Back from the Brink

THE 2008 MEDIATION PROCESS AND REFORMS IN KENYA

The Office of the AU Panel of
Eminent African Personalities

Foreword by Kofi A. Annan

In December 2007, following a bitterly disputed presidential election, violence rippled out across Kenya, exposing entrenched ethnic divisions fuelled by social and economic exclusion, corruption, and winner-takes-all politics.

This book describes the remarkable intervention of the Panel of Eminent African Personalities. Convened by the African Union while violence was still spreading, Kofi Annan, Graça Machel and Benjamin Mkapa were asked to mediate between the parties, create the conditions for peace, and negotiate a political settlement that would tackle the root causes of conflict, mend Kenya's failing institutions and reduce its profound inequalities.

With the advantage of an insiders' account, *Back from the Brink* describes how the Panel deployed their diplomatic and peace-making skills to stop the bloodshed, and how, from 2008 to 2013, Annan, Machel and Mkapa remained deeply engaged in Kenya's efforts to build a durable peace.

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About the Authors

This book was written by members of the Coordination and Liaison Office of the Panel of Eminent African Personalities. The work was overseen by Ambassador Nana Effah-Apenteng and the text was drafted by G. Justin Jepson, Neha Sanghrajka, and Jimmy Ochieng. Martin Griffiths wrote the final chapter. Support was also provided by Leonard Obonyo and John Omondi.

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This book is dedicated to the victims of the post-election violence and those who continue to fight for sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.

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List of Acronyms

4Cs	Citizens Coalition for Constitutional Change
AACC	All Africa Conference of Churches
AfriCOG	Africa Centre for Open Governance
AGLI/FCPT	Africa Great Lakes Initiative and Friends Church Peace Teams
AMP	Adversely Mentioned Person
ANC	African National Congress
AP	Administration Police
APRM	African Peer Review Mechanism
AU	African Union
AU-EOM	African Union Election Observation Mission
BVR	Biometric Voter Registration
CAJ	Commission on Administrative Justice
CCP	Concerned Citizens for Peace
CDU	Central Depository Unit
CIC	Commission for the Implementation of the Constitution
CID	Criminal Investigations Directorate
CIOC	Committee for the Implementation of the Constitution
CIPEV	Commission of Inquiry into Post-Election Violence
CKRA	Constitution of Kenya Review Act
CKRC	Constitution of Kenya Review Commission
CLO	Coordination and Liaison Office
CMP	Conflict Management Panel
CoE	Committee of Experts
COG	Commonwealth Observer Group
COMESA	Common Market for Eastern and Southern Africa
CORD	Coalition for Reform and Democracy
CRA	Commission on Revenue Allocation
CRECO	Constitutional Reform and Education Consortium
CSO	Civil Society Organization
DCI	Directorate of Criminal Investigations

DIG	Deputy Inspector General
DPP	Director of Public Prosecutions
EAC	East African Community
EACC	Ethics and Anti-Corruption Commission
ECCECC	Electoral Code of Conduct Enforcement and Compliance Committee
ECK	Electoral Commission of Kenya
EISA	Electoral Institute for Sustainable Democracy in Africa
EJE	Extra-Judicial Execution
ELOG	Elections Observation Group
EU	European Union
EU-EOM	European Union Election Observation Mission
FGD	Focus Group Discussion
FORD-P	Forum for the Restoration of Democracy-People
GEMA	Gikuyu Embu and Meru Association
GIS	Geographic Information System
GJLOS	Governance, Justice, Law and Order Sector
GSU	General Service Unit
HD Centre	Centre for Humanitarian Dialogue
IAC	Inter-Agency Committee
IAU	Internal Affairs Unit
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICD	International Crimes Division
ICJ-K	International Commission of Jurists-Kenya
ICPC	International Centre for Policy and Conflict
ICTJ	International Centre for Transitional Justice
IDMC	Internal Displacement Monitoring Centre
IDP	Internally Displaced Person
IEBC	Independent Electoral and Boundaries Commission
IGAD	Intergovernmental Authority on Development
IGP	Inspector General of Police
IIBRC	Interim Independent Boundaries and Review Commission
IICDRC	Interim Independent Constitutional Dispute Resolution Court
IIEC	Interim Independent Electoral Commission
IMLU	Independent Medico-Legal Unit
IPI	International Peace Institute
IPOA	Independent Policing Oversight Authority
IPPG	Inter-Parties Parliamentary Group
IREC	Independent Review Commission
IRI	International Republican Institute

JSC	Judicial Service Commission
KAF	Kenyan Asian Forum
KAM	Kenya Association of Manufacturers
KANU	Kenya African National Union
KEC	Kenya Episcopal Conference
KEDOF	Kenya Elections Domestic Observation Forum
KEPSA	Kenyan Private Sector Alliance
KHRC	Kenya Human Rights Commission
KIA	Kenya Institute of Administration
KICC	Kenyatta International Conference Centre
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
KNHREC	Kenya National Human Rights and Equality Commission
KPTJ	Kenyans for Peace with Truth and Justice
KRCS	Kenya Red Cross Society
LDP	Liberal Democratic Party
LIMS	Land Information Management System
LSK	Law Society of Kenya
LWG	Legal Working Group on Governance
MoU	Memorandum of Understanding
MP	Member of Parliament
MRC	Mombasa Republican Council
MSTF	Multi-Sectoral Task Force
MTP	Medium Term Plan
NAK	National Alliance (Party) of Kenya
NARC	National Rainbow Coalition
NCA	National Convention Assembly
NCC	National Constitutional Conference
NCCK	National Council of Churches of Kenya
NCEC	National Convention Executive Council
NCIC	National Cohesion and Integration Commission
NEC	National Executive Committee
NEPAD	New Partnership for Africa's Development
NGEC	National Gender and Equality Commission
NGO	Non-Governmental Organization
NLC	National Land Commission
NPSC	National Police Service Commission
NSIS	National Security and Intelligence Service
NTC	National Tallying Centre

ODM	Orange Democratic Movement
ODM-K	Orange Democratic Movement Party of Kenya
OP	Office of the President
OSE	Office of the Supervisor of Elections
OTP	Office of the Prosecutor
PBCR	Peace Building and Conflict Resolution Programme
PEAP	Panel of Eminent African Personalities ('the Panel')
PEV	Post-Election Violence
PCK	Proposed Constitution of Kenya
PNU	Party of National Unity
PO	Presiding Officer
PPDRT	Political Parties Dispute Resolution Tribunal
PPLC	Political Parties Liaison Committee
PPOA	Police Procurement Oversight Authority
PRIC	Police Reforms Implementation Committee
PSC	Parliamentary Select Committee on Constitutional Review
PSC	Peace and Security Council
PSC	Public Service Commission
PTC	Pre-Trial Chamber
PVT	Parallel Vote Tabulation
PWD	Person With Disabilities
RO	Returning Officer
SID	Society for International Development
SLDF	Sabaot Land Defence Force
SRC	Salaries and Remuneration Commission
TA	Transition Authority
TJRC	Truth, Justice and Reconciliation Commission
TSC	Teachers Service Commission
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNDPA	United Nations Department of Political Affairs
UNGASS	United Nations General Assembly
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNON	UN Office in Nairobi
UPR	Universal Periodic Review
US	United States of America

Foreword by
Kofi Annan

In January 2008, when I responded to John Kufuor's personal appeal to lead a Panel of Eminent African Personalities to help mediate Kenya's post-election crisis, I could not possibly have conceived that I would still be so involved in Kenya some five years later.

My deep engagement with this country turned into a labour of love – love for the Kenyan people and a fervent desire to see them achieve an enduring peace and prosperity through the rule of law and respect for human rights. I know that the same hope motivated my fellow Panel members, Graça Machel and Benjamin Mkapa, to maintain their personal commitment throughout the KNDR process.

Typically, when an envoy is appointed by an international organization or regional body to a conflict situation, the individual rarely stays the course for the duration of the mandate. The AU Panel members were a rare exception. As a result, the three of us often came to personify the mediation – both its successes and its failures.

It is important to understand both. In Kenya, as elsewhere, it is not possible to create new institutions or reform an entrenched political culture at a stroke. It involves much resilience and determination, a long effort of imagination and resolve. Moments of progress are followed by moments of regression. Kenya's people have deep experience of this and their long unfinished struggle for reform, for a fairer and more secure future, deserves attention, support and respect.

This book does not purport to 'set the record straight' on the Panel's role in Kenya, as if it were to be the final word on the subject. At the same time, it aims to inject fresh perspectives on the mediation and its implementation between 2008 and 2013. It draws on new material and breathes life into and contextualizes well-known documentation.

Perhaps most critically, "Back from the Brink" seeks to draw out the lessons learned from the entire period with a view to making them accessible to students, academics and practitioners alike, and for possible replication in other situations where mediation is being undertaken.

Attempting to capture the most relevant details, anecdotes, references and lessons from a five year long period in one volume is a herculean task, but one that I can confidently say has been achieved. My hope is that, as the book answers the reader's questions, it will also engender many more – about Kenya and the prospects of peace, prosperity and democracy in Africa in general.

It was a great pleasure and an enriching experience to work with Graça Machel and Benjamin Mkapa on this collective endeavour. I thank them for their wisdom and immeasurable contributions. I also wish to pay tribute to Oluyemi Adeniji and to the staff of the Coordination and Liaison Office – Nana Effah-Apenteng, G. Justin Jepson, Neha Sanghrajka, Gerald Bennett, Leonard Obonyo, John Omondi and Jimmy Ochieng – whose dedication and steadfast support for the work of the Panel were invaluable. Hans Corell, Ruth McCoy, Michael Møller and Lamin Sise accompanied me on this journey, providing vital advice and support along the way. Finally, I would like to express my deep appreciation to the people of Kenya for their trust and strong commitment to a peaceful, just and cohesive society. It has been a privilege and an honour to serve them.

Kofi A. Annan
Chair,
Panel of Eminent African Personalities

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Back from the Brink

THE 2008 MEDIATION PROCESS AND REFORMS IN KENYA

Introduction

Much has already been written about the mediation process in Kenya, which brokered a political solution to the crisis that followed the 2007 general election.

Interest in 'the case of Kenya' is understandable. Long perceived to be a bastion of peace in an unstable region, Kenya shocked the world when, seemingly overnight, it descended into violent internal conflict that had frighteningly evident ethnic dimensions. Yet, in the midst of mounting violence, mass internal displacement and a widening chasm between the main protagonists, agreements were hammered out that restored peace, reaffirmed human rights, addressed the humanitarian suffering of Kenya's people and brought the main political parties together in a coalition government. The agreements ensured stability in the short term and promised, in the long term, reforms that would address the underlying causes of the violence that had occurred.

In a world in which conflicts too often remain unresolved, or peace agreements prove ephemeral, Kenya's return from the brink after 41 days of facilitated negotiation is of great interest to observers of international relations as well as specialists in conflict studies and mediation.

Two things set this book apart.

The first is its provenance. It has been prepared by those who worked for and with the Panel of Eminent African Personalities (the Panel), which led mediation during the crisis. It therefore offers an inside perspective not available elsewhere. The book draws on minutes of the mediation and other primary documents that shed light on what the mediation team, the Principals, and other key interlocutors, thought and did at a crucial time.

The second is its timescale and coverage. Previous studies have reviewed the 2007-2008 conflict and the mediation process, but none have examined the Panel's role after the National Accord was signed in February 2008. A rounded evaluation of the success or failure of the mediation needs to take account of the Accord's implementation. The book underlines that creating the Coalition

Government, heralded as the political solution to Kenya's crisis, was not an end in itself but the instrument for achieving long-term reforms.

Readers will note that the chapters are interconnected, reflecting the fact that both the Panel and the Negotiating Team recognized that the reform agenda set out in the Accord must be seen as a whole and implemented fully to be effective.

Chapter One: The Crisis puts in context the grievances that generated the crisis and examines how the Panel guided the Principals and then the negotiating team to agree to mediation. It argues that mediation was successful because the parties came to a shared understanding of the situation that gave rise to the crisis. Numerous groups in Kenya provided ideas, analysis and background information that enabled the Panel to grasp Kenya's history, the grievances that Kenyans have struggled with since independence, the nature of electoral violence in the country, and relations between the parties in dispute. This understanding was crucial to the development of the annotated agenda that provided the framework for designing a reform agenda. The chapter describes how, through dialogue, the Panel assisted the negotiating team to focus on solutions.

Chapter Two: International Response and the Mediation provides an inside account of how the mediation process unfolded. It describes how the Panel formed and acquired its mandate and rules of procedure, and its strategy for engaging the negotiating team. It discusses the many local, regional and international actors who played a role, how the Panel mobilized them, and the challenges it had to surmount to ensure that they remained committed, and recognized that the AU initiative was the sole process. It suggests some key ingredients for successful mediation, focusing on how the Panel conceptualized each agenda item and how the negotiating teams reached agreement.

Chapter Three: Concluding the Mediation and Facilitating Implementation draws attention to the support role that the Panel fulfilled during implementation of the reform agenda, and the contribution of the Coordination and Liaison Office (CLO). It suggests that the Kenya National Dialogue and Reconciliation (KNDR) is a unique example of sustained high-level political support for a reform process.

Chapter Four: The Grand Coalition Government complements Chapter Two. It describes Agenda Item 3 in detail and bridges to subsequent chapters by describing the political environment in which implementation occurred. Primarily through the eyes of the KNDR, it describes how the Panel helped shape discussion of power-sharing and how the Grand Coalition Government came into being. This chapter walks the reader through the delicate process

of agreeing to form the coalition, describes the government's evolution, and assesses its successes and problems at the end of its mandate in 2013.

Chapter Five: Reforming the Management of Elections in Kenya examines imperfections in the electoral process and abuses that occurred during the 2007 general election, which triggered the crisis. The KNDR argued at length over the presidential results before the parties eventually shifted their attention to electoral reform. After considering a range of options (a recount, a re-tally, a forensic audit, a rerun, a judicial process or an independent review) they eventually agreed to ask an Independent Review Committee (IREC) to investigate all aspects of the 2007 presidential election and make recommendations to improve the electoral process. The chapter shows clearly how the parties resolved a deeply divisive issue through dialogue.

The chapter goes on to examine the implementation of recommendations that emerged from the review process, and their impact on the 2013 general election. The key question it asks is whether the 2013 general elections strengthened confidence in the country's electoral management body, a core component of democratization ever since multiparty politics were restored.

Chapter Six: Accountability for Post-Election Violence deals with the key issue of accountability for the post-election violence. It traces how the negotiating team agreed to investigate the circumstances that led to post-election violence, a step that is crucial to end Kenya's culture of impunity and create conditions in which the country can achieve long-term stability. The chapter describes how the negotiating team came to agree to form a Commission of Inquiry into the Post-Election Violence (CIPEV), to gather evidence on the events and investigate the violations that occurred, differences of view that had to be resolved, and the appointment of CIPEV's members. It considers the outcome of CIPEV's recommendations and the involvement of the International Criminal Court (ICC).

Chapter Seven: The Truth, Justice and Reconciliation Commission focuses on how the KNDR created the Truth, Justice and Reconciliation Commission (TJRC) and the discussions that surrounded its formation. It traces the life of the TJRC, highlighting the challenges that limited its effectiveness and capacity, and reflects on the difficulty of achieving transitional justice when the public and stakeholders have disengaged and political leadership is lacking.

Chapter Eight: The Journey to a New Constitution examines the constitutional reform process. It describes how the KNDR crafted a process that enabled Kenyans to promulgate a new constitution despite repeated failures in the past. This was important because this failure was perceived to be one of the more

important causes of the 2007-2008 crisis. The chapter analyses the formation of the Committee of Experts (CoE), arguments over process, and the drafting, adoption and promulgation of Kenya's 2010 Constitution.

Chapter Nine: Fruits of a New Constitution examines Agenda Item 4 (long-term problems and their resolution). The issues addressed under Agenda Item 4 were integrated in the constitution and as a result Agenda Item 4 came to be spoken of as constitutional implementation. While it is too early to properly evaluate the constitution's impact, this chapter asks whether the 2010 Constitution made it possible to address issues identified under Agenda Item 4 more effectively. It concludes that the constitution provides tools for addressing Agenda Item 4 issues but, for lack of political will, they have not been properly applied. Kenya has yet to reach the point where constitutional reforms will become irreversible; vested interests have hampered efforts to reform; and Kenya's political culture has been slow to change because political ownership of the constitution is weak.

Chapter Ten: Judicial Reform and Human Rights begins by summarizing the Kenyan judiciary's history, and why it lacked independence from the executive. During the negotiations, it was recognized that this had contributed to the crisis. The chapter goes on to describe the reforms that were put in place under the National Accord and by the 2010 constitution. It reflects on judicial independence and financial autonomy, and ends by asking whether the performance of the judiciary has improved, notably its capacity to resolve electoral disputes.

Despite its heading, **Chapter Eleven: The Security Sector** focuses exclusively on reform of the police, because the police service played an important and contested role during the 2007-2008 crisis. It describes the police reforms recommended by CIPEV, the National Task Force on Police Reforms, and the Police Reforms Implementation Committee, and asks whether their implementation has influenced the state's behaviour and the police service's performance. In doing so, it explores a number of challenges and missed opportunities that occurred during implementation.

Chapter Twelve: The Electoral Boundaries Commission and the 2013 General Election describes the formation of new electoral bodies after the 2007-2008 crisis, and preparations for the 2013 general election. It reports on the successes and shortcomings of the Independent Electoral and Boundaries Commission (IEBC) and considers the evolution of electoral politics in Kenya since the 2007-2008 crisis.

Chapter Thirteen: Drawing Lessons from the Kenya Mediation Process suggests some of the key lessons that can be learned from the KNDR process and implementation of the reforms it agreed. Recognizing that mediation is more of an art than a science, it teases out some of the qualities that made the mediation and the Panel successful, and the reasons why their achievements and tactics may not be replicable elsewhere. It concludes that the initial phase of mediation was successful in curbing conflict and creating a platform for reform that might bring long-term peace and prosperity to Kenya. Its implementation, by contrast, has been hampered and undermined by the competitive and ethnicized character of Kenya's political culture.

Chapter One
The Crisis

"The level and intensity of the violence had not been anticipated. This was a key lesson: Kenya needed to recognize and address the underlying tensions that remained in order to ensure longer-term peace and stability."

– Report of the Conference "Kenya National Dialogue and Reconciliation: One Year Later", Geneva, 30 March 2009

Introduction

When the African Union (AU) Panel of Eminent African Personalities (the Panel) – composed of Kofi Annan, Graça Machel and Benjamin Mkapa – published the annotated agenda and timetable that set the direction of its mediation and negotiations to resolve the crisis that followed Kenya's general elections in December 2007, it identified the underlying causes of tension, instability and violence in Kenya: "poverty, the inequitable distribution of resources, and perceptions of historical injustices and exclusion on the part of segments of the Kenyan society".[1] This chapter provides a brief chronology of the crisis and puts those grievances in context.

A brief chronology of the crisis

On 27 December 2007, Kenya held historic and peaceful presidential, parliamentary and local elections. Eight candidates stood for the presidency but in the end the contest pitted President Kibaki and his Party of National Unity (PNU) against Raila Odinga, leader of the Orange Democratic Movement

1 Kenya National Dialogue and Reconciliation (2008), Annotated Agenda and Timetable.

(ODM). It was a passionate campaign in which (according to one observer) the PNU came to represent: "the incumbency dominance of the so-called 'Mount Kenya mafia', the economic and political elite, disproportionately represented in the Executive branch and the public sector, of the Gikuyu and allied communities such as the Embu and Meru", while the ODM "came to represent essentially everybody else, particularly the Luo and the Kalenjin".[2]

It was the closest election since the reintroduction of multiparty politics in 1992. According to (disputed) results released by the Electoral Commission of Kenya (ECK), President Kibaki won 4,578,034 and Raila Odinga 4,352,860 votes – a difference of about 225,000 votes or 2.5 per cent of the votes cast.[3]

Voting was peaceful, but confusion and delays in announcing the result created unease, then unrest, and eventually violence. The ODM refused to accept the outcome and rejected the Electoral Commission's declaration that President Kibaki had been legitimately elected to the presidency. This triggered a political crisis. Kenya became engulfed in violence that lasted for almost a month. It was evident that the election dispute was a catalyst that had brought simmering tensions to the surface.

The PNU insisted that President Kibaki had won the election. The ODM claimed that Raila Odinga was the winner, on the grounds that rigging had occurred in polling stations, the Constituency Tallying Centres and the National Tallying Centre. The ODM alleged that the ECK had released results in 48 constituencies without the mandatory documentary evidence (Form 16A), had announced results that varied from the results issued and confirmed by Returning Officers (ROs) and its own agents, and that in 10 disputed constituencies the presidential vote cast had exceeded the parliamentary vote by an unusual margin. For the first time in Kenya's history, it said, local and international observers were unanimous in saying that counting and tallying had been flawed.[4]

2 Wanyeki, M. (2008), "Lessons from Kenya: Women and the Post Election Violence", Africa Gender Issue, Feminist Africa 10: Militarism, Conflict and Women's Activism, Cape Town: Africa Gender Institute, University of Cape Town.

3 United Nations Office of the High Commissioner for Human Rights (2008), *Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008*, Geneva: OHCHR; Kanyinga, K., Long, J.D., and Ndii, D. (2010), "Was it Rigged? A Forensic Analysis of Vote Returns in Kenya's 2007 Election", in *Tensions and Reversals in Democratic Transitions: Kenya 2007 General Elections*, Nairobi, Kenya: Society for International Development; Kenya National Commission on Human Rights (2008), *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, Nairobi: KNCHR.

4 Orange Democratic Movement (2008), "Death of Democracy in Kenya through the Theft of the 2007 Elections", Paper presented during the Kenya National Dialogue and Reconciliation's Sixth Session.

Complicating matters, the ECK's chairperson, Samuel Kivuitu, had also cast doubt on the credibility of the result. Unable to submit presidential results during the second day of counting, he had said publicly that he had no confidence in the results being submitted by his officials, because some tallies were higher than the number of registered voters. He was quoted as stating: "I hear there is a communication problem, that phone lines have been blocked. Even in my office right now I cannot ring out, but I can receive."[5] Public suspicion that the election had been manipulated solidified.[6]

Despite this, on 30 December, Kivuitu declared President Kibaki the winner: he was sworn in the same day at dusk, less than half an hour after Kivuitu's announcement; the majority of Kenyans became aware of the event as it was being broadcast. This further deepened public suspicion, because previous ceremonies had taken place at least 48 hours after the result, in the presence of regional and international leaders. The next day, five ECK commissioners called for an independent inquiry into whether any of their colleagues had tampered with the presidential election results.[7]

The PNU asserted that President Kibaki had been duly elected President and that complaints about the conduct of the election should be resolved in the courts. It argued that the votes cast for presidential and parliamentary elections has always varied; that errors in the electoral process (particularly in counting and tallying) were not sufficient to falsify the result; and that the ODM refused to accept defeat because it had declared to the media and on the basis of opinion polls that Raila Odinga would win.[8]

The ODM refused to take the dispute to court because it believed the judiciary was not independent. It said that electoral petitions had consistently faced inordinate delay. Ten petitions arising from the 2002 elections had still not been adjudicated in 2007, and President Kibaki's own petition in 1997 had been dismissed on frivolous grounds.

The violence that erupted after the election took three distinct, sometimes concurrent, forms: spontaneous, organized and retaliatory.[9] The PNU

5 Technical Background Paper on the Current Constitutional, Political and Humanitarian Crisis, prepared by the Civil Society, 25 January 2008. Paper presented for the Kenya National Dialogue and Reconciliation sessions.

6 *Op. cit.*

7 Minutes of the Kenya National Dialogue and Reconciliation, Fifth Session, 5 February 2008.

8 Party of National Unity (2008), "The Future of Kenya is in the Rule of Law: A Clarification of Issues arising out of the 2007 general elections", Paper presented during the Kenya National Dialogue and Reconciliation's Sixth Session.

9 United Nations Office of the High Commissioner for Human Rights (2008), *Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008*, Geneva: OHCHR.

was categorical that the unity of the country was at stake, because ethnic stereotyping and discrimination were occurring on an unprecedented scale. It noted that communities were being subjected to violence because of how they had voted.[10] A security briefing noted that violence had erupted immediately the presidential result was announced in many areas (including Nairobi, Rift Valley, Western, and Coast provinces), and had been directed at Kikuyu. It explained that initial protests against election fraud had been followed by the formation of opportunistic groups that took advantage of the crisis to commit violence, including murder, mutilation, arson, sabotage, destruction of property and theft. For example, in Nyanza and Rift Valley provinces, groups (organized to a greater or lesser degree) evicted people from their land, took property, robbed travellers, blocked roads and looted.[11] Whereas violence had previously affected two or three provinces, on this occasion it occurred in up to 136 constituencies in six of Kenya's eight provinces.[12]

Background to the violence

Competition between ethnic groups for political power had frequently led to violence in Kenya, before, during and after elections. The 'normalization' of political violence[13] ensured that after 1992 ethnicized political conflict occurred in every year in which elections took place.

After 1992, antagonisms also sharpened. The Kalenjin political elite feared that multiparty politics would cause them to lose power. This prompted efforts to ring-fence areas under the control of the Kenya African National Union (KANU, for many years Kenya's ruling party), by preventing members of other parties from registering, voting or organizing political activities.[14] This practice contributed to violence during the 1992 and 1997 elections.

A similar number of casualties was reported in the elections of 2007-2008, 1997 and 1992. In ethnic clashes in 1992 and 1997, over 3,000 people were killed and over 300,000 displaced.[15] In both 1992 and 1997, however, violence erupted

10 Minutes of the Kenya National Dialogue and Reconciliation, Third Session, 1 February 2008.

11 Minutes of the Kenya National Dialogue and Reconciliation, Fifth Session, 5 February 2008.

12 Kenya National Commission on Human Rights (2008), *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, Nairobi: KNCHR, p. 8.

13 Murunga, G. (2011), *Spontaneous or Premeditated? Post-Election Violence in Kenya*, Uppsala: Nordiska Africakinstitutet.

14 Republic of Kenya (2008), *Report of the Commission of Inquiry into the Post-Election Violence*, Nairobi: Government Printer; Kenya Human Rights Commission (2003), *Warlord democracy: the proliferation of militia and pre-election violence in Kenya, 1999-2002*, unpublished.

15 Cheeseman, N. (2008), "The Kenyan Elections of 2007: An Introduction", in *Journal of Eastern African Studies*, 2:2, p. 170.

Map of Kenya

SOUTH SUDAN
ETHIOPIA
SOMALIA
UGANDA
TANZANIA
INDIAN OCEAN
Lokichoggio
Mandera
Lake Turkana
Moyale
Lodwar
Turkwel
Marsabit
RIFT VALLEY
Wajir
EASTERN
Maralal
Kitale
Lake Baringo
Bungoma
Eldoret
WESTERN
NORTH-EASTERN
Isiolo
Kakamega
Kapsabet
Nyahururu
Nanyuki
Meru
Kisumu
Rongai
Nakuru
Tana
Molo
Kericho
Nyeri
Embu
Garissa
Homa Bay
Kisii
NYANZA
CENTRAL
Lake Victoria
Lake Naivasha
Naivasha
Mara
Migori
Narok
Ruiru
Thika
NAIROBI
Machakos
Athi
Lake Magodi
Lamu
Lake Amboseli
COAST
Ungama Bay
Tsavo
Galana
Malindi
Voi
Kilifi
Mombasa

before the elections, creating ethnically (and politically) homogeneous voting blocs; in 2007, by contrast, it occurred afterwards, in reaction to the outcome.[16]

The elections in December 2002 did not generate serious violence. There were fewer casualties than in 1992 and 1997 and violent incidents during the nominations period and in the week before the elections appeared to be isolated.[17] Information collected by the Central Depository Unit (CDU) showed that violence associated with the election caused 325 deaths between January and December 2002, 203 of whom were killed between January and August.[18]

A number of elements might explain the fall. First, a broad coalition of 14 opposition parties formed a National Rainbow Coalition (NARC), which cut across most major ethnic groups and included all the opposition presidential candidates from 1997. Second, the two main presidential candidates were both Kikuyu; this 'detribalized' the poll.[19] Third, the prospect of a NARC government did not deeply alarm the old guard. Political mobilization was less intensely ethnicized than in previous elections, when each of the big five ethnic groups had put forward its own candidate for the presidency. Fourth, this was the first election in which an incumbent was not running for office. President Moi had served the maximum two terms permitted under the constitution – though he accompanied Kanu's candidate, Uhuru Kenyatta, to most of his rallies.

The violence in 2007-2008 was unprecedented in intensity and scope. Again, a variety of reasons account for this. The country had not healed after a referendum in 2005 that followed the collapse of NARC. The Rainbow Coalition had begun to fragment immediately after the 2002 election, over implementation of a Memorandum of Understanding (MoU) on power-sharing which the two main partners had signed.[20] The MoU had detailed the allocation of ministerial and key civil service positions on a 50-50 basis, and stated that Raila Odinga would become Prime Minister after the adoption of a new constitution within

16 Minutes of the Kenya National Dialogue and Reconciliation, Fourth Session, 4 February 2008.

17 European Union Election Observation Mission (2003), *Kenya General Elections 27 December 2002*, EU-EOM.

18 Mutahi, P. (2005), "Political Violence in the Elections", in Maupeu, H., Katumanga, M., and Mitullah, W., *The Moi Succession: The 2002 Elections in Kenya*, Nairobi: Transafrica Press; Kiai, M. (2002), Summary of Electoral Violence in Kenya: January-August 2002, Central Depository Unit, December 2002.

19 Brown, S. (2004), "Theorizing Kenya's Protracted Transition to Democracy", *Journal of Contemporary African Studies*, Vol. 22, No. 3.

20 The National Alliance (Party) of Kenya (NAK), headed by President Kibaki, and the Liberal Democratic Party (LDP), headed by Raila Odinga.

100 days. Work on a draft constitution had been suspended in 2002 and NARC had promised to complete the process quickly.[21]

Trouble began with naming the Cabinet. The 50-50 power-sharing agreement was not honoured because the Liberal Democratic Party's (LDP) list was interfered with. Positions for Permanent Secretaries were not shared equally either. President Kibaki's National Alliance (Party) of Kenya (NAK) faction took most of the posts. Equally important, the Summit (the coalition's highest political organ) became increasingly irrelevant as the NAK faction consolidated power.

The mistrust and resentment this generated created divisions that paralyzed the constitutional conference that was established to finalize the draft constitution. Once in power, NAK became uncomfortable with a proposal to create a post of executive Prime Minister, earmarked for the LDP. It was described as "a power grab through the back door and a creation of two centres of power".[22] When NAK manoeuvred to block it, LDP members of Parliament joined forces with their KANU colleagues and campaigned against the 'Wako Draft' under the umbrella of the Orange group that would later transform itself into the Orange Democratic Movement (ODM).[23] Post-election violence in 2007 owed a good deal to the evolution of pro- and anti-Kikuyu voting blocs during divisive *majimbo* (regionalist) debates for and against the Wako Draft. Ethnic identities sharpened because they came to embody other divisions in society, including grievances over unequal access to political power and uneven regional development.[24]

The defeat of the Wako Draft gave NAK grounds to exclude the LDP from power. Instead, President Kibaki formed what he called a Government of National Unity, which brought together people from his own faction NAK, the Forum for the Restoration of Democracy-People (FORD-P), and a section of KANU. The sacking of LDP cabinet members was perceived to have consolidated Kikuyu

21 Kadima, D., and Owuor, F. (2006) "The National Rainbow Coalition: Achievements and Challenges of Building and Sustaining a Broad-Based Political Party Coalition in Kenya", in Kadima, D. (ed), *The Politics of Party Coalitions in Africa*, South Africa: Electoral Institute of Southern Africa.

22 *Daily Nation*, 19 August 2003.

23 An attempt was made to transform the coalition into a single party, which would have enabled the Democratic Party faction to hold influence over the government and coalition. This did not succeed because LDP and FORD-K refused to dissolve their parties. A new effort to turn NARC into a single party was made after NAK and LDP fell out before the 2007 elections. However, NAK leader Charity Ngilu (who would later join ODM) resisted these manoeuvres. This compelled the President to contest the election on a different platform, and led to formation of the PNU.

24 Branch, D., and Cheeseman, N. (2008), "Democratisation, Sequencing, and State Failure in Africa: Lessons from Kenya", *African Affairs*, 108/430; Bates, R. (2008), *When Things Fall Apart: State Failure in Late Century Africa*, Cambridge: Cambridge University Press.

power at the expense of other ethnic groups and the new cabinet strengthened this perception because it was unrepresentative. One author concluded that the Kibaki administration would "institute new ethno-regional imbalances in political appointments and in resource allocation",[25] helping to polarize the country between a Kikuyu bloc and a bloc representing others.

Polarization continued until the 2007 elections: the two main parties entered the campaign backed by their ethnic blocs, and divided by deep, accumulated mistrust.

In 2008, the violence was stopped as a result of international mediation: violence in 1992 and 1997 did not trigger international intervention, because it was less intense and less extensive, because the government managed to contain it, and because the international community accepted the election result despite incidences of malpractice.

Root causes

Political conflict in Kenya was driven essentially by competition for political power and its benefits, principally between different political elites. Competition generated in-groups preoccupied with retaining, and out-groups plotting to acquire political power.

This struggle relied on mobilizing ethnic identity to achieve political objectives. Ethnicity was the easiest form of identity to manipulate because 'ethnic emotions' are "rooted in historical memories of grievances",[26] and based on "a deeply ingrained pattern of social inequality and exclusion. This refers not only to the problem of widespread poverty but also to the systematic exclusion from livelihood resources (land, work and wages), from public welfare schemes, from political participation and even from the nation as a collective social and cultural construct."[27] An Africa Peer Review of Kenya[28] had concluded in 2006 that, among the "major factors that have stoked the fires of dissension in the country are marginalization of the regions as well as regional imbalances,

25 Murunga, G. (2011), *Spontaneous or Premeditated? Post-Election Violence in Kenya*, Uppsala: Nordiska Africakinstitutet.

26 Blagojevic, B. (2009), "Causes of Ethnic Conflict: A Conceptual Framework", *Journal of Global Change and Governance*, Vol. 3, No. 3, p. 3.

27 Apollos, M. (2001), "Ethnicity, Violence and Democracy", *Africa Development*, Vol. XXVI, Nos. 1 & 2, p. 115.

28 The Africa Peer Review Mechanism is a self-monitoring mechanism established by Member States of the African Union. Members assist each other to meet agreed political, economic and corporate governance values, codes and standards, and the development objectives set out in the New Partnership for Africa's Development (NEPAD). Kenya was one of the first four African states (with Ghana, Rwanda and Mauritius) to accede to the APRM in March 2004 in Abuja Nigeria.

competition for resources and access to them, and the mobilization of ethnic identities in political and economic power struggles".[29] In light of the country's polarization, it warned that Kenya was likely to face serious challenges unless it took immediate steps to resolve these underlying problems.

Historical grievances in Kenya have their roots in an argument that arose after independence between advocates of a capitalist or a socialist economy. The argument was settled by the adoption of Sessional Paper No. 1 of 1965 on African Socialism and its Application to Planning in Kenya, which determined that investment would focus on "high potential areas". These areas cover about 20 per cent of Kenya's land surface[30] and are concentrated along the 150 kilometre railway line that was built during the colonial period. Over the years, regions outside this enclave were starved of investment, creating the regional imbalances that exist today. In an audit of the government's strategy Vision 2030, the Society for International Development (SID) observed that the concentration policy had exacerbated deprivation in the country's most marginalized areas, and created unequal access to infrastructure (the provision of schools, roads, health centres, etc.).[31] The wide regional disparities and inequalities that resulted have an ethnic dimension because most regions in Kenya are coterminous with ethnic group(s).[32]

Successive regimes strived to ensure that the President's ethnic group improved its access to political power, which implied stronger development in the President's region, at the expense of other ethnic groups. During the Kenyatta regime, Kikuyu had the advantage over Luo, Luhya and, later, the Kalenjin.[33] Under the Moi regime, the Kalenjin rose and, by the end of his 24-year reign, they were perceived to have succeeded the Kikuyu.[34] Under President Kibaki, the Kikuyu had a new opportunity to dominate.

The inability or unwillingness of Kenya's political leaders to break with the colonial practice of divide and rule has been described as one of the country's

29 Africa Peer Review Mechanism (2006), *Country Review Report of the Republic of Kenya*, Durban: NEPAD.

30 At: http://siteresources.worldbank.org/INTAFRICA/Resources/257994-1335471959878/Sessional-Paper-No-10-(1965).pdf.

31 Society for International Development (2010), *Kenya's Vision 2030: An Audit from an Income and Gender Inequality Perspective*, Nairobi: SID.

32 UNDP (2002), *Kenya Human Development Report 2001: Addressing Social and Economic Disparities*, Nairobi: UNDP.

33 Leys, C. (1975), *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism*, London: Heinemann.

34 Oyugi, W.O. (2001), "Ethnic Conflicts in the Great Lakes Region", Paper presented at the Great Lakes Conference on Ethnicity; Klopp, J. M. (2002), "Can Moral Ethnicity Trump Political Tribalism? The Struggle for Land and Nation in Kenya", *African Studies*, Vol. 62, No. 2.

gravest weaknesses since independence.[35] This suggests that poor leadership has been the central issue, rather than the colonial legacy per se.

The most damaging effect of political and economic concentration was the centralization and personalization of political power. It became so heavily concentrated in the presidency that the President came to dominate political and economic life. Other institutions, notably the judiciary and Parliament, became subservient; no institution responsible for the credibility of political elections (the electoral commission, the judiciary, the police) dared to oppose the executive. The result over time was that confidence and trust in public institutions collapsed.

The system generated a form of patron-client politics that entrenched corruption and encouraged the political elite to accumulate wealth at the expense of development and the poor. Poverty increased and Kenya became the third most unequal society in the world. The top 10 per cent of Kenyan households controlled 42 per cent of all income while the bottom 10 per cent earned less than 1 per cent.[36] Unemployment was very high among young adults, and finding employment depended on whether your ethnic group was represented in government. The ethnic groups in power would stuff positions with senior members from their own community.

