the Office of the UN High Commissioner for Human Rights, and other organizations. She was previously a program officer on international human rights and world security for the Joyce Mertz-Gilmore Foundation in New York. She holds degrees from Earlham College and the School of International and Public Affairs at Columbia University.

## Elisabeth Jacobsen

Ambassador of Norway to Kenya

Elisabeth Jacobsen is the Ambassador of the Royal Norwegian Embassy in Kenya. Amb. Jacobsen started her career in Kenya working for UNDP (1986 – 1989), after Development Studies at University of Bergen and attachment at Christian Michelsen Research Institute.

She has worked in the Royal Norwegian Ministry of Foreign Affairs since 1990 and has served as Head of section for Asian Affairs, Head of Development Research in the Section for Development Policy and held various positions in the UN Department. She was posted to the Permanent Mission of Norway to the United Nations in New York (1993-1996). She graduated from the University of Bergen in 1985 with a Master's Degree in Sociology and a Bachelor's Degree in Sociology/Social Anthropology/History of Art.

## Karuti Kanyinga

Director, South Consulting, Kenya

Karuti Kanyinga is a Senior Research Fellow at the Institute for Development Studies (IDS), University of Nairobi, Kenya. Mr. Kanyinga is also a consultant with South Consulting Africa Ltd. The firm is monitoring the implementation of the Kenya National Dialogue and Reconciliation agreements. Mr. Kanyinga holds a PhD in Social Sciences from Roskilde University, Denmark. Mr. Kanyinga has eighteen years of teaching and research experience at the University of Nairobi. He has undertaken many research projects and published extensively on politics, development and governance in Kenya. Some of his publications include 'Redistribution from above: The Politics of Land Rights and Squatting in Coastal Kenya'. Uppsala: Nordic Africa Institute, 2000; and 'Ethnic inequalities and governance of the public sector in Kenya.' In Bangura, Yusuf (ed). Ethnicity, Inequalities and public sector. London: Palgrave Macmillan, 2006.

## Martha Karua

Minister for Justice, Kenya

A graduate of Law from the University of Nairobi, Hon. Martha Karua has served in several positions and was the first female lawyer to be elected to the Kenyan Parliament. She is currently the Minister for Justice, National Cohesion and Constitutional Affairs. Hon. Karua was a leading crusader for returning Kenya to a multi-party state, widening democratic space and gender issues. As a legal practitioner, she was involved in championing human rights through public interest litigation, lobbying for laws to enhance and protect women's rights through her work with various women's organizations particularly the International Federation of Women Lawyers-Kenya and the League of Kenya Women Voters. She has been awarded the International Commission of Jurists (Kenya)-Jurist of the Year award (the first to be given to a female jurist in Kenya) and the Human Rights Monitor Award by Human Rights Watch, New York, among other awards.

## Johann Kriegler

Chair, Independent Review Commission, South Africa

A South African human-rights lawyer and a judge, Johann Kriegler headed his country's Independent Electoral Commission through the liberation elections of 1994 and was instrumental in establishing its first permanent elections agency, which he chaired until 1999. After the 1994 elections, he was appointed a founding justice of the new Constitutional Court, from which he retired in 2002.

Over the last 10 years, he has engaged in various missions under the auspices of the AU, the UN and other agencies, inter alia in Afghanistan, East Timor, Iraq, Liberia, Pakistan, Palestine and Sierra Leone and a dozen countries in sub-Saharan Africa, and has lectured extensively on judicial and electoral matters on five continents. He spent six months in Kenya, chairing the Independent Review Commission (IREC) investigating the disputed elections of December 2007.

## Haile Menkerios

**Assistant Secretary-General, UN Department of Political Affairs, New York**

Mr. Menkerios is UN Assistant Secretary-General Political Affairs. Prior to this, he served as Deputy Special Representative of the UN Secretary-General for the Democratic Republic of Congo (DRC). After participating in the Eritrean war of liberation in different leadership capacities for almost 20 years, he served as Eritrea's first Representative (1991-1993) and as Ambassador (1993-1996) to Ethiopia. Concomitantly appointed Special Envoy for Somalia, he participated in several mediation attempts to bring Somali factions to reconcile and form a national government. Mr. Menkerios has been the Special Envoy of Eritrea for the Great Lakes Region (1996-1997), liaised with regional actors to support change in the DRC, and worked as Political Adviser to President Laurent Kabila (1997). As Envoy of the Secretary-General for Zimbabwe, he has worked closely with the South African Mediation (as member of the Reference Group) for Agreement between ZANU-PF and the MDC factions to form a coalition government.