The outcome, reported by the National Cohesion and Integration Commission (NCIC), was that only 20 of Kenya's more than 40 listed ethnic groups were statistically visible in the civil service, the country's largest employer. In the case of 23 communities, their members composed less than 1 per cent of civil servants. In six ministries, more than a third of the staff were from a single community; and in 22, more than one quarter.[37]

The rule of law was weak and, in the absence of accountability, impunity thrived. Most of the high-ranking politicians who were implicated in organizing violence in the 1990s have never been prosecuted and have continued to hold high government positions.[38] A 1992 Parliamentary Select Committee (chaired by Kennedy Kiliku) concluded that violence in Rift Valley Province had been

35 Kofi Annan Foundation and African Union Panel of Eminent African Personalities (2012), *The Kenya National Dialogue and Reconciliation: Building a Progressive Kenya*, Report of the Meeting, Nairobi 5-6 December 2011, Geneva: Kofi Annan Foundation.

36 Society for International Development (2004), *Pulling Apart: Facts and Figures on Inequality in Kenya*, Nairobi: SID.

37 National Cohesion and Integration Commission (2012), *Towards Cohesion and Unity in Kenya: Ethnic Diversity and Audit of the Civil Service*, Nairobi: NCIC.

38 Kenya National Commission on Human Rights (2008), *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, Nairobi: KNCHR.

planned and instigated by senior politicians in the government of President Moi.[39] A Judicial Commission of Inquiry (chaired in 1999 by Judge Akilano Akiwumi) similarly concluded that violence had been the work of senior politicians.[40]

Most attacks have been executed by militias. These flourished during the one-party era (1982-1992), when KANU politicians employed them to harass opponents, a practice that continued after multiparty politics returned in 1992. Unprotected by state security services, opposition parties set up their own gangs and militias to counter state-sponsored ones and provide protection during elections. The fragmentation of opposition political parties multiplied such groups.

Crucially, the ethnic character of many gangs and militias reflected membership of the political party they supported, making it easier to mobilize them to "protect the interests of their ethnic group". They depended on criminal protection rackets to sustain themselves between elections. Though 18 militia groups were banned in 2002, the infrastructure for violence was in place, waiting to be reactivated.[41]

Land has been another emotive and contentious problem, also with colonial roots. During the colonial period, about 20 per cent of Kenya's land, especially in the Rift Valley and Central provinces, was taken from local people and reserved for white settlers. This land was the most productive agriculturally. When the settlers departed at independence, a system of willing buyer-willing seller enabled Kikuyu and kindred groups (the Meru and Embu) to acquire it; other groups also benefited as the government sought to deepen political support and build alliances. The Moi regime continued the same practice. An official commission of inquiry into illegal and irregular allocation of public land (the Ndung'u Report) demonstrated how, under President Moi, illegal land allocations regularly increased before and after elections.[42]

Conclusion

As we shall see in the next chapter, violence was continuing when the Panel arrived in Kenya to start their work on 22 January 2008. After arrival, it took advice from a wide variety of stakeholders, in an effort to grasp the background

39 Republic of Kenya (1992), *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, Nairobi: Government Printer.

40 Republic of Kenya (1999), *Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya*, Nairobi: Government Printer.

41 Republic of Kenya (2008), *Report of the Commission of Inquiry into the Post-Election Violence*, Nairobi: Government Printer; Kenya Human Rights Commission (2003), *Warlord democracy: the proliferation of militia and pre-election violence in Kenya, 1999-2002*, unpublished.

42 Republic of Kenya (2004), *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, Nairobi: Government Printer.

to the crisis and understand Kenya's structural problems, and then prepared an annotated agenda that became the roadmap for addressing the crisis. The Panel's thinking was based on several starting points:

- Irrespective of who had won the elections, the country was deeply divided and neither of the two main parties would be able to govern without the other;
- Most public institutions lacked credibility and had contributed to the crisis;
- The breakdown of law and order was unprecedented and escalating, making the country ungovernable;
- It was necessary to address underlying issues, especially issues of land and lack of accountability, if the country was to avoid violence in the future;
- Kenyans were disappointed by their failure to draft and approve a new constitution; many believed this was the answer to the ills that afflicted the country;
- Since it had become impossible to determine who had won the 2007 presidential election, only a political settlement could halt the violence and provide a platform for addressing long-term issues.

The Panel recognized from the beginning that post-election violence in 2007-2008 was driven by historical socio-political and economic grievances that had been swept under the carpet for many years. Deep grievances needed to be addressed to restore any form of sustained peace.

Crises rarely arise spontaneously and the importance of understanding the context of a political crisis cannot be overstated. The Panel was able to guide the disputing parties towards agreement on the causes of Kenya's political crisis, and eventually measures to address them, because it had studied and understood the root causes of the violence.

Throughout the negotiations, Kofi Annan frequently recalled that, in Chinese, the same character signifies 'crisis' and 'opportunity'. He did so to remind the parties and all Kenyans that, terrifying as it was, the crisis was an opportunity to overcome sectoral and factional interests and craft effective and lasting solutions to problems that had afflicted their country since independence.

Chapter Two

International Response and the Mediation

"A key achievement of the mediation process was the combination of domestic support and pressure lending credibility to the international and regional pressures to resolve the crisis."

– Report of the Conference "Kenya National Dialogue and Reconciliation: One Year Later", Geneva, 30 March 2009

The unexpected explosion

Kenya was considered to be a stable country in a volatile region and few had anticipated the chaos that erupted. In the run-up to the polls, the international community had been confident that there would be no major problems. Warning signs, picked up by the Kenyan media, were largely ignored. The scale and ferocity of the violence therefore astonished as well as horrified Kenyans and international opinion.

Protests, arson and looting, and subsequently politicized ethnic violence, caused the deaths of 1,113 people and displaced over 600,000.[43] Kenya's strategic position in East Africa meant that ripple effects were felt in economies across the Great Lakes region as communications, transport links, fuel and food supplies were disrupted.[44]

43 Republic of Kenya, *supra* note 41.

44 United Nations Office of the High Commissioner for Human Rights (2008), *Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008*, Geneva: OHCHR.

Despite the chaos, President Kibaki and Raila Odinga refused to meet and neither of the main parties was willing to renounce its claim to have won the election. The international community reacted swiftly, but calls for peace were largely ineffective. A telephone call by Britain's Prime Minister Gordon Brown (31 December 2007),[45] and successive visits by South Africa's Nobel Peace laureate Archbishop Desmond Tutu under the umbrella of the All Africa Conference of Churches (AACC) (2 January 2008), Jendayi Frazier, US Assistant Secretary of State for African Affairs (4 January), and former African Heads of States Benjamin Mkapa (Tanzania), Kenneth Kaunda (Zambia), Ketumile Masire (Botswana) and Joachim Chissano (Mozambique) (10 January) had little effect.

As the situation worsened, it was clear that quick intervention was crucial.

The role of the African Union Chair

Recognizing the gravity of the situation, Ghana's President John Kufuor, then Chair of the African Union, immediately called an emergency meeting of the AU Commission and consulted African heads of state and the United Nations (UN).

In parallel, he sent a mission to Kenya to prepare for his own visit, led by the AU Peace and Security Commissioner, Ambassador Said Djinnit, and Ghana's Ambassador to Addis Ababa.[46]

Kufuor delayed his visit, having heard through the international media that senior Kenyan officials felt that it "would only amount to a cup of tea". Concerned by the Kenya Government's initial resistance to AU intervention, Kufuor met with former UN Secretary-General Kofi Annan in Ghana to discuss the evolving crisis. Both agreed that Kufuor should go to Kenya, but that, to be successful, both sides to the dispute would need to accept the visit.

As violence continued to escalate, President Kibaki dispatched a Special Envoy, Moses Wetang'ula, to brief Kufuor. He invited Kufuor to Kenya to assess the political environment, meet with both parties, and help them to find common ground to dialogue and reconcile.[47]

Kufuor made plans to travel to Kenya immediately. As no flights were available, the Nigerian President, Umar Musa Yar-Adua sent a plane, a gesture that demonstrated the continent's concern and willingness to provide support.[48]

45 Brown, S. (2009), "Donor Responses to the 2008 Kenyan Crisis: Finally getting it right?", *Journal of Contemporary African Studies*, 27:3, pp. 389-406.

46 At the time, Ghana's ambassador in Addis Ababa had concurrent accreditation to Kenya.

47 "Kufuor to go to Kenya in attempt to ease crisis", *Reuters*, 5 January 2008.

48 Oral Interview, John Kufuor, 6 December 2011.

Kufuor flew to Nairobi on 8 January aiming to persuade the parties to consent to AU involvement in a mediation process.[49]

Unfortunately, his arrival coincided with the announcement of the new cabinet, which included the Orange Democratic Movement Party of Kenya (ODM-K); Kalonzo Musyoka became Vice-President.[50]

Kufuor shuttled between the parties for two days, encouraging the two sides to prevail on their supporters to end the violence[51] and reach agreement on the need for a constructive dialogue to speedily resolve the crisis.[52]

However, mistrust ran deep. President Kibaki was willing to meet but Raila Odinga would not meet him at State House, because this would amount to recognizing his election. Kufuor arranged a meeting at Harambee House, the Office of the President, but Raila Odinga also rejected this proposal. Recognizing the need to build trust, Kufuor then suggested that a group of eminent Africans might create a neutral space in which the two parties could dialogue. Both sides readily agreed.[53]

Kufuor put forward a panel, to be led by Kofi Annan, with President Benjamin Mkapa of Tanzania and Graça Machel of Mozambique, 'to assist the Kenyan brothers and sisters to find a peaceful way forward'.

"I phoned Kofi Annan, former UN Secretary-General, from here and prevailed on him. [The] situation was so dire it needed someone like him – otherwise, there may be a continuation of the situation and no end to it. [I] flew back to Ghana and wrote to all three."[54]

The international community is often criticized for its inaction or slow response to violent conflict. In this case, intervention occurred quickly. The African Union's willingness to engage, through the Panel, owed a good deal to growing political support in Africa for the responsibility to protect doctrine, as well as Article 4(h) of the African Union's Constitutive Act, transforming the

49 Hansen, T.O. (2013), "Kenya's Power-Sharing Arrangement and Its Implications for Transitional Justice", *International Journal of Human Rights*, 17:2, pp. 307-327.

50 Kalonzo Musyoka, the ODM's presidential candidate, was appointed with ODM's chair, Samuel Poghisho, who became Minister for Information and Communication.

51 John Kufuor, letter to Kofi Annan on the Kenyan situation, 11 January 2008.

52 *Ibid.*

53 Oral Interview, John Kufuor, 6 December 2011.

54 *Ibid.*

Organization of African Unity to the African Union, which affirmed the right to intervene in the affairs of Member States under certain conditions.[55]

The international community

By 6 January 2008, a gap had opened between American and European perspectives on the election. The United States (US) initially appeared to believe that a recount was unnecessary, whereas the European Union (EU) considered that the presidential election had been flawed and that allegations of fraud should be addressed. The international community was sending Kenyans mixed signals.

Colin Bruce, then World Bank Country Director, had facilitated talks between the PNU and ODM, and helped the parties to develop Principles of Agreement, a document that would be signed in Parliament on 10 January.[56] It provided the basis for a subsequent face-to-face meeting between President Kibaki and Raila Odinga.[57]

Diplomatic representatives had spoken of this to President Kufuor on his arrival but, when Kufuor brought it up, President Kibaki denied the agreement was valid.[58] The PNU also issued a statement saying that it had not sent emissaries to negotiate on its behalf and was unaware of an agreement between the two parties.[59]

On 15 January 2008, the diplomatic and aid community issued a declaration expressing their concern and stating that lack of progress between the two parties could not continue without consequences for development assistance programmes. On 19 January, EU Commissioner Louis Michel arrived in Nairobi and reiterated the same message.

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55 The responsibility to protect doctrine was endorsed by the United Nations General Assembly on 15 September 2005 (paragraphs 138–139 of the Outcome Document of the 2005 World Summit) and subsequently unanimously endorsed on 28 April 2006 by the Security Council (Resolution 1674). World leaders agreed that each state has a responsibility to protect its population from genocide, ethnic cleansing, war crimes, and crimes against humanity; and that, to prevent these crimes, the international community should encourage or assist states to exercise their responsibility. Equally, they agreed that the international community should use appropriate diplomatic, humanitarian and other peaceful means to help protect populations threatened by these crimes. Accordingly, Kenya's government had primary responsibility for protecting Kenyans affected by the crisis, but the international community had both a right and a responsibility to assist it to do so.

56 International Crisis Group (2008), *Kenya in Crisis*, Africa Report 137, Nairobi/Brussels: ICG.

57 The document was to be signed by President Kibaki and Raila Odinga, and witnessed by John Kufuor, UK High Commissioner Adam Wood, US Ambassador Michael Ranneberger, and French Ambassador and local EU President Elisabeth Barbier.

58 Oral Interview, John Kufuor, 6 December 2011.

59 Jaindi Kisero, "Kufuor's whistle-stop diplomacy was only to pave way for Kofi Annan", *The East African*, 14-20 January 2008; David Ohito, "Mediation talks hit dead end", *The Standard*, 9 January 2008.

Local stakeholders, notably Kenyans for Peace with Truth and Justice (KPTJ), a coalition of civil society organizations, met regularly with the diplomatic and aid community. The business community also mobilized to call for an end to the crisis under the banner of peace.

Setting the scene

Based on his United Nations' experience, Kofi Annan was familiar with the danger of rival mediation processes. From the start, he insisted that the Panel would be the only mediation process and that this was to be made clear to both parties. This was part of his strategy to prevent the parties from "forum shopping".[60]

He had been due in Kenya on 16 January but an infection delayed his arrival by a week. He used the time in hospital to mobilize international support for the Panel, making calls to key regional and international actors, including the AU, the EU (especially the United Kingdom and France), the US and the UN (including Secretary-General Ban Ki-Moon). He explained how the Panel was going to approach the problem, what sort of support was needed, and how coordination should be undertaken.[61]

Ban Ki-Moon allowed him to draw on UN staff for the Panel's Secretariat and on logistical and administrative support from UN agencies in Nairobi, including the UN Office in Nairobi (UNON) and the UN Development Programme (UNDP). Officials from the UN Department of Political Affairs (UNDPA) were deployed to set up a Secretariat, composed of staff from the UNDPA, staff from the Centre for Humanitarian Dialogue (HD Centre, Geneva), and technical experts.[62] The AU also provided staff and the President pledged his own office's support to Kofi Annan.[63]

As a result, when the Panel landed in Nairobi, international support was firmly behind a single mediation process. This later proved crucial.

The Panel arrived on 22 January 2008. President Yoweri Museveni of Uganda arrived, at President Kibaki's invitation, on the same day.[64] President Museveni telephoned Kofi Annan and suggested a meeting at State House to discuss his own peace plan, which he said both parties were willing to explore, based on acceptance of the presidential election. Kofi Annan replied that he had to

60 Griffiths, M. (2008), *The Prisoner for Peace: An interview with Kofi A. Annan*, Geneva: Centre for Humanitarian Dialogue.

61 *Op. cit.*

62 Call, C. (2012), "UN Mediation and the Politics of Transition after Constitutional Crises", New York: International Peace Institute (IPI), pp. 1-22.

63 *Supra* note 51.

64 Yoweri Museveni was then chair of the East African Community (EAC).

consult both parties before making any visits. When he called Raila Odinga, it emerged that ODM had made no such agreement.[65] This ended President Museveni's role in the mediation process, and he left two days later.

When the Panel met the ODM on 23 January, Raila Odinga set out the party's conditions for negotiation: resignation of President Kibaki from the presidency; a rerun of the presidential election; and power-sharing in a transitional government to facilitate comprehensive legal, constitutional and land reforms.[66] Despite mistrust between the two parties, the ODM said that it was ready to reach an agreement provided its implementation was guaranteed by an international arrangement.[67]

When President Kibaki and his cabinet met the Panel, the PNU stated that it was ready to negotiate, provided no preconditions were imposed by the ODM. It argued that President Kibaki had been declared winner of the presidential elections and any dispute should be resolved in the courts.[68]

At this point, over 500 people had been killed and passions were high. The Panel realized that it was imperative to present evidence of progress to boost public confidence. When Kofi Annan recommended a public meeting between the Principals, Raila Odinga objected to meeting at State House because this would imply recognition of President Kibaki as President, while the PNU demanded that the ODM accept President Kibaki's presidency. A meeting finally took place after Kofi Annan suggested to Raila Odinga that protocol could be worked out later. The two Principals agreed to meet at Harambee House that afternoon.[69]

24 January 2008: The handshake

Kofi Annan met the two Principals alone on the afternoon of 24 January 2008. He advised both leaders that the greatest losers in the ongoing crisis were the people of Kenya. No effort should be spared to stop the violence and to protect civilians and property. Given the political deadlock, and the intractable nature of the problems, both parties must commit to genuine dialogue and compromise. Immediate political issues needed to be addressed, as well as

65 Annan, K. with Mousavizadeth, N. (2012), *Interventions: A life in war and peace*, London: Penguin Group.

66 Confidential progress report to the AU Chair, 28 January 2008.

67 Kofi Annan had asked to see President Kibaki earlier but the meeting was postponed due to the visit by Museveni.

68 Panel of Eminent African Personalities (2008), Confidential progress report to the AU chair, 28 January.

69 President Kibaki and Raila Odinga were referred to as the Principals from the beginning of negotiations in 2008 to the end of the Grand Coalition Government in 2013.

longer-term issues. Nor should the Principals lose sight of Kenya's role in ensuring regional stability. He insisted that the Principals should work together to deliver specific results and give Kenya's people a sense of progress.[70] Kofi Annan knew that the people of Kenya needed to see that the Principals were prepared to work together to find a solution and that the Panel was prepared to work with them to find it.[71]

After more than an hour, they held a short press briefing. President Kibaki and Raila Odinga shook hands and addressed the country, affirmed their desire for dialogue, and pleaded for peace. It was an important moment.

Tension was nevertheless high and mistrust very deep. Kofi Annan recognized that direct negotiations between President Kibaki and Raila Odinga would inevitably lead to confrontation. He therefore asked the Principals to each name three representatives to begin a dialogue.

Experiencing the crisis first-hand

On 26 January, members of the Panel visited affected communities in the Rift Valley. They came face-to-face with the scale of the violence, the destruction of lives and livelihoods, and evidence of gross and systematic human rights violations.[72] They heard first-hand from victims, saw their suffering, and witnessed how violence was ripping families and communities apart.

On their return to Nairobi, the Panel held a press conference in which it appealed to Kenyans to refrain from acts of revenge that would only lead to further violence. They subsequently briefed President Kibaki and made a number of proposals. These included: to establish a fund to compensate victims, which could receive contributions from Kenyans and the international community;[73] to arrange a visit to affected communities by a cross-party group of Members of Parliament (MPs), to appeal for calm; to hold a special parliamentary session on the crisis to show solidarity with Kenya's citizens; and to announce an investigation of the crimes committed so that culprits could be held to account.

70 *Supra* note 68.

71 Oral interview, Kofi Annan, 3 December 2010.

72 Confidential progress report to the AU chair, 28 January 2008.

73 The government established a trust fund on 5 February, by which time a Humanitarian Services Committee and a Transport Committee had been established. The latter ensured the railways were re-opened and the roads cleared, permitting free movement of goods and services. The former addressed immediate and medium-term needs for food and welfare, in addition to keeping statistics.

When the first session of the dialogue took place the following day, the Panel underlined that resolving the crisis politically was a priority and reminded the parties that both sides had a responsibility they could not avoid.[74]

Formal negotiations begin

On 29 January, the Panel formally launched negotiations to facilitate a peaceful end to the crisis. The two Principals were each assisted by a delegation of 20, including their negotiating teams. Kofi Annan encouraged both leaders to seize this historic occasion to begin the process of national reconciliation. It was important to send a strong message to the population to desist from all violent activities and avoid taking the law into their own hands.[75]

The launch was almost derailed by a seating issue. The Panel had placed the Principals on either side of Kofi Annan but at the last minute government protocol staff put a presidential chair in the middle. Kofi Annan insisted that this was neither a presidential meeting nor business as usual, and that he was dealing with two protagonists. He knew that, if it saw such an arrangement, the ODM would abandon the event. It was finally agreed that the presidential chair could stay, but to one side. The officials relented, and the original seating arrangement was restored.[76]

The opening ceremony, broadcast live, took place at the National Assembly and was chaired by its Speaker, Kenneth Marende. During the event, Kofi Annan stressed that agreement on short-term issues (stopping violence, addressing the humanitarian crisis, resolving the election dispute, restoring fundamental human rights and liberties) could be reached within four weeks, provided the parties remained committed. Long-term issues, including land reform and unequal distribution of resources, could be resolved within a year. The two Principals reiterated their message of peace and their willingness to work together to address the crisis.[77]

Building teamwork

The Panel's strategy was to foster solidarity and ownership by working towards a common goal. It began by establishing an objective that all sides accepted

74 Confidential annotations to the suggested agenda, Minutes of the Kenya National Dialogue and Reconciliation, First Session, 29 January 2008.

75 Kofi Annan, letter to the Principals, 28 January 2008.

76 *Supra* note 60.

77 President Kibaki announced the immediate construction of 32 additional police stations in affected areas and the establishment of a National Humanitarian Fund to provide help to and resettle victims of violence.

and supported: that the overall goal of the KNDR was to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights. This objective was included in the modalities document that the whole team adopted and remained a point of reference throughout the mediation process.

The ODM asked to expand the negotiating teams from three to four members, so that it could include a lawyer, noting that the PNU team had two lawyers. ODM further requested that each team should have an alternate member, to replace any member who could not attend a given session. The PNU did not reject this proposal but observed that it might disrupt the negotiation of very urgent matters. It suggested that alternates might be appointed later, to deal with the long-term issues.[78]

Kofi Annan expressed reservations on the appointment of alternates. He said the teams had bonded well and the introduction of alternates might change the group dynamics. He wanted to keep the negotiating teams as small as possible. It was his experience that, when alternates are appointed, members tend to miss meetings. He went on to note that the Panel had made provision for the participation of others in the committees and task forces, and that the liaison meetings were designed to ensure that the Panel had direct and timely access to President Kibaki and Raila Odinga; liaison officers were not expected to attend the negotiating sessions.[79]

The negotiating teams considered the composition of each body, including its size, the roles of liaison officers, and the advisability of appointing alternates. It was agreed that teams would consist of four members and one liaison officer. Each would appoint an alternate for its liaison officer. Liaison officers (or their alternates) would attend sessions to take notes but would not speak or otherwise participate.[80]

The PNU team was composed of Martha Karua, then Minister for Justice and Constitutional Affairs, Sam Ongeri, then Minister for Education, Mutula Kilonzo, MP of ODM-K, and Moses Wetang'ula, then Minister for Foreign Affairs; the liaison officer was Gichira Kibara. The ODM team was composed of Musalia Mudavadi, William Ruto, James Orengo and Sally Kosgei; Caroli Omondi was the liaison officer.

The Panel engaged every member on all issues, including whether the team was to be called a Mediation, Reconciliation or Arbitration Team. They decided

78 Minutes of the Kenya National Dialogue and Reconciliation, First Session, 29 January 2008.

79 *Ibid.*

80 Minutes of the Kenya National Dialogue and Reconciliation, Second Session, 31 January 2008.

to speak of the negotiating team. This inclusive approach helped unite the teams because, despite their differences, the negotiators quickly realized that they had a monumental task ahead of them and needed to cooperate wherever it was possible.

Tension was evident and at times emotions ran high. The Panel employed other strategies to forge bonds between the members. Every meeting began with a prayer that members led in turn.

It was also decided that, during the chair's absence, members would rotate the chair. This practice began as early as the third session when Kofi Annan stepped out to meet UN Secretary-General Ban Ki Moon.[81]

Noting that the Panel could not remain in Kenya throughout the negotiations, Kofi Annan indicated that it would be necessary to appoint a chair and deputy chair to mediate negotiations on behalf of the Panel when its members could not do so. Kofi Annan said that the Panel was considering Cyril Ramaphosa of South Africa, who was highly regarded and had considerable experience, including in South Africa and Northern Ireland. The PNU said that it had some concerns. It expressed admiration for Ramaphosa and his achievements but believed that some sections of the African National Congress (ANC) had links to the ODM. Kofi Annan stressed that the Panel should have a chair in whom it had confidence and the appointment should be made by the Panel. He undertook to look into the matter and give the negotiators his assessment,[82] but he noted that the focus should be on Ramaphosa's qualifications and track record.[83]

Addressing heightened tensions

The killing of two ODM MPs, Mugabe Were and Kimutai Too, on 29 and 31 January, triggered a new wave of violence. The Panel cut short its meetings and appealed for calm. This was an important moment because the Panel feared that such events might undo some of the gains made so far.

Communication and transparency

From the outset, the Panel adopted a communication strategy that was transparent, designed to build public confidence in the mediation process. It included regular consultations with different domestic stakeholders and the creation of a website (http://www.dialoguekenya.org) on which all KNDR agreements and press statements were posted.

81 Minutes of the Kenya National Dialogue and Reconciliation, Third Session, 1 February 2008.

82 *Supra* note 78.

83 *Supra* note 80.

Benjamin Mkapa, himself a former journalist, emphasized the role of the media. Two of the Panel's key objectives were to scotch false rumours about the negotiations, and to moderate statements and comments by parties to the negotiation.[84]

The negotiating teams were encouraged not to speak to the media. After some discussion it was decided that the Panel should designate a spokesperson to keep the media informed. The Panel agreed that it was important to communicate decisions that had been reached.[85] Mkapa facilitated translation into Kiswahili[86] at press conferences, helping the Panel to reach a larger proportion of the population.

All agreements and decisions reached were signed by every member of the negotiating teams and witnessed by the Panel's chair. They were made public immediately. This kept the talks moving forward, reducing the risk that decisions might be reviewed; in addition, it allayed public fears and reassured Kenyans that progress was being made. Signing agreements created a sense of ownership: the documents became more truly Kenyan.

Kofi Annan introduced the use of brackets around decisions that had not been agreed; this also helped to prevent the negotiation from becoming bogged down.

It was also agreed that, while the liaison officers could take notes, official summaries of the process would be taken by the Panel's Secretariat and that negotiations would be based on the official summaries. This reduced the risk that conflicts might occur because of differences in the parties' minutes, and assisted the Panel to control and direct the negotiations. It was important to establish the negotiators' confidence in the minutes as well as to avoid misrepresentation.

The role of other national stakeholders

Realizing the enormity of the task that faced them, the Panel sought advice from a wide cross-section of Kenyan society to help it understand the issues.

From the outset, in the first session of negotiation, the Panel invited the negotiating teams to consider giving civil society an opportunity to make submissions to the mediation process. The Panel felt strongly that it needed to listen to civil society and other stakeholders and to take account of a wide range

84 To ensure wide dissemination of decisions, advertising space was purchased in the newspapers and coverage secured on television channels and radio stations.

85 Oral interview, Benjamin Mkapa, 31 December 2010.

86 Kiswahili is Kenya's only national indigenous language.

of views.[87] Two civil society groupings were already mobilized — Concerned Citizens for Peace (CCP), which focused on the violence, and Kenyans for Peace with Truth and Justice (KPTJ), which focused on the elections and the violence. Graça Machel was keen to see women's organizations mobilize and submit information, to ensure that issues affecting Kenyan women would be heard. Through the Kenya Association of Manufacturers (KAM) and the Kenyan Private Sector Alliance (KEPSA), the Panel also wanted to hear the perspective of the private sector.

Civil society organizations made an immense contribution to the mediation process. Their submissions and meetings with the Panel contextualized the crisis and helped it to formulate appropriate corrective measures. They described the extent of the crisis, the atrocities committed, and the probable outcomes if the negotiations failed.[88]

Kenyan civil society played five key roles during the mediation process. First, it responded to the emerging humanitarian crisis by ensuring that domestic aid contributions were channelled through the Kenya Red Cross Society (KRCS), with assistance from the United Nations. Unusually, the face of the humanitarian response was Kenyan.[89]

Second, it focused the internal demand for peace. Citizens' gatherings created a space for initial discussion between the parties. Seasoned domestic negotiators began to "break the ice" between them, laying a foundation for the Panel's work.[90]

Third, it helped to generate a demand for truth and justice as preconditions for sustainable peace – electoral truth and accountability for the violence. Civil society organizations worked actively to monitor and document the elections and the violence. They analyzed the patterns of violence.[91]

Fourth, it generated domestic pressure for a political settlement by disseminating information and analysis to the Kenyan public. Civil society organizations also organized regular briefings with the diplomatic corps and the Panel, among

87 Oral Interview, Graça Machel, 6 December 2011.

88 Minutes of the Kenya National Dialogue and Reconciliation, Fourth Session, 4 February 2008.

89 *Ibid.*

90 Kofi Annan Foundation (2010), *The Kenya National Dialogue and Reconciliation: One year later, Geneva, 30-31 March 2009*, Report of the meeting; Minutes of the Kenya National Dialogue and Reconciliation, Fourth Session, 4 February 2008.

91 Kofi Annan Foundation (2010), The Kenya National Dialogue and Reconciliation: One year later, Geneva, 30-31 March 2009, Report of the meeting.

others, helping to generate "domestic legitimacy" for international positions on the crisis.[92]

Fifth, civil society made recommendations to the Panel on its agenda items, alongside inputs from other regional experts. These had often been shared beforehand with the private sector, the Inter-Religious Forum and other stakeholder groups, which increased their value and legitimacy.

During the first week, the Panel held consultations with: the Speaker of the National Assembly; the chair and members of the Electoral Commission of Kenya (ECK); the head of the Kenya Red Cross Society; and a wide range of civil society organizations (CSOs). Among the latter, it met religious, women's and youth organizations, the private sector and the media.[93] The Panel supported calls for peace from all parts of Kenyan society, which helped to defuse tension.

These meetings enabled the Panel to hear different analyses of the crisis and proposals for moving forward. They also gave the Panel an opportunity to say to Kenya's people that it was committed to finding a solution. The Panel later incorporated civil society and private sector views in the roadmap signed on 1 February 2008.

At the same time, they established the Panel's independence. The Panel signalled that it was mediating a negotiation for the benefit of the entire country, not only the political class, and that every stakeholder who had something to say would be heard.

Engagement of the international community

The Panel also consulted the diplomatic community, including: the AU Representative and African Ambassadors; the AU Peace and Security Commissioner; the local President of the EU and ambassadors from EU countries; and the US Ambassador.[94] It regularly briefed them on the status of the negotiations, continuing to urge them to speak with one voice.

During the negotiations, international pressure continued to remind the two parties of what was at stake. On 7 February, the US Congressional Sub-Committee on Africa, the UN Security Council and the EU threatened to intervene if the parties were unable to come to an agreement.[95] EU Commissioner Louis Michel visited the country again to give the Panel and negotiations

92 Minutes of the Kenya National Dialogue and Reconciliation, Seventeenth Session, 26 February 2008.

93 *Supra* note 74.

94 *Supra* note 68.

95 "ODM ready to cede ground as talks enter critical stage", *The Standard*, 8 February 2008.

moral support. He held talks with President Kibaki and Raila Odinga, and warned that the EU would deal firmly with anybody who attempted to derail the mediation process.[96] The UK, Switzerland and Canada threatened to impose travel bans against politicians who were linked to the violence or who subverted democracy.[97] Australia warned that it would limit contact with President Kibaki's cabinet, and France and Germany both called for the rapid appointment of a government representative of the will of Kenya's people.[98]

When talks hit a roadblock shortly afterwards (following the retreat to Kilaguni Lodge), international pressure again helped the parties to focus on a solution. On 16 February 2008, US President George W. Bush supported calls for power-sharing and dispatched Secretary of State Condoleezza Rice to underscore that the United States supported the Panel, to pressurize the parties to move towards an agreement, and signal that business would not continue as usual until power-sharing was in place.[99] On her arrival, Dr Rice met the Panel and then separately met President Kibaki and Raila Odinga.[100] A day after her departure, the EU Council reiterated in Brussels that it would not conduct business as usual with Kenya until a legitimate political solution had been agreed.[101] On 21 February, the Chair-elect of the AU Commission, Jean Ping, paid the Panel a courtesy call to extend his moral support and explore how the AU might continue to provide support to the mediation process.

Modalities, terms of reference and rules of procedure

Several procedural agreements were drafted, discussed and adopted by both parties on 5 February 2008. They covered the rules of procedure for the KNDR, modalities, and the structure and terms of reference of the Panel.

At its second session, the negotiating teams also agreed on the title of the negotiating process. This required discussion because there were important political implications. Should it be described as a 'mediation' or a 'dialogue'? It

96 "Poll crisis: UN warns leaders", *Daily Nation*, 8 February 2008.

97 "Britain could join US and Canada on visa ban", *The Standard*, 8 February 2008.

98 Sihanya, B., and Okello, D. (2010), "Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement", in Kanyinga, K., and Okello, D., (eds), *Tension and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, Nairobi: Society for International Development and Institute for Development Studies, University of Nairobi.

99 "Proposals for political settlement", *Sunday Standard*, 17 February 2008; "US demands power sharing agreement", *Sunday Nation*, 17 February 2008; Gavin, M.D. (2008), "Policy Options Paper – Kenya", New York: Council on Foreign Relations.

100 Dinah Ondari, Mercy Mwai, Wanjohi Githae, "Real shared power the only way – US", *The People*, 19 February 2008.

101 Alex Ndegwa, "EU issues another warning over political impasse", *The Standard*, 20 February 2008.

was decided to adopt the term Kenyan National Dialogue and Reconciliation and make some reference to mediation. The Panel suggested that the parties should include a statement in the modalities document that they would be bound by the outcome of the process and committed themselves to implement it.[102]

The Panel made provision for consulting experts during the negotiation. Expert inputs would help to inform the negotiators and cut through protracted arguments; they also depoliticized discussions, and could identify solutions to intractable challenges. They became an important element of the Panel's approach. The negotiating teams cautioned that the advice of both local and international experts might be biased, but agreed that experts would be valuable for longer-term and more complicated issues.[103]

The negotiating teams raised concerns about the composition and political affiliations of staff in the Secretariat. The Panel responded that appointments to the Secretariat were a prerogative of the Panel, but agreed that changes could be made if problems emerged. There was also concern about staff of the negotiating teams. To avoid unfair advantage, the teams decided that no staff perceived to offer an undue advantage to either side would be directly involved in talks.[104]

The negotiating teams stressed that, to retain Kenyan ownership and acknowledge that the Kenyan people were responsible for resolving the crisis, the costs of the negotiation should be met by the government.[105] Kofi Annan said that he was gratified that the government wished to fund the dialogue; that the Panel was preparing a budget; and that financial grants could be held in a trust fund, because it was common practice to manage such funds independently. The parties agreed that either the Panel or the UN would administer the trust fund, and that contributions should have no conditions.[106]

The entire mediation process was in fact supported by the international community. Its willingness to fund the mediation quickly and generously ensured that negotiations were not delayed and that the Panel could work free of constraints that might have been attached to government grants.

The negotiating teams offered to provide a venue for meetings, but it was agreed that practical arrangements (meeting venues, office facilities, etc.) should not jeopardize the public's perception of the Panel as a neutral body.[107] The Panel's

102 Minutes of the Kenya National Dialogue and Reconciliation, Second Session, 31 January 2008.
103 *Ibid.*
104 Minutes of the Kenya National Dialogue and Reconciliation, Third Session, 1 February 2008.
105 *Ibid.*
106 *Ibid.*
107 *Ibid.*

terms of reference also stated that negotiations could be located in any neutral venue within Kenya.

The Panel settled on the Serena Hotel, an ideal venue practically and in terms of security. The hotel was also neutral ground, where both sides could meet without discomfort. Recognizing the importance of the mediation process, the Serena Hotel renamed the negotiating teams' principal meeting room the Amani Room. A plaque recalls the mediation's significance. In Swahili 'amani' means 'peace'.

An agenda and modalities of the negotiating process (its structure, the Panel's terms of reference, and rules of procedure) were submitted to both parties on 27 January 2008.[108] The parties were asked to provide feedback by close of business the next day, so that negotiations could be launched formally on 28 January.

Signing of Agenda Items 1 and 2

Kofi Annan encouraged the negotiating teams to begin by identifying the problems. He asked them to analyze the crisis, develop agenda items from their analysis, and use these to generate an order of priorities for negotiation. He reiterated the importance of finding specific solutions.

The Panel was aware that, as negotiations proceeded, the country would need to manage a range of issues, including food security (if farmers were unable to return to their farms). It suggested that individual ministers should be invited to briefing sessions with the negotiating teams, to aid the talks and update them on implementation of agreements.

Noting that misinformation was widespread, Kofi Annan also asked whether, to avoid confusion, a regular arrangement could be found for providing the Panel with accurate information on the situation in the country. The government undertook to do this.[109] The Panel asked the government to provide security briefings, for the same reason.

On 1 February, the KNDR agreed on a roadmap and timetable proposed by the Panel, including: an agenda; annotations to the agenda; modalities; the Panel's structure and terms of reference; and rules of procedure. The agenda contained four items:

108 Panel of Eminent African Personalities, Confidential progress report to the AU Chair, 28 January 2008.

109 Minutes of the Kenya National Dialogue and Reconciliation, Second Session, 31 January 2008.

(i) Immediate actions to stop the violence and restore fundamental rights and liberties;

(ii) Immediate measures to address the humanitarian crisis, and promote reconciliation, healing and restoration;

(iii) How to overcome the political crisis;

(iv) Long-term issues and solutions. These included: land reform; poverty and inequality; unemployment, particularly among youth; consolidating national cohesion and unity; preventing impunity and promoting transparency and accountability; and constitutional and institutional reform.

On the same day, the KNDR also reached agreement on Agenda Item 1.[110] Both documents were immediately made available to the public.

Buoyed by the first agreement, the team began work on Agenda Item 2.[111]

The Secretary-General of the Kenya Red Cross Society and UNDP were called in to brief the parties on the humanitarian situation and suggest solutions. They noted that 300 camps for internally displaced persons (IDP) had been established in the country, accommodating 10,000-15,000 people. UNDP advised that it would become increasingly difficult to provide humanitarian aid and focus on the needs of the displaced if the crisis extended.[112] The following day, the Permanent Secretary, Provincial Administration and Internal Security, reviewed security and measures taken to control the violence and protect citizens. He reported that 923 people had died and 250,000 IDPs were in camps.

On 1 and 4 February 2008, the KNDR issued two public statements that set out measures to address Agenda Items 1 and 2. They included: refrain from irresponsible and provocative statements; hold joint meetings to promote peace; demobilize and disband illegally armed groups; ensure freedom of expression and the right to peaceful assembly; investigate speedily and effectively all cases of crime and police brutality or excessive use of force; assist the safe return of IDPs to their homes and places of work; provide basic services in camps for the displaced; and establish a Truth, Justice and Reconciliation Commission (TJRC) that would include local and international jurists. The parties also agreed to provide weekly progress reports on implementation.

110 Agenda Item 1: Immediate actions to stop the violence and restore fundamental rights and liberties.

111 Agenda Item 2: Immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration.

112 Minutes of the Kenya National Dialogue and Reconciliation, Fourth Session, 4 February 2008.

Agreement on Agenda Item 3

As negotiations on Agenda Item 3 got under way, the PNU was planning to host a meeting of the Intergovernmental Authority on Development (IGAD) in Nairobi (5 February 2008). Concerned that this would strengthen President Kibaki's image, the ODM protested and accused the PNU of attempting to derail the KNDR.[113] It wanted the conference cancelled. The Panel persuaded the ODM to call off protests, on the grounds that they would undermine the KNDR, and the IGAD conference went ahead, but at ministerial level. During the conference, IGAD's Foreign Minister met the Panel and explained that IGAD was in the country, following a decision of the IGAD Summit in Addis Ababa, to express its solidarity with Kenya's people and its support for the Panel.

On 6 February, under Agenda Item 3, the parties reiterated their positions on the presidential election dispute. The ODM team insisted that the presidential election was fraudulent, while PNU maintained that the elections had been free and fair. The Panel was compelled to focus the parties on solutions. Discussions were heated and advanced more slowly than before, but nevertheless proceeded in a relatively good spirit.

With the help of Craig Jenness, Director of the Electoral Assistance Division of the DPA, the Panel took the parties through each of the options available, weighing their costs, benefits and risks: a rerun of the presidential elections; a recount of the votes; a re-tally; a forensic audit of the declared result; a political settlement involving power-sharing between the parties.[114]

This process helped the KNDR to rule out a rerun, a re-tally, a recount and a forensic audit. It settled instead on holding an independent review. On 11 February, the parties agreed to establish an independent review committee (which later became the Independent Review Commission, IREC) to investigate all aspects of the 2007 presidential election and make recommendations to improve future electoral processes. By the end of the day, the parties were in agreement about the need for a political solution, under which both parties would together implement reforms before holding elections.

The following afternoon (7 February), the PNU changed its position, rejected a political solution, and demanded a recount or a rerun, options which had already been set aside. Backtracking on previous commitments had become a

113 Keck, T. (2011), "Mediating Ethnic Conflict: Kofi Annan in Kenya", The Selected Works of Trevor Keck, at: http://works.bepress.com/trevor_keck/2; Lindenmayer, E. and Kaye, J. L. (2009), "A Choice for Peace? The story of forty-one days of mediation in Kenya", New York: International Peace Institute.

114 See Chapter Five for more detail.

pattern[115] which slowed progress. The Panel stated that it was not feasible to conduct a recount, because it was impossible to access all parts of the country.

Tension and disagreements mounted and the Panel became increasingly concerned that both parties were taking intractable positions.

Benjamin Mkapa implored the teams to think of Kenya's people and put partisan demands aside. He said that every person is important, no matter for whom they voted, and that the government was elected to serve the people. He stressed that the sanctity of life was being violated and asked where honour could be found in leadership at such a time. Given that so many of the participants had worked together in the past, he said he was surprised that they could not find common ground now to create a more sustainable political situation for the country.

Graça Machel said that Kenya as a country was at stake. She said that it was divided and bleeding and that it was essential to bring the nation together in a place where all citizens had a sense of belonging. She underlined that the negotiations were about the interests of the nation: the people needed to be at the centre of them, and both sides must be willing to make concessions, even if they were damaging to personal or political interests. She noted that divisions during the referendum had widened even further and that it was vital to find a middle ground, rather than ignore whole swathes of the population.

On 8 February, the Panel briefed the Principals on progress. This was its third face-to-face meeting with the two leaders.

As noted, a number of international statements were issued on the same day, pressing the negotiating parties to cooperate and reach agreement.

On 12 February, the Panel briefed Parliament. In a three-hour *Kamakunji* (informal session), the Panel urged parliamentarians to work across party lines to engage with constituencies and act speedily on the agreements made. The MPs thanked the Panel for involving them and promised to implement the agreements quickly.

The Panel also used this occasion to float a proposal that had not yet been agreed: the formation of a Grand Coalition Government that could oversee reforms for two years.[116] Kofi Annan carefully tempered his remarks by

115 Lindenmayer, *supra* note 113.

116 *Op. cit.*

saying that the proposal was "his perspective", but his remarks created public expectations and set the stage for power-sharing.[117]

The Kilaguni retreat

The retreat to the Kilaguni Lodge in Tsavo National Park allowed the parties to escape to a quiet location to deal with contentious issues. Reaching agreement on Agenda Item 3 required sustained, concentrated attention.

Hans Corell, former Under-Secretary-General for Legal Affairs and Legal Counsel of the UN, joined the meeting to advise on legal issues.

Secluded in Kilaguni, on 12 February the teams addressed governance. The lawyers in each party were asked to come up with a proposal on the position of Prime Minister, while Gernot Erler, Minister of State of the Federal Republic of Germany, led a discussion on the formation and functioning of coalition governments.[118] Mr Erler was the third expert to have been drafted in to move negotiations forward, an indication that tension needed to be reduced.

Though no agreement had been reached on the position of Prime Minister by the end of the session that Dr Erler facilitated, consensus had emerged that the post was required. The retreat helped the negotiators to make some headway, but their opinions and positions did not change; neither side was willing to compromise.[119]

On 14 February, the parties signed an agreement to establish an Independent Commission on the Review of the 2007 Elections (IREC), which would investigate all aspects of the 2007 presidential election and make findings and recommendations to improve elections in the future. They also agreed that a political settlement would guide reforms introduced to address root causes of the crisis.

The parties agreed to consult their Principals from 15 to 18 February before continuing negotiations in Nairobi. At this point negotiations came close to breaking down. There was a real possibility that violence would re-erupt and Kofi Annan knew it was essential to keep hopes of a solution alive. In a press briefing, he advised patience: "The issues are complex; reaching compromise

117 Namunane, B. "Grand Coalition row", *Daily Nation*, 8 February 2008; Keck, T. (2011), "Mediating Ethnic Conflict: Kofi Annan in Kenya", Selected Works of Trevor Keck, at: http://works.bepress.com/trevor_keck/2.

118 Annan, K. with Mousavizadeth, N. (2012), Interventions: A life in war and peace. London: Penguin Group.

119 Kofi Annan Foundation (2010), *The Kenya National Dialogue and Reconciliation: One year later*, Geneva, 30-31 March 2009, Report of the meeting.

is difficult. But let me assure you that there is real momentum. We are at the water's edge and the last difficult and frightening step will be taken. I am confident that, in the interests of Kenya and its people, the parties will show the wisdom, flexibility and foresight to conclude an agreement."[120]

The hard bargaining

After Kilaguni, a particularly disheartening time followed. The Panel and negotiating teams worried about the lack of progress.

There had developed a custom that plenary meetings of the KNDR started with a member of the negotiating team rising and saying a prayer. On 19 February 2008, Kofi Annan rose and said:

> "As in the past, we should commence our meeting with a prayer. I believe it falls to me to say the prayer this morning. I will do so by playing a hymn, composed by Hans Corell, who joined my team here in Nairobi last week. When he left the UN in March 2004, he presented me with this hymn as a farewell gift, explaining its title – 'Secretary-General Kofi Annan's Prayer for Peace' – with these words:
>
> "'At one point, Mr Secretary-General, when we were engaged in a difficult and politically perilous task, you said to me: It often helps to pray! I recalled that moment some time ago and thought: maybe I should give the Secretary-General a prayer! And so, I have written a prayer. But this prayer has no words. It is a piece of music that hopefully can be understood by all. And those who listen would be free to add in their minds, in any language, words of their own. I know that the composition is a very humble contribution to music. But so should a prayer be humble.'"

[Here the music was tuned in for a few moments and was then slowly tuned out.]

When the music faded out, Kofi Annan continued:

> "We read from the National Anthem of Kenya:
>
> | | |
> |---|---|
> | *Natujenge taifa letu* | Let all with one accord |
> | *Ee, ndio wajibu wetu* | In common bond united |
> | *Kenya istahili heshima* | Build this our nation together |
> | *Tuungane mikono* | And the glory of Kenya |

120 Kofi Annan, press briefing, 15 February 2008.

> Lord, may you make the parties to this Kenya National Dialogue and Reconciliation realize the seriousness of the situation and see that they have an obligation to find, in the interest of all people of Kenya, this one accord. And may you lead them that they may unite in a common bond not only to build their nation together but now also to bring their nation together. Amen."

When negotiations resumed, the most challenging discussions – on the governance structure – took centre stage. On 19 February, when the parties confirmed their divergent positions on power-sharing, the Panel asked them to form a Legal Working Group on Governance (LWG). It was asked to turn an eventual political agreement into a legal framework acceptable to both sides.

Corell was requested to facilitate and he began by giving the LWG a memorandum and a draft piece of legislation; he argued that drafting should begin immediately because it would then be easier to identify elements that required more work. The Working Group adopted the bracketing method introduced earlier by Kofi Annan, and this proved a useful tool for identifying and understanding points of agreement and disagreement. During three days of closed working sessions, the LWG prepared a draft National Accord and Reconciliation Act 2008 for discussion in plenary. Contentious language remained in brackets.

Corell insisted that legislation would not align with the constitution unless the latter were amended. The delegations could not agree to discuss such a proposal but agreed that he could make a personal proposal. This he did in a note to Kofi Annan on 22 February.

The draft National Accord and Reconciliation Act 2008 defined the appointment and functions of a Prime Minister and two Deputy Prime Ministers, arrangements for forming a coalition government, and arrangements and conditions for its dissolution.[121] However, the parties still disagreed on several key questions.

During this tense period, both parties broke their earlier agreement not to issue public statements. On 19 February, President Kibaki issued a statement that any changes in governance must respect the terms of the constitution, a position that the PNU had maintained during negotiation of Agenda Item 3.[122] On the same day, the PNU Parliamentary Group ruled out power-sharing and

121 It was titled: An Act of Parliament to provide for the settlement of the disputes arising from the presidential election of 2007, formation of a Coalition Government and Establishment of the Offices of Prime Minister, Deputy Prime Ministers and Ministers of the Government of Kenya, their functions and various matters connected with and incidental to the foregoing.

122 Cyrus Kinyungu, Karanja Njoroge, "Coalition must be within the law, says President Kibaki", *The Standard*, 20 February 2008.

creation of a post of Prime Minister.[123] In response, the ODM Parliamentary Group resolved to call for mass action if Parliament did not convene in a week to amend the constitution and implement the KNDR's proposals.[124]

These developments compelled the Panel to set up a system to monitor press statements. Over the weekend of 23 to 24 February, the negotiating teams said that they again wanted to consult their Principals. The Panel issued a press statement urging President Kibaki and Raila Odinga to give their negotiators clear instructions so that discussions on Agenda Item 3 could move swiftly to a conclusion when talks resumed.

However, the teams came back without guidance and, in spite of intense negotiations on 25 and 26 February, almost no progress was made towards agreement. The parties appeared unable to narrow the gaps in their positions, notably their differences over the powers and responsibilities of the Prime Minister, the representation of each party in the coalition government, the process for nominating ministers, and the procedure that would be followed if the coalition government were dissolved. They also disagreed on whether or not the constitution should be amended to reflect these temporary governance arrangements. The Panel felt that little headway was being made. Tensions remained high and both sides seemed committed to intractable positions.

Suspension of talks

In this unproductive atmosphere, Kofi Annan, in consultation with Benjamin Mkapa, decided on 26 February to suspend talks with the negotiating teams and to overcome the impasse by talking directly with the Principals. The Panel also issued a press statement in which it explained that the negotiators were not able to resolve the outstanding issues and that President Kibaki and Raila Odinga should conclude the negotiations face-to-face.

In parallel, Kofi Annan requested President Jakaya Kikwete of Tanzania, then AU Chair, to come to Nairobi to assist in the negotiations, considering that Tanzania operated with a President and a Prime Minister. Kikwete met President Kibaki on 27 February, explained to him the powers of Tanzania's Prime Minister and persuaded him to include the word "supervise" in the duties outlined in the agreement.[125] Kofi Annan also spoke with the US Secretary of

123 Joseph Murimi, Ayub Savula, , "PNU rejects creation of PM post to end crisis", *The Standard*, 20 February 2008.

124 Ayub Savula, "ODM MPs threatens mass action over PM post", *The Standard*, 21 February 2008.

125 Annan, K. with Mousavizadeth, N. (2012), *Interventions: A life in war and peace*. London: Penguin Group.

State, Condoleezza Rice, who issued a statement announcing that US relations with Kenya depended on the parties agreeing to the compromise on the table. She said that the US would draw conclusions as to who was responsible for lack of progress and take necessary steps.

On 27 February, Kofi Annan and Benjamin Mkapa met Raila Odinga and then President Kibaki. The Panel convinced them that it was time to make a deal and that they must set aside their differences to secure peace for the country.

On 28 February, Kofi Annan, Benjamin Mkapa and Jayaka Kikwete met the two Principals, without their negotiating teams.[126] This meeting was a turning point. From the outset Kofi Annan stated that this would be the final negotiation. Both leaders were aware of the meeting's importance and the impact that failure would have, nationally and internationally.

During a five-hour discussion, the Principals agreed to a power-sharing arrangement. They then called in their lawyers (Attorney General Amos Wako for President Kibaki, James Orengo for Raila Odinga) to work on the draft agreement with them and with the Panel. The Principals reached a compromise on all contentious issues and agreed to embed the National Accord in the constitution.

The same afternoon, they signed the Agreement on the Principles of Partnership of the Coalition Government on the steps of Harambee House. This was a defining moment for the country and a welcome relief – bittersweet, because it had taken so long and so many lives had been lost.

A small drama occurred immediately before the Accord was signed, when PNU Ministers approached President Kibaki to dissuade him from proceeding. President Kibaki demonstrated his leadership by refusing their request, but these misgivings were a harbinger of difficulties that the coalition government would experience from its inception.

On the basis of the Principles of Partnership, a draft bill was presented to Parliament for debate. The bill stated that the Prime Minister would be the parliamentary leader of the largest party or coalition of parties in the National Assembly, with responsibility for "coordinating and supervising the execution of the functions and affairs of Government". The two parties in the coalition would each name one member of the National Assembly to be appointed as Deputy Prime Minister. The composition of the coalition government would at all times take into account the principle of portfolio balance and reflect the

126 Kikwete, Mkapa and Kofi Annan had met the previous day at the Grand Regency Hotel where it was agreed that Kikwete and Mkapa would counsel President Kibaki on the Tanzania system, which also includes a sharing of power between the President and a Prime Minister.

parties' relative parliamentary strength.[127] The removal of any coalition minister would be subject to consultation between the leaders and agreement in writing. The Prime Minister and Deputy Prime Ministers could only be removed by a motion of no confidence passed in Parliament by a majority of MPs.[128]

After 41 days of negotiations, Kofi Annan left the country on 2 March, having appointed Oluyemi Adeniji (former Minister of Foreign Affairs of Nigeria, former UN Special Representative of the Secretary-General for Sierra Leone) to conclude negotiations on Agenda Item 4. Adeniji arrived in Nairobi on 26 February, joined the team on 29 February, and commenced his first session on 3 March 2008.

The end of the mediation

On 13 March 2008, Ambassador Adeniji travelled to Addis Ababa to brief the AU Peace and Security Council (PSC) and assist the Council to decide on the Panel's future role and assistance. On 14 March the PSC formally commended the two Principals for the wisdom, leadership and courage they had shown in ending the crisis. Expressing appreciation for its efforts, the PSC asked the Panel to continue to provide support during implementation of the agreements, to the parties, to the various committees and commissions that had been created, and with respect to the recommendations they would produce. The PSC requested the Panel to support the coalition government and other stakeholders during the constitutional review process.[129]

The National Accord and Reconciliation Act 2008 was anchored in the constitution by means of an amendment passed by Parliament on 18 March. As expected, Raila Odinga was appointed Prime Minister, assisted by a Deputy Prime Minister from his own party, Musalia Mudavadi, and a Deputy Prime Minister from PNU, Uhuru Kenyatta. For the second time in Kenya's history, the position of Prime Minister had been created.

Significant as the KNDR agreements were, the Panel remained acutely aware that it was essential to support their implementation. In line with this view, Kofi Annan suggested at the twenty-fifth session that a signed omnibus agreement

127 See Chapter Four for more on portfolio balance, a concept presented to the negotiating teams by Gernot Erler, Minister of State of the Federal Republic of Germany. Essentially, it is achieved in a department when one partner in a coalition holds the post of Minister and the other party has the right to choose that department's Permanent Secretary.

128 Kofi Annan Foundation (2010), *The Kenya National Dialogue and Reconciliation: One year later*, Geneva, 30-31 March 2009, Report of the meeting.

129 African Union Peace and Security Council. 14 March 2008.

should be compiled, to include all the elements agreed to date.[130] In effect, his idea was to create an annotated text, spelling out in detail the nature of the agreements and filling gaps of interpretation that were already becoming visible.

The Dialogue Team (formerly known as the Negotiating Team) voiced support for the proposal in April, but did not follow through and at its final session on 29 July 2008 the KNDR agreed that it would cause confusion if the President and Prime Minister were at that stage to sign a new agreement. As one member noted, since one of the KNDR agreements was part of the 2010 Constitution and another was an Act of Parliament, they could not in fact be collapsed into an omnibus text.[131]

The KNDR concluded on 29 July 2008, after it completed negotiation on Agenda Item 4. The Panel continued to play a role in its implementation, in accordance with the mandate it received from the AU. The work of the Panel after the signing of the agreements is summarized in the next chapter. Subsequent chapters look in more detail at the implementation of the KNDR agreements in specific areas.

Conclusion

The value of well-judged early intervention cannot be overemphasized. The longer a conflict remains unaddressed, the more intractable it is likely to become and the more difficult it will be to bring protagonists to the table; at the same time, interventions must be timed well and the context evaluated with judgement. Premature mediations may not be successful.

In this regard, Kenya was perhaps fortunate in that it plays an important role in the region. This created exceptional regional and international interest in finding a solution.

The Panel's decision to remain continuously in Kenya for 41 days reassured the parties and Kenya's people that the mediation had serious intent and that the Panel was as committed as the parties to finding a solution. This precedent is worth exploring in future mediations.

It was also important to arrive at a single mediation process. Parties to a conflict are entitled to explore alternative offers of mediation but, if a single proposal is not adopted quickly, 'forum shopping' can delay substantive negotiation, disperse the commitment of the parties, and impede the construction of broad

130 Minutes of the Kenya National Dialogue and Reconciliation, Twenty Fifth Session, 17 April 2008.

131 Minutes of the Kenya National Dialogue and Reconciliation, Twenty Seventh Session, 29 July 2008.

diplomatic and political support, making it more likely that mediation will fail when challenges inevitably arise. Kofi Annan insisted from the outset that the AU initiative was the sole mediation. He emphasized this point from the beginning to key Kenyan and international actors. As a result, the Panel was able to call on support when it was needed, and was not obstructed in its work by other attempts to mediate. This undoubtedly concentrated minds and helped the negotiation to achieve results.

In most conflict situations, those who are most affected by violence are not heard at the negotiating table. It is important to ensure that ownership of a peace process extends beyond the political elite that negotiates it, and embraces the needs and aspirations of the public. The Panel made explicit and consistent efforts to consult a wide range of Kenyan stakeholders during the mediation, and Kenya's vigorous civil society made extremely important contributions to the content of the Accords and subsequently to the content and adoption of Kenya's 2010 Constitution. Public approval and advocacy gave these documents legitimacy and put pressure on the political elites to implement them.

Ultimately, the most critical decisions were made by the Principals. The Panel took a significant risk when it suspended stalled discussions with the negotiating teams over Agenda Item 3. The gambit succeeded, because President Kibaki and Prime Minister Odinga understood the urgency of the situation and set aside their differences to reach a deal that would overcome the political crisis.

Chapter Three

Concluding the Mediation and Facilitating Implementation

"Look to the past to determine when and where the country got derailed. Once that is determined you must fix and adjust the rails towards the direction of peace, justice and prosperity."

– The Panel's message to Kenyans, 18 April 2008

Introduction

External support to implement peace agreements is not uncommon, particularly when international mediation has been involved. Is it effective? This chapter focuses on the Panel's support to implementation of the National Accord and shows that the KNDR provides an almost unique example of sustained high-level political support for a reform process.

Completing the unfinished agenda

When Kofi Annan left Kenya on 3 March 2008, after 41 days of mediation, the ink on the National Accord was still fresh. While the country rejoiced at the political agreement reached between the parties, the agenda they had agreed on 1 February remained incomplete, and its implementation lay ahead.

The Panel had not lost sight of the need to maintain momentum. Kofi Annan formally introduced Oluyemi Adeniji on 29 February 2008 as Session Chair of the process. Adeniji, a former Foreign Minister of Nigeria, was asked to keep the negotiations going in Kofi Annan's absence and, specifically, to facilitate an agreement between the parties on Agenda Item 4 (long-term issues and solutions), as well as foster the conditions necessary to implement Agenda Items 1, 2 and 3.

On 4 March, agreements established the frameworks for a constitutional review, a Commission of Inquiry into Post-Election Violence (CIPEV), a Truth, Justice and Reconciliation Commission (TJRC), and an Independent Review Committee (IREC). These decisions confirmed that the parties were willing to conclude the KNDR, now that political agreement had been reached, and reflected the preparatory work that had been done to prepare the issues.

Unfortunately, the speed with which these agreements were drafted was not sustained when it came to operationalizing them, or negotiating the solution to long-term issues. Having met formally 19 times between 29 January and 3 March, the negotiating teams met just eight times between 4 March and 29 July.[132] A statement on long-term issues and solutions, finally agreed on 23 May 2008, was initially circulated as a draft to the parties on 17 April 2008. The matrix on implementation in the same agreement was finalized two months later on 29 July, signalling the conclusion of mediation.

While it would be simplistic to draw conclusions from these dates alone, they highlight several issues that confronted the mediators after the National Accord.

The first concerned the KNDR's standing and role. When the negotiating teams discussed how best to push ahead with the reform process after 4 March, two points of view emerged. One held that Parliament was the right forum in which to discuss the formation of the various commissions and prepare the legislation required, with support from relevant ministries.[133] On this view, implementation was a matter for Parliament and did not require continuous sessions of the KNDR; occasional sessions would be sufficient.[134]

Against this, it was argued that the wisdom of the Panel would be of value as the commissions were formed, especially its advice on structures and timelines.[135]

132 These figures are drawn from the formal meeting records for which Minutes were recorded. They do not take account of informal sessions.

133 Minutes of the Kenya National Dialogue and Reconciliation, Nineteenth Session, 3 March 2008.

134 Minutes of the Kenya National Dialogue and Reconciliation, Twenty third Session, 20 March 2008.

135 *Supra* note 133.

One member noted that the KNDR had been fortunate because the agreements and bills it had proposed had been accepted without question, whereas parliamentarians now raised challenges. He said the teams would be unwise to over-extend their authority, which they would appear to do if they started to take firm positions on key issues. It was time for Kenyans to take ownership of the process and participate.[136] When Adeniji formally asked how future sessions should be organized, at the 21st Session (11 March), one member suggested that the objective should be to end the sessions because the remaining long-term issues could be tackled during the constitutional review process.

Second, KNDR members had less time, because from mid-April they were all appointed to posts in the cabinet.

Third, the KNDR's work needed to be reconciled with the government's programmes. Agenda Item 4 identified six long-term issues:

(i) Constitutional, institutional and legal reform;

(ii) Land reform;

(iii) Poverty, inequity and regional imbalance;

(iv) Unemployment, particularly youth unemployment;

(v) Consolidation of national cohesion and unity;

(vi) Transparency, accountability, impunity.

As the negotiating team started to discuss these, the government was simultaneously preparing a five-year Medium Term Plan (MTP) for realizing its Vision 2030 development strategy. The MTP was finalized and launched in June 2008. It included a one-year strategy to address the impact of post-election violence and facilitate economic recovery.

In some respects, the two processes were usefully complementary. The MTP's Strategy for National Transformation: Accelerating Equitable Economic and Social Development for a Prosperous Kenya included several components that were designed to resolve long-term issues and were in line with outputs of the KNDR. The implementation matrix for Agenda Item 4 provided a useful roadmap, because it set out required actions, timelines and focal points for each of its six sub-themes. It could serve to track implementation, since it reflected the strategies of both the MTP and the KNDR agreements.

Fourth, discussion of the negotiating team's role folded into discussion of the Panel's evolving role.

136 *Supra* note 134.

The negotiating team was very aware that the process, and the Panel's role in moving it forward, mattered greatly to Kenya's people. Proposals to adjourn the negotiations to accommodate the parliamentary timetable and constituency responsibilities were qualified by this understanding. The Panel needed to clarify through a public statement that talks on Agenda Item 4 would continue, and a pause did not imply any form of breakdown.[137]

The political significance of the Panel's continued role was also highlighted when a member suggested that the Panel should be present when bills to establish IREC, CIPEV and TJRC were debated in Parliament, because misunderstanding was widespread and ultimately only the Principals had a stake in success. This member believed that the Panel had not completed its work and that talks should continue, both informally and in full session.[138]

Speaking about the Panel's mandate, Adeniji stressed that the Panel had an obligation to ensure that the KNDR's agreements were implemented.[139] Recognizing that the Panel would not remain indefinitely, a member stressed that its eventual departure should be mutually agreed.[140]

On returning to Kenya for the ceremony to swear in the coalition cabinet, Kofi Annan stated at a meeting with the negotiating team on 17 April that mediation would end when the Panel had completed its agenda and the entities established began to take action. From that point there would be no need for a chief mediator. He would continue to monitor from the outside and would step in if necessary.[141]

At the same meeting, Kofi Annan observed that a secretariat, to support IREC's work and provide necessary resources, would continue to be necessary. Experts to draft the new constitution would need to be recruited, for example, and work should be done to engage civil society and structure its contribution. He concluded by saying that the Panel would continue to involve the international community,[142] and would redraft the terms of reference of the secretariat to make sure that its remit was clearly understood.

Formally, the Panel's long-term engagement was anticipated quite early in the process. At its 115th meeting (14 March 2008), the Peace and Security Council of the African Union called on:

137 Minutes of the Kenya National Dialogue and Reconciliation, Twenty first Session, 11 March 2008.

138 *Ibid*.

139 *Ibid*.

140 *Supra* note 136.

141 Minutes of the Kenya National Dialogue and Reconciliation, Twenty fifth Session, 17 April 2008.

142 *Ibid*.

> "the Kenyan parties to continue in their spirit of cooperation and dialogue, to reach a common understanding on all the Agreements reached in the National Dialogue and to ensure their full implementation. In particular, Council calls on the parties to ensure a complete end to the violence, as well as the full implementation of the Agreements relating to the long-term issues, including the consolidation of national cohesion and unity, land reform, tackling poverty and inequity, combating regional development imbalances, promoting equal access to opportunities, tackling unemployment, reform of the public service, strengthening of anti-corruption laws and public accountability mechanisms, reform of public finance and revenue management systems and institutions, and addressing issues of accountability and transparency."[143]

At the same meeting, it adopted a decision on the situation in Kenya in which it:

> "further request[ed] the Panel of Eminent African Personalities to continue to support the Kenyan parties in the implementation of [the KNDR] Agreements, including support to the various Committees and Commissions provided therein, as well as in the follow-up to the recommendations emanating from them…"[144]

This request was reaffirmed in the agreement which the negotiating team signed on behalf of the Government of Kenya on 23 May 2008:

> "We shall, when necessary, seek international community expertise and support and request the Panel to continue to provide, on a need basis, support in the implementation of these and previous agreements, including assistance to the various Committees and Commissions provided therein."[145]

The Panel's role in supporting the KNDR process

After the Panel concluded its formal mediation role, and the implementation matrix, on 29 July 2008, it continued to support the reform agenda by fulfilling its formal responsibilities under the KNDR agreements and engaging politically with the two Principals and other key implementation agents.

Through its Coordination and Liaison Office (CLO), the Panel supported efforts to build institutional capacity and continued to monitor and engage in

143 African Union (2008), Communique, 115th Meeting of the Peace and Security Council, PSC/PR/Comm (CXV).

144 *Ibid*.

145 KNDR (2008), Statement of Principles on long-term issues and solutions, Nairobi: KNDR.

the political process by making regular visits to Kenya and issuing statements on important issues, from 2008 until 2013. The negotiating team approved terms of reference for a CLO on 29 July 2008. Its terms of reference were to:

(i) Assist the Panel in mobilizing international support and resources for the implementation processes;

(ii) Undertake periodic consultations with the Kenya National Dialogue and Reconciliation team (Dialogue Team);

(iii) Keep the Dialogue Team informed about the status of donor contributions to the work of the Panel;

(iv) Liaise with the Coalition Government on the implementation of the reform agenda;

(v) Sourcing experts to assist the Coalition Government with implementation of the reform agenda;

(vi) Provide support to the Panel for the periodic/episodic visits of its members, including for ad hoc facilitation missions;

(vii) Collaborate with the Dialogue Team to provide regular briefings to key stakeholders;

(viii) Collaborate with its project service provider to continue administering the project assistance to the Panel and provide reports to funding agencies.

(ix) Provide daily situation reports to the Panel and periodic updates to the AU through the Chair.

(x) Complete the handover of the archives of the National Dialogue, including the Commissions, to the Coalition Government.

The CLO was set up in 2008 under a UNDP project entitled: "Consolidating the gains from the Kenya National Dialogue and Reconciliation Process". The project was initially expected to run for 12 months, from October 2008 to September 2009. A project document was signed in January 2009.

The project's overall objective was to assist the Coalition Government to implement the agreements reached during the KNDR process and to support the government as it addressed the root causes of the 2007 post-election crisis. Its specific objectives were:

- To maintain the political dialogue between the coalition partners and the Panel.

- To put in place a comprehensive and coordinated system to monitor and evaluate implementation of the KNDR agreements and ensure that its findings were processed and analyzed.
- To ensure that knowledge and information generated by the KNDR process is preserved for posterity, and made available to improve national understanding of and expertise in conflict prevention and mediation, in Kenya and beyond.

Institutional capacity-building

The CLO helped to develop the institutional capacity of several bodies established under the KNDR. They included the IREC, CIPEV, CoE, TJRC, and IICDRC.

IREC and CIPEV

The Independent Review Commission Act 2008, and the Commission of Inquiry on Post-Election Violence Act 2008 came into force on 13 March and 22 May respectively.[146]

Under these laws, the Panel became responsible for recommending to the National Assembly three non-Kenyan members of IREC and two non-Kenyan members of the Commission of CIPEV. IREC was asked to examine the 2007 elections, including the constitutional and legal framework, the structure of the Electoral Commission of Kenya (ECK), and the overall electoral environment.[147] CIPEV was asked to investigate the facts and circumstances surrounding the violence and the conduct of state security agencies, and to make recommendations concerning these and other matters.

The final reports of both IREC and CIPEV were posted on the KNDR website after they had been submitted to President Kibaki and Kofi Annan, with the aim of making them more accessible to the Kenyan public. The CLO facilitated their translation into Kiswahili.

Committee of experts

Enacting a new constitution for Kenya was central to the reform agenda and to finding long-term solutions. At its 115th meeting (14 March 2008), the Peace and Security Council of the African Union requested the Panel to provide all

146 Republic of Kenya (2008), *Report of the Commission of Inquiry into the Post-Election Violence*, Nairobi: Government Printer.

147 Independent Review Commission (2008), *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007*, Nairobi: Government Printer.

support necessary to the coalition government and other stakeholders in the Constitutional Review Process.

The CLO was therefore involved in forming the Committee of Experts (CoE) and supported its work. As required by the Constitution of Kenya Review Act 2008, the Panel recommended five non-Kenyan experts to the Parliamentary Select Committee (PSC), which selected members of the Committee of Experts on the constitutional review process.[148]

Before submitting names, the CLO consulted members of the dialogue team (both PNU and ODM), in accordance with the legislation. Names were submitted on 8 January 2009. The PSC then ranked the five nominees and made recommendations to the National Assembly, which agreed on three experts for appointment by the President.

On 23 February 2009, the President appointed Ms Christina Murray (South Africa), Dr Chaloka Beyani (Zambia) and Mr Frederick Ssempebwa (Uganda) to the Panel of Experts.

Interim Independent Constitutional Dispute Resolution Court

On 14 January 2009, the Clerk to the National Assembly requested the Panel's help to identify non-Kenyan judges whom the Parliamentary Select Committee on the Constitutional Review Process might consider for appointment to the proposed Interim Independent Constitutional Dispute Resolution Court (IICDRC). Under the Constitution of Kenya Amendment Act 2008, the Court would "hear and determine all and only matters arising from the constitutional review process".[149] The court was to be composed of nine judges nominated by the PSC, of whom three would be non-Kenyans who were qualified to serve or had served as judges of the highest court in any jurisdiction within the Commonwealth. Six Kenyan judges were recruited separately by means of a competitive procedure. After selection by the PSC and approval by the National Assembly, all nine judges were to be appointed by the President in consultation with the Prime Minister.

Specifically, the Clerk requested the Panel to provide a list of five non-Kenyan judges, from whom the PSC would select three for appointment. The PSC tabled the nominees on 18 November 2009. Ms Unity Dow (Botswana), Mr Michel Bastarache (Canada) and Mr John Alastair Cameron, Lord Abernethy (UK) were selected by the PSC from the five non-Kenyan candidates nominated by the Panel. Their nominations were approved by Parliament on 25 November 2009.

148 Constitution of Kenya Review Act 2008.

149 Constitution of Kenya Amendment Act 2008.

Truth, Justice and Reconciliation Commission

The Truth, Justice and Reconciliation Act 2008 came into force on 9 March 2009. Under this law, the Panel became responsible for recommending to the National Assembly three non-Kenyan members of the Truth, Justice and Reconciliation Commission (TJRC), who would serve alongside six Kenyan members. The TJRC was asked to establish an accurate, complete and historical record of violations and 'abuses of human rights and economic rights' inflicted on persons between 12 December 1963 and 28 February 2008.[150]

On 21 April 2009, the CLO, on behalf of the Panel, submitted the names of Justice Gertrude Chiti Mukuka Chawatama (Zambia), Mr Berhanu Dinka (Ethiopia) and Professor Ronald Slye (US) to the Clerk of the National Assembly.

On 28 May 2009, the Parliamentary Committee on Legal Affairs and the Administration of Justice tabled its recommendations. The report was approved by Parliament on 25 June 2009 and on 22 July the President appointed the three non-Kenyans and six Kenyans as TJRC commissioners.

On 24 July 2009, Kofi Annan issued a statement on behalf of the Panel. Congratulating the Coalition Government on these appointments, he urged Kenyans to engage and fully cooperate with the TJRC, and requested the international community to support its work, because it was a key component of the reform agenda agreed during the KNDR process. Kofi Annan also wrote a letter of congratulation to the two Principals and to the TJRC's chair, Bethwell Kiplagat.

The nine commissioners were sworn into office on 3 August 2009.

Police reforms

On 8 May 2009, President Kibaki appointed 16 members of a National Task Force on Police Reforms. The Task Force, chaired by retired judge Philip Ransley, was asked to recommend comprehensive reforms, taking into account recommendations in the IREC and CIPEV reports and other police-related reports.

On 7 May 2009, the Office of the Prime Minister requested the CLO to submit a list of international police reform experts, from which the Coalition Government would choose one to serve as Vice-chair of the Task Force.

The CLO identified a number of candidates in consultation with UNDPA, UNDP, ICTJ and the AU. On 20 May 2009, it submitted a list of seven

150 Truth, Justice and Reconciliation Act 2008.

international experts to the Office of the Prime Minister. From that list, the government selected Mr Peter Gastrow (South Africa).[151]

Panel interventions to support and encourage implementation of the KNDR Agreements

In addition to accepting the responsibilities mentioned above, whenever it became necessary the Panel helped remove obstacles to implementation. It made use of quiet diplomacy and also intervened publicly by means of press statements, or visits to Kenya, between 2008 and 2012.

The Panel's press statements during this period reveal three dominant concerns: to demonstrate accountability with respect to victims of the post-election violence; to complete the constitutional review process; and to establish the coalition government and sustain cooperation and consultation between the two Principals.

On 13 February 2009, speaking on behalf of the Panel, Kofi Annan expressed his disappointment that the Constitution of Kenya (Amendment) Bill, 2009, had been defeated in Parliament. The bill would have authorized the formation of a Special Tribunal to prosecute those accused of post-election violence in 2008. He described the defeat as 'a major setback' to implementation of CIPEV and efforts to end Kenya's culture of impunity.[152]

On 24 February 2009, Kofi Annan warned that further delays in establishing the Tribunal could have grave consequences for the country's reform agenda, on which Kenya's stability and prosperity depended. He stressed the Panel's firm conviction that a "Kenya-owned and Kenyan-led process would be the most beneficial to the Kenyan people". While welcoming the efforts of the Principals to persuade Parliament to pass the necessary legislation, he made it clear that involvement of the International Criminal Court would become unavoidable if a Special Tribunal were not established in reasonable time.[153]

Interaction with other stakeholders

The CLO used various means to disseminate information to stakeholders, including meetings, the KNDR website and statements. On 2 January 2009, in an article published in several Kenyan newspapers, Kofi Annan wrote that Kenyans had entered 2009 in peace and tranquillity, with renewed optimism

151 Republic of Kenya (2009), Report of the National Task Force on Police Reforms, Nairobi: Government Printer.

152 Kofi Annan, press statement, 13 February 2009.

153 Kofi Annan, press statement, 24 February 2009.

for a brighter future, having overcome an unprecedented spiral of violence and ethnic animosity after the December 2007 elections. At the same time, the reforms that had been agreed must be implemented more quickly, because the window of opportunity would soon start to close. The horrific violence of early 2008 could recur if the full reform agenda were not completed effectively.

The CLO continued to meet periodically with members of Kenyan civil society. On 13 February and 7 July 2009, it organized briefing sessions on the monitoring and evaluation reports by South Consulting. On 30-31 March 2009, a conference titled 'KNDR: One Year Later' took place in Geneva. The CLO subsequently worked closely with civil society to follow up its recommendations, notably the proposal that civil society groups should coordinate their advocacy in support of full implementation of the KNDR agreements. Civil society and private sector groups met several times to share views and plan; the CLO participated in some of these meetings as an observer.[154]

In conjunction with the Kenya Private Sector Alliance (KEPSA), the CLO also convened and helped to facilitate a dialogue between members of the business community in Kenya. At these events, the participants committed the private sector to enhance its engagement and participation in the implementation process. KEPSA agreed to evaluate the impact and effectiveness of Public-Private Dialogue and the participants undertook to address ethnicity by means of a national campaign to promote national integration and ethical values.

On 19 May 2012, CLO convened meetings with the KEPSA peace initiative (Mkenya Daima team), at which the participants reflected on what had been achieved and planned the launch of Phase II. A successful campaign was subsequently launched to coordinate the work of organizations running peace initiatives across the country.

On 2 October 2012, the CLO facilitated a meeting in Mombasa between the Independent Electoral and Boundaries Commission (IEBC) and members of the Media Owners Association. The meeting was informed by the practical need to ensure that the IEBC and the media remained mutually supportive of each others' roles in supporting the preparations for and conduct of credible elections in 2012. The CLO's role as a neutral convener and facilitator underscored the continued significance of the Panel. It was agreed that the media should support a 4 March 2013 election date and that closer working relations should be established between the media and the IEBC.

154 Kofi Annan Foundation (2010), The Kenya National Dialogue and Reconciliation: One year later, Geneva, 30-31 March 2009, Report of the meeting.

KNDR archives

In accordance with its terms of reference, the CLO put in place arrangements for establishing and managing the KNDR's archives.

An archivist attached unique repository identification numbers to all records in the CLO's custody, making it possible to put the materials in series and sub-series, and provide detailed descriptions.

In November 2009, at the CLO's request, the Rockefeller Foundation approved funding that made it possible to continue to compile an oral history of the KNDR, digitize paper documents, and create a broadcast news footage archive.

Monitoring and evaluation

Both the negotiating team and the Panel considered that it was a priority to review the status of implementation of the KNDR agreements after negotiations on Agenda Item 4 had been concluded. They agreed that it should have two elements.

First, members of the negotiating team, who had helped draft the agreements, should continue to monitor their implementation. The Panel considered that the negotiators not only possessed a detailed understanding of the process, but were in a position to encourage implementation because they were members of the cabinet. The Negotiating Team became known as the Dialogue Team.

Second, it was agreed to hire an independent firm to monitor implementation and provide reports to the Dialogue Team. The Panel selected South Consulting for this work, which was funded by the Open Society Institute.[155]

In a statement on 23 September 2008, issued after he visited Kenya to receive the report of the Independent Review Commission (IREC), Kofi Annan stated that:

> "Given the importance of the timely and effective implementation of the agreements and reforms, there is a need to ensure broad awareness of what progress has been achieved and what constraints have been encountered. Towards this end, the panel has engaged South Consulting, a Kenyan research firm, to independently monitor the implementation process. South will issue periodic reports to the Panel, which will be shared with the Coalition Government and the public."[156]

155 African Union Panel of Eminent African Personalities – Kenya National Dialogue and Reconciliation, press statement, 30 January 2009.

156 Kofi Annan, statement, 23 September 2008.

The Dialogue Team met 14 times between January 2009 and the general election on 4 March 2013. Members initially aimed to review the progress of all four agreements, but later meetings usually focused on themes, including implementation of the constitution and electoral preparedness.

After the Dialogue Team had considered South Consulting's reports, it became standard practice to issue the report and a press statement, endorsed by the Dialogue Team. These documents were disseminated to the public via regional meetings, the media and the KNDR website. At the Panel's request, the CLO formally transmitted the evaluation reports of South Consulting to both Principals and the AU Chair, after they had been approved by the Dialogue Team.[157]

By means of Dialogue Team meetings, the Coalition Government was able to give sustained attention to implementation of the KNDR Agreements and address gaps that emerged. Its work, supported by South Consulting, shaped and influenced major policy decisions under Agenda Item 4.[158]

Conclusion

The Panel remained engaged in Kenya for an unusually long time, through the mediation, and then during implementation of the agreements reached by the KNDR. Its sustained commitment to the government and to other Kenyan stakeholders helped the Panel to build domestic and international support for the KNDR's reform agenda.

The Panel, and CLO, used their experience and connections with the UN, AU, Commonwealth and other international agencies to source experts who provided support and advice required for effective implementation of the KNDR agreements.

Ongoing monitoring and evaluation were also an essential component of efforts to implement the KNDR agreements. Monitoring reports provided the parties with a record of achievements and shortfalls. The Panel's decision to recruit an independent domestic research institute to monitor and evaluate implementation of the agreements was an innovative approach that added legitimacy and weight to the reporting process and increased national ownership. It sets a precedent that other mediations may find useful to adopt.

157 The reports by South Consulting for the period 2009-2013 have been consolidated into an edited volume which is due to be published in December 2013.

158 South Consulting, October 2009.

There is no set formula for implementing fundamental reforms that emerge from peace agreements, and such reforms require time and long-term commitment. Persistent, balanced and considered political support is critical to the success of long-term reforms.

Chapter Four

The Grand Coalition Government

"The power-sharing agreement must not be seen as an end in itself. It is a first step in a very long journey towards a better more tolerant and more equitable nation."

– The Panel's message to Kenyans, 17 October 2008

Introduction

When the Principles of Partnership Agreement was signed on the steps of Harambee House, it was a watershed moment for Kenya and the mediation process. Its significance was captured by Kofi Annan, who wrote: "On the 28 February 2008, Kenya pulled back from the brink".[159]

This was not hyperbole. Without a political compromise between the PNU and ODM, the crisis that had engulfed Kenya threatened to worsen.

This chapter complements Chapter Two. It explains in more detail how the Grand Coalition Government came into being, and goes on to assess its influence on the mediation process, and the political context in which the reform agenda was implemented.

Resolving the political crisis: the beginning

Despite the urgency of the situation and the need to find specific and sustainable solutions to the crisis, for both tactical and strategic reasons the Panel did not

159 Kofi Annan, article, 3 March 2008.

press the parties to consider the political issue at once, when it started work in January 2008.

Kofi Annan reflected later that "when [the Negotiating Team] first came together, I could see there was some tension within the group. So when we were setting up the agenda, it became clear to me that if I could give them something they could agree on in the early stages and build confidence, it would help the process."[160]

The first two items of the Annotated Agenda and Timetable were therefore tackled first. Item 3 (how to overcome the current political crisis) was not formally discussed until 5 February, during the Fifth Session,[161] after agreements on Agenda Items 1 and 2 had been reached on 1 and 4 February respectively.

This tactical delay may have built confidence in the mediation process, among the parties and the public. However, a strategic reason for not rushing was even more critical.

When Kofi Annan opened the afternoon session on 5 February, he warned both sides that, because the issues were so contentious, it would be wise to take a measured approach.[162] In effect, a chasm separated the parties.[163]

Without simplifying their respective positions, ODM was unconvinced that the announced outcome of the presidential election reflected the will of Kenya's people,[164] whereas the PNU believed that President Kibaki had won "fair and square".[165]

The Panel recognized that, while it needed to ensure the Negotiating Team's discussions were solution-oriented, it was neither advisable nor possible to impose a particular solution. Kofi Annan therefore emphasized from the outset that "all options were on the table".[166] It was for the parties to agree a way forward.

That said, the Panel unmistakably steered the discussions. The following day, Kofi Annan presented the parties with a matrix that set out various options available to both sides. Clarifying his statement that "all options were on the

160 Griffiths M. (2008), *The Prisoner of Peace: An interview with Kofi A Kofi Annan, Centre for Humanitarian Dialogue*.

161 Minutes of the Kenya National Dialogue and Reconciliation, Fifth Session, 5 February 2008.

162 *Ibid*.

163 A political solution to the crisis depended on addressing the disputed presidential election. The chapter on elections provides more information on the positions of the parties.

164 ODM member of the Negotiating Team, Minutes of the Kenya National Dialogue and Reconciliation, Fifth Session, 5 February 2008, p. 33.

165 Minutes of the Kenya National Dialogue and Reconciliation, Sixth Session, 6 February 2008.

166 *Supra* note 161.

table", he noted that the parties would discover that some options were viable and others were not.[167]

The Panel continued to remind the parties what they had already agreed, to ensure that gains already made would not be reversed. At the Sixth Session, for example, Kofi Annan recalled that both parties had accepted that the presidential election results were disputed,[168] indirectly reminding them that it would not be easy to move forward unless both sides could agree on the facts.

Kofi Annan's constant summaries of what had been agreed, and what remained unresolved, also clarified where and how fast progress was being made. This too helped discussion to advance.

By the second discussion of Agenda Item 3, both parties had agreed that the election result had been close. Both were willing to accept some form of review of the results. Both had also agreed that constitutional, legal and institutional reforms were necessary.[169]

At this point, both parties systematically examined the options set out in the matrix.[170] Before asking for their reactions, Kofi Annan noted that free and fair elections required an appropriate environment. In addition to security, elections needed to be, and be perceived to be, transparent and credible.[171]

In summary, the five options for addressing the presidential election were: to hold a forensic audit; to re-tally; to recount; to rerun the election; or conduct fresh elections.

By examining the alternatives dispassionately, the Panel not only focused the discussion but helped the negotiating teams to frame the issue in terms of realistic and unrealistic solutions.

Power-sharing

The mediation process did not have a predetermined political solution in mind. It was presumed that solutions would emerge over time, following the gradual elimination of options. Considering the distance between the parties at the start of negotiations, the emergence of power-sharing as an acceptable option is at first sight surprising. How was this political compromise arrived at?

167 *Supra* note 165.
168 *Supra* note 161.
169 *Ibid.*
170 *Ibid.*
171 *Ibid.*

At the beginning of the mediation, the notion of power-sharing was anathema to both sides, but particularly unacceptable to the PNU. When it submitted written comments on the draft Annotated Agenda, it questioned the statement that "some power-sharing was unavoidable"[172] and a member of the PNU team subsequently took issue with a media article that claimed power-sharing had been raised in the negotiations.[173]

Power-sharing was first raised formally in the context of a discussion about how the presidential election might be rerun, were a rerun to be agreed. While the new election was being conducted, the country would need a transitional government.[174] In this context, power-sharing would be a practical, short-term arrangement – not the desired way forward but an unavoidable interim measure, an incidental consequence of rerunning the presidential election, which was the ODM's preferred option.

The merit of an interim government was that it would provide a political basis for undertaking the legal and constitutional reforms that were required to hold another election in a manner acceptable to both parties. An interim government was also essential because electoral experts recommended waiting for at least one year before a new vote. Given the situation in Kenya, holding a snap election would have been irresponsible and no party advocated it.[175]

The PNU team opposed a transitional arrangement on two grounds: viability and constitutionality. With respect to the first, a PNU member argued that sharing power would not work if the sides distrusted one another.[176] Significantly, the same member stated that power-sharing would be an option if a recount were to show that the Presidential election had not produced a clear winner.[177]

Constitutionally, the PNU argued that a transitional arrangement would only be appropriate where constitutional order had given way or law and order had collapsed. Kenya was not in that position, because its constitution was operative.[178] When this argument was made, Benjamin Mkapa pleaded with the PNU team (with whom he had worked previously) to put political interests

172 Minutes of the Kenya National Dialogue and Reconciliation, Fifth Session, 5 February 2008. The Panel agreed that "unavoidable" was an unfortunate choice because it gave the impression that power-sharing was the only option, whereas it was one of many.

173 Minutes of the Kenya National Dialogue and Reconciliation, Seventh Session, 7 February 2008.

174 ODM member of the Negotiating Team, Minutes of the Kenya National Dialogue and Reconciliation, Seventh Session, 7 February 2008, p. 47.

175 Minutes of the Kenya National Dialogue and Reconciliation, Seventh Session, 7 February 2008. The Panel made reference to an "election", distributed to the negotiating team earlier.

176 Minutes of the Kenya National Dialogue and Reconciliation, Seventh Session, 7 February 2008.

177 *Ibid*.

178 *Ibid*.

aside, reach agreement on a sustainable political solution, and pull the country back from the brink. Based on the case of Zanzibar, it seemed to Mkapa that the most critical issue was to recognize that any structure that emerged from the negotiations needed to vary from the Westminster model.[179]

When he summarized the talks during the afternoon of 7 February 2008, Kofi Annan noted that the parties had not favoured a coalition or transitional arrangement. However, making an implicit reference to legal arguments that could preclude certain political solutions, he stressed that the crisis facing the country required extraordinary measures, including legislative adjustments if necessary.[180] Graça Machel amplified this comment by stating that she believed the issues on the table were much broader and deeper than the disputed presidential election and that any political solution would need to understand that elections were part of a broader process.[181]

The Panel's intention was to focus discussion on transitional arrangements at the Ninth Session (11 February). It believed the timing was opportune because the parties had already agreed by then that an election review commission should be formed and new elections held after a reform process. At the PNU's request, a recount remained a possibility.[182] However, it had been removed from the list of options by the time the Panel and the Negotiating Team travelled to Kilaguni for a meeting on 13 and 14 February.

The implications of a political compromise

From the Kilaguni retreat until agreement was eventually reached on the National Accord and Reconciliation Act, discussion focused on the nature of the government that would be formed. By referring (at the parliamentary *Kamakunji* on 12 February) to a possible "grand coalition" that could oversee reforms within two years, followed by presidential elections, Kofi Annan had made sure the Negotiating Team was under no illusion that consideration of power-sharing could be further delayed.[183]

On 13 February 2008, the Panel laid out what had already been accepted by both sides. A government was required that would bring both sides together. Such a government would undertake reforms, including constitutional and electoral reforms, and would implement transitional justice mechanisms, identify persons for posts, foster respect for human rights, pass anti-corruption

179 *Ibid.*
180 *Ibid.*
181 *Ibid.*
182 Minutes of the Kenya National Dialogue and Reconciliation, Ninth Session, 11 February 2008.
183 Kofi Annan, press statement, 13 February 2008.

legislation, and reform the police, the public sector and the judiciary. It was also necessary to establish a shared national agenda for reform, equity and access to opportunities.[184]

At the outset, the Panel was challenged to suggest how the new government should be described, because each of the parties consistently defended a particular model of government that it believed should emerge from the negotiation. The PNU argued that a "broad-based government" would be appropriate if a recount declared President Kibaki the winner, whereas "a power-sharing agreement" would be appropriate if no clear winner emerged. It rejected the proposal for a "transitional government" on the grounds that such a government would be unsustainable.[185] For its part, the ODM insisted that power should be equally shared, and any settlement packaged constitutionally and legally, whatever entity emerged from negotiations.[186] Not wishing to aggravate sensitivities (particularly on the PNU side) or allow the issue to become a red herring, Kofi Annan indicated that the name mattered less than the structure and should not obstruct the mediation process. It was later proposed that words such as 'coalition' and 'power-sharing' should be avoided, and 'partnership' used instead.[187] This suggestion became significant when the National Accord was signed.

Constitutional amendment

During negotiations of the National Accord, the most difficult issue to resolve was how to entrench a new government within the existing constitutional order. Here, the Legal Working Group on Governance (LWG), chaired by Hans Corell, played a significant role. The purpose of the LWG was to comment on the "legal viability" of a coalition.[188]

The parties developed three approaches to this issue. The PNU team had two distinct positions. It argued, first, that a constitutional amendment, permitting a coalition government to form, should be approved by referendum.[189] Second, it held that a constitutional amendment was inappropriate for political arrangements, which by their nature needed to be flexible and subject to

184 Minutes of the Kenya National Dialogue and Reconciliation, Tenth Session, 13 February 2008.

185 Minutes of the Kenya National Dialogue and Reconciliation, Seventh Session, 7 February 2008.

186 Minutes of the Kenya National Dialogue and Reconciliation, Twelfth Session, 19 February 2008.

187 *Ibid*.

188 *Ibid*.

189 Minutes of the Kenya National Dialogue and Reconciliation, Twelfth Session, 19 February 2008. The Government/PNU representative observed that the constitution made no provision for power-sharing. The mandate for it was based on the public vote.

change. Coalitions sometimes failed and it was not appropriate to amend the Constitution each time they did so.[190]

The ODM asserted that any constitutional arrangements made must guarantee equality between the parties and protect ODM from arbitrary treatment by the other side.[191] One ODM member stated that, if equality between the parties was not accepted, there would be nothing more to discuss. Neither side could deliver the agenda to the country on its own.[192]

Without dismissing the legal questions that arose with respect to a coalition government, the Panel deliberately treated them as secondary to the political question. "How" the coalition government formed was less important than its substance ("what") or the reasons for creating it ("why?"). Kofi Annan reminded both sides that the President was willing to bring ODM members into the government. He noted that the situation was so extraordinary that a special partnership was needed.[193] At one point, he underlined that what mattered was to be constitutional rather than do everything in accordance with the constitution.[194]

The Office of the Prime Minister and security of tenure

The negotiating team had agreed that it was necessary to include the Office of the Prime Minister in the government structure. When Benjamin Mkapa opened a discussion on how that office would be established,[195] there followed a debate on the Prime Minister's role. It was quickly agreed that the office was necessary, but differences emerged about its nature and powers. The PNU's position was based on the principle of non-fragmentation of authority. It held that the post of Prime Minister should not create two centres of power, because this could paralyze the government. A Prime Minister might be assigned special responsibilities, but must remain subject to the Head of Government.[196] This argument continued a debate that led to the defeat of the 2005 constitution-making process: at that time, President Kibaki's government had become uncomfortable with a proposal to create an executive Prime Minister; PNU

190 Minutes of the Kenya National Dialogue and Reconciliation, Twelfth Session, 19 February 2008.
191 *Ibid.*
192 *Ibid.*
193 *Ibid.*
194 Minutes of the Kenya National Dialogue and Reconciliation, Thirteenth Session, 20 February 2008.
195 Minutes of the Kenya National Dialogue and Reconciliation, Seventh Session, 7 February 2008.
196 Minutes of the Kenya National Dialogue and Reconciliation, Twelfth Session, 19 February 2008.

had equated it to "a power grab through the back door and a creation of two centres of power".[197]

The ODM believed the constitution permitted fragmentation because it authorized the President to assign powers vested in him to subordinate officers and institutions for legislative and other purposes. It was necessary, however, to provide assurances on security of tenure.[198]

The parties both agreed that the Head of Public Service would coordinate bureaucracy at permanent secretary level and the Prime Minister would coordinate at governmental and ministerial level.[199] The role and functions of the Prime Minister were ultimately defined in Section 4(1) of the National Accord and Reconciliation Act:

> "4.1. The Prime Minister:
>
> a) shall have authority to coordinate and supervise the execution of the functions and affairs of the Government of Kenya including those of Ministries;
>
> b) may assign any of the coordination responsibilities of his office to the Deputy Prime Ministers, as well as one of them to deputise for him;
>
> c) shall perform such other duties as may be assigned to him by the President or under any written law."[200]

Other issues

During the mediation, the ODM called for the creation of a clear mechanism of consultation that would allow the two Principals to work together.[201] A "consultation" mechanism was included in the National Accord and Reconciliation Act, giving form to the principle, articulated in the preamble, that "neither side is able to govern without the other and that there needs to be real power-sharing to move the country forward". Articles 4(2) and 4(5) state:

> "In the formation of the coalition government, the persons to be appointed as Ministers and Assistant Ministers from the political

197 *Daily Nation*, 19 August 2003.

198 *Supra* note 196.

199 Minutes of the Kenya National Dialogue and Reconciliation, Sixteenth Session, 25 February 2008.

200 The National Accord and Reconciliation Act 2008.

201 Minutes of the Kenya National Dialogue and Reconciliation, Thirteenth Session, 20 February 2008.

> parties that are partners in the coalition other than the President's party, shall be nominated by the parliamentary leader of the party in the coalition. Thereafter there shall be full consultation with the President on the appointment of all Ministers.
>
> The removal of any Minister nominated by a parliamentary party of the coalition shall be made only after prior consultation and concurrence in writing with the leader of that party."

The Prime Minister and Deputy Prime Minister acquired security of tenure by requiring that a vote of no confidence supported by a majority of all the members of the National Assembly would be necessary to remove them from office.[202] The essential purpose was to ensure that Prime Ministers could not be dismissed on a whim.

The allocation of ministerial portfolios was another contentious issue. ODM pushed for equal representation. However, Kofi Annan cautioned that balance and equity, not only numbers, should be considered.[203] It was finally agreed that "[t]he composition of the coalition government shall at all times take into account the principle of portfolio balance".[204] Gernot Erler, Minister of State of the Federal Republic of Germany, explained the concept of 'portfolio balance' when he briefed the negotiating team at the Kilaguni retreat. Under the terms of Germany's Coalition Agreement, portfolio balance was achieved in a department when one partner in the coalition held the post of Minister and the other had the right to choose that department's Permanent Secretary.

The parties agreed that the term of the new government could be for a full five years, making it possible to introduce extensive constitutional reform.[205]

The National Accord specified in Article 6 that the coalition would stand dissolved if:

(i) The Tenth Parliament was dissolved;

(ii) The coalition parties agreed in writing; or

(iii) One coalition partner withdrew from the coalition by a resolution of the highest decision-making organ of that party in writing.[206]

202 Article 4(4) of the National Accord and Reconciliation Act.

203 Minutes of the Kenya National Dialogue and Reconciliation, Twelfth Session, 19 February 2008.

204 Article 4(3) of the National Accord and Reconciliation Act 2008.

205 Minutes of the Kenya National Dialogue and Reconciliation, Thirteenth Session, 20 February 2008.

206 Article 6 of the National Accord and Reconciliation Act.

The National Accord and Reconciliation Act would remain valid unless the above requirements were met, or a new constitution came into force, whichever occurred first.[207]

A vital element of the Act is found in the last paragraph of its preamble: "A coalition must be a partnership with commitment on both sides to govern together and push through a reform agenda for the benefit of all Kenyans".

This statement underlined that the coalition had not been created as an end in itself, or to resolve a short-term political crisis. Its purpose was to implement reforms that the parties had agreed were essential to address the root causes of the violence.

The National Accord provided the coalition with a road map for returning the country to normalcy. It called for: (i) immediate action to stop violence and restore fundamental rights and liberties; (ii) immediate measures to address the humanitarian crisis, promote reconciliation and healing; and action to (iii) overcome the political crisis and (iv) address long-term issues. The agenda of (iv) covered: constitutional, legal and institutional reforms; land reform; youth unemployment; poverty, inequity and regional development imbalances; the consolidation of national unity and cohesion; and action to address impunity and promote transparency and accountability.

The parties to the coalition were expected to implement these reforms. Accordingly, on 30 July 2008, they adopted an implementation framework on long-term issues, which set out specific actions, timelines and focal points for reform. From then, the coalition was implementing this programme, albeit in a slow and uncoordinated manner until the end of its tenure.

The next section discusses political factors that shaped implementation of the reform agenda.

The National Accord in practice: difficulties of implementation and consequences

The National Accord established the posts of Prime Minister and two Deputy Prime Ministers. It stated that the Prime Minister was to be the parliamentary leader of the largest party or coalition of parties in the National Assembly and would coordinate and supervise execution of the functions and affairs of government. As a result, ODM's presidential candidate, Raila Odinga, filled this position. For the posts of Deputy Prime Minister, the PNU nominated Uhuru Kenyatta and the ODM Musalia Mudavadi.

207 Article 8 of the National Accord and Reconciliation Act.

The euphoria that followed signature of the National Accord faded quickly as the difficulties of working together in practice became evident.

Immediately, the Principals struggled to form a cabinet. The Panel had scarcely left Nairobi after crafting a political solution before it was asked to bring pressure to ensure its implementation. On 2 April 2008, Kofi Annan issued a press statement, as the Panel's chair, expressing his concern at the failure to compose and announce the government. Drawing attention to the spirit and letter of the National Accord and Reconciliation Agreement, he called on both leaders to agree on the number and composition of the government expeditiously, "since the main elements for concrete decisions already feature in the agreement". He called on them to "assume their joint responsibility and make decisions for the sake of Kenya, and hoped the Kenyan people would not be kept in suspense for much longer". The coalition was finally announced on 12 April and new ministers were sworn in on 17 April.[208]

On 18 April, in an article that was widely published, Kofi Annan wrote: "When I sat with the parties on 1 February, they agreed to a list of issues under Agenda Item 4 that must be addressed within one year from the beginning of the dialogue process. There is just a little more than nine months left to do that and, even if the tasks ahead seem daunting, the new government must seize the day and take advantage of this unique opportunity to get it right for Kenya."[209]

The coalition parties allocated cabinet positions on an equal basis, in accordance with the spirit of the National Accord, taking into account the principle of portfolio balance. Because hardliners in both parties were unhappy with its composition, however, running the government remained fraught with difficulties throughout its five-year term.

Disagreements and disputes between the parties did not necessarily reflect personal differences between the two Principals. This implied that it was necessary to articulate and explain the nature of the agreement between them, in terms that were more detailed than the National Accord.

Analysts have argued that the coalition's dysfunctional behaviour was due to the absence of a detailed coalition agreement, accompanying the National Accord. Such a document might have put to rest debates about the architecture of political power, the 'composition' of the government, and the meaning of 'portfolio balance'. A number of challenges did indeed arise. The ODM complained that portfolio balance favoured the PNU because the PNU had already taken control of strategic ministries before the National Accord was

208 Press Statement, 2 April 2008.

209 Kofi Annan, Kofi, article, 18 April 2008.

signed. Territorial conflicts between the offices of the Prime Minister, the Vice President, the Head of the Civil Service, and the Secretary to the Cabinet were obstacles to implementation of the Accord. The ODM also complained that it had been denied its quota of key public sector appointments and that decisions were made without involving it appropriately.

Against this argument, it may be said that the formation and functioning of the government was a Kenyan affair. The Panel simply provided a framework for developing a coalition agreement. In the circumstances, and given the scale of the reform agenda, it would have derailed the talks to press for a detailed coalition agreement.

During the mediation, Benjamin Mkapa noted that any agreement would be difficult to sell to constituencies and political principals,[210] and that the almost equal split in Parliament gave each side the power to veto a political settlement it did not like.[211] Nor could the protagonists agree on the composition of the governmental structure they would use to implement the reform agenda.

In many respects, the coalition that emerged represented a cease-fire arrangement. For this reason, it did not agree goals, objectives and procedures that are vital to the successful operation of a coalition.

Attempts were made to bind the coalition more closely together and create mechanisms to deal with disagreements. At the Twenty-Fifth Session of the Negotiating Team (17 April 2008), it was agreed that the team would prepare an agreement clarifying roles and relationships, draft a code of conduct, and define dispute resolution mechanisms for the coalition. A draft document was circulated to members for discussion on 2 May 2008, but was not subsequently considered, at least in the context of the mediation process.

The two Principals also anticipated challenges in executing the National Accord. Early in the coalition, they sought to ensure that the dialogue team would spearhead implementation of recommendations from the different commissions which the KNDR agreements generated. However, many senior politicians and cabinet ministers were uneasy about the dialogue team's perceived influence. Members of Parliament (MPs) were mobilized to defeat a bill on implementing IREC and CIPEV recommendations when it was presented to the Speaker's *Kamakunji* (an informal meeting of parliamentarians). Agreement was not reached until a Parliamentary Select Committee of 27 MPs drawn from the ODM and PNU took over from the dialogue team the constitution-making

210 Minutes of the Kenya National Dialogue and Reconciliation, Seventh Session, 7 February 2008.

211 Minutes of the Kenya National Dialogue and Reconciliation, Thirteenth Session, 20 February 2008.

process and appointments to several new commissions created after the National Accord was signed.

The inability of the coalition to institute an effective mechanism for resolving conflicts further hampered implementation of the reform agenda from 2008 until the mandate of the coalition came to an end.

As early as 17 March 2008, President Kibaki and Raila Odinga presented a report on National Reconciliation and Emergency Social and Economic Recovery. The report had been prepared by the Kenyan National Accord Implementation Committee, a bipartisan committee formed on 10 March 2008 that included five members from each party, none of whom had participated in the mediation process. The Committee had been asked, inter alia, to prepare "a programme of action of the Grand Coalition Government, including incorporation of the recommendations of the Mediation Committee and its auxiliary committees".[212]

On 15 January 2009, a new attempt was made to establish a Permanent Committee on Management of Coalition Affairs, composed of seven representatives from each side. However, it did not take off and had no impact on the running of the coalition's affairs. It held only two meetings, which attempted to agree on rules of engagement. Beyond that, it was unable to function.

Another ad hoc mechanism was conceived when the constitution was being drafted. A Grand Coalition Management Team was formed, co-chaired by the two Deputy Prime Ministers, to resolve disputes about constitutional proposals.[213]

None of these mechanisms were able to counteract forces that opposed cohabitation in the coalition cabinet that emerged after the National Accord. During its negotiation, the PNU had insisted that the cabinet should be limited in size, to give the President some latitude.[214] The size of the cabinet that took form (about 45 members) facilitated the emergence of conflicts and strengthened the perception that two governments were operating at the same time inside it. With the wisdom of hindsight, it would probably have been sensible to have imposed a ceiling on the cabinet's size. So large a cabinet created a patronage opportunity and hindered efficient and effective implementation of the reform agenda.

212 Panel of Eminent African Personalities, Fourth Progress Report to the Chairman of the African Union, 1 April 2008.

213 *Daily Nation*, 16 December 2009.

214 Minutes of the Kenya National Dialogue and Reconciliation, Thirteenth Session, 20 February 2008.

In addition, occasional open displays of disagreement between cabinet members immediately aroused lingering mistrust between the ODM and PNU and fears that it might undermine the reform agenda.

A key bone of contention in early days was the fate of young adults who had been detained during the post-election violence, many reportedly without charge. While some ODM members called for their unconditional release, some PNU members argued that all those who had perpetrated crimes should be subject to the law. This debate was partially resolved during the cabinet's second formal meeting (21 May 2008) when it decided that the police should categorize the offences of all those in custody according to their gravity, pending investigation and further consideration by the cabinet.[215]

Despite these problems, in January 2009 Kofi Annan felt able to give a positive assessment of the coalition's progress in implementing the National Accord. He wrote: "On 17 April 2008, the Coalition Government was formed. Its primary purpose: to address the root causes of the recurrent conflict in Kenya through the implementation of a coherent and far-reaching reform agenda. Since then – and in spite of occasional open displays of disagreement among some Cabinet members – the coalition has not fallen apart, as some sceptics had predicted. And as Cabinet worked to improve service delivery to the Kenyan people, a collaborative spirit showed signs of strengthening, particularly between President Mwai Kibaki and Prime Minister Raila Odinga, who are ably steering the Coalition Government in the spirit of partnership envisioned in the National Accord."[216]

The workings of the Coalition Government

From the moment the coalition formed, the parties had been sharply divided over how to address the post-election violence. These divisions prevented the government from developing an agreed position on accountability with respect to the scale and gravity of crimes that had been committed.

Although this debate was contentious, on 16 December 2008 the Principals nevertheless agreed on how CIPEV's recommendations would be implemented. They also agreed to establish a Special Tribunal by 1 February 2009.

However, attempts by the cabinet and Parliament to create the Special Tribunal failed. Parliament failed on three occasions to pass a motion to form that body. On 12 February 2009, the Constitution of Kenya Amendment Bill, 2009, which would have paved the way for the establishment of the Special Tribunal, was

215 Fifth Progress Report to the Chairman of the African Union, 7 July 2008.

216 Kofi Annan, article, 2 January 2009.

defeated in Parliament. On 14 July 2009, the cabinet rejected a new bill. On 30 July 2009, Parliament rejected a further new bill.

On 13 February 2009, the Panel said that Parliament's failure to pass the Constitution of Kenya Amendment Bill, 2009, was a setback both to implementation of CIPEV recommendations and efforts to end impunity in Kenya, which had been one of the objectives of the mediation process.[217]

Political divisions also affected the constitution-making process. The ODM's and PNU's disagreements over how the constitutional review process should proceed, and its outcomes, posed special difficulties. For example, while ODM advocated a parliamentary system with an executive Prime Minister, PNU supported a presidential system.

However, symbolic unity of purpose was demonstrated by the support which both President Kibaki and Prime Minister Odinga gave the new constitution. In a statement issued on 5 August 2010, after the constitutional referendum, the Panel commended the two Principals for their stewardship of the constitutional review process. They had marshalled the cabinet in support of the constitution and on 27 April 2010 the cabinet resolved to endorse the draft.[218] However, if the Principals showed unity of purpose, party differences among their supporters persisted. The PNU and ODM did not pull in one direction, even though both supported the draft constitution. The joint secretariat for the Yes campaign, formed by ODM and PNU, was split.[219] These differences made it impossible to launch an effective strategy for its adoption.

In addition, not all members of the coalition supported the document. Some were opposed, not to its content, but to alliances and realignments within the coalition that promoted the political ambitions of some members.[220] Others were indifferent to the draft because they felt that its passage would raise the political stock of rivals. For example, some PNU members felt that a Yes victory would advantage the ODM.[221] Because they perceived that the Prime Minister was dominating the Yes campaign, for example, in June 2010 politicians allied to the PNU formed a new alliance to campaign for the constitution. It was coordinated by Mandera MP Abdikadir Mohamed and Kinangop MP David Ngugi[222] but folded after it failed to attract key PNU leaders.[223]

217 The Panel, press statement, 13 February 2009.
218 *Daily Nation*, 28 April 2010.
219 South Consulting, July 2010.
220 South Consulting, July 2010; *Sunday Standard*, 9 May 2010.
221 South Consulting, July 2010.
222 *Saturday Nation*, 12 June 2010.
223 *Sunday Standard*, 13 June 2010.

At critical moments, the Principals sometimes managed to project an image of "a unified executive". They consulted regularly and on occasion both presented the government's policy on important national questions. Nevertheless, their working relationship did not improve relations between their respective parties. Politicians in the coalition continued to hold different views on issues that required a common government position.[224] Political competition and mistrust continued to influence the way in which technocrats from both parties related to one another and to the Principals.

This factionalism slowed implementation of the reform agenda. The government's legislative agenda was constrained, for example, because for two years the coalition could not fill the post of Leader of Government Business in the National Assembly. On occasion (for example, between February and March 2010), the cabinet was unable to meet to conduct business because of political tensions.

Despite mistrust and the absence of shared purpose within the coalition, whenever the two Principals resolved to work for the same goal, their efforts were crowned with success. The passage of the 2010 Constitution, in the face of opposition from both sides of the coalition, demonstrated this. The opposite was equally true, however. The most challenging moments for the coalition occurred when the Principals disagreed, and did so publicly, for prolonged periods of time. Their failure to agree paralyzed government and raised questions about the viability of the National Accord.

Appointments and dismissals were an obvious difficulty, which focused attention on the meaning of "consultation".

A crisis erupted on 14 February 2010 after the Prime Minister decided to suspend two members of the cabinet for three months, following claims of corruption against them. William Ruto (then Minister for Agriculture) and Sam Ongeri (then Minister for Education) were respectively implicated by a forensic audit (carried out by an international firm) into the purchase of subsidized maize and an internal auditor's report on Free Primary Education. The President, who did not support the Prime Minister's decision, overturned it the same day, arguing that the Prime Minister had exceeded his powers under the National Accord and had not consulted the President. On 15 February 2010, Attorney-General Amos Wako issued a press statement supporting the President's stance, having examined the provisions of the National Accord and Reconciliation Act.

224 South Consulting, June 2011.

> "By law, the power to appoint, unless otherwise expressly stated, includes the power by the appointing authority to exercise disciplinary control over the person so appointed, including removing, suspending, dismissing or revoking [the appointment of] such a person from office. The power to suspend, therefore, under the current Constitution as modified by the Act, can only be done after "full consultation". The authority "to coordinate and supervise" does not of itself confer a power to suspend."[225]

In response, the ODM appealed to the Panel and announced it would boycott cabinet meetings until the matter was addressed. On 18 February 2010, the Panel issued a press statement expressing concern at the impasse created and the effect it could have on implementing the National Accord. The Panel warned that progress achieved, particularly on constitutional, land and electoral reforms, could be reversed unless the disagreement was resolved.[226]

The Panel called on President Kibaki and Prime Minister Odinga to find a practical and workable application of the principle of collaboration; to affirm that alleged acts of corruption should continue to be investigated; and agree on the need to sustain joint efforts to implement the reform agenda.

Kofi Annan urged the coalition to focus on the difficult tasks ahead and re-dedicate itself to full and speedy implementation of the reform agenda for the sake of the prosperity and well-being of all Kenyans. He recalled the core principle of collaboration agreed to in the National Accord and exhorted the coalition to re-commit to it.

A similar situation arose in early 2011, after President Kibaki put forward the first nominations for constitutional offices created under the new constitution. On 28 January 2011, President Kibaki announced nominees for the posts of Attorney General, Chief Justice, Director of Public Prosecutions (DPP), and Controller of Budget. Soon after, the Prime Minister asserted that he had not been consulted as required by the National Accord. The Judicial Service Commission (JSC) and the Commission for the Implementation of the Constitution (CIC) issued public statements declaring that the President's action contravened the constitution. The political class divided.

On 31 January 2011, Kofi Annan, as the Panel's chair, issued a statement noting with concern the divergent positions of the two Principals. He recalled that the 2010 Constitution enshrined the National Accord and Reconciliation Act 2008, which included the principle of collaboration. He called on the two

225 S. Amos Wako, Attorney-General, press statement, 15 February 2010.

226 The Panel, press statement, 18 February 2010.

Principals to work together by means of transparent consultation, as required by the constitution, and urged them to make every effort to solve the impasse.[227]

The struggle that ensued delayed appointments to those offices for four months. Later, both the Speaker of the National Assembly and the High Court were petitioned to determine the constitutionality of the appointments. Both ruled that the nominations did not meet the requirements of the constitution. The High Court ruled that the appointments did not comply with Article 166(1) read together with Section 24(2) of Schedule Six of the Constitution and Article 27(3) on equal treatment of men and women. The Speaker ruled that a nomination procedure under which the Principals both sent to the House a list of nominees for constitutional office had not been contemplated by the National Accord and Reconciliation Act; since the latter is part of the constitution, the arrangement was therefore unconstitutional, and this could not be cured by any act of the House or its committees or by a vote on a motion in the House.[228] On 22 February 2011, the President therefore withdrew his proposed list of nominees.[229] The appointments were completed after selection panels nominated candidates and forwarded their names to the Principals for transmission to Parliament for vetting.

Implementing the KNDR agreements

To stabilize the environment within which the reform agenda was to be implemented, the government's first task had been to tackle the violence and the humanitarian crisis it caused. The initial objectives were to stop violence and provide assistance to, as well as resettle, Internally Displaced Persons (IDPs).

The coalition began by seeking to demobilize illegal militias and criminal gangs. Some progress was made in reining in the Mungiki and the Sabaot Land Defence Force (though operations against them were marred by allegations of human rights violations). Some IDPs were also resettled while others returned to their homes. By the end of December 2012, the government had disbursed

227 The Panel, press statement, 31 January 2011.

228 Speaker of the National Assembly, Ruling on Admissibility of Proposed Motions to Adopt the Reports of the Departmental Committee on Finance, Planning and Trade and the Departmental Committee on Justice and Legal Affairs on the Nomination of Certain Constitutional Office Holders, 17 February 2011.

229 Kenya National Assembly (2011), *The Constitutional Implementation Oversight Committee Report on the Approval of Dr. Willy M. Mutunga for Appointment to the Office of Chief Justice, Ms. Nancy M. Baraza for Appointment as Deputy Chief Justice and Mr. KeriakoTobiko for Appointment as Director of Public Prosecutions*, Nairobi: Government Printer.

KES10,000 per household to 170,058 households, and KES25,000 to 37,843 heads of households.[230]

After signing the National Accord, the coalition began implementing the reform programme identified by the KNDR. It established IREC and CIPEV and asked them to examine the circumstances that led to the 2007-2008 crisis, including actions and inactions, and identify measures to prevent its recurrence. IREC recommended that the Electoral Commission of Kenya (ECK) should be disbanded and called for electoral reforms and the appointment of an interim electoral body. CIPEV recommended the creation of a Special Tribunal to bring to account those who were most responsible for the violence.

The coalition implemented IREC's recommendations by dissolving ECK and establishing the Interim Independent Electoral Commission (IIEC). It also established a Committee of Experts (CoE), the Interim Independent Boundaries and Review Commission (IIBRC), and the Interim Independent Constitutional Dispute Resolution Court (IICDRC) – though it did so almost a year after signing the National Accord. The National Cohesion and Integration Commission (NCIC) and the Truth, Justice and Reconciliation Commission (TJRC) were also formed to promote healing and reconciliation as well as investigate long-standing human rights violations.

However, the coalition's inability to fully address Agenda Items 1 and 2 meant that the country continued to struggle with insecurity and IDPs, even after five years. The government failed to arrest, prosecute and punish members of militias, and these mutated into criminal gangs that were not entirely independent of the political patronage they had previously enjoyed, even when they became violently involved in resource-based conflicts.[231] New militias, such as the Mombasa Republican Council, the China Squad and the American Marines, emerged ahead of the 2013 general election. The police seemed unable to take effective action against them.

Although all official IDP camps had been closed, a significant number of displaced persons continued to live in 'transit' camps. A report released in April 2012 by the Parliamentary Select Committee on the Resettlement of IDPs in Kenya observed that, of 9,571 households in camps, only 2,287 had been resettled since 2008. In effect, over a period of five years about one quarter

230 Ministry of State for Special Programmes, "Press Release: Government not Discriminating against Displaced People", Republic of Kenya, 24 January 2013.

231 South Consulting, May 2009; Brown, S. (2011), "Lessons Learned and Forgotten: The International Community and Electoral Conflict Management in Kenya", in Gillies, D., (ed), *Elections in Dangerous Places: Democracy and the Paradoxes of Peace-building*, Montreal: McGill-Queen's University Press.

of IDPs had been resettled. The report found that the government's response – its delivery of security, food and non-food items, and shelter – had been haphazard and uncoordinated.[232] These conclusions were confirmed by the Kenya Human Rights Commission (KHRC) and the International Commission of Jurists–Kenya (ICJ-K). Their report, released in October 2012, noted that no comprehensive programme had been established to compensate victims, and that livelihood assistance (such as re-training and the provision of farm inputs) had been minimal.[233]

The Internal Displacement Monitoring Centre (IDMC) estimated that approximately 200,000 of the 350,000 persons who fled their homes as a result of the post-election violence had not returned.[234] A press statement released by the government on 24 January 2013 stated that 6,178 IDP households had been resettled.[235] The government undertook to ensure that all the remaining 735 IDP families would be resettled before it left office.[236]

Following its failure to set up a Special Tribunal, the coalition did not initiate other mechanisms to deliver justice and reparations to survivors and victims of crimes committed during the post-election violence. No member of the police has been convicted for such crimes, despite reports of 962 police shootings and evidence that police committed sexual offences.[237] Only four middle and lower-level perpetrators to date have been taken to court; these cases resulted in two convictions and two acquittals. On 13 February 2013, 19 victims and survivors[238] brought a case against the government[239] in the High Court for failing to investigate alleged extra-judicial executions (EJEs). Through the

232 Republic of Kenya (2012), *Report of the Parliamentary Select Committee on the Resettlement of the Internally Displaced Persons in Kenya*, Nairobi: Government Printer.

233 Kenya Human Rights Commission and International Commission of Jurists-Kenya (2012), *Elusive Justice: A Status Report on Victims of 2007–2008 Post-Election Violence in Kenya*, Nairobi: KHRC and ICJ-K.

234 United States Department of State (2013), *Country Report on Human Rights Practices for 2012*, Washington: Bureau of Democracy, Human Rights and Labour.

235 Office of the President, Ministry of State for Special Programmes, "Government Not Discriminating Against Displaced People", press statement, 23 January 2012.

236 Noah Cheploen, "IDPs promised land before poll," *Daily Nation*, 31 January 2013.

237 *Supra* note 233.

238 Hellen Oyuso, Eunice Orwa, Hudson Lumwaji, Vincent Koech, Daniel Kogei, MutaiKipng'eno, Winrose Sang, Alice Ochieng, Maurice Aluso, Walter Thabaka, Zakaria Anyanga, Tobias Odhiambo, Protus Obare, Bernard Rono, Nicholas Odhiambo, the Citizens Against Violence, Kalenjin Youth Alliance, South Rift Human Rights and Advocacy Centre, and the Independent Medico-Legal Unit.

239 The Attorney General, the Director of Public Prosecutions, the Independent Policing Oversight Authority, former Commissioner of Police Major General (rtd.) Hussein Ali, and former Administration Police Commandant Kinuthia Mbugua.

National Council on Administration of Justice,[240] the judiciary has only recently initiated plans to set up an International Crimes Division (ICD) to deal with middle and lower-level perpetrators.

Although the government managed to establish the NCIC and the TJRC, the goal of creating a cohesive and peaceful society remains elusive. The NCIC has yet to successfully prosecute hate speech or deter politicians from employing it, though it has investigated several politicians, musicians and local language radio stations. One case, that involved former Cabinet Minister Chirau Makwere, ended in an out-of-court settlement under which he was pardoned in exchange for a public apology.

Ethnic mobilization and polarization also remain obstacles to stability. Initiatives to address youth unemployment have not achieved sustainable results, mainly because they are temporary or are not well planned. No meaningful land reforms have been undertaken; a start has been made on implementing an automated land rate integrated system, cancelling title deeds that irregularly allocated land earmarked for public use, and rehabilitation of the Mau Forest.

The implementation of Agenda Item 4 is described in Chapter Nine, on the fruits of the new Constitution. At this point it suffices to note the effect of the coalition's lack of cohesion on constitutional implementation. Coalition partners and factions competed over which reforms to support. This slowed down the process at critical moments. Disagreements over the appointment of members were the main cause of delays. The parties sided with their Principal whenever disputes arose, irrespective of whether or not their positions reflected the constitution and law.

Despite the stresses of managing a coalition, the government achieved several important reforms under Agenda Item 4, including the promulgation of a new constitution that captured the aspirations of the Kenyan people, and the creation of independent institutions that enjoy public confidence. This was a real achievement, considering that many observers were sceptical that the coalition would last its term. Though implementation of the reform agenda should have held the coalition together, in practice elite self-interest did so.

Conclusion

Partisan attitudes between members of a coalition are a major obstacle to success. If parties agree to share power, they must find a way to shelve personal

240 The National Council on Administration of Justice, which was launched on 11 August 2011, is mandated to ensure that the administration of justice and reforms of the justice system occur in a coordinated, efficient, effective and consultative manner.

and party interest in favour of higher or larger objectives. In Kenya this was not adequately achieved and implementation of the KNDR agreements suffered accordingly.

A detailed plan of action, and analysis of responsibilities, might have helped the coalition government in Kenya to work more effectively. The KNDR did not achieve this objective and as a result the coalition frequently failed to resolve its internal disputes.

Mutual trust underpins the success of coalition governments. In Kenya's case, mistrust caused parties and factions to plot against one another rather than focus on delivering the agreements reached on Agenda Item 4, as citizens wanted.

Chapter Five

Reforming the Management of Elections in Kenya: IREC

"The conduct of the 2007 elections was so materially defective that it is impossible – for IREC or anyone else – to establish true or reliable results for the presidential and parliamentary elections."

– Final report of the Independent Review Committee (IREC), 17 September 2008

Introduction

An unprecedented number of election observers (24,063) were accredited to watch over Kenya's 2007 general election. Of these, 16,595 were local observers organized under the Kenya Elections Domestic Observation Forum (KEDOF). Six international groups sent missions: the European Union Election Observation Mission (EU-EOM); the Commonwealth Observer Group (COG); the East African Community (EAC); the Common Market for Eastern and Southern Africa (COMESA); the Pan African Parliament; and the International Republican Institute (IRI). The domestic team was funded under the Election Assistance Programme managed by the United Nations Development Programme (UNDP) and supported by the diplomatic missions of Canada, Denmark, Finland, the Netherlands, Norway, Sweden, the EU, the United Kingdom and the United States.

All the observers were united in finding that the conduct of the electoral process up to polling day was credible and that counting in the polling stations was technically professional. However, tallying, tabulation and the declaration of results did not meet international and regional standards of transparency. Neither did the independence of the elections administration, against the norms established in the International Covenant on Civil and Political Rights and the African Union Declaration on the Principles Governing Democratic Elections in Africa. On these grounds, observers declared that the 2007 general election in Kenya was not free or fair.[241]

Yet Kenya had been steadily reforming its election management systems over a long period. This chapter describes the historical background to election management in Kenya, and how the mediation team moved the focus of negotiations away from investigating what happened in the 2007 poll and towards finding solutions for the future.

Background

Kenya's independence constitution created an Electoral Commission. However, it played a limited role because the Office of the Supervisor of Elections (OSE), which administered elections, fell under the authority of the Attorney General. The Supervisor of Elections had powers to conduct elections and register voters, but his office was not independent. It did not have operational autonomy or security of tenure and relied on the provincial administration to provide officers to coordinate and conduct elections at local level. These officers were answerable to the Office of the President (OP) through the provincial administration's command structure.

Election administration reached its lowest point when queue voting (*mlolongo)* was introduced in 1988. Voters lined up at polling stations behind their preferred candidate or her/his symbol, and were counted manually, compromising the right to vote in privacy, by secret ballot. *Mlolongo* was associated with blatant

241 See: European Union Election Observation Mission (2008), *Kenya: General Elections 27 December 2007*, EU-EOM; Kenya Elections Domestic Observation Forum (2007), *Preliminary Statement and Verdict of the 2007 Kenya General Elections*, Nairobi: KEDOF; Commonwealth Secretariat (2008), *Kenya General Election 27 December 2007: The report of the Commonwealth Observer Group*, London: Commonwealth Secretariat; International Republican Institute (2008), *Kenya Presidential, Parliamentary and Local Elections December 27 2007*, Washington: IRI; East African Community Observer Mission (2008), *Report on Kenya December 2007 Elections*, Arusha: EAC; Kenya Human Rights Commission (2008), *Violating the Vote: A Report on the 2007 Elections*, Nairobi: KHRC; Human Rights Watch (2008), *Ballots to Bullets: Organised political violence and Kenya's crisis of governance*, New York: HRW.

abuse. In some instances, queues were under- or over-counted and candidates who were out of favour with the ruling party suffered discrimination.[242]

When multiparty politics resumed in 1992, Parliament abolished the Office of the Supervisor of Elections and the Electoral Commission of Kenya (ECK) became the sole body responsible for conducting elections. Commissioners were appointed to the ECK from 1992, but the commission's Secretariat did not take shape until 1998.[243] Commissioners were appointed at the discretion of the President, who had a direct interest and power to determine election dates.

Continued agitation for constitutional reform forced KANU, then the ruling party, to introduce some electoral reforms. An Inter-Parties Parliamentary Group (IPPG), composed of Members of Parliament from a range of parties, met to propose reforms before the 1997 general election. Some of its proposals became law in November 1997; others (relating notably to the composition of the ECK) were implemented as part of a 'gentleman's agreement' with the President and were never translated into law.

Some colonial-era laws, which had been used to restrict freedom of association, were repealed; ECK's membership was expanded; and a framework for comprehensive constitutional review was established. However, voter registration procedures that left between 2 and 4 million Kenyans without franchise were not addressed, nor was the issue of gerrymandering, and the powers of the Executive remained unchanged.[244]

ECK's commissioners conducted the 1992 and 1997 general elections assisted by staff from government agencies, departments and ministries. After pressuring the Treasury for resources, it established an independent secretariat in 1998. The number of permanent staff in the secretariat rose from 112 in 1998 to 448 in 2002.[245] ECK managed elections in Kenya until 2008, when it was disbanded at the recommendation of IREC.

Leading up to the 2007 general election

When Kenya went to the polls in December 2007, it possessed a workable but flawed legal framework for holding elections. This, combined with a pattern of lawlessness at election time, put in question ECK's capacity to guarantee a free and fair poll. It lacked a statute that clearly determined its

242 Kariuki, G. G. (2001), *The Illusion of Power: Reflections on fifty years in Kenya politics*, Nairobi: Kenway Publications, p. 117.

243 Independent Review Commission (2008), *Report of the IREC on the General Elections held in Kenya on 27 December 2007*, Nairobi: Government Printer.

244 Africa Policy Information Centre (1998), "Moving Towards Constitutional Reform in Kenya?".

245 *Supra* note 243.

composition, secretariat, funding, administration and general regulation. Transparency safeguards for tallying and publishing results were lacking. The ECK's regulatory authority was limited, and was not supported by robust legal powers. In particular, the ECK could not enforce its decisions. Its impotence when political parties and candidates flouted the Electoral Code of Conduct was widely criticized as the 2007 general election approached.[246]

As a result, ECK's authority and reputation were essentially determined by its 22 commissioners. The terms of fifteen came to an end during 2007. Without wide consultation, the President appointed 10 new commissioners in January and another five in October 2007. These appointments undermined ECK's standing as an independent body, and flew in the face of the 'gentleman's agreement' between the IPPG and the President, which required him to consult with opposition political parties when appointing ECK commissioners. By the time of the election, the President had appointed 19 of the 22 commissioners. At the 1997 election, ECK's commissioners had been far more representative.

One of the new commissioners appointed in 2007 was Kihara Muttu, who had previously acted as the President's lawyer. Most of the commissioners appointed in 2007 lacked experience in election administration. Only five had previously conducted a general election. A delay in re-appointing the ECK's chair further eroded public confidence; his tenure was finally renewed in December, just a few days before the poll.[247]

Credibility gaps in the 2007 elections

A series of incidents poisoned the political atmosphere before and during the election.

Before polling day, it was reported that some Administration Police (AP) officers had been deployed to certain parts of the country as party agents. Several were subsequently attacked by the public, and some died as a result.[248]

On Election Day, some voters failed to find their names listed in the polling stations where they were registered to vote. This was apparently caused by streaming arrangements that ECK had introduced to manage the numbers: voters had been moved from one polling station to another but the public had not been informed.

246 *Ibid.*

247 *Ibid.*

248 Report of the Independent Review Commission (Kriegler Commission), pp. 59, 96.

There were delays in announcing the results of the presidential race. Presidential ballots were usually counted and tallied before parliamentary ballots. When the presidential result was announced after the parliamentary results, including from areas considered to be strongholds of the incumbent president, it created suspicion in many parts of the country.

Two days after the vote, on 29 December, the ECK chair explained that he had lost contact with some of his Returning Officers (ROs), who had switched off their phones. He could not explain why delays had occurred in nearby constituencies such as Nairobi and Central Province. He added, on live television, that he hoped "the books were not being cooked".[249] His statement deepened unease.[250]

The aggregation of results at constituency tallying centres was delayed, inconsistent and lacked transparency in a number of constituencies. In Central Province, the majority of EU observers had difficulty obtaining results at polling stations. In several constituencies, the ROs refused to provide them. No detailed breakdowns of polling station results were posted at constituency level.

At the ECK's national tallying centre in Nairobi, the tabulation of results could not be observed properly because observers and party agents were unable to fit in the space allotted for this task. Constituency results were announced on the basis of telephone and telefax reports rather than official result forms as required by law. Inconsistencies were identified between presidential results announced at constituency level and results announced at national level.[251]

The management of counting, tallying and announcing results would later be roundly condemned for failing to protect the integrity of the electoral process, for both the presidency and parliament.[252] The ECK also failed to meet international and regional standards of transparency, because observers and party agents were denied full access to the tabulation of results at national and constituency levels. In some areas, agents were expelled from polling stations, in some cases at the time of counting. Agents were also not allowed to

249 International Crisis Group (2008), *Kenya in Crisis*, Africa Report 137, Nairobi/Brussels: ICG.

250 Odhiambo, E. (2009), "Consequences of a flawed presidential election", *Legal Studies*, 29:1.

251 European Union Election Observation Mission (2008), *Kenya: General Elections 27 December 2007*, Nairobi: EU-EOM.

252 Independent Review Commission (2008), *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007*, Nairobi: Government Printer.

accompany ballot boxes to the constituency tallying centres. ECK announced the final presidential result in the absence of certified constituency results.[253]

Official ECK results in a number of constituencies showed considerable and unlikely discrepancies between the presidential and parliamentary voter turnout.[254] Since this was observed primarily in President Kibaki's strongholds, many political parties, domestic and international observers, and ordinary voters concluded that ECK's personnel and commissioners had inflated Kibaki's vote at the national tallying centre in the Kenyatta International Conference Centre (KICC) in Nairobi.[255] In some instances, differences between the voter turnout for the presidential and parliamentary elections exceeded 10 per cent. Discrepancies were most evident in Embakasi, Msambweni, Kaloleni, Taveta, Central Imenti, Masinga, Machakos Town, Kirinyaga Central and Kajiado North.[256] The Independent Review Commission (the Kriegler Report) also observed that, in a number of constituencies, the sum of votes for all candidates did not tally with the number of valid votes.

At an ECK-sanctioned overnight scrutiny of the results with representatives of the two main political parties, agents of the PNU and ODM agreed that the results already announced in 44 constituencies were not credible because they were not supported by proper legal documentation. Results from an additional 19 constituencies were yet to be announced. The statutory Forms 16 and 16A, used to record results officially, signed by ROs and counter-signed by party agents, were missing. Other irregularities included inconsistencies between presidential and parliamentary tallies, and instances where the number of votes cast was higher than the number of registered voters.[257] The ECK chair would later admit that presidential results announced in 32 constituencies (roughly 15 per cent of the total) differed from the official returns from those constituencies.[258]

253 European Union Election Observation Mission (2008), Kenya: General Elections 27 December 2007, Nairobi: EU EOM; Independent Review Commission (2008), Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007, Nairobi: Government Printer.

254 Kanyinga, K., Long, J.D., Ndii, D. (2010), "Was it Rigged? A Forensic Analysis of Vote Returns in Kenya's 2007 Election", in *Tensions and Reversals in Democratic Transitions: Kenya 2007 General Elections,* Nairobi, Kenya: Society for International Development.

255 *Supra* note 251.

256 European Union Election Observation Mission (2008), *Kenya: General Elections 27 December 2007*, Nairobi: EU-EOM.

257 International Crisis Group (2008), *Kenya in Crisis*, Africa Report 137, Nairobi/Brussels: ICG; Kenya Elections Domestic Observation Forum (2007), *Preliminary Statement and Verdict of the 2007 Kenya General Elections*, Nairobi: KEDOF.

258 Independent Review Commission (2008), *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007*, Nairobi: Government Printer.

Abnormal and suspiciously high voter turnout figures were recorded in many constituencies that were dominated by one of the major parties. Voter turnout higher than 90 per cent was observed in a number of polling stations, mainly in Central, Rift Valley and Nyanza provinces. In Othaya, 16 polling stations reported a turnout of above 95 per cent, and one reported 100 per cent. In Gatundu South, one station reported a turnout of 100 per cent. In Kiharu, three polling stations reported turnouts of between 95.5 per cent and 98.2 per cent. In Ugenya, eight polling stations reported turnouts of between 95.8 per cent and 98.7 percent. In Baringo Central, 13 polling stations reported turnouts of more than 96 per cent, including five at 100 per cent. In Kericho, two polling stations reported turnouts of 96.5 per cent and 97.5 per cent. In Keiyo South, four polling stations reported turnouts of between 94.3 per cent and 98.5 per cent.

The ECK file for parliamentary results in Maragwa in Central Province indicated a 115 per cent turnout for the parliamentary elections. The ECK subsequently manually changed these results and reduced the turnout to 85.27 per cent.[259]

The absence of an effective electoral dispute resolution mechanism to adjudicate on challenges to the results from PNU strongholds added to tensions at the national tallying centre, which were not eased when the ECK chair and PNU's Martha Karua invited challengers to take their appeals to the courts. ODM made plain its distrust of the judiciary and insisted that its challenges should be resolved on the spot, even if this delayed the result.[260] Days before the election, President Kibaki had appointed five new judges in the run up to the elections, giving rise to the charge that he controlled the courts.

On 31 December 2007, a day after results were announced, four ECK commissioners (Jack Tumwa, David Ndambiri, Samuel arap Ng'eny and Jeremiah Matagaro) issued a press statement recognizing that "some of the information received from some of our ROs now cast doubts on the veracity of the figures".[261] They called for an independent inquiry to establish whether any of their colleagues had tampered with the presidential results before they were

259 European Union Election Observation Mission (2008), *Kenya: General Elections 27 December 2007*, Nairobi: EU EOM; International Crisis Group (2008), Kenya in Crisis, Africa Report 137, Nairobi/Brussels: ICG: Kenya Elections Domestic Observation Forum (2007), *Preliminary Statement and Verdict of the 2007 Kenya General Elections*, Nairobi: KEDOF; Independent Review Commission (2008), *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007*, Nairobi: Government Printer.

260 *Supra* note 251.

261 Jack Tumwa, D.A. Ndambiri, S.K. arap Ng'eny, and J. Matagaro, press statement, 31 December 2007.

announced. In Molo, they reported, information received from the RO after results had been announced cast doubt on the figures presented to the public.

On 1 January 2008, the chair added: "Concerns about these situations (turnout discrepancies and alleged irregularities) cannot be dismissed offhand. They call for investigation." He further stated: "If the parties in the dispute so agree, an independent impartial team of eminent men and women can be empowered to study and inquire into the whole matter. It should have the power to make a finding as to the effect of any anomalies it may find. Their decision should be binding on the disputing parties."[262]

On 2 January 2008, the chair admitted publicly that he had announced the results after coming under pressure from the main political protagonists. He added that problems had arisen in tallying the presidential results in Juja and Kieni constituencies, where results had been altered without the RO's countersignature.[263]

The Panel: beyond the electoral dispute to reform

Because the election triggered Kenya's crisis, discussion on how to resolve and surmount the dispute over the election result dominated the Kenya National Dialogue and Reconciliation negotiations.

The ODM had numerous grievances. It claimed the ECK had not conducted itself correctly in the run-up to the election. It challenged the appointment of commissioners, failure to consult on appointments, and the ECK's composition. It criticized the counting and tallying process. It criticized the lack of an appeal and dispute resolution mechanism, noting that Kenyans had not been able to secure the vote recounts to which they were entitled because it had not been possible to object formally and openly to the results, as required under the constitution. It complained that the ODM had been unable to petition formally for a fresh count because its candidates and agents had been refused access to the tallying centre in KICC, although the ECK was required to investigate any formal objections within 24 hours.

Unconvinced that the outcome of the presidential election was a true reflection of the will of Kenya's people, the ODM wanted redress and to raise fundamental issues so that a lasting solution could be found. Arguing that it was unprecedented for the President's party to be in the minority in the House,

262 International Crisis Group (2008), *Kenya in Crisis*, Africa Report 137, Nairobi/Brussels: ICG; SM Kivuitu, Chair, Electoral Commission of Kenya, "Parliamentary election results", press statement, 1 January 2008.

263 Isaac Ongiri, "I acted under pressure, says Kivuitu," *The Standard*, 2 January 2008.

the party suggested that the first step would be to admit that there had been a problem with the result, before agreeing whether to hold a rerun or find a different option.[264]

The PNU agreed that the President had appointed ECK's commissioners and that the electoral changes of 1997 had been introduced through a gentleman's agreement because the ruling party at the time did not wish to enshrine them in law. It argued that the membership of ECK had increased to accommodate the opposition; but, after some MPs had crossed the floor, balanced representation became more difficult and the governing party had been left to make all the appointments.

The PNU agreed with the ODM that the electoral laws required amendment. Reforms should enable courts to process electoral petitions faster. However, it expressed deep misgiving about proposals to rerun the election. The PNU disagreed that problems had occurred during the run-up or voting, but accepted that errors had arisen in tallying. It noted that the number of polling stations had more than doubled for the 2007 election, and argued that, tallying apart, the ECK had discharged its mandate genuinely and seriously.[265]

At the Panel's request, both teams presented their positions on how to address the challenges that had arisen from the 2007 election. It stressed that all options should be put on the table. The PNU called for a vote recount, the establishment of an independent electoral review commission, and a rerun of the presidential election, and suggested how these actions might be implemented. The party stressed that an independent electoral review commission option should include international jurists.

The ODM proposed two options: a recount or a rerun. Options that it considered but did not adopt included a rerun pitting the two leading presidential candidates against one another, a re-tally of the Forms 16 and 16A, a forensic audit of the presidential elections, and a court determination of the dispute.[266]

Kofi Annan urged the parties not to dwell on history, but to look forward to solutions.[267] He recalled points of agreement and encouraged both sides to avoid revisiting issues that had been concluded. He moved quickly beyond the question of who had won the elections, which dominated the initial exchanges,

264 Minutes of the Kenya National Dialogue and Reconciliation, Fifth-Seventh Session, 5-7 February 2008.

265 *Ibid.*

266 Minutes of the Kenya National Dialogue and Reconciliation, Fifth-Seventh Session, 5-7 February 2008.

267 *Ibid.*

by recalling that both parties had accepted that the presidential election result was disputed.[268,269]

After oral and written presentations by both sides, Kofi Annan identified the areas of convergence. Both parties agreed that the result had been extremely close, raising the question of how comprehensive an acceptable scrutiny of the 2007 presidential ballot papers would need to be. Each alleged some malfeasance by the other at polling stations, each lacked confidence in some aspects of the ECK, and both were willing to accept some form of review. Both sides, finally, had agreed on the need for constitutional, legal and institutional reforms.

The Panel distributed an electoral best practice paper, which presented the various options available to both sides. The two sides then began to consider the options systematically.[270]

Options

It was acknowledged that the ECK would need to be reformed before a recount could be held. Both sides would need to agree on its composition. It would also be necessary to increase confidence in the security of ballots, and make them more accessible.[271] The PNU noted that any commission to oversee the count would have to be widely accepted, and should perhaps include distinguished jurists from the Commonwealth.

The PNU further argued that re-tallying the official result forms, though provided for in law, needed to be undertaken within 24 hours of the result being announced. Undertaking a re-tally later than this would be outside the law.[272]

It was agreed that a forensic audit could be combined with a larger process that examined other issues. It could therefore be the basis for a future reform programme.[273]

The possibility of an independent judicial commission was argued. Kofi Annan reiterated that it would be an abdication of responsibility to agree that it was necessary to review who had won and lost. He instead proposed, lest the naming of the commission obfuscate the intent, that it be referred to as an independent review committee, which would look at the elections to see what

268 Minutes of the Kenya National Dialogue and Reconciliation, Fifth Session, 6 February 2008.
269 This was a reference to Agenda Item 3 in the Annotated Agenda, agreed on 1 February 2008.
270 Minutes of the Kenya National Dialogue and Reconciliation, Fifth-Seventh Session, 5-7 February 2008.
271 *Ibid*.
272 *Ibid*.
273 *Ibid*.

had gone wrong and offer possible corrective measures for future elections.[274] Calling IREC a committee would indicate that its work was different from the three other commissions (CIPEV, TJRC and NCIC) in terms of approach, time-frame and nature of work. IREC's mandate was more limited in scope and, therefore, expected to deliver its report within a shorter time.[275]

Attention then focused on three options: a run-off between the two main presidential candidates; a rerun in which all the presidential candidates in the December 2007 poll would take part; and fresh elections, in which new candidates might stand.[276] When considering these options, it was recognized that holding a snap election in the prevailing climate would be irresponsible. Nobody advocated doing so. Holding new elections would therefore make it necessary to establish an interim power-sharing arrangement to manage the country until elections could take place.

Mention of a political solution led the PNU to consider afresh the possibility of a recount. However, the Panel emphasized that the situation in the country would not permit a rapid recount, and some electoral reform would be required before it could be done. Shifting the discussion from the implications of a rerun (namely transitional arrangements) to technical issues, it recalled Jenness to explain that, based on practice elsewhere, the UN estimated that a recount would take a minimum of two to three months.

When some members of the negotiating team argued that it would only take one to two days, Kofi Annan recalled the other major issue associated with a recount: which body would control the process.

Graça Machel presented a further argument. She recalled that the parties had agreed to establish an independent review committee to examine all aspects of the election, and asked whether a recount was necessary if the committee would report on the truth of what happened.

Returning to the issue of a rerun, Benjamin Mkapa noted that, like the original election, a rerun too might be disputed. He therefore wondered whether it would be wise to rerun the election without some prior constitutional reform.

On 11 February, before departing for the Kilaguni retreat, Kofi Annan gave one of his most important summaries of where the parties stood on the disputed presidential elections. He noted that they had concluded that no viable way existed to ascertain the truth quickly, by re-tallying, recounting or a similar

274 *Ibid.*
275 *Ibid.*
276 *Ibid.*

measure. At the same time, it was accepted that the truth should not be swept under the carpet because there was a genuine need to understand what had happened. For this reason, the parties had agreed to establish an independent review committee to investigate all aspects of the 2007 presidential election. He reiterated that such a committee would not make a pronouncement on the outcome, but would determine what had gone wrong and recommend steps to improve future electoral processes. In Kofi Annan's view, this would end the controversy, and for that reason he would not wish to return to issues of recounting and re-tallying. The committee offered a more complete way forward.

Following this introduction the negotiating team drafted an agreed statement on the independent review committee. It affirmed that the committee would commence its work on 15 March 2008, and report in two to six months. Its report would be published within 14 days of submission (see IREC, below).

The statement of 14 February on Agenda Item 3 also included an analysis of all the solutions that the negotiating team had reviewed, leading them to conclude, by patient elimination, that a political solution was required, not only as an option of last resort, but to make the reforms required to ensure that future electoral contests would be deemed fair by all sides.

The single most powerful argument voiced against a rerun was that it was impossible to repeat the election freely and fairly in the prevailing circumstances.[277]

IREC's review

The Independent Review Commission (IREC; also referred to as the Kriegler Commission) was established by the government in February 2008 to inquire into all aspects of the 2007 general elections with particular emphasis on the presidential election.

It was asked to: analyze the constitutional and legal framework for the conduct of elections; examine all aspects of the preparedness of the ECK and its methods of conducting elections; examine public participation in the electoral process; investigate all aspects of the 2007 electoral operations; investigate vote counting and tallying for the entire election; assess the functional capacity of the ECK and its capacity to discharge its mandate; and make findings and recommendations to improve the electoral process in the future.[278]

277 Minutes of the Kenya National Dialogue and Reconciliation, Fifth-Seventh Session, 5-7 February 2008.

278 African Union Panel of Eminent African Personalities and Kofi Annan Foundation (2010), "Independent Review Commission: terms of reference", *Kenya National Dialogue and Reconciliation: Basic documents*, Nairobi: AU and KAF.

IREC had seven members, including four Kenyans, two of whom were nominated by the PNU and two by the ODM. After consulting the teams, the Panel appointed three international experts. Their inclusion was designed to secure IREC's public acceptance and provide international experience. The members were Johann Kriegler (Chair), Lady Justice Imani Daudi Aboud, Francis Ang'ila, Horacio Boneo, Lucy Kambuni, Professor Marangu M'Marete and Catherine Mumma. Jorgen Elklit acted as secretary.[279]

IREC concluded that the conduct of the 2007 general election was so flawed that it was impossible to establish true or reliable results of the presidential and parliamentary election. The system of tallying, recording, transcribing, transmitting and announcing results was conceptually defective and poorly executed. The country's constitutional and legal framework on elections contained weaknesses and inconsistencies. IREC stated that the country's electoral management and the institutions in which it was anchored should be thoroughly overhauled.[280]

IREC also found that the ECK lacked independence and operational capacity because of its organizational structure, composition and management systems. It criticized the political parties and the media, and noted "serious anomalies" in the delimitation of constituencies which caused evident gross disparities in their voting populations.[281]

IREC recommended radical reforms. It called for urgent executive, legislative and political measures that would enable a newly reconstituted electoral body to perform its essential functions, and would create and sustain public commitment to electoral integrity. This required relevant legal reforms and the adoption of a new voter registration system.[282]

Some stakeholders felt that IREC did not sufficiently address the root causes of the electoral crisis. Kenyans for Peace with Truth and Justice (KPTJ), for example, criticized IREC on a range of counts. They asserted that IREC had failed to summon Returning Officers from 49 constituencies to explain anomalies ranging from the alteration of documents to filing improper election returns. It had not summoned all the ECK commissioners and staff at the nerve centre of the discredited tallying process. It had listened only to the ECK chair, one commissioner and 10 staff and, for corroboration, had taken evidence

279 The foreign experts were Johann Kriegler, a retired judge from South Africa, Imani Dudi Aboud, a judge in Tanzania, and Horacio Boneo, an experienced electoral advisor from Argentina and former head of the United Nations Electoral Assistance Division.

280 *Supra* note 251.

281 *Ibid.*

282 *Ibid.*

from only one domestic election observer. It had not examined allegations of a break-in at the tallying centre in the Kenyatta International Conference Centre (KICC) on or around 31 December 2007 (recorded at KICC police station). It had not given attention to allegations that local officials had issued identity cards to schoolchildren, so they could vote; or claims that Presiding Officers had neglected to accompany ballot boxes; or allegations that fake or parallel ballot papers had been circulated. It had not investigated claims that security agents were deployed to rig the election.[283]

Notwithstanding these criticisms, the report remains the most detailed forensic audit and independent study of an election and election system anywhere in the world.

Acting on IREC's recommendations, Parliament repealed Section 41 of the constitution in 2008, and disbanded the ECK. It established an Interim Independent Electoral Commission (IIEC) under Section 41(a) of the constitution, and an Interim Independent Boundaries Review Commission (IIBRC) to review constituency boundaries under Section 41(b).

The IIBRC

The Interim Independent Boundaries Review Commission of Kenya (IIBRC) was established by an Act of Parliament on 12 May 2009, and asked to review existing constituency boundaries to ensure they were balanced in size and population, taking account of factors including ease of communication, communities of interest, population density and population trends.

The IIBRC's task was to correct gerrymandering, which had contributed to the 2007 electoral crisis. IREC's report had noted gross disparities in voting populations and the size of Kenyan constituencies. The number of voters in Embakasi constituency was 3.5 times larger than the average, for example, while Lamu East had just one fifth of the average. As a result, the ballot cast by a Lamu East voter was 19 times more influential than that of a voter in Embakasi. IREC concluded that such wide disparities existed nowhere else in the world. They breached the equality principle of democracy, articulated in the constitution as "one person, one vote", impaired the integrity of the electoral process, and contributed to defects and delays in tallying, recording, transcribing and transmitting results. Delays in announcing the results from

283 Kenyans for Peace with Truth and Justice (2008), *Truth and Justice Digest*, Issue Number 04/08, October 2008, Nairobi: KPTJ.

large constituencies also heightened the explosive political mood that overtook Kenya during elections.[284]

IIBRC's report eventually remained unpublished, due a series of disputes. First. the Government Printer failed to publish the report within the required time. Then IIBRC's standing to publish its report was contested, on the grounds that it was mandated only to report to Parliament. The High Court subsequently barred the Commission from publishing information on a number of constituencies because it had not detailed constituency and ward boundaries, as required by the constitution.[285] Finally, IIBRC's analysis of population density, population trends, means of communication and communities of interest was challenged,[286] and it was accused of using skewed population data that favoured certain regions.[287]

IIBRC's term expired before the suit could be heard. The Parliamentary Committee on Justice and Legal Affairs, which received IIBRC's report on 27 November 2010, subsequently took over control of the process, and a fifth schedule was introduced in the Independent Electoral and Boundaries Commission Act that set out guidelines on the review of boundaries. After the committee presented its own report to Parliament on 16 December 2010, the IIBRC's report was adopted. However, it was widely perceived that the IIBRC had not completed its mandate, and the Independent Electoral and Boundaries Commission (IEBC) was therefore asked to address issues emerging from its report.[288]

The IIEC

The Interim Independent Electoral Commission (IIEC) replaced the ECK. It was gazetted on 8 May 2009 with a two-year mandate and closed when the permanent commission, the IEBC, came into being.

The IIEC was tasked to reform the electoral process and institutionalize free and fair elections. It was required to set up an efficient and effective secretariat, conduct fresh voter registration and develop a modern system of

284 Interim Independent Boundaries Review Commission (2010), *Report of the IIBRC: Delimitation of constituencies and recommendations on local authority electoral units and administrative boundaries for districts and other units*, Nairobi: Government Printer; Independent Review Commission (2008), *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007*, Nairobi: Government Printer.

285 Media Development Association (2012), *Katiba News: The Birth of a New Republic*, Nairobi: MDA; EM Gekara, "New boundaries haunting Ligale", Daily Nation, 27 November 2010.

286 Independent Electoral and Boundaries Commission (2012),*The Revised Preliminary Report of the Proposed Boundaries of Constituencies and Wards (Volume 1)*, Nairobi: Government Printer.

287 *Supra* note 284.

288 *Supra* note 285.

collecting, collating, transmitting and tallying electoral data. In addition, it was asked to organize and facilitate a referendum on the draft constitution.[289] Its commissioners were competitively recruited by the Parliamentary Select Committee on the Constitution and approved by the National Assembly before formal appointment by the President in consultation with the Prime Minister.

The IIEC recorded several achievements. It established a professional, effective and efficient secretariat. It also recruited a permanent cadre of constituency election coordinators who double up as Returning Officers during elections.

A key finding of IREC was that there were serious defects in the voter register, which impaired the integrity of the 2007 election. The register excluded nearly one third of eligible voters, particularly women and young adults, and included the names of some 1.2 million dead people.[290] IREC recommended establishing a new register and a fresh registration drive was organized from 22 March to 9 May 2010. In all, the IIEC aimed to register 10 million voters in 192 constituencies (8.2 million manually and 1.8 million electronically), using Optical Marker Recognition technology which converts manual into electronic data. In fact 12,470,433 voters were registered, representing 62 per cent of the total eligible population. In terms of gender, 51 per cent were male and 49 per cent female. At the close of registration, 1.6 million voters had been registered electronically in selected constituencies.[291]

The IIEC also developed a modern system for collecting, collating, transmitting and tallying electoral data, and strengthened communication between headquarters and field offices by adopting a virtual private network, using a BlackBerry mobile phone system.

Though the referendum on the draft constitution was successful and those campaigning against its passage accepted defeat, one major weakness in the process went unnoticed. This subsequently became the Achilles heel of the 2013 general election. The IIEC's servers collapsed while the referendum results were being transmitted, at a moment when the No side was ahead after a handful of polling stations had reported. Electronic transmission was subsequently restored, but no lessons were learnt from this failure, nor were measures put

289 United Nations Development Programme (2010), *Final Narrative Report of Support to Electoral Reforms and Constitutional Processes in Kenya: Implementing period April – December 2010*, Nairobi: UNDP.

290 Independent Review Commission (2008), Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007, Nairobi: Government Printer.

291 Interim Independent Electoral Commission (2011), *Exit Report*, Nairobi: IIEC; Vergniault, S., and Oloo, A. (2011), *Report of Evaluation of UNDP Support to Electoral Reforms and Constitutional Referendum Project in Kenya*, Nairobi: UNDP.

in place to prevent such failures in the future. Needless to say, the electronic transmission system failed again during the 2013 general election.

The IIEC also sought to address the role of the media in elections. They were considered to have played a harmful role in the disputed 2007 general election, and to have been guilty of partisan reporting, bias, factual inaccuracy, uncritical reporting of results and hate speech. The IIEC developed guidelines for the media and engaged with them at every level. Media workers were trained to report on voter registration, referendum symbols, and voting, counting, collating, tallying and declaration of results. The value of this work was evident during the referendum and various by-elections. The media helped considerably to raise voters' awareness.[292]

The absence of an effective electoral dispute resolution mechanism was another anomaly IREC had identified. The IIEC was mandated to resolve minor disputes according to the law, but no legislation existed. The IIEC's Elections Committee transformed itself into a Dispute Resolution Committee. Consultative meetings with the Electoral Institute for Sustainable Democracy in Africa (EISA) led it to convene Conflict Management Panels (CMPs) in eight regions, while a national panel composed of eminent personalities was formed to oversee their work. Nine CMPs were convened: in Nairobi, Coast (Mombasa), Rift Valley (Nakuru and Eldoret), Western (Kakamega), Nyanza (Kisumu), Eastern (Embu), Central (Nyeri), and North Eastern (Garissa). The members of CMPs came from the provincial administration, the police, county councils, NGOs, the private sector, the IIEC, and EISA staff. Various interest groups, including youth, women, political parties and religious organizations were also represented. In each CMP a multi-sectoral group of 13-15 individuals was elected to serve as mediators. EISA and IIEC acted as focal points for their activities; EISA, in partnership with the IIEC, trained all 139 mediators in the eight regions.[293]

The IIEC nevertheless experienced challenges during the referendum, including with voters' interpretation and use of symbols. During polling, it was observed that an unusually large number of voters received assistance, even though the ballot paper had only two choices. In addition, a high number of votes were rejected. As noted, server overload delayed the transmission of results.[294]

As the IIEC gave way to its successor, some commissioners were embroiled in turf wars with the secretariat over their roles in the execution of the

292 *Ibid.*
293 *Op. cit.*
294 *Op. cit.*

IIEC's mandate. There were also allegations of political bias against some commissioners. Both may have contributed to the fact that only two of the nine IIEC commissioners were reappointed to the Independent Electoral and Boundaries Commission (see Chapter 13). Three former IIEC commissioners played active political roles in the run-up to the 2013 general election.

Conclusion

The IREC report was forward-looking and made recommendations which were very useful in reforming Kenya's electoral system.

A recurrent problem (in Africa as well as Kenya) is that election reforms often focus solely on election day, whereas the integrity of elections depends on managing the complete electoral cycle. Most elections are won and lost before a vote is cast.

It was not easy for IREC to call for an overhaul of the ECK, because the verdict of the ECK in the 2007 election had favoured a member party in the coalition government. The parties in the coalition reacted differently to IREC's report. The ODM called for its implementation, while the PNU called for caution, particularly in overhauling the ECK.

However, without IREC's report, no-one would have known about the inner workings of the electoral management body or how potentially explosive it was and would have continued to be. IREC remains the most detailed forensic audit and independent study of an electoral system undertaken anywhere in the world. It created a foundation for far-reaching reforms that have guided reform on electoral preparedness.

It should be noted, finally, that reports on electoral reforms should be undertaken, completed and implemented well in advance of major elections.

Chapter Six

Accountability for Post-Election Violence

"Bringing to justice those responsible for the post-election violence is essential to help Kenya heal its wounds, and prevent such crimes from being committed again. In doing so, we must understand that no single community or group is being targeted. It is about bringing individuals to account for crimes they may have committed and ensuring that the victims receive justice."

– Kofi Annan speaking at the Conference "The Kenya National Dialogue and Reconciliation: Two Years On, Where Are We?", Nairobi, 2 December 2010

Introduction

After the restoration of multiparty politics in 1992, unpunished violence characterized every Kenyan election. Despite detailed documentation by civil society organizations and official commissions of inquiry, the Kenyan government consistently failed to punish perpetrators of election-related violence, creating a culture of impunity.[295] This was again evident in the lead-up to the 2007 general election.

295 For the history of violence in Kenya, and official responses to it, see: Republic of Kenya (2008), *Report of the Commission of Inquiry into the Post-Election Violence (CIPEV)*, Nairobi: Government Printer; Kenya Human Rights Commission (1998), *Killing the Vote: State sponsored violence and flawed elections in Kenya*, Nairobi: KHRC; National Council of Churches of Kenya (1992), *The Cursed Arrow: A report on organised violence against democracy in Kenya*, Nairobi: NCCK; Human Rights Watch (1993), *Divide and Rule: State-sponsored ethnic violence in Kenya*, New York: HRW; Republic of Kenya (1992), *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*. Nairobi: Government Printer; Republic of Kenya (1999), *Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya*, Nairobi: Government Printer.

Hate speech was a specific concern, particularly on local language radio stations. The 2006 review of Kenya for the African Peer Review Mechanism (APRM), which Graça Machel headed, warned of this danger.[296] Before leaving Kenya, she met with President Kibaki and gave him a letter in which she likened the hate speech she had heard to that in Rwanda.[297]

The scale and spread of the violence in January 2008 nevertheless surprised and shocked both Kenyans and international observers.[298] The UN High Commissioner for Human Rights sent a team to investigate, which urged the prosecution of perpetrators.[299] The negotiating team subsequently agreed that prosecutions should be encouraged.[300]

Violence continued during the KNDR negotiations. The Panel asked for regular updates on the violence and displacement, and invited Abbas Gullet, Secretary-General of the Kenya Red Cross Society (KRCS), and Elizabeth Lwanga of the United Nations Development Programme (UNDP) to brief the negotiating teams. Recognizing the need to defuse tensions,[301] the teams agreed to encourage IDPs to return to their homes, to advocate their safe passage and security, and to augment efforts to provide basic services to those who had been displaced.[302]

Parties to KNDR also undertook to investigate the circumstances leading to the post-election violence and recommend measures to bring to justice those responsible for criminal acts. This commitment was not only a fulfilment of obligations under various human rights treaties and conventions to which Kenya had subscribed, but was a crucial step towards ending its culture of impunity and ensuring long-term stability in the country.[303]

This chapter does not describe the violence that took place before, during and after the 2007 elections (see Chapter One for an overview). It describes the efforts made, through the KNDR, to end impunity in Kenya, establish accountability and the rule of law, and protect Kenya's people from a recurrence of sectarian violence during elections and at other times.

296 Oral Interview, Graça Machel, 6 December 2011.

297 *Ibid*.

298 United Nations Office of the High Commissioner for Human Rights (2008), Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008, Geneva: OHCHR.

299 Minutes of the Kenya National Dialogue and Reconciliation, Fourth Session, 4 February 2008; Minutes of the Kenya National Dialogue and Reconciliation, Eighth Session, 8 February 2008.

300 Kofi Annan, press statement, 4 February 2008.

301 Minutes of the Kenya National Dialogue and Reconciliation, Fourth Session, 4 February 2008.

302 *Supra* note 299.

303 Letter from the Panel to the Principals, 22 June 2009.

CIPEV

As a first step, the parties resolved on 4 March 2008 to establish a Commission of Inquiry into the Post-Election Violence (CIPEV). The commission, a non-judicial body, was asked to gather evidence on the events surrounding the elections and investigate the violations that occurred.[304]

CIPEV's inquiry was small in scale because its recommendations were expected to feed into the work of the Truth, Justice and Reconciliation Commission (TJRC), which would have the task of examining historical grievances (see Chapter Seven).[305]

Specifically, CIPEV was mandated to: (i) investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 presidential election; (ii) investigate the actions or omissions of Kenya's security agencies during the course of the violence, and make recommendation as necessary; and (iii) to recommend measures of a legal, political or administrative nature, as appropriate, including measures with regard to bringing to justice those persons responsible for criminal acts.

Its final report was to be submitted to the President, with a copy to the Panel. The main findings were to be made public within 14 days of submission, though certain aspects of the report or annexes might remain confidential in order to protect the identity of witnesses or persons accused. It would be published and tabled in Parliament in accordance with the Commissions of Inquiry Act of Kenya.[306]

The commission had three members. Two international experts, Gavin McFadyen (a former Assistant Commissioner of Police from New Zealand)[307] and Pascal Kambale (a human rights lawyer from the Democratic Republic of Congo), were selected by the Panel after consultation with the parties.[308] The Kenyan member, Chair Justice Philip Waki (a Court of Appeal judge) was jointly chosen by the parties.[309]

CIPEV started its work on 23 May 2008 and was sworn into office on 3 June 2008. Its initial mandate of three months was extended for an additional one month and then an additional two weeks to draft its report. Because of its limited

304 Minutes of the Kenya National Dialogue and Reconciliation, Nineteenth Session, 3 March 2008.
305 Agreement on the Commission of Inquiry for Post-election Violence, 4 March 2008.
306 Minutes of the Kenya National Dialogue and Reconciliation, Twentieth Session, 4 March 2008.
307 Minutes of the Kenya National Dialogue and Reconciliation, Twenty-Fourth Session, 2 April 2008.
308 *Ibid.*
309 *Ibid.*

remit, CIPEV did not have the time to examine all the areas where allegations of crimes had been made. It interviewed government officials, representatives of the main political parties, security agents, non-governmental organizations (NGOs), representatives of religious and faith-based organizations, and ordinary citizens, in public and closed hearings.[310]

It submitted its final report to the two Principals on 15 October 2008. Like the Independent Review Commission (IREC), the report was also given to the Panel (17 October) to guard against non-publication and non-implementation.[311] In November 2008, the cabinet adopted the report and an eight-person cabinet committee headed by the President and Prime Minister laid out an implementation framework.[312]

The report noted that post-election violence in 2007 resembled the politically-instigated, so-called ethnic clashes of the 1990s and reflected the institutionalization of violence in Kenya over many years. Armed militias that flourished in the 1990s had not been demobilized, and it was easy for political leaders and private individuals to put them to violent purposes. The violence itself involved systematic attacks on Kenyans based on their ethnicity and perceived political leanings. Attackers organized on ethnic and political lines, assembled considerable logistical resources, and travelled long distances to burn houses, maim, kill and sexually assault people because they belonged to particular ethnic groups or were assumed to be of certain political persuasions.[313]

The commission recommended that, to end impunity, which it put at the heart of the post-election violence, a Special Tribunal should be established to investigate and prosecute suspected perpetrators of crimes committed during the crisis. The commission further recommended that the parties should sign an agreement to establish the tribunal no more than 60 days after the Principals and Panel received its report, and should enact an International Crimes Act no more than 45 days after signing that agreement. The commission indicated that it would pass the matter to the International Criminal Court (ICC) for investigation and prosecution if these recommendations were not taken forward,[314] and would follow the same course if the Crimes Act was not implemented after its passage, or its implementation was subverted.[315] By

310 Letter from CIPEV to the President, Minister of Justice and the Panel, 3 July 2008.

311 Republic of Kenya (2008), *Report of the Commission of Inquiry into the Post-Election Violence (CIPEV)*, Nairobi: Government Printer.

312 South Consulting, May 2009; Agreement for implementation of the CIPEV recommendations, signed by the President and Prime Minister, 16 December 2008.

313 *Supra* note 310.

314 *Op. cit.*

315 *Op. cit.*

providing a timeline, the commission established a threshold for determining Kenya's willingness to investigate and prosecute.

Early on, the negotiating team had expressed concern that so few prosecutions had occurred, given the scale and gravity of the violence and the fact that crimes had been committed in full view of the media.[316] It was also concerned by the degree to which violence had been organized, which some believed implied considerable financing by individual politicians and the state.[317]

CIPEV and the ICC

Even before the Grand Coalition Government formed, the PNU and ODM had differed sharply on how to address the post-election violence. During the mediation, at least one member of a negotiating team openly accused another of direct involvement. The emotion surrounding this issue fractured the coalition and prevented it from developing a shared approach to accountability.

On 16 December 2008, nevertheless, President Kibaki and Prime Minister Odinga formally undertook to implement the commission's recommendations and enact a statute to establish the Special Tribunal by 1 February 2009. Parliament adopted the CIPEV report on 27 January 2009.[318]

Implementing CIPEV's recommendations would have taken the country a long way towards ending Kenya's culture of impunity and would advance institutional reforms.[319] The political obstacles to doing so became evident, however, when it became known that the Kenya National Commission on Human Rights (KNCHR) (which had conducted its own investigation into the post-election violence) possessed a confidential database of alleged perpetrators.[320]

Attempts by the cabinet and the National Assembly to set up the Special Tribunal by the commission's deadline (30 January 2009) failed. On three occasions, Parliament voted down a motion to establish it: the Constitution of Kenya Amendment Bill, 2009, was defeated in Parliament on 12 February; cabinet rejected a new bill on the Special Tribunal on 14 July; and Parliament again rejected a Private Member's Bill seeking to create a Special Tribunal on 30 July.

316 Minutes of the Kenya National Dialogue and Reconciliation, Third Session, 1 February 2008.

317 *Op. cit.*

318 Statement by State House, 17 December 2008.

319 Kofi Annan, statement on Implementation of the Report of the Commission of Inquiry on Post-Election Violence (CIPEV) and the Independent Review Commission (IREC), 19 December 2008.

320 Wanyeki, L.M. (2012), "The International Criminal Court's cases in Kenya: Origin and impact", Institute for Security Studies (ISS), Johannesburg: ISS, 237, August 2012.

The Constitution of Kenya Amendment Bill, 2009, would have created a pathway for forming a tribunal.[321] Though they had unanimously endorsed the commission's recommendations, MPs voted against it. Inter- and intra-party divisions contributed to their decisions. Some were concerned that the proposed legislation contained loopholes that would make the Special Tribunal ineffective. (A presidential pardon, for instance, might nullify convictions.) These MPs preferred to see justice delivered by the ICC in The Hague, because they believed that the ICC would be less open to influence than a Kenyan tribunal – despite the promise that international staff would be appointed at all levels. Others opposed the legislation because they feared that it would be effective and result in their prosecution or the prosecution of allies. An ICC investigation appeared less threatening to them because it was likely to drag on for years. Yet another group voted against the legislation because it felt the government had not consulted sufficiently or allowed sufficient time to debate the bill.[322]

The Panel believed the bill's defeat was a major setback to Kenya's efforts to end impunity.[323] The two Principals and the Panel immediately opened discussions, during which the Panel was assured that a good-faith effort would be made to re-engage Parliament. Against this background, the Panel extended the deadline set by the commission, giving the government more time to enact the necessary legislation. In a letter dated 23 February 2009 to the two Principals, Kofi Annan urged them to establish a Special Tribunal in a reasonable time because the Panel remained convinced that a process led and owned by Kenyans would bring most benefit to Kenya's people.

At the same time, the Panel made it clear that the ICC would become involved if efforts to establish a Special Tribunal did not produce results reasonably quickly.[324] In a subsequent letter, dated 22 June, the Panel set a new deadline of 31 August 2009.[325] In that letter, the Panel indicated clearly that it would hand over a sealed list of perpetrators (the so-called 'sealed envelope') and accompanying materials to the Prosecutor of the ICC for his consideration

321 Corell, H., Legal Adviser to the African Union (AU) Panel of Eminent African Personalities, "Note on handover of CIPEV materials to the Prosecutor of the ICC", 29 July 2009.

322 Brown, S. (2013), "The National Accord, Impunity and the Fragile Peace in Kenya", in Sriram, C.L., García-Godos, J., Herman, J., and Martin-Ortega, O. (eds) (2013), *Transitional Justice and Peacebuilding on the Ground: victims and ex-combatants*, London: Routledge; Musila, G. (2009), "Options for Transitional Justice in Kenya: autonomy and the challenge of external prescriptions", *International Journal of Transitional Justice*, 3; *Hansard,* 3 February 2009.

323 Kofi Annan, statement, 13 February 2009.

324 Kofi Annan, Letter to the Principals, 23 February 2009.

325 Kofi Annan, Letter to the Principals, 22 June 2009.

and possible action, in accordance with the commission's recommendations, if Parliament did not enact the necessary legislation by the deadline.[326]

In early July, however, both the factual and legal basis for that extension changed. On 2 July, a Government of Kenya delegation met Kofi Annan in Geneva. It was composed of PNU and ODM members and included Amos Wako (Attorney General), Mutula Kilonzo (Justice, National Cohesion and Constitutional Affairs Minister), James Orengo (Lands Minister), William Cheptumo (Justice Assistant Minister), Miguna Miguna (adviser to the Prime Minister on Coalition Affairs), and Amina Mohammed (Permanent Secretary in the Ministry of Justice, National Cohesion and Constitutional Affairs).

The delegation expressed its concern that a new proposal for the Special Tribunal might not attract enough support in Parliament before approval of a new constitution. It requested more time for consultation. The delegation indicated that it intended to discuss the issue with the ICC Prosecutor the following day.[327]

The delegation's meeting with the Prosecutor resulted in Agreed Minutes. These stated that the delegation would deliver to the Prosecutor a report on the status of investigations and prosecutions related to the post-election violence by the end of September 2009. The report would set out measures taken to ensure the safety of victims and witnesses, and modalities for conducting national investigations and prosecutions of those responsible for the post-election violence by means of a Special Tribunal or another judicial mechanism adopted by Parliament. Alternatively, the Kenyan Government would refer the situation to the Prosecutor in accordance with Article 14 of the Rome Statute.[328]

When the Panel was informed of the contents of this agreement on 3 July, it concluded that the extended deadline had become moot. In addition, the ICC Prosecutor had contacted the Panel to request the 'sealed envelope' (listing alleged perpetrators) and supporting evidence. On 9 July 2009, therefore, the Panel handed to the Prosecutor the materials he had requested.[329]

326 *Ibid*.

327 *Supra* note 320.

328 Agreed Minutes of the meeting of 3 July 2009 between ICC Prosecutor and the Government of Kenya delegation.

329 Kofi Annan, statement, 9 July 2009; Corell, H, Legal Adviser to the Panel, "Note on handover of CIPEV materials to the Prosecutor of the ICC", 29 July 2009; Request for authorization of an investigation pursuant to Article 15.

The Panel reaffirmed its conviction that combating impunity and bringing those responsible for violent crimes to justice was a fundamental element of the country's reform agenda.[330] "Justice delayed is justice denied", Kofi Annan said.

On 30 July, the Kenyan Government held a cabinet meeting at which it considered whether to withdraw from the ICC, refer the situation to the ICC, set up the Special Tribunal, or prosecute suspects using the High Court. They decided to reform the courts, to prosecute crimes domestically, and to establish a TJRC. The cabinet abandoned attempts to establish the Special Tribunal.[331]

On 26 August, a Private Member's Bill was gazetted.[332] Initiated by Gitobu Imanyara, it assumed that those bearing the greatest responsibility for crimes committed during the post-election crisis would be prosecuted by the ICC, while middle and lower-level perpetrators would be prosecuted by a Special Tribunal. Debate on the bill stalled in November 2009, however, after four failed attempts to obtain a quorum in Parliament. At one hearing on the proposed legislation, on 11 November 2009, only 18 of 222 parliamentarians were present.[333]

On 30 September, Kofi Annan announced that he favoured a three-pronged approach to addressing Kenya's post-election violence and preventing its recurrence. The ICC would prosecute individuals bearing the greatest responsibility for crimes committed; national proceedings would seek accountability for other perpetrators; and other reforms and mechanisms, such as the TJRC, would address the underlying causes of violence.

On 9 October 2009, in accordance with the understanding reached during the July 2009 meeting, the Prosecutor requested a meeting with the Kenyan Government to inform them of his next steps. On 27 October, he sent a letter to the government explaining that the ICC's preliminary examination had revealed that acts constituting crimes against humanity might have occurred during the post-elections crisis, that no relevant national judicial enquiries were ongoing, and that the threshold of gravity under the Rome Statute had been reached. The letter explained that an investigation might be initiated in two circumstances: following a referral by the government, or on the basis of an

330 Kofi Annan, statement, 9 July 2009.

331 Cabinet, statement, 5 October 2009; Nmaju, M.C. (2009), "Violence in Kenya: Any role for the ICC in the quest for accountability", *African Journal of Legal Studies*, 3.

332 Constitution of Kenya (Amendment) (No. 3) Bill, 2009, 24 August 2009.

333 "Kenya MPS were decisive in rejecting local court", *Daily Nation*, 10 April 2011; Human Rights Watch (2011), *"Turning Pebbles": Evading Accountability for Post-Election Violence in Kenya*, Washington DC: HRW.

independent decision by the Prosecutor to request authorization from the Pre-Trial Chamber (PTC).

On 5 November, the Prosecutor met President Kibaki and Prime Minister Odinga in Nairobi and informed them that, since all the statutory criteria had been fulfilled, it was his duty to open an investigation. He requested the government's cooperation and announced his decision in a joint press conference with the two leaders the same day.[334] The two Principals confirmed that the government would cooperate with the ICC.[335] Also on the same day, the Prosecutor indicated to the President of the ICC that he intended to request an investigation into the situation in Kenya, pursuant to Article 15(3) of the Rome Statute. In the court's short history, the Prosecutor had never previously opened a case *proprio motu* (at his own initiative).[336]

The ICC Presidency assigned the situation in Kenya to Pre-Trial Chamber II (PTC II) on 6 November 2009. The Chamber was composed of Judges Ekaterina Trendafilova (Presiding Judge), Hans-Peter Kaul and Cuno Tarfusser.[337]

Following this development, and in line with CIPEV's recommendations, on 26 November 2009 the Prosecutor requested authorization from PTC II to open an investigation into the situation in Kenya. He stated that he had a reasonable basis to believe crimes against humanity had been committed after Kenya's elections; that the offences fell within the temporal, territorial, and personal jurisdiction of the ICC; that no national criminal proceedings divested the ICC of jurisdiction; that cases would be admissible before the ICC because of the nature and gravity of the crimes; and that his investigations would not be against the interests of justice.[338]

On 31 March 2010, the PTC II, by a majority, authorized the Prosecutor to commence investigations covering alleged crimes against humanity committed between 1 June 2005 and 26 November 2009.[339] Judge Kaul dissented on the basis of his interpretation of Article 7(2)(a) of the Rome Statute (which sets out the legal definition of "attack directed against any civilian population") and because his examination of the Prosecutor's request and supporting material

334 Request for authorization of an investigation pursuant to Article 15; International Centre for Transitional Justice, *Kenya: Impact of the Rome Statute and the International Criminal Court*, ICTJ Briefing, May 2010.

335 Kofi Annan and Graça Machel, statement, 7 November 2009.

336 International Crisis Group (2012), *Kenya: Impact of the ICC Proceedings*, Africa Briefing 84, and Nairobi/Brussels: ICG.

337 *Supra* note 320.

338 *Op. cit.*

339 United Nations General Assembly, Report of the ICC to the UN for 2009/10, A/65/313, 19 August 2010.

led him to conclude that the acts in question did not qualify as crimes against humanity falling under the jurisdiction of the court.[340]

On 27 August 2010, the Office of the Prosecutor (OTP) requested the Kenyan government to facilitate interviews with five provincial commissioners and five senior police officers. The OTP subsequently wrote 10 letters and sent its staff on five separate missions to follow up this request. The interviews were never conducted because two private individuals obtained a preliminary injunction from the High Court prohibiting Justice Kalpana Rawal from taking or recording evidence from the police officers and from any Kenyan for purposes of the ICC process.[341] This temporary injunction remained in force more than two years later. The Kenyan Government has not appealed to the High Court on the Prosecutor's behalf to resolve the issue or to ensure the case was heard. Nor did the government contest the standing of the two private individuals to seek an injunction.[342] The Prosecutor's efforts to interview police officers were therefore thwarted.

At the confirmation of charges hearings, nevertheless, the Defence submitted 39 written statements from police officers and other law enforcement officials. These statements were taken after the injunction that prevented the Prosecution from interviewing the police officers in question.

In this way, the government's failure to facilitate the OTP's request appeared to create a situation in which the accused enjoyed access to evidence denied to the Prosecution.

The prospect of prosecution by the ICC also appeared to cause the disappearance and intimidation of potential witnesses, making it necessary to introduce an effective witness protection programme. In June 2010, the President assented to the Witness Protection (Amendment) Act, which paved the way for the formation of an independent Witness Protection Agency. A Witness Protection Advisory Board, chaired by the Attorney General, was appointed. Civil society organizations expressed concern that it would not be neutral,

340 Situation in the Republic of Kenya, No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010.

341 In September 2010, lawyers for the police officers informed the Office of the Prosecutor that they declined to be interviewed as voluntary witnesses. It therefore sought national assistance to secure their compulsory appearance. On 4 October 2010, the Chief Justice appointed Justice Kalpana Rawal to take this evidence (ICC-01/09-01/11).

342 On 16 February 2012, when the Prosecutor's Office met the Head of the Public Service to seek the government's help to complete the statement-taking process, the latter asserted that the issue was in the hands of the courts and requested the Prosecutor's Office to reimburse the Kenyan government for the costs of the preliminary hearings (ICC-01/09-01/11).

considering that state organs had been accused of perpetrating crimes during the post-election crisis.

Subsequently, on 15 December 2010, the Prosecutor submitted two applications for summonses regarding six individuals who became known as the Ocampo Six. Case 1 named William Ruto, then ODM deputy party leader and Minister for Agriculture and now Deputy President of Kenya; Henry Kosgey, ODM Chair and Minister for Industrialization; and Joshua Sang, a radio broadcaster with Kass FM, a private radio station. Case 2 named Major-General Ali, a former Police Commissioner who was then Postmaster General; Uhuru Kenyatta (PNU), former Deputy Prime Minister and Minister of Finance and now President of Kenya; and Francis Muthaura, former Head of the Civil Service.

The politics of accountability

As noted earlier, members of the coalition government took different positions on accountability. Early on, the PNU supported prosecution, whereas the ODM favoured amnesty. (Most of those likely to be arrested immediately following the violence were affiliated to ODM.[343]) In December 2010, after the ICC Prosecutor named the six suspects against whom he wished to issue summonses, the leaders of both parties changed position[344] and, as a result, efforts to overcome impunity became personal, politicized and ethnicized.[345]

The government itself made a concerted effort to halt the ICC process. On 22 December 2010, almost immediately after the Prosecutor's request to issue summonses, Parliament passed a (non-binding) motion, requiring the government to take appropriate action to withdraw from the Rome Statute.[346] The government subsequently lobbied in support of a pan-African protest against the ICC's perceived focus on Africa. At its Summit in January 2011, the African Union supported Kenya's attempt to have the ICC defer its proceedings

343 South Consulting, June 2011.

344 Human Rights Watch (2011), *"Turning Pebbles": Evading Accountability for Post-Election Violence in Kenya, Washington DC: H*RW.

345 Kofi Annan Foundation and the Panel (2012), *The Kenya National Dialogue and Reconciliation: Building a Progressive Kenya*, Nairobi, 5-6 December 2011, Report of the meeting.

346 Hansen, T.O. (2011), "Transitional Justice in Kenya: an assessment of the accountability process in light of domestic politics and security concerns", *California Western International Law Journal*, 42:2.

in Kenya,[347] reasoning that Kenya would be in a position to deliver justice for victims of the 2007 violence after it implemented judicial reforms required by the 2010 Constitution. The AU suggested that failure to refer the cases back to Kenya might jeopardize "peace building and national reconciliation".[348]

From January 2011, Vice President Kalonzo Musyoka and cabinet members from the ODM and PNU began to lobby the UN Security Council, the AU and countries across Africa to support national criminal trials or defer international proceedings, using the argument that ICC prosecutions would pose a threat to peace and security.[349]

The demand was based on two grounds. First, the preamble of the Rome Statute and Article 1 refer to the ICC as an international institution "that shall be complementary to the national criminal jurisdiction".[350] Not having primary jurisdiction, the ICC may intervene only if national institutions are unwilling or unable to investigate or prosecute. Secondly, Article 16 of the Rome Statute permits the UN Security Council, pursuant to a Chapter VII resolution, to request the ICC to defer investigation or prosecution for a renewable 12-month period.[351]

While the PNU supported this "shuttle diplomacy", the ODM argued that it had not been sanctioned by the cabinet.[352]

347 Deferral attracted high-level support at the Seventeenth Extraordinary Session of the Assembly of the Intergovernmental Authority on Development (IGAD). The Communiqué of the Heads of States and Government on Sudan, Somalia and Kenya (30 January 2011): "Decided to support Kenya's deferral of the ICC investigations and prosecutions in line with Article 16 of the Rome Statute to enable affirmation of the principle of complementarity". IGAD's response ensured that the AU would also back Kenya. International Crisis Group (2012), *Kenya: Impact of the ICC Proceedings*, Africa Briefing No. 84, Nairobi/Brussels: ICG.

348 Decisions on the Implementation of the Decisions of the International Criminal Court, Doc. EX.CL/639(XVIII) Assembly/AU/Dec 334 (XVI), 30-31 January 2011.

349 This lobbying involved Robinson Githae (then Minister for Nairobi Metropolitan Development and later Minister for Finance), Sally Kosgei (Minister for Agriculture), Hellen Sambili (Minister for East African Community), George Saitoti (Minister for Internal Security), Chirau Ali Makwere (then Minister for Trade and later Minister for Environment and Natural Resources), Wilfred Ombui (Assistant Minister, Ministry of State for National Heritage and Culture), and Richard Onyonka (Assistant Minister for Foreign Affairs). African countries visited included: Botswana, Burundi, Cameroon, Djibouti, Ethiopia, Equatorial Guinea, Gabon, Lesotho, Libya, Malawi, Nigeria, South Africa, Tanzania and Uganda. See: *Daily Nation*, 21 January 2011; *Daily Nation*, 24 January 2011; *Daily Nation*, 5 March 2011; *The Star*, 7 March 2011; International Crisis Group (2012), *Kenya: Impact of the ICC Proceedings*, Africa Briefing No. 84, Nairobi/Brussels: ICG.

350 Benzing, M. (2003), "The Complementarity Regime of the International Criminal Court: International criminal justice between state sovereignty and the fight against impunity", in Bogdandy, A. von, and Wolfrum, R. (eds) (2003), *Max Planck Yearbook of United Nations Law*, 7.

351 International Crisis Group (2012), *Kenya: Impact of the ICC Proceedings*, Africa Briefing No. 84, Nairobi/Brussels: ICG.

352 *Daily Nation*, 27 January 2011.

On 8 February, Kenya's Permanent Mission to the UN forwarded to all Permanent and Observer Missions at the UN an aide-memoire titled "Kenya's Reform Agenda and Engagement with the ICC", which justified the government's case for deferral.[353] On 4 March, the mission wrote to the UN Security Council's President, requesting the council to consider an Article 16 deferral. This request was followed by a meeting on 8 March between Secretary-General Ban Ki-Moon and Musyoka.[354]

On the same day, the ICC issued summons for the six suspects to appear before it. Again, Judge Kaul dissented, maintaining that the crimes committed in Kenya did not meet the threshold for crimes against humanity because the requirement of a state or organizational policy in Article 7(2) had not been met.[355]

The UN Security Council's permanent members, including the United States, the United Kingdom and France, made it clear they would not support Kenya's request in a formal vote.[356]

On 11 March, ODM Secretary-General Anyang' Nyong'o wrote urging the UN Security Council not to defer the ICC cases.[357]

The coalition partners differed; there were also tensions within the ODM. On 15 March, ODM Vice-chair Aden Duale, Deputy Organizing Secretary Benjamin Langat and Deputy Secretary-General Mohamed Mohamud wrote to the UN Security Council to disown Nyong'o's letter, saying it did not reflect the party's position on deferral.[358] The PNU also wrote a letter to the UN Security Council (copied to all foreign missions, the European Union (EU) and all UN

353 *Supra* note 350.

354 *Ibid.*

355 Dissenting Opinion by Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons; Hansen, T.O. (2011), "The Policy Requirement in Crimes against Humanity: lessons from and for the case of Kenya", *The George Washington International Law Review*, 43: pp. 1-42.

356 *Daily Nation*, 6 February 2012.

357 Hansen, T.O. (2013), "Kenya's Power-Sharing Arrangement and Its Implications for Transitional Justice," *International Journal of Human Rights*; Lau, R.K. (2012), "Stopping the Violence and the Responsibility to Punish: Drawing the right lesson from Kenya's post-election crisis", Paper presented at the Oceanic Conference on International Studies, 18-20 July 2012, University of Sydney, Sydney, Australia; International Crisis Group, 2012, *Kenya: Impact of the ICC Proceedings*, Africa Briefing No. 84, Nairobi/Brussels: International Crisis Group; Nyong'o, P.A. (2011), "Petition to the members of the UN Security Council regarding the Kenyan case at the ICC", 11 March 2011.

358 Hansen, T.O. (2011), "The Policy Requirement in Crimes against Humanity: lessons from and for the case of Kenya", *The George Washington International Law Review*, 43: 1-42; *Daily Nation*, 16 March 2011.

agencies in Nairobi), accusing its coalition partner of "malice" for opposing its bid to defer the ICC cases.[359]

Later, the ODM clarified that it supported referral, not deferral, and only if a credible local tribunal was in place.[360]

The Kenyan Permanent Mission then sent another letter (29 March, dated 23 March) requesting the UN Security Council to reconsider deferral based on a decision by the ODM National Executive Council and Parliamentary Group (22 March 2011) "to push for the ICC cases relating to Kenya to be handled locally through a credible local mechanism".[361]

When the ICC investigation began, nevertheless, there was no evidence that the police had investigated any of the six individuals named by the Prosecutor. On 18 March 2011, Police Spokesperson Eric Kiraithe stated that some post-election violence cases, implicating as many as 6,000 individuals, provided grounds for challenging their admissibility before the ICC.[362] This was followed by an order by Attorney General Amos Wako, on 26 April 2011, to investigate the Ocampo Six. Three of the suspects, Major-General Ali, Henry Kosgey and Joshua Sang recorded statements with the police in June and July,[363] while William Ruto did so in August 2011. Francis Muthaura and Uhuru Kenyatta did not record statements. Muthaura's lawyers noted at the time that local proceedings were "a distraction"[364] and that their client could not face two jurisdictions at the same time.[365]

On 31 March 2011, the government filed an application under Article 19 of the Rome Statute challenging the admissibility of the cases before the ICC. The application requested the PTC II: to declare the Kenyan cases inadmissible under Article 19; call a status conference to determine the procedures that PTC II would follow before it issued orders or directions; and grant the government an opportunity to address the PTC II when the six suspects first appeared before it.[366] The PTC II rejected the application on 30 May 2011, on the

359 *Daily Nation*, 16 March 2011.

360 *The Standard*, 23 March 2011.

361 International Crisis Group (2012), *Kenya: Impact of the ICC Proceedings*, Africa Briefing No. 84, Nairobi/Brussels: ICG; Letter, 23 March 2011, from the Permanent Representative of Kenya to the UN addressed to the President of the UN Security Council, S/2011/201, 29 March 2011.

362 International Center for Transitional Justice (2011), "Criminal Accountability, the ICC and the Politics of Succession", *Kenya Transitional Justice Brief*, 1:1, April 2011.

363 *Daily Nation*, 24 July 2011.

364 *Daily Nation*, 8 August 2011.

365 *The Standard*, 10 August 2011.

366 "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute", ICC-01/09-02/11, 4 April 2011.

grounds that it provided no evidence that national proceedings were taking forward the six cases.[367]

Tension was palpable on the eve of the departure of those summoned to The Hague. Incidents of hate speech and incitement to violence on ethnic and political grounds were reported. The Panel publicly emphasized that neither Africa, nor Kenya, nor any ethnic community, was on trial at the ICC and that justice was essential to healing.[368]

On 7 and 8 April 2011, the six suspects made their initial appearance before the ICC, during which the PTC II set dates for confirming charge hearings. On the same day (8 April), the UN Security Council held informal consultations on the matter. It concluded that Kenya's assertion that a deferral under Article 16 would allow the country to set up a local judicial mechanism was a *non-sequitur* that should be presented to the ICC, not the Security Council.[369] Some African non-permanent members shared this sentiment.[370]

On 30 August 2011, the ICC Appeals Chamber, by a majority, rejected the Kenyan Government's appeal (filed 20 June) against the PTC II's decision on 30 May 2011 on admissibility.[371]

The confirmation of charge hearing for Case 1 was held from 1 to 8 September 2011; and for Case 2 from 21 September to 5 October 2011.

On 23 January 2012, the PTC II confirmed charges against Ruto and Sang for crimes against humanity, including murder, forcible transfer of populations and persecution; it did not confirm charges against Kosgey. The PTC II also confirmed charges against Muthaura and Kenyatta for crimes against humanity, including murder, forcible transfer of populations, rape, persecution and other inhumane acts; it did not confirm charges against Major-General Ali.[372] Judge Kaul appended dissenting opinions in both cases, maintaining that the ICC was not competent to try the individuals charged because the crimes committed were serious crimes under Kenyan criminal law, but not crimes against humanity under Article 7 of the Rome Statute.

President Kibaki directed the new Attorney-General, Githu Muigai, to set up a legal team to advise the government on actions to be taken following the

367 UN General Assembly, Report of the ICC to the UN for 2010/11, A/66/308, 19 August 2011.

368 Kofi Annan, statement, 5 April 2011.

369 "Press Statement on the request of Kenya for deferral under Article 16 of the Rome Statute of the International Criminal Court (S/2011/201)", UN Webcast, 8 April 2011.

370 "Kenya and the ICC", Security Council Report , 6 April 2011.

371 UN General Assembly, Report of the ICC to the UN for 2011/12, A/67/308, 14 August 2012.

372 *Op. cit.*

decision.[373] When he named the team, Muigai stated that he would discuss with the Chief Justice the possibility of setting up a special division of the High Court to deal with crimes committed during the post-election crisis. The Judicial Service Commission (JSC) subsequently approved the establishment of such a division. The International Crimes Division (ICD) is expected to deal with "middle and lower-level" perpetrators of international crimes committed in Kenya during the post-election violence in 2007-2008. The National Council for Administration of Justice endorsed this proposal but recommended that it should also consider violence during the elections that were held in 1992 and 1997.[374]

On 30 January 2012, the Defence for the four accused requested leave to appeal the PTC II's decisions. On 24 May 2012, the Appeals Chamber (Judges Akua Kuenyehia [Presiding], Sang-Hyun Song, Sanji Mmasenono Monageng, Erkki Kourula and Anita Usacka) unanimously rejected the Defence's appeal, and confirmed the ICC had jurisdiction.[375]

On 29 March 2012, the ICC Presidency constituted Trial Chamber V, composed of Judges Christine Van den Wyngaert,[376] Kuniko Ozaki and Chile Eboe-Osuji, and referred both cases to it.[377]

On 11 June, Trial Chamber V held the initial status conference to set dates for trial and on 9 July it issued a decision on the schedule leading to trial, setting a number of deadlines for filings required from the parties. The trial of Ruto and Sang would start on 10 April 2013 and that of Muthaura and Kenyatta on 11 April 2013.[378] The first joint submission on agreed facts was filed on 3 September. The Prosecution filed provisional witness and evidence lists on 16 October. On 31 October, the Prosecution and Defence discussed the joint instructions of experts, the witness list, the list of evidence and disclosure to the Defence of all incriminating material. Pre-trial briefs were submitted by 9 January 2013. Disclosure to the Defence of witness identities was completed by

373 The legal team was composed of Geoffrey Nice (Queen's Counsel, London), Rodney Dixon (Barrister, London), Fred Ojiambo, Joe Okwach and Waweru Gatonye (all Senior Counsel), and international law experts Godfrey Musila, Betty Murungi, Lucy Kambuni, Grace Wakio and Henry Mutai.

374 N. Musau, "JSC to set up new division to deal with poll violence", *The Star*, 26 November 2012.

375 Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-425, 24 May 2012.

376 Judge Christine Van den Wyngaert was replaced by Judge Robert Fremr on 26 April 2013 due to her workload.

377 UN General Assembly, Report of the ICC to the UN for 2011/12, A/67/308, 14 August 2012.

378 On 7 March 2013, Trial Chamber V reset the trial dates for 28 May 2013 and 9 July 2013, respectively.

11 February 2013; disclosure of expert witness reports for the Prosecution case by 14 February 2013; the second joint submission on agreed facts was filed on 8 March 2013; and disclosure to the Defence of other witness identities by 12 March 2013.[379]

The ICC's Prosecutor, Fatou Bensouda (succeeding Louis Moreno Ocampo), visited Kenya in October 2012. During her visit, which included a meeting with President Kibaki and Prime Minister Odinga, she conveyed to the government her concern about witness intimidation and delays in responding to her office's requests regarding investigations.[380] The Prosecutor asked to receive the information for which she had asked by 30 November 2012. Though the Principals issued instructions to the Attorney General and the Cabinet Sub-Committee on the ICC, the government failed to meet this deadline, and subsequently missed a 9 January 2013 deadline (to supply outstanding documents before disclosure of the Prosecution's list of evidence).[381]

Public attitudes

It can be said that Kenyans were generally supportive of the ICC, but that support rose and fell in response to the political mood and anxieties about security. To some, the ICC was the only initiative that might hold powerful people accountable for the violence in 2007-2008. Others considered the ICC represented one path towards accountability. In December 2010, 78 per cent of Kenyans were glad that the ICC was conducting investigations and up to 69 per cent were confident or very confident that the ICC would eventually prosecute those named as perpetrators of the violence. (24 per cent were not confident.) In March 2011, 72 per cent were confident and 16 per cent were not. The 16 per cent who were not confident expressed concern that the ICC might fail to gather sufficient evidence to obtain convictions. Others thought the ICC process had been politicized and was unlikely to meet Kenyans' desire to end impunity. Some raised concerns about bribery of witnesses. In June 2011, 89 per cent of Kenyans expressed satisfaction with the ICC.[382]

379 Decision on the schedule leading to trial, No. ICC-01/09-01/11 and No. ICC-01/09-02/11, 9 July 2012.

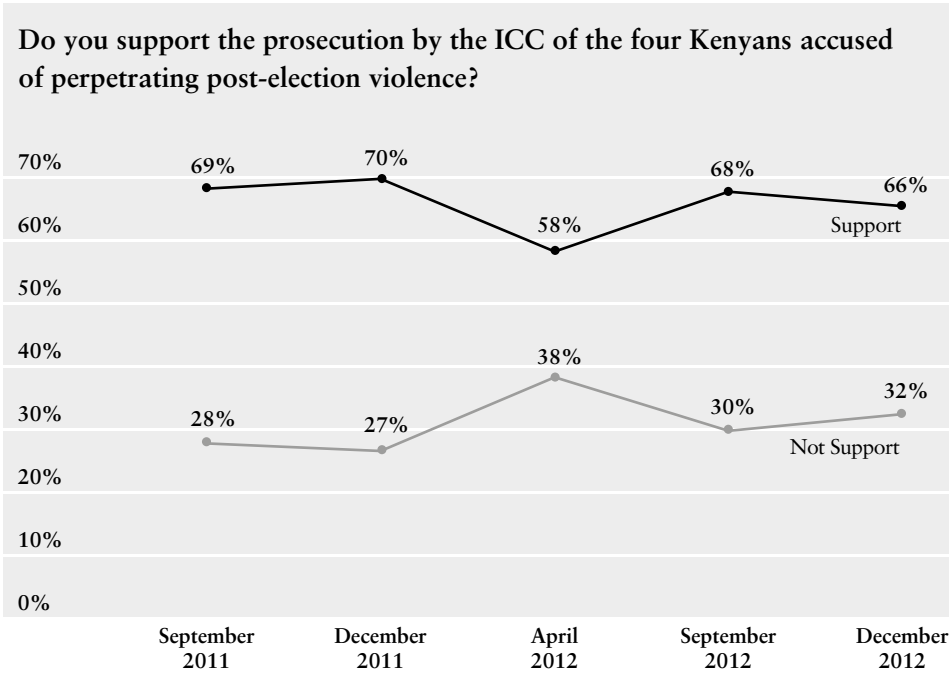
380 Statement by the Prosecutor of the ICC, 22 October 2012.

381 ICC-01/09-01/11.

382 South Consulting, Review Report, April 2011.

Polls taken between September 2011 and December 2012 showed that support for the ICC diminished somewhat (notably in April 2012) but remained at a high level (see figure below).[383]

6.1 Support for ICC Prosecutions



Source: South Consulting March 2013

The ICC's impact in the run-up to the 2013 general election

The ICC's intervention influenced campaigning for the general election of 4 March 2013. New political alliances emerged to secure the interests and political careers of senior politicians indicted by the ICC. In particular, an alliance between Uhuru Kenyatta and William Ruto was signalled by a meeting in Eldoret in January 2011, attended by President Kibaki and a large number of mainly Kikuyu and Kalenjin MPs. A committee of MPs from the two communities was constituted.[384] Political rallies organized by Kenyatta's and Ruto's supporters tore into the ICC from their first appearance at The Hague,

383 South Consulting, Review Report, February 2013.

384 Kenya Section of the International Commission of Jurists, Katiba Institute and Kenya Human Rights Commission (2013), *If Uhuru Kenyatta and William Ruto are elected President and Deputy President: Implications of a Kenyatta/Ruto presidency for Kenya*, Nairobi: ICJ, Katiba Institute and KHRC.

questioning the court's objectivity and alleging that its intervention was designed to prevent Kenyatta and Ruto from contesting the 2013 presidential election. Speakers also heightened ethnic anxieties, claiming that their communities would be excluded from the new government.[385]

Ethnic associations aligned with Kenyatta and Ruto mobilized to oppose the ICC trials.[386] On 23 March 2012, for example, the Gikuyu Embu and Meru Association (GEMA) held a meeting in Limuru at which it appointed Uhuru Kenyatta its presidential standard bearer, warning that it would be dangerous for the country to go to elections without him on the ballot.[387]

Some two weeks before polling day, the High Court ruled on a suit that challenged the eligibility of Uhuru Kenyatta and William Ruto to stand for election on integrity grounds. The court declared the case did not fall within its jurisdiction and should be judged by the Supreme Court. From that moment, Kenyatta and Ruto framed the elections as a referendum on the ICC and intimated that, if Kenyans elected them to office, they would be voting against the ICC – a view their supporters had advanced since charges had been confirmed against them in January 2012. The two were subsequently elected to the offices of President and Deputy President, respectively.

After the general election

The trial of Ruto and Sang was scheduled to begin on 10 September 2013, while Kenyatta's was set for 12 November 2013. However, Ruto requested a date not earlier than November 2013 on the grounds that the Prosecutor's Office had failed to provide timely and effective disclosure,[388] while Kenyatta requested a date not earlier than January 2014 on the grounds that his Defence team needed more time to investigate the "credibility and substantive allegations made by five prosecution witnesses, whose identities and un-redacted transcripts have still not been disclosed".[389]

Charges against Kenyatta's co-accused, Francis Muthaura, were withdrawn on 18 March 2013. The Prosecutor said that her office had faced "severe challenges" in its investigation of Muthaura. Some potential witnesses had died, while others were afraid to come forward; a key prosecution witness,

385 South Consulting, October 2010; South Consulting, April 2011.

386 *The Standard*, 5 April 2012.

387 Peter Kagwanja, "Hague fault line a big dilemma for Kenya's post-poll democracy", *Sunday Nation*, 24 February 2013.

388 "ICC Weekly Update #174", 11 June 2013, ICC-PIDS-WU-174/13.

389 Situation in the Republic of Kenya, No. ICC-01/09-01/11, Public redacted version of "Decision on commencement date of trial", 20 June 2013.

identified as Witness 4, had withdrawn;[390] and the Kenyan Government had failed to provide requested evidence or facilitate access to witnesses.[391]

On 10 May, the Prosecutor again noted that the Kenyan Government continued to compromise investigations and limit the evidence available to assist Trial Chamber V to adjudicate on the crimes charged.[392] She observed that some public officials had promoted an anti-ICC climate, which had a chilling effect on the willingness of potential witnesses and partners to cooperate with her office.[393]

On 21 May 2013, the Presidency of the ICC issued a decision constituting two Trial Chambers for the Kenya cases. Trial Chamber V(a), in charge of the Ruto and Sang case, would be composed of Judges Olga Herrera Carbuccia, Robert Fremr and Chile Eboe-Osuji. Trial Chamber V(b), in charge of the Kenyatta case, would be composed of Judges Kuniko Ozaki, Robert Fremr and Chile Eboe-Osuji.[394]

Both Kenyatta and Ruto filed a request to attend trial by video link from Nairobi so that they could continue to discharge their official responsibilities. They also requested a change of venue to Kenya or Tanzania. On 18 June 2013, by a majority, Trial Chamber V(a) conditionally granted Ruto's request to be excused from being physically present throughout the trial. It nevertheless required him to be present for: the opening and closing statements of all parties and participants; when victims present their views and concerns in person; when judgement is delivered and, if applicable, for sentencing and reparations;

390 To date, the ICC Prosecution has lost 13 key witnesses in the two cases. The withdrawal of Witness 4 led to the dropping of charges against Muthaura.

391 The ICC Prosecutor has indicated that Kenya has frustrated or failed to assist her office to collect evidence, including by limiting access to government records. Significantly, at the confirmation of charges hearing, the Muthaura Defence submitted 32 entries from the National Security Advisory Committee minutes, evidence sought by the Prosecution in its original August 2010 request. The use by the Defence of selected portions of the minutes, with no obligation to produce other (perhaps incriminating) portions, limited the information available to the court at the confirmation hearing.

392 Situation in the Republic of Kenya, No. ICC-01/09-01/11, Prosecution response to the Government of Kenya's Submission on the Status of Cooperation with the International Criminal Court, 10 March 2013.

393 The Prosecutor has noted that, since her office began investigations in April 2010, the Kenya Government has been outwardly cooperative, but has failed to execute fully her office's most important requests. Critical documents and records, which the Prosecutor's Office has repeatedly requested, remain unavailable after three years. The effect of the government's actions has been to undermine investigation in these cases and limit the evidence available to the Chamber at trial. ICC-01/09-01/11.

394 "ICC Weekly Update #172", 27 May 2013, ICC-PIDS-WU-172/13.

and on any other occasion as ordered.[395] The Prosecutor appealed against this decision, and dispensation was waived in the interim period.

On 2 May 2013, Kenya's Permanent Representative to the UN, Macharia Kamau, submitted a brief to the Security Council seeking to have the Kenyan cases terminated on the grounds that they were a threat to security and sovereignty. On 9 May 2013, William Ruto and the Attorney General declared this initiative did not reflect official policy, but the Kenyan government never formally withdrew the brief.[396] Instead, on 13 May 2013, Kamau requested an informal interactive dialogue with Security Council members to elaborate his request. During the informal session, nine of the 15 Security Council members opposed this request and three permanent members (France, the UK and the US) rejected it.

As a result of persistent Kenyan Government lobbying, on 26 May 2013 the African Union called on the ICC to refer the cases back to Kenya, on the grounds that Kenya's judiciary is competent to hear and determine the cases impartially and expeditiously. The AU argued that holding trials in The Hague risked destabilizing the country and reversing gains made since 2008. Only Botswana argued that the ICC should handle the cases in accordance with its mandate.[397]

The government's inability to reach a common position on accountability for the post-election violence also meant that it failed to hold suspected low-level perpetrators to account. Of 92 low-level suspects arrested in 2008, 19 were charged in May 2009 in Eldoret. They were acquitted for lack of evidence; the court found that the police had failed to establish a *prima facie* case against the accused. In November 2009, a Nakuru court also acquitted three suspects for lack of evidence. These cases pointed to poor investigation and low prosecutorial capacity.[398]

The Task Force on Post-Election Violence set up by the Office of the Director of Public Prosecutions on 20 April 2012 released a press brief on 17 August 2012 in which its chair, Deputy Director of Public Prosecutions Dorcas Oduor, stated that it had reviewed 4,000 files of the 6,081 files allocated to it. Most suspected offenders could not be prosecuted locally for lack of evidence. 5,374 suspects were still under investigation.[399]

395 "ICC Weekly Update #176", 24 June 2013, ICC-PIDS-WU-176/13.

396 International Crisis Group (2013), "Kenya After the Elections," Africa Briefing Paper 94, Nairobi/Brussels: ICG, 15 May 2013.

397 "AU/Kenya: bringing it all back home", Africa Confidential, 54:12.

398 South Consulting, June 2011.

399 Task force on Post Election Violence, press brief, 17 August 2012; Daily Nation, 18 August 2012.

Conclusion

Pursuing accountability In Kenya is not easy because influential interest groups are well entrenched in its institutions. Powerful and senior figures have never been held to account as a result.

Many low and mid-level perpetrators of crimes have still to be investigated, let alone charged and tried.

For these reasons, many Kenyans have supported ICC intervention, in principle. However, since the Court can only deal with those who are considered to be most responsible for international crimes, a local mechanism is still needed to look at less prominent cases.

The indictment of a current President and Deputy President in their individual capacities, before they assumed office, is unprecedented; but it should be understood in the context of Kenya's culture of impunity. Unless impunity is addressed, as the Panel repeatedly affirmed, the country will continue to face the possibility of violence and instability. Addressing impunity is vital if Kenyans are to build a sustainable democracy.

In this context, it is important to remember both that Parliament voted down three proposals to create a Special Tribunal, and that the government made no subsequent attempt to put in place mechanisms for a Tribunal or for prosecuting lesser perpetrators of crimes during the violence in 2007-2008.

Chapter Seven

The Truth, Justice and Reconciliation Commission

"Reconciliation requires a society to face up more widely to the violations and misdeeds of the past. Only then can all Kenyans feel that their rights will be respected in the future."

– The Panel's message to Kenyans, 2 December 2009

Revisiting the idea of a truth commission

The KNDR made provision for a Truth, Justice and Reconciliation Commission (TJRC) in the comprehensive framework it developed to address the causes and consequences of the crisis of 2007-2008. However, the substance of the TJRC's work was addressed in Agenda Item 4.

Early on, during the KNDR's Fourth Session (4 February 2008), the idea of a Truth, Justice and Reconciliation Commission was raised in the context of Agenda Item 2 (resolving the humanitarian crisis). Support for a TJRC was bi-partisan. One member stated that it would deepen Kenyans' understanding of the causes of humanitarian crises.[400] Another remarked that a TJRC should be established because genuine reconciliation would occur only if the truth

400 Minutes of the Kenya National Dialogue and Reconciliation, Fourth Session, 4 February 2008.

about events related to the elections was known.[401] Another noted that the government had already accepted the proposal to hold a truth commission.[402]

The importance of reconciliation had been highlighted by its inclusion in Agenda Item 2 of the Annotated Agenda, agreed on 1 February 2008. "Discussions will be conducted to identify and agree on the modalities of implementation of immediate measures aimed at … [e]nsuring that the processes of national healing, reconciliation and restoration start at once."[403]

Reference to a TJRC was also made in the Agreed Statement on How to Resolve the Political Crisis (14 February 2008). "A political settlement is necessary to manage a broad reform agenda and other mechanisms that will address the root causes of the crisis. Such reforms and mechanisms will comprise, but are not limited to, *inter alia*: A truth, justice and reconciliation commission …"[404]

Though the decision to form a TJRC had been taken, it was not discussed substantively until the Eighteenth Session (29 February 2008), two weeks later. Kofi Annan informed the negotiating team that preparatory work on forming a TJRC had begun, and indicated that it would be necessary to work with the Attorney-General, Amos Wako, to decide on the arrangements.[405]

The negotiating team did not discuss the mandate of the TJRC in detail or at length. One member requested the inclusion of poverty and land in its terms of reference, noting that these issues had preoccupied the country for decades and were at the heart of the crisis.[406] Observing that poverty could arise from impunity and historical wrongs, the same member suggested that it would be salutary to identify historical mistakes with regard to inequality in resource allocation. On that basis, it was argued that the TJRC should have a broad mandate.[407] Endorsing this approach, one member suggested that the TJRC might address all the elements in Agenda Item 4 except the constitutional review process.[408]

Views differed. One member wished to avoid encumbering the TJRC's agenda with poverty and economics. In his view, it should have a simple remit that

401 *Ibid*.
402 *Ibid*.
403 Annotated Agenda, Agreed on 1 February 2008.
404 Kenya National Dialogue and Reconciliation, Agreement of 14 February 2008.
405 Minutes of the Kenya National Dialogue and Reconciliation, Eighteenth Session, 29 February 2008.
406 *Ibid*.
407 *Ibid*.
408 *Ibid*.

was understandable to Kenyans: "once the people saw the matter of truth and reconciliation was being addressed, they would be on board".[409]

Priscilla Hayner, an expert from the International Centre for Transitional Justice (ICTJ), who assisted the Panel, explained that the TJRC's mandate should be drafted with care since it would not be well-suited to deal with all issues. Given Kenya's history and context, she nevertheless considered that economic and land issues would be admissible. She suggested that participants agree quickly on broad principles and parameters, since the bill that would eventually establish a TJRC could be more detailed.[410] She emphasized that the purpose of a TJRC was to examine the broad pattern of acts over time; it was not an exercise in recrimination, but an attempt to understand the root causes of current situations.

At the Nineteenth Session (3 March 2008), the negotiating team followed Ms Hayner in adopting four issues for discussion. Should the TJRC examine economic crimes, land, corruption and human rights violations? How many experts would the TJRC need, should they be international or national, and how would they be selected? What would be the start date for the TJRC's work (cut-off date)? What would be the end date for its work?[411]

With respect to the scope of its inquiry, the 4 March Agreement stated that:

> "The Commission will inquire into human rights violations, including those committed by the state, groups or individuals. This includes but is not limited to politically motivated violence, assassinations, community displacements, settlements, and evictions. The Commission will also inquire into major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, especially as these relate to conflict or violence. Other historical injustices shall also be investigated."[412]

On the selection of commissioners, there was support for applying the formula used for IREC: three international experts proposed by the Panel and four national experts nominated by the two parties.[413] However, Ambassador Oluyemi Adeniji pointed out that this would exclude civil society.[414] It was

409 *Ibid.*

410 *Ibid.*

411 Minutes of the Kenya National Dialogue and Reconciliation, Nineteenth Session, 3 March 2008.

412 Kenya National Dialogue and Reconciliation, Agreement of 4 March 2008 on the TJRC.

413 Minutes of the Kenya National Dialogue and Reconciliation, Eighteenth Session, 29 February 2008.

414 Minutes of the Kenya National Dialogue and Reconciliation, Twentieth Session, 4 March 2008.

important to secure acceptance[415] of the TJRC and essential that people should feel they owned the process.

In the end, the negotiating team defined the qualifications that commissioners required, but stated that "to ensure broad trust in and ownership of the process of seeking the truth, the national members of the Commission [will be] chosen through a consultative process", the parameters of which Parliament would agree. As with IREC, the Panel was responsible for selecting three international commissioners, "taking into account public input".[416]

With respect to the start date, debate focused on balancing the need to determine root causes (and therefore consider the pre-independence period) with the need to work quickly. The 4 March Agreement was drafted to address both concerns. It stated: "The Commission will inquire into such events which took place [between] 12 December 1963 and 28 February 2008. However, it will, as necessary look at antecedents to this date in order to understand the nature, root causes or context that led to such violations, violence or crimes."[417] The terms of reference entitled the commission to receive statements from victims, witnesses, communities, interest groups, persons directly or indirectly involved in events or any other group or individual; undertake investigations and research; hold hearings; and engage in activities that it determined would advance national or community reconciliation. The TJRC was permitted to take confidential evidence, if requested, to protect individual privacy or security, or for other reasons. The TJRC alone would determine whether its hearings would take place in public or *in camera*. Individual amnesty could be recommended by the commission in exchange for the full truth, but no blanket amnesty would be provided for past crimes. Serious international crimes (crimes against humanity, war crimes or genocide) were not subject to amnesty. Individuals who bore great responsibility for crimes the commission examined could not be amnestied. The commission was to complete its work and submit a final report within two years. Its final report would set out findings and recommendations, which would be submitted to the President and made public within 14 days before being tabled in Parliament.

Two schools of thought emerged. One proposed that the TJRC's mandate should conclude on 27 December 2007 (before the general election), the other that the TJRC's remit should extend into the mandate of the current government, because crimes had continued after the election.[418] The 4 March

415 *Ibid*.

416 Kenya National Dialogue and Reconciliation, Agreement of 4 March 2008.

417 *Ibid*.

418 Minutes of the Kenya National Dialogue and Reconciliation, Nineteenth Session, 3 March 2008.

Agreement decided the mandate would continue until 28 February 2008, when the National Accord was signed.

The negotiating team also discussed the legal framework of the TJRC and the length of its mandate.

With regard to the legal framework, the negotiating team felt that it had a duty to formulate the terms of reference, parameters and mandate of the TJRC to ensure that its work healed, rather than divided the country.[419] It felt too that the Panel should be able to provide guidelines for, and affirm the desirability of, the TJRC and give it a structure and deadlines. In part, this was because Parliament would be unusually busy in 2008.[420] One member suggested that discussion of the TJRC should be led by Parliament and the relevant ministry,[421] but others were concerned that Parliament might be unable to define the TJRC's role appropriately. Adeniji, too, cautioned against referring the debate to Parliament without adequate definition.[422]

Views diverged on how much time the TJRC needed to complete its work. Hayner had proposed two years with the possibility of extension,[423] but this was considered too long, because it was important to maintain momentum, because the TJRC and constitutional review should be in synchrony, and because the risk of political influence would increase with time.[424] The parties finally agreed to a mandate of no more than two years. Under section 20(3) of the TJR Act, the commission was required to submit to the National Assembly a progress report and to request any extension longer than six months at least three months before its two-year mandate expired.

Constructing the TJRC's legal framework

Under the 4 March Agreement, a TJRC was to be created by Act of Parliament by a bill to be adopted by 4 April 2008.

The negotiating team shared a draft bill with the Panel on 18 April (when Kofi Annan returned to Nairobi to see the new cabinet sworn in). The Panel provided written comments which reported its own views and concerns and observations received from civil society and other stakeholders. They emphasized the

419 *Ibid.*
420 *Ibid.*
421 *Ibid.*
422 *Ibid.*
423 *Ibid.*
424 Minutes of the Kenya National Dialogue and Reconciliation, Twentieth Session, 4 March 2008.

importance of a transparent and open consultative process, with broad input from society, to ensure public trust in and ownership of the process.[425]

The National Assembly passed the TJRC Bill on 23 October 2008. It received presidential assent on 28 November and came into force on 17 March 2009. Enactment was delayed because substantive legal loopholes were found in the initial bill. The amendments addressed: the TJRC's financial independence from the executive; inconsistencies with international law and practice; witness protection; the issues it would address; the vague term "conditional amnesties" for some human rights violations; and the responsibility of the Attorney General to prosecute crimes on the basis of the TJRC's recommendations.

Civil society support for the TJRC was led by the Multi-Sectoral Task Force (MSTF) on Truth, Justice and Reconciliation,[426] which pushed hard for a people-centred, effective and credible commission. The MSTF's lobbying succeeded in limiting the bill's amnesty provisions, made sure that crimes against humanity, war crimes and genocide were not subject to amnesty, and created an opportunity for victims to have a say when applications for amnesty were being considered. The Task Force also raised public awareness of the TJRC, collected and publicized concerns, enunciated best practices, developed a model operational framework, mobilized victims and prepared them to participate in the process.[427]

The TJRC was mandated to: investigate and establish a historical record of gross economic crimes and violations of human rights during the period between 12 December 1963 and 28 February 2008; identify victims and make recommendations for redress; identify alleged perpetrators and recommend their prosecution; inquire into the irregular and illegal acquisition of public land;

425 Panel of Eminent African Personalities, Fifth Progress Report to the Chairman of the African Union (Confidential).

426 This coalition, formed in March 2008, brought together human rights groups and the Kenya National Commission on Human Rights. Key members were the International Centre for Policy and Conflict, the Kenya Human Rights Commission, the Coalition on Violence against Women-Kenya, the International Commission of Jurists-Kenya, Urgent Action Fund-Africa, the Centre for Rights Education and Awareness, the Centre for Multiparty Democracy, the Kenya Land Alliance, and the Mazingira Institute. After the law was enacted, the MSTF became the Kenyan Transitional Justice Working Group and later the steering committee of the Kenyan Transitional Justice Network.

427 Kenya Human Rights Commission, Kenyan Section of the International Commission of Jurists, International Centre for Policy and Conflict (2010), *Transitional Justice in Kenya: A Toolkit for Training and Engagement*, Nairobi: Zand Graphics Ltd; Mue, N. "Kenya Case Study," African Transitional Justice Research Network Workshop, 30-31 August 2010, Johannesburg, South Africa; "Creating a Credible and Effective Truth Justice and Reconciliation Commission in Kenya", Letter from Kenyans for Peace with Truth and Justice and Civil Society Congress to President Mwai President Kibaki, Prime Minister Raila Odinga, Kofi Annan and the Mediation team (15 October 2008).

inquire into the causes of ethnic tensions; and promote healing, reconciliation and co-existence.[428] The TJRC was to submit its findings to the President and Prime Minister, and recommend actions that should be undertaken to reconcile the nation. It was not stated that the Panel would receive the report, because it was assumed that by that time the Panel would have ceased its work.

With regard to appointments, the Act stipulated that the Panel would select three non-citizens and forward their names to the National Assembly for onward transmission to the President and Prime Minister for appointment.[429] The panel charged with nominating Kenyan commissioners was formed on 12 March 2009 and forwarded names to Parliament on 21 April 2009.[430] On the same day the Panel nominated three non-Kenyan commissioners: Gertrude Chawatama (Zambia); Berhanu Dinka (Ethiopia); and Ronald Slye (United States). The Kenyan commissioners were: Ambassador Bethuel Kiplagat (Chair), Betty Murungi (Vice-chair), Tecla Namachanja Wanjala, Tom Ojienda, Margaret Shava and Ahmed Sheikh Farah.[431]

The TJRC was sworn into office on 3 August 2009 and started its work on 3 November 2009.

The TJRC collected a total of 42,465 statements from across the country. The human rights violations reported most frequently were: land and property (41 per cent), serious injury (13 per cent), and extra-judicial executions (11 per cent). People from the Rift Valley region contributed most statements (28 per cent), followed by Western (16 per cent), Eastern (12 per cent), and Nyanza and North Eastern (10 per cent each); 8 per cent of statements were made by people in the Central region and the Coast region and 4 per cent by people from Nairobi.[432] In terms of gender, males contributed 62 per cent and females 38 per cent of all statements.[433]

428 Truth Justice and Reconciliation Commission Act, No. 6 of 2008.

429 *Op. cit.*

430 It included representatives of religious organizations, the legal profession, trades unions and professional associations, employers, doctors and the Kenya National Commission on Human Rights.

431 Republic of Kenya (2013), *Report of the Truth Justice and Reconciliation Commission*, Nairobi: Government Printer.

432 Truth Justice and Reconciliation Commission (2012), *Progress Report (May 2012 – July 2012)*, Nairobi: TJRC.

433 Truth Justice and Reconciliation Commission, "Advertiser's Announcement", *The Standard*, 30 April 2013.

7.1. Statements' distribution

Region	Male	Female	Unknown	Total	%
Central	1,778	1,574	6	3,358	7.9%
Coast	2,455	1,079	13	3,547	8.4%
Eastern	3,467	1,775	7	5,249	12.4%
Nairobi	832	947	2	1,781	4.2%
North Eastern	2,883	1,307	2	4,192	9.9%
Nyanza	2,602	1,828	7	4,437	10.4%
Rift Valley	7,211	4,698	23	11,932	28.1%
Western	3,934	2,890	8	6,832	16.1%
Not Given	649	405	83	1,137	2.7%
Total	**25,811**	**16,503**	**151**	**42,465**	

The TJRC also collected 1,828 memoranda from communities and organizations. Rift Valley contributed most (34 per cent), then Coast (14 per cent), Western (12 per cent), Eastern and Central (9 per cent each), Nyanza (7 per cent), Nairobi (3 per cent), and North Eastern (1 per cent).[434]

7.2. Regional distribution of memoranda

Region	Number	%
Central	162	8.9%
Coast	255	13.9%
Eastern	168	9.2%
Nairobi	55	3.0%
North Eastern	24	1.3%
Nyanza	122	6.7%
Rift Valley	626	34.2%
Western	214	11.7%
Not Given	202	11.1%
Total	**1,828**	

434 *Supra* note 431.

The TJRC established an electronic database to store and retrieve information, which ensured that statements, memoranda and other avenues were preserved for posterity and future reference.[435]

Under the TJRC's rules of procedure: (1) hearings were conducted in the eight designated regions of this country; (2) hearing panels included a minimum of three commissioners, enabling several panels to operate simultaneously; (3) testimony could be made in English and Kiswahili; (4) the commission employed qualified language and sign interpreters as needed; and (5) all statements, remarks and questions were addressed to the Panel, not other participants.

The TJRC held individual hearings, women's hearings and thematic hearings in all regions. Hearings commenced in mid-April 2011 in Garissa and concluded at the beginning of April 2012 in Nairobi. The TJRC also held 10 reconciliation forums between 9 and 20 March 2012.[436]

7.3. Venue of hearings

	Region	Where hearings were held
1	Central	Nyeri, Muranga, Kiambu and Nyandarua
2	Coast	Lamu, Hola, Kilifi, Mombasa, Kwale and Wundanyi
3	Eastern	Meru, Embu, Machakos, Makindu, Kitui, Marsabit and Isiolo
4	Nairobi	Nairobi
5	North Eastern	Garissa, Wajir, Mandera and Moyale
6	Nyanza	Kisumu, Kisii and Kuria
7	Rift Valley	Kericho, Nakuru, Naivasha, Narok, Kajiado, Rumuruti, Eldoret, Lodwar, Kapenguria, Kitale and Baringo
8	Western	Mount Elgon, Kakamega
9	Uganda	Kiryandongo

Women's hearings were conducted in all regions and attended by more than 1,000 women, with an average of 60 women at each hearing.[437]

Fourteen thematic hearings were held on: access to justice; economic marginalization and minorities; land; armed militia groups; prisons and

435 *Op. cit.*

436 Forums were held in Machakos, Mombasa, Garissa, Isiolo, Nyeri, Eldoret, Nakuru, Kakamega, Kisumu and Nairobi. Truth Justice and Reconciliation Commission (2012), *Progress Report (October 2012)*, 11 October 2012, Nairobi: TJRC.

437 Republic of Kenya (2013), *Report of the Truth Justice and Reconciliation Commission: Volume I*, Nairobi: Government Printer.

detention centres; torture; ethnic tensions and violence; the 1982 attempted coup; security agencies, extra-judicial executions and massacres; persons with disabilities (PWDs); women; children; internally displaced persons (IDPs); and political assassinations. In selecting the subject of hearings, weight was given to significant events during the mandate period and the vulnerability of specific groups to gross and systematic human rights violations.[438]

The TJRC also ran nationwide focus group discussions between 25 January and 8 February 2012 to gather information on perceptions of violations of socio-economic rights and economic marginalization. It held a total of 81 focus group discussions in which 1,192 individuals participated. Most groups had 12 to 15 participants drawn from urban informal settlements or rural areas, chosen to ensure diversity in terms of age and gender. An effort was made to include persons with disabilities and other vulnerable groups.[439]

7.4. Focus group discussions

	Province	Location	Number	Participants
1	Central	Ol Kalou, Nyahururu, Nyeri, Othaya, Mwea, Kagio, Muranga, Kenol, Kiambu and Lari.	10	135
2	Coast	Malindi, Garsen, Kilifi, Mtwapa, Mombasa, Kwale, Kaloleni, Mariakani, Voi, Taveta.	10	170
3	Eastern	Machakos, Kitui, Embu, Chuka, Meru, Isiolo, Archers Post, Laisamis, Garbatulla.	10	137
4	Nairobi	Kibera, Starehe, Kayole, Korogocho, Githurai, Kasarani, Makadara, Mukuru kwa Njenga, Kawangware.	9	145
5	North Eastern	Garissa, Shanta Abak, Wajir, Giriftu, Bura, Masalani.	5	86
6	Nyanza	Kisumu, Ahero, Bondo, Siaya, Kisii, Nyamira, Borabu, Migori, Kuria, Homa Bay, Suba.	11	155
7	Rift Valley	Lodwar, Kitale, Turbo, Eldoret, Eldama Ravine, Nakuru, Kericho, Bomet, Kilgoris, Lolgorian, Narok, Isinya, Kiserian.	14	246
8	Western	Kakamega, Mumias, Bungoma, Cheskaki, Kapsokwony, Webuye, Amagoro, Chakol, Busia, Funyula, Vihiga, Hamisi.	12	118
		Total	**81**	**1,192**

438 Truth Justice and Reconciliation Commission (2012), *Progress Report (May – July 2012)*, Nairobi: TJRC.

439 Truth Justice and Reconciliation Commission (2012), *Progress Report (October 2012)*, Nairobi: TJRC.

The TJRC database assembled the names of 54,275 individuals who were accused of abuses ('adversely mentioned persons' or AMPs). This number was reduced to 650 after investigation. By October 2012, for reasons of time, only a small fraction (50) had been given an opportunity to reply to the accusations against them.[440] The exercise was therefore extended and concluded on 10 April 2013. A number of AMPs disregarded requests to appear, including the Office of the President, the National Security and Intelligence Service (NSIS), and the National Police Service Commission (NPSC).[441]

Challenges to the TJRC's leadership

The TJRC experienced challenges in several key areas. The sharpest problems concerned its mandate and the credibility of its leadership. Although the mandates of the TJRC, IREC and CIPEV had been defined at the same time, the TJRC formed much later, indeed after IREC and CIPEV had reported. The TJRC was used as something of a political football in cabinet, because those opposed to an ICC investigation argued that its existence removed Kenya from the ICC's jurisdiction.

Its credibility came into question because conflict of interest allegations against the chair paralyzed its work for two years. Ambassador Kiplagat had been a member of the government during the period which the commission was to investigate. In addition, he had been Permanent Secretary in the Ministry of Foreign Affairs when the then Minister, Robert Ouko, was controversially murdered; he had been named as a beneficiary of irregular and illegal allocations of public land by a presidential commission of inquiry (the Ndung'u Report);[442] and, as Permanent Secretary for Foreign Affairs, he had attended a meeting of the Kenya Intelligence Committee in Wajir on 8 February 1984, less than 48 hours before the start of the security operation that resulted in the Wagalla Massacre.[443]

On 20 August 2009, human rights defenders and victims filed a legal suit against the TJRC and its chair and in early 2010 pressure on the commission increased

440 *Supra* note 437.

441 Ally Jamah, "TJRC says crucial documents out of reach", *The Standard*, 11 April 2013; Ramadhan Rajab, "Kimemia, NIS snub TJRC", *The Star*, 11 April 2013.

442 Republic of Kenya (2004), *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, Nairobi: Government Printer.

443 Lynch, G. (2011), "The search for 'truth and justice' and understandings of ethnic identity and ethnic conflict in contemporary Kenya", Paper presented at the Ethnicity, Conflict and Cooperation in Africa Workshop, University of Michigan, 11-12 November 2011; Constitution and Reform Education Consortium (2012), *The Quest for an Elusive Justice: A Report on Observation of the Truth Justice and Reconciliation Commission of Kenya*, Nairobi: CRECO.

rapidly. In press conferences on 31 January and 7 February 2010, civil society leaders called for the resignation of the chair and presented evidence against him.[444] On 19 January 2010, religious leaders asked the government to disband the TJRC if its proceedings and findings were not to be made public. On 25 February 2010, some 10 former truth commission heads, led by Archbishop Desmond Tutu of South Africa, called on the TJRC chair to resign.[445] Though Cabinet Minister Sally Kosgei and former President Daniel Moi defended Ambassador Kiplagat on 3 and 7 March,[446] on 27 March 2010, two of the commissioners, Vice-chair Betty Murungi and Ronald Slye, wrote a press article asking him to stand down.[447] Eventually, Murungi herself resigned, as Vice-chair on 29 March and from the commission on 21 April 2010.[448]

The chair himself did not budge. Ronald Slye resigned on 21 October 2010[449] but revoked his decision when Kiplagat agreed to step down.[450] Although the President was required to gazette Murungi's vacancy within seven days of her resignation so that a replacement could be chosen, the notice was never published and no replacement was ever made.[451]

After three months of internal discussion, Kiplagat indicated that he preferred to follow the provisions of the Act concerning the removal of a commissioner, to which the other commissioners unanimously agreed. Therefore, on 12 April 2010, Kiplagat joined the commissioners in signing a letter to the Minister for Justice, National Cohesion and Constitutional Affairs asking him to request the Chief Justice to establish a tribunal to inquire into the conflicts of interest raised by his presence in the TJRC. Kiplagat agreed to step aside until the tribunal reached its conclusion; but 24 hours later, rescinded this decision on the advice of the ministry.[452]

In the meantime, the Minister responded to the TJRC's letter of 12 April 2010 and advised that given the provisions of the Act, the TJRC should not

444 International Centre for Policy and Conflict (2010), *Monitoring Report of the Truth Justice and Reconciliation Commission (April 2008 – June 2010): A Case of Concealing Truth to Reward Impunity*, Nairobi: ICPC.

445 *Op. cit.*

446 International Centre for Policy and Conflict (2013), *Concealing the Truth to Reward Impunity: A Critical Analysis of Truth-Seeking in the Absence of Political Will in Kenya*, Nairobi: ICPC.

447 *Sunday Nation*, 27 March 2010.

448 *Supra* note 443.

449 Lucas Barasa, "Kenya truth body commissioner resigns", *Daily Nation*, 21 October 2010.

450 Truth Justice and Reconciliation Commission, "TJRC Commissioners Applaud Chair Bethuel Kiplagat for Stepping Aside", 3 November 2010.

451 Republic of Kenya (2013), *Report of the Truth Justice and Reconciliation Commission: Volume I*, Nairobi: Government Printer.

452 *Ibid.*

write directly to the Chief Justice. Eventually, on 16 April 2010, all eight commissioners, with the consent and approval of Kiplagat, petitioned the Chief Justice to set up a tribunal to investigate allegations against Kiplagat and rule on his suitability to chair the TJRC. The Chief Justice did not establish the tribunal for over six months. In October 2010, the Parliamentary Committee on Justice and Legal Affairs gave the commission 72 hours to find a way forward on the Kiplagat conundrum, or it would move to have it disbanded. Consequently, the TJRC applied to the High Court for a *writ of mandamus* to compel the Chief Justice to set up a tribunal, which he announced on 29 October 2010. A Kenya Gazette notice was published on 1 November 2010 dated 21 October 2010 establishing the tribunal.[453]

Ambassador Kiplagat stepped down the following day, but the tribunal only began its formal sittings in March 2011, four months later, because of delays due to its obligation to reconstitute itself after the resignation of one of its members. Later, Kiplagat went to court to challenge the tribunal's jurisdiction to investigate his past conduct prior to his appointment. The court granted a stay against the proceedings of the tribunal on 27 April 2010. While the case proceeded, the six-month term of the tribunal expired.[454] With the lapse of the tribunal's mandate and the Chief Justice's refusal to extend it, Kiplagat withdrew his court challenge.

On 4 January 2012, Kiplagat returned to the TJRC's offices unannounced and occupied the office of the Acting Chair. He requested access to documents related to the final report, including documents that touched on matters where he had conflicts of interest. The TJRC went to court on 10 January 2012 requesting an order to prohibit Kiplagat from returning to the TJRC unless and until a competent tribunal had addressed the allegations in the original petition, and a second order requiring the Chief Justice to constitute such a tribunal.[455]

On 24 February 2012, the court dismissed the application, ruling that the TJRC had no legal capacity or authority to bring an application against the chair, and that the application should have been brought through the Attorney General. Judge Mohammed Warsame held that no statutory power required the Chief Justice to appoint a tribunal to investigate and inquire into the past conduct of the chair.[456] In March 2012, the TJRC filed an appeal against the ruling and

453 Truth Justice and Reconciliation Commission (2011), *Progress Report to the National Assembly, June 2011*, Nairobi: TJRC.

454 *Supra* note 450.

455 *Ibid.*

456 Judicial Review 7 of 2012, Truth Justice and Reconciliation Commission versus Chief Justice of the Republic of Kenya and Bethuel Kiplagat.

asked for an emergency injunction to keep Kiplagat out of the TJRC's offices until the issues raised by the case had been decided. That appeal, including the request for an emergency injunction, was still pending at the time the TJRC released its final report.[457]

On 12 April 2012, Eugene Wamalwa, newly appointed Minister, brokered an agreement with the commissioners for Kiplagat to return as chair.[458] Kiplagat agreed in principle not to be involved in parts of the report in which he had conflicts of interest. An aide-memoire was developed to govern his participation in the TJRC's work for the remainder of its life. His return to the TJRC, when it was preparing its report, raised serious concerns about the report's credibility.[459] During his absence, Vice-chair Tecla Namachanja served as Acting Chair from 2 November 2010 to 27 February 2012.[460]

The Kiplagat controversy prompted victims, civil society and grant makers to disengage from the commission. Victims walked out of public outreach meetings the TJRC attempted to hold[461] and hostile demonstrations greeted the TJRC whenever it ventured into the field. Significant sections of civil society refused to cooperate, and few grant makers would provide support.[462]

The dispute damaged the commission's credibility with the public and reduced the amount of substantive work the TJRC could do during its first year in office. Many individuals and organizations withheld potentially important information. For example, the Independent Medico-Legal Unit (IMLU), which has assembled a wealth of information on torture since the mid-1990s, opted not to participate in the TJRC's work.[463]

Financing

The commission lacked and was deprived of funds. Throughout its term, the TJRC operated on a small budget. In violation of the TJRC Act, the government

457 *Supra* note 450.

458 *Supra* note 443.

459 Kenya Stakeholders Coalition for Universal Periodic Review (2012), *Annual Progress Report: An Assessment by Stakeholders of Government's performance in implementation of UPR Recommendations*, Nairobi: KSC-UPR.

460 *Supra* note 450.

461 Mue, N. "Kenya Case Study", African Transitional Justice Research Network Workshop, 30-31 August 2010, Johannesburg, South Africa.

462 *Supra* note 450.

463 Lynch, G, 2011, "The search for 'truth and justice' and understandings of ethnic identity and ethnic conflict in contemporary Kenya", Paper presented at the Ethnicity, Conflict and Cooperation in Africa Workshop, University of Michigan, 11-12 November 2011; Njonjo Mue, "Kenya Case Study", African Transitional Justice Research Network Workshop, 30-31 August 2010, Johannesburg, South Africa.

released only a small portion of the sums allocated to it, demonstrating its lack of commitment to the exercise.[464]

During the TJRC's first year, its finances were controlled and administered by the Ministry of Justice, National Cohesion and Constitutional Affairs. This situation arose because government regulations prohibited the TJRC from controlling its finances until a Secretary had been hired. Though one was appointed in February 2010, the TJRC did not take control of its finances until the start of the next fiscal year in July, more than five months later.[465] Lack of financial independence impeded its ability to operate.

The TJRC's preliminary budget for the two years of its mandate was approximately US$27 million. For the 2009/10 fiscal year, it submitted to treasury a budget of KES1.2 billion but was only allocated KES190 million, less than 16 per cent of its request. (With supplementary funding, it eventually received KES650 million.) It was compelled to seek monthly advances in November and December 2011 from the ministry. For the 2010/11 fiscal year, it was allocated KES650 million against a proposed budget of KES1.2 billion. This uncertain and limited funding impeded the TJRC's ability to do outreach,[466] for which it was criticized in a report by the International Centre for Policy and Conflict (ICPC).[467]

These financial constraints seriously delayed TJRC's operations. It had neither a Secretary nor a functioning secretariat for the first nine months. Its operational units became functional only in September 2010. It did not have adequate office space until January 2011, more than a year after its establishment. And the launch of public hearings was delayed for a year (to April 2011).[468]

Technical and protection shortcomings

A monitoring report by the Constitutional Reform and Education Consortium (CRECO), which assessed citizen participation in the TJRC between January 2011 and April 2012 and the delivery of transitional justice to victims, identified several flaws in its statement-taking.

464 Human Rights Watch (2011), *"Turning Pebbles": Evading Accountability for Post-Election Violence in Kenya*, Washington DC: HRW.

465 *Supra* note 450.

466 *Supra* note 452.

467 *Supra* note 443.

468 Truth Justice and Reconciliation Commission (2011), *Request for Extension of the life of the Truth Justice and Reconciliation Commission submitted to the National Assembly*, Nairobi: TJRC.

The recruitment of monitors was not done professionally and transparently. This led to accusations of bias against some communities with victims and perpetrators being hired, compromising objectivity. This was also noted in another study by Gabriel Lynch. For example, in Mount Elgon, some statement takers were said to be former members of a militia group, the Sabaot Land Defence Force (SLDF). In Uasin Gishu, five out of six statement takers were non-Kalenjin in a majority Kalenjin area, meaning some people felt uncomfortable and incapable of recording statements as they were unsure who would get to see their statements and how the information might be used.[469] Most monitors were not trained on transitional justice, human rights and the mandate and operations of the TJRC, thus affecting the quality of statements taken. Statement takers were few and did not, therefore, reach out to all affected areas. There were many places in which crimes and human rights violations were not covered. In Nairobi, for example, priority was accorded to post-election violence hot spots. There were cases in which women and children did not participate because it was assumed that, if a husband or father was involved, he would represent issues affecting the entire family. Statement-taking was rushed. Given the short period of statement-taking, the gaps therein and yet the large number of statements collected, it is impossible to explain how the TJRC struck a balance between quality and quantity.

The report found that the commission did not make adequate provision for witness protection or psycho-social support to victims. Its dependence on the provincial administration also deterred victims, many of whom considered that the administration had been responsible for human rights violations and impunity.

It also found that little civic education had been conducted before statement-taking began, with the effect that most people did not know about the TJRC's mandate or powers, or that statement-taking was in process, or how to locate a statement taker or submit a memorandum.[470]

With regard to public hearings, the report identified further gaps.

(i) The TJRC failed to acquire legitimacy or a profile because key stakeholders (the public, some victims, civil society, the media and grant makers) withdrew because of doubts about the credibility of its chair.

469 Lynch, G. (2011), "The search for 'truth and justice' and understandings of ethnic identity and ethnic conflict in contemporary Kenya", Paper presented at the Ethnicity , Conflict and Cooperation in Africa Workshop, University of Michigan, 11-12 November 2011.

470 *Ibid*.

(ii) The process was delayed. Scheduled to begin in February 2011, it was moved to March 2011, and finally started in April 2011.

(iii) The TJRC did not inform stakeholders in time about its calendar and schedule. This, together with arbitrary changes of venue, undermined public support and participation.

(iv) Hearings took place in municipal centres which made participation difficult for victims and other stakeholders who lived at a distance or in rural areas.

(v) The TJRC failed to make sure witnesses could attend its hearings and express themselves. In some instances the presence of police officers intimidated victims, and some *in-camera* sessions were held in tents, a few metres from public venues.

(vi) The TJRC failed to create spaces where both victims and suspected perpetrators could engage in non-retributive truth-telling. Many suspected perpetrators failed to confess and show remorse.

(vii) Finally, sometimes only one commissioner turned up for sittings, contrary to the quorum threshold envisaged in the Act.[471]

A review by the Kenya Stakeholders Coalition, and Lynch's study, supported these findings. Both noted that hearings tended to concentrate only on certain incidents, such as the Wagalla Massacre; were brief in each location; were based on limited investigation and research; suffered from poor communication; frequently included last minute changes; and had low levels of public engagement and media coverage. In addition, suspected perpetrators appeared in Nairobi rather than at relevant sites. Finally, it was problematic that the TJRC's approach did not complement other truth-seeking mechanisms: the TJRC, national, regional and international prosecutions, and legal, policy and institutional reforms were pursued as stand-alone processes.[472]

471 Constitution and Reform Education Consortium (2012), *The Quest for an Elusive Justice: A Report on Observation of the Truth Justice and Reconciliation Commission of Kenya*, Nairobi: CRECO; Lynch, G. (2011), "The search for 'truth and justice' and understandings of ethnic identity and ethnic conflict in contemporary Kenya," Paper presented at the Ethnicity , Conflict and Cooperation in Africa Workshop, University of Michigan, 11-12 November 2011.

472 Kenya Stakeholders Coalition for Universal Periodic Review (2011), *Annual Progress Report, 22 September 2010 – 21 September 2011: An Assessment by Stakeholders of Government's performance in implementation of UPR recommendations*, Nairobi: KSC-UPR.

Report writing

The problems listed above caused the TJRC to begin its operations one year later than planned. By June 2011, it had conducted hearings only in North Eastern Province and partially in Western Province; six provinces had still to be covered. To make up for lost time, the TJRC requested Parliament on 24 June 2011 for a six-month extension. This was granted on 18 August 2011; its report was rescheduled for May 2012. The TJRC completed its schedule of public hearings and thematic hearings within this time and began drafting the report in February 2012.[473]

In late April it requested a further extension and Parliament first approved a three-month deferment to 3 August 2012, then a nine month deferment to May 2013, two months after the 2013 general election.

The TJRC finally delivered its report on 21 May 2013, but failed to obtain an appointment to meet with the President. Upon receiving the report, the President was called under the Act to gazette and circulate it to the public; it was to be tabled in the National Assembly within 21 days. This did not happen. The report has yet to be made public, and its implementation had not commenced when this book went to print.

Recommendations

The report calls on the government to: acknowledge previous reports and issue apologies to victims; provide compensation; establish public memorials; investigate and (where justified) prosecute adversely mentioned persons within 12 months; reform the police; set up and equip forensic laboratories in each county; establish an Office of the Independent Inspector of Prisons and All Places of Detention; provide reparations for victims of historical injustice; establish a Special Rapporteur on Sexual Violence; and appoint a committee to monitor implementation.

The release of the report was associated with a final controversy. The three non-Kenyan commissioners disassociated themselves from the chapter on land, which they stated had been altered following intervention by a senior official in the Office of the President. They reported that the official had compelled the TJRC to submit an advance copy to him and the Attorney General, Githu Muigai. They alleged that the official then exerted pressure on the commissioners to change the chapter. The Kenyan commissioners reportedly did so and

473 Truth Justice and Reconciliation Commission (2012), *Progress Report (May – July 2012)*, Submitted to the Ministry of Justice, National Cohesion and Constitutional Affairs, 27 July 2012, Nairobi: TJRC.

refused to place a dissenting opinion on record.[474] On 3 June 2013, the three international commissioners put their name to an editorial that reproduced the paragraphs on the land question that had been removed.[475]

Conclusion

If the public and stakeholders disengage from a truth and reconciliation process, little can be expected to come of it. Political leaders did not support the TJRC, and the religious sector, Parliament and civil society organizations actively disengaged from it. A TJRC needs to win and keep the loyalty of key stakeholders, who must believe its work is meaningful, designed to result in forms of justice or compensation. The problems experienced by the Kenyan TJRC were particularly due to internal tensions among the commissioners, and public concerns about their credibility.

Another obvious lesson is that the mandate of a TJRC should neither be too heavy nor open-ended. The gap between popular expectations and what can be realistically achieved by a TJRC has sometimes caused the public to feel disappointed or disillusioned. Reconciliation is a process, not an event. The objective of truth seeking and reconciliation cannot be fulfilled within the term of any TJRC.

Elections can be a distracting factor. The commission's work should have been completed well before the 2013 general election. In practice, because of delays, the election threatened to influence the impact and perceptions of the commission's report.

The delays had other effects. Reliance on the government to grant extensions and finance compromised the commission's freedom of manoeuvre. The number of extensions made it difficult for the public to keep track of what was happening. In addition, prolonging its lifespan diminished the commission's ability to signal an early break with past abusive practices.

Decisions on when to establish a TJRC, and when to conduct hearings, are critical. Had the commission formed in 2008, when memories of the violence were fresh, the public would have engaged more actively. Leaders too would have given it more support. Truth seeking needs to be done quickly and should not be open-ended.

474 "TJRC process has been irredeemably damaged", *Daily Nation*, 5 June 2013; Nzau Musau, "How OP intervened to censor the TJRC Chapter on land", *The Star*, 3 June 2013.

475 Prof. Ron Sly, Behanu Dinka and Judge Gertrude Chawatama, *Daily Nation*, 3 June 2013.

When the report is received matters too. In Kenya, the TJRC's report was received by a different administration than the administration that had created it.

Finally, an evident point: it is difficult to take action on a truth, justice and reconciliation report if the political environment is polarized.

Chapter Eight

The Journey to a New Constitution

"The Constitution belongs to the people.
It vests all sovereign authority in the people.
Its legitimacy is drawn from the people's
overwhelming support for it."

– Kofi Annan speaking at the Conference "Kenya National Dialogue and Reconciliation 2011: Building a Progressive Kenya", Nairobi, 5 December 2011

Many considered that Kenya's failure to create a new constitutional order was one of the long-term causes of the crisis in 2007-2008. The negotiating team acknowledged that the crisis might have been avoided had constitutional reforms been introduced earlier.

Background

After independence, Kenya's constitution underwent a series of fundamental amendments. By 1969, the country's system of government was a pale shadow of the democracy that had been established in December 1963.

The sections that were amended became critical areas of reform in subsequent years, as efforts were made to reclaim freedoms and powers the executive had acquired. The changes after 1963 had moved Kenya: from a decentralized to a unitary state; from a bicameral to a unicameral legislative structure; from a parliamentary system with an executive prime minister (rather than head of state) to a semi-parliamentary system with a powerful presidency; from a regime with effective safeguards for human rights and civil liberties to one with

a weak Bill of Rights; and from a multiparty to a *de jure* single party system (following reforms in 1982).[476]

Although formal constitutional review processes began in the 1980s, effective pressure for reform started in 1991, when KANU was forced to repeal section 2A of the former constitution and restore multiparty democracy. The repeal followed popular demand for change by pro-reform forces inside and outside the country. The change did not create a constitutional democracy but expanded political space; it became easier to advocate for a political and legal system based on fundamental freedoms and rights.

In 1992, pro-reform civil society organizations and the political opposition formed a National Convention Assembly (NCA) to lobby for comprehensive constitutional reform in Kenya.[477] The National Convention Executive Council (NCEC), the NCA's executive wing, organized many public demonstrations[478] and pressure mounted. Additional constitutional amendments in July 1992 enabled the opposition to campaign in that year's general election. Faith-based groups, including the National Council of Churches of Kenya (NCCK) and the Kenya Episcopal Conference (KEC), joined the clamour for constitutional reform.

President Daniel arap Moi and KANU promised comprehensive constitutional reforms (rather than further piecemeal amendments) after the general election, but this promise was not honoured. In 1994, the NCA coalesced into a more assertive and popular constitutional reform movement under the Citizens Coalition for Constitutional Change (4Cs).

In early 1995, President Moi again promised a comprehensive review of the constitution, to be led by Parliament. In response, the KHRC, the Law Society of Kenya (LSK) and the International Commission of Jurists-Kenya (ICJ-K), under the 4Cs, drafted the first Proposed Model Constitution. This was an attempt to demystify constitution-making. Public demonstrations continued and were dispersed more harshly. When 14 Kenyans were killed in demonstrations to mark the July 7 anniversary of the first pro-multiparty protests (Saba Saba) in

476 Chitere, P., Chewy, L., Musya, J., Tostensen, A. and Waiganjo, K. (2006), *Kenya Constitutional Documents: A Comparative Analysis*, Bergen: Chr. Michelsen Institute, CMI Report R 2006: 5.

477 The NCA was established by representatives from a range of sectoral and interest groups at its First Plenary Session in Limuru, 3-6 April 1997.

478 The NCA/NCEC initiative became a mass movement which institutionalized an alliance of pro-constitutional reform and pro-democracy forces in the run-up to the 1997 general election. Their call was: "No Reforms, No Elections". They organized seminars, workshops and demonstrations that were regularly dispersed by the Kenya Police and the militia Jeshi la Mzee (The Old Man's Army). Kenya Human Rights Commission (2010), *Wanjiku's Journey: Tracing Kenya's Quest for a New Constitution and Reporting on the 2010 National Referendum*, Nairobi: KHRC.

1997, domestic and international outrage forced President Moi to capitulate.[479] Largely excluding civil society, he formed an Inter-Parties Parliamentary Group (IPPG) brokered by MPs and some religious groups. The Constitution of Kenya Review Act of 1997 once again made piecemeal reforms to facilitate the 1997 general election.[480]

The Act nevertheless became the legal foundation for constitutional reform because it created a Constitution of Kenya Review Commission (CKRC) and provided for people's representation in the constitutional review process; Parliament's role was to be confined to technical approval of the final draft. There followed a protracted battle. After a series of amendments to the law in 1998, 2000, 2001 and 2004, the role of Parliament as the key decision-maker was reinstated.[481]

The CKRC was not appointed until November 2000. Civil society and religious groups, with the participation of a section of opposition politicians, rallied against a process led by Parliament and the ruling party and formed a parallel commission, the People's Commission of Kenya, under the aegis of the Ufungamano Initiative.[482] When Professor Yash Pal Ghai was appointed chair of the CKRC, he negotiated the merger of the two commissions on 18 May 2001, following another amendment to the Review Act to incorporate the terms of the merger agreement.

Once the two initiatives had merged, the unified commission began its work in earnest: It collected views from around the country through written memoranda and hearings held in every constituency. These consultations formed the basis of a comprehensive report and a draft constitution, released on 19 September 2002 (popularly known as the 'Ghai' or 'CKRC' draft). In accordance with the Review Act, the CKRC convened 629 delegates for a National Constitutional

479 Harberson, J. (1998), "The Future of Democracy in Kenya", *Africa Today (Special Issue)* Vol. 45, No. 2; KHRC, 2010.

480 Ndegwa, S.N. (2001), "The Incomplete Transition: The Constitutional and Electoral Context in Kenya", *Africa Today (Special Issue)* Vol. 45, No. 2; Oyugi, W.O. and Oloo, A. (2001), "Pluralist Politics and Democratization in Kenya: Prospects and Obstacles", in Bujra, A. and Adejumobi S. (eds), *Democracy, Civil Society and Governance in Africa*, New Jersey: Africa World Press.

481 KHRC (2010); Constitution of Kenya Review Commission (2005), *Final Report of the Constitution of Kenya Review Commission*, Nairobi: CKRC; Oyugi, W.O. (2003), "The Politics of Transition in Kenya, 1992-2003: Democratic Consolidation or Deconsolidation?", in Oyugi, W.O, Odhiambo-Mbai, C. and Wanyande, P. (eds), *The Politics of Transition in Kenya: From KANU to NARC*, Nairobi: Heinrich Böll Foundation.

482 Led by a steering council of religious leaders with strong backing from civil society and the political opposition, the Ufungamano Initiative for Constitution Reform was established on 15 December 1999. Out of necessity, it began its own process of reviewing the Kenyan constitution, leading to long negotiations with the parallel statutory body. At: http://www.ncck.org/index.php/about-ncck/history-of-ncck.html.

Conference (NCC) scheduled to begin on 28 October 2002 at the Bomas of Kenya, a cultural centre in Nairobi.

On 27 October, President Moi dissolved Parliament, thereby preventing the NCC and disrupting the process. The 2002 general election took place under the old constitutional order. A new political alliance, the National Rainbow Coalition (NARC), campaigned on the platform that it would deliver a new constitution within 100 days of taking office.[483]

Divisions within NARC a mere three months after the election put the review process out of reach. Though NARC reconvened the NCC, political differences between factions in the coalition led to the collapse of the process.[484] Nonetheless, elements of NARC later prepared a Proposed New Constitution of Kenya (2005) (the Wako Draft). This was taken to a referendum on 21 November 2005 but rejected (by a majority of 57 per cent against 43 per cent).

After rejection of the Wako Draft, two schools of thought emerged. One supported minimal constitutional and legal reforms designed to level the political playing field, while the other (led by civil society organizations) continued to advocate comprehensive constitutional reform. Between 2005 and 2007, these two groups pursued divergent paths. The issue of constitutional review regained momentum during the mediation process that followed the 2007 post-election violence.

Mediation and the review process

From the start of the mediation, it was understood that Kenya's governance structure needed to change profoundly. Even the government and the PNU agreed that the only way to stop violence was through reform of the legal, institutional and constitutional framework.[485] In this sense, there was broad agreement that the crisis had created an opportunity to change the constitution that must be seized.[486]

It was also recognized that opportunities for reform had been missed. One member commented on the consequences of failing to respect agreed principles when appointing commissioners to the Electoral Commission of Kenya (ECK) (see Chapter Five). If principles had been respected, minimum reforms passed,

483 Lumumba, P.L.O. (2011), "A Journey through time in search of a new Constitution", in Lumumba, P.L.O., Mbondenyi, M.K. and Odero, S.O. (2011), *The Constitution of Kenya: Contemporary Readings*, Nairobi: Law Africa Publishing Ltd.

484 Committee of Experts on Constitutional Review (2010), *Final Report of the Committee of Experts on Constitutional Review*, Nairobi: CoE.

485 Minutes of the Kenya National Dialogue and Reconciliation, Seventh Session, 7 February 2008.

486 *Ibid*.

or the constitutional review process at the Bomas of Kenya in 2005 concluded, the crisis might have been avoided.[487]

At the same time, the PNU resisted a political solution that would require changes to the constitution. The ODM, by contrast, argued that the crisis could not be resolved without constitutional reform.[488]

The immediate limitations of the constitution became apparent when Benjamin Mkapa observed that it might be unwise to rerun the election before introducing constitutional reforms because a rerun election might be disputed in just the same way. A PNU member agreed, and said that reforms had to be undertaken to avoid repeating the mistakes of the past.[489]

Kofi Annan's statement on 11 February 2008, that a political solution would ultimately have to be based on a new constitutional order, proved prescient.[490] Ultimately, it was agreed that the special nature of the crisis made it necessary to enshrine the National Accord within a new constitution.

Ironically, the vehemence of opposition to constitutional reform regenerated the momentum needed to achieve it. As one ODM member noted, the debate on a new constitution would need to be continued by a new government.[491] That sentiment was echoed by a PNU member, who said that a comprehensive review of the constitution was vital for the coalition; it could not be reviewed piecemeal. The same member added that the opportunity to undertake land reform should be grasped. Having signed the National Accord on 28 February, the negotiating team started at once to consider how a constitutional review would be undertaken. Various issues and points of convergence surfaced when members took the floor.

One proposed that Parliament be converted into a constituent assembly, which could then work with an expert team, including international constitutional lawyers, to draft a new constitution that would draw on existing drafts, such as Bomas, the Naivasha Accord and constitutions from the continent. Whatever arrangements emerged, they should be presented to the people in a referendum, to avoid the conflict that had surrounded previous processes.[492]

487 *Ibid.*

488 *Ibid.*

489 Minutes of the Kenya National Dialogue and Reconciliation, Eighth Session, 8 February 2008.

490 Minutes of the Kenya National Dialogue and Reconciliation, Ninth Session, 11 February 2008.

491 Minutes of the Kenya National Dialogue and Reconciliation, Tenth Session, 13 February 2008.

492 Minutes of the Kenya National Dialogue and Reconciliation, Eighteenth Session, 29 February 2008.

Another member supported the idea of a constituent assembly, but noted that the form of a reform process was as critical as its content. A constitutional amendment approach might further split the country. The Panel should convince the Principals that pursuing constitutional reform by referendums, which were discredited, could destroy the National Accord.[493]

A third speaker posed three questions. Would a constituent assembly be able to deliver a new constitution in 12 months as had been promised? Would a review of previous constitutional drafts take the debate back to the beginning? Would it not be advisable to engage professional experts to isolate the contentious issues and present Parliament with feasible solutions?[494]

A fourth speaker believed the issues and options were extremely clear to Kenya's people. Without political posturing, Parliament could achieve agreement in a matter of weeks. There was ample material – the Bomas Draft, the Kilifi/Wako Draft, and the Yash Pal Ghai drafts: a review could be completed in less than 12 months, if ordered by a professional body within 100 days and then put through Parliament. In this member's view, the work could be done without recourse to a referendum, even if the process was called a constituent assembly.[495]

A fifth speaker agreed that a professional team should analyze the available documents and highlight the 80 per cent of issues on which agreement had been reached during previous constitutional debates. The No vote had triumphed in 2005 because there was 20 per cent disagreement. A few contentious issues needed to be debated and refined by Parliament before putting a reformed constitution to a referendum. At the same time, institutions needed to be strengthened. The question of a timetable remained open.[496]

A sixth speaker agreed that previous drafts could be made use of and drew attention to the unfinished debate on whether Kenya wanted a presidential or a parliamentary system of government. If this debate was taken straight to the people, and was not presented properly, some issues would be politically exploited and there would be misunderstandings.[497]

The same speaker foresaw that, if Parliament were transformed into a constituent assembly, the process would not be perceived as people-driven and civil society would object. Civil society and larger constituencies needed to be

493 *Ibid.*
494 *Ibid.*
495 *Ibid.*
496 *Ibid.*
497 *Ibid.*

involved in the constituent assembly. Enlisting outside expertise would help convince the public that this was not just an exercise for the political class.[498]

One member of the negotiating team suggested that a committee of six to nine experts could be asked to prepare a conceptual proposal and review the existing documents, beginning at the same time as the independent review committee. This would send a signal to the public that the process would not benefit the political class alone. Consensus was reached on this proposal, which prefigured the Committee of Experts on constitutional review.[499]

After this initial exchange of views, the Panel moved from ideas to agreement. With the assistance of a constitutional expert from the UN Department of Political Affairs, Andrew Ladley, the negotiating team quickly reached consensus, on 4 March.[500]

The initial elements of the plan involved three steps: Parliament would pass a law to enable the process; the law would specify a time line; the law would provide for the appointment of experts. One member believed that Parliament should be asked to pass the law within eight weeks.

The experts would harmonize the provisions of previous draft constitutions. One member stressed that they needed to do this work within a statutory framework, to avoid confusion; statutes would need to be drafted quickly. With respect to the constituent assembly proposal, different views emerged on the role of the legislature. It was accepted that a referendum was unavoidable and that legislation to enable a referendum would be needed.

One suggestion was that the negotiating team should propose the immediate formation of a parliamentary select committee and simultaneously recommend a committee of experts to work with it and Parliament. The parliamentary committee would be the vehicle for interaction between civil society and the political leadership.

A contrary view held that, since civil society did not like to see Parliament controlling the process, the Review Act should create a Committee of Experts to receive recommendations from stakeholders. The committee would prepare necessary submissions, the relevant ministry would prepare legislation, Parliament would approve the law, and a road map to a new constitution could then be rolled out. If a referendum was inevitable, the constituent assembly would be superfluous; and in that case, Parliament would in any case have a role.

498 *Ibid.*

499 *Ibid.*

500 These discussions led to the 4 March Agreement on constitutional review.

Anxiety with respect to Parliament had roots in Kenya's history. One member emphasized that it was vital to avoid the fate of the Wako Draft. If that had not been presented to Parliament as a *fait accompli*, and had been debated, he suspected Kenya might already have enjoyed a new constitution. Parliament must have a role, because MPs would need to sell the document to their constituents, and because, if MPs felt sidelined (as they did in 2005), they would withhold support.

Ladley agreed that the constituent assembly option should be a last resort. He had no objection to including a referendum law in the parliamentary process, and agreed that Parliament should debate it. The law could establish a process whose outcome would be approved by the people.[501]

It was important to decide what arrangements needed to be in place to produce the draft and engage civil society in the process. Noting that a good document could be killed by a bad process, Ladley suggested that the negotiating team should establish broad principles and a process. The process should indicate how the Committee of Experts would create working groups, develop a website, and consult, before synthesizing a draft to put before Parliament. Civil society could be part of all three aspects of the process.[502]

A critical issue was whether Parliament could in fact make a new constitution, and what enabling body was required. Would a new constitution go first to Parliament and then to the people, or the reverse?

When the negotiating team decided that the process must be people-driven, it was proposed that a specific provision in the referendum law should entrench that view and that the Constitutional Review Act should state that the constitution would enter into force following its approval by referendum.

The same speaker expanded the three steps of implementation to five. A Parliamentary motion would establish a select committee within two weeks. The relevant ministry would present a draft bill and road map which the select committee would discuss, involving civil society. The bill would be published and enacted by Parliament. The road map would be implemented and the draft constitution prepared. A referendum would be held.

The speaker commented that legislation should be designed to ensure the process was inclusive at every stage by involving Parliament and civil society. Her five-point proposal commanded general agreement.

501 Minutes of the Kenya National Dialogue and Reconciliation, Twentieth Session, 4 March 2008.
502 *Ibid*.

One key issue remained. Should Parliament be permitted to amend the draft constitution prepared by the experts before it was put to the people in a referendum? A member contended that, constitutionally, the document that would be placed before Parliament was not a constitution but a draft, or sessional paper, and its content could therefore be amended. It would not be enacted until it had been approved by referendum.

A member of the negotiating team recalled how upset civil society had been when they had last endeavoured to amend the constitution. Kenya had a history of confused amendments. On this ground, he felt that Parliament should not amend the draft before it was placed before the people. A draft law was necessary to ensure that the constitutional review process was people-driven; but safeguards were needed to make sure that Parliament did not run away with it. Ladley believed that Parliament should have an opportunity to edit the document. Another member of the negotiating team said that removing Parliament's ability to amend would be too restrictive.[503]

Agreement was ultimately reached and codified in the 4 March Agreement. The parties agreed that a constitutional review would begin around August 2008, and be completed within 12 months.

Reviving the constitutional review

Two crucial laws to jump-start the review process – the Constitution of Kenya (Amendment) Act 2008 and the Constitution of Kenya Review Act (CKRA) 2008 – were enacted in December. The Constitution Review Act established the procedure, process and timeline and the implementing organs, namely, the Committee of Experts on Constitutional Review (CoE), the Parliamentary Select Committee on Constitutional Review (PSC),[504] the National Assembly, and the referendum. Both laws received presidential assent on 11 December and came into effect on 22 December 2008.

The Parliamentary Select Committee (PSC) was established in the same month. It was composed of 27 MPs representing different parliamentary parties. Its principal responsibility was to provide political leadership and forge consensus on issues that the CoE identified as contentious.

503 *Ibid.*

504 The PSC included: Amina Abdallah, Sophia Abdi, Mohammed Abdikadir, Najib Balala, Ekwee Ethuro, Chachu Ganya, Martha Karua, Uhuru Kenyatta, Mutula Kilonzo, Wilfred Moriasi Ombui, Kambi Kazungu, Jeremiah Kioni, Mwangi Kiunjuri, Sally Kosgei, Musalia Mudavadi, Danson Mungatana, Peter Munya, David Musila, Ababa Namwamba, Charity Ngilu, Joseph Nkaissery, Millie Odhiambo, James Orengo, Isaac Ruto, William Samoei Ruto and Moses Wetang'ula.

Parliament announced on 5 January 2009 that applicants should apply to appointment to the CoE by 26 January. On 8 January, the Panel presented the nominations of five foreign experts. The PSC recommended three for approval by Parliament and subsequent appointment by the President. The candidates shortlisted to serve on the CoE were approved by Parliament on 10 February.

President Kibaki formally appointed the CoE on 23 February. The Kenyan commissioners were: Nzamba Kitonga (Chair), Atsango Chesoni (Vice-chair), Abdirashid Abdullahi, Otiende Amollo, Bobby Mkangi, and Njoki Ndung'u. The international commissioners were: Chaloka Beyani (Zambia), Christina Murray (South Africa), and Frederick Ssempembwa (Uganda). The Minister for Justice, National Cohesion and Constitutional Affairs convened the first meeting of the CoE on 2 March 2009.

The committee was mandated to: identify issues on which agreement had already been reached in previous draft constitutions; identify issues that were contentious or not agreed in previous draft constitutions; solicit and receive from the public written memoranda and presentations on the contentious issues; undertake thematic consultations with caucuses, interest groups and other experts; carry out studies, researches and evaluations concerning the constitution and other constitutions and constitutional systems; articulate the respective merits and demerits of proposed options for resolving the contentious issues; make recommendations to the PSC for resolving contentious issues in a manner that will be for the greater good of the people of Kenya; prepare a Harmonized Draft Constitution for presentation to the National Assembly; facilitate civic education in order to stimulate public discussion and awareness of constitutional issues; and liaise with the Electoral Commission of Kenya on holding a referendum on the draft constitution.[505]

In May 2009, the CoE identified the following contentious issues and asked the public to make submissions on them: the system of government (whether presidential, parliamentary or a hybrid of the two); devolution of power (the levels to which power would be devolved); and when the constitution would enter into force (transitional clauses). On 19 June, the CoE published advertisements, inviting the public to submit memoranda in these three areas. It held public hearings on contentious issues in different regions of the country between 20 and 25 July.[506]

505 Constitution of Kenya Review Act, No. 9 of 2008.

506 *Supra* note 483.

On 23 July, the Statute Law (Miscellaneous Amendments) Bill 2009 received presidential assent. It amended the Constitution of Kenya Review Act and authorized the CoE to identify 30 individuals from civil society to form a stakeholder advisory body, called the Reference Group. The Reference Group included representatives from religious bodies, the private sector, professional associations, women's organizations, and civil society groups, among others. It met the CoE formally on 11 August, 24 September, and 14-16 October 2009. At the end of the October retreat, the CoE and the Reference Group signed a joint statement that described their consultations, outlined their conclusions on the contentious issues, and expressed support for the review process. It urged all Kenyans to contribute to and cooperate with the process.[507]

On 16-18 September 2009, the CoE met in Naivasha to begin drafting the constitution.

The Review Act required the CoE to prepare a Harmonized Draft Constitution[508] and a report on the merits and demerits of the various positions. The CoE completed this work in five months, and on 17 November 2009 published the *Preliminary Report of the Committee of Experts on Constitutional Review Issued on the Publication of the Harmonised Draft