## Binaifer Nowrojee

**Director, Open Society Initiative for East Africa, Kenya**

Binaifer Nowrojee heads the Open Society Initiative for East Africa (OSIEA). Prior to joining OSIEA, she worked for 11 years as legal counsel with the Women's Rights and Africa Divisions of Human Rights Watch. Before that, she served as a staff attorney with the Lawyers Committee for Human Rights. Ms. Nowrojee has investigated and reported on human rights abuses throughout the African continent and is the author of a number of reports and articles on these issues. She is also a lecturer at Harvard Law School. Ms. Nowrojee graduated with a master's in law from Harvard Law School.

## James Orengo

**Minister for Lands, Kenya**

Hon. James Orengo is the Minister for Lands. He holds a law degree from the University of Nairobi and was educated at Ambira Primary School and the Alliance High School. Originally from Ugenya constituency of Siaya District, Mr Orengo ran for the presidency in 2002 for the Social Democratic Party (SDP). At the December 2007 general elections, the SDP supported Hon. Raila Odinga of the Orange Democratic Movement (ODM). During the post-election crisis negotiations with the Party of National Unity, Mr. Orengo was part of the negotiating team and served as one of four spokesmen for the ODM.

## Ndung'u Wainaina

**Executive Director, International Center for Policy and Conflict, Kenya**

Mr. Wainaina is the Executive Director, International Center for Policy and Conflict, an NGO that advances the transitional justice, human security and peace building discourse. He convenes and coordinates the Kenya Transitional Justice Initiative, a Thematic Working Group of the Kenyans for Peace with Truth and Justice (KPTJ). The Working Group has done a lot work around Truth, Justice and Reconciliation process, the Special Tribunal for Kenya and Institutional Reforms. Mr. Wainaina does training and consultancy work on transitional justice in Kenya and also in collaboration with international organizations. He has written widely on transitional justice, governance and conflict in Kenya, Great Lakes and other parts of the world including being a regular contributor in the Transitional Justice Forum. He holds a Bachelor of Science degree from Kenya and Post-Graduate Diploma in Transitional Justice-Transitional Justice Fellow International Center for Transitional Justice, New York and Institute for Justice and Reconciliation. He also holds several certificates on human rights and leadership. Mr. Wainaina's key areas of focus are human rights, Transitional justice and human security.

## Philip Waki

### Chair, Commission of Inquiry into Post-Election Violence

The Hon. Mr. Justice Philip Nyamu Waki has had a distinguished career in the Kenyan legal and judicial systems spanning over three decades, leading to his appointment as a Judge of the Court of Appeal, the highest court in the land, in June 2003. He still serves in that capacity. Justice Waki holds a Bachelor of Laws, Honours, degree from the University of Nairobi (1974) and a diploma from the Kenya School of Law (1975). His career as a Legal Practitioner was firmly established as an Advocate of the High Court of Kenya for 20 years before his appointment as a Judge of the High Court in 1995. He has been an active member of the Law Society of Kenya (LSK), The Kenya Magistrates & Judges Association (KMJA), the East African Magistrates & Judges Association (EAMJA); the Commonwealth Magistrates & Judges Association (CMJA) and the Chartered Institute of Arbitrators (CI Arb).

## L. Muthoni Wanyeki

### Executive Director, Kenya Human Rights Commission

L. Muthoni Wanyeki is the Executive Director of the Kenya Human Rights Commission (KHRC), a national, non-governmental organisation (NGO). She was the Executive Director of the African Women's Development and Communication Network (FEmNET) for seven years. She serves as a regional advisor/Board member to several Kenyan, African and international organisations including: the African Women's Development Fund (AWDF) in Accra; the African women's fellowship programme and African Leadership Centre (ALC) of the Conflict, Security and Development Group (CSDG) at King's College London (KCL); the Afrimap and Justice Initiative-Africa programmes of the Open Society Initiative (OSI), Johannesburg and Abuja; Article 19, London; the Forum International de Montréal; the Global Fund for Women, San Francisco; and the Institute of Economic Affairs (IEA), Nairobi. During 2007/8, the KHRC was a key member of Kenyans for Peace with Truth and Justice (KPTJ), which sought accountability for both the elections and the ensuing violence.

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**Kofi Annan Foundation**

9 -11 rue de Varembé  
1202 Geneva, Switzerland

Tel: +41 22 919 7520

Fax: +41 22 919 7529

[info@kofiannanfoundation.org](mailto:info@kofiannanfoundation.org)

[www.kofiannanfoundation.org](http://www.kofiannanfoundation.org)

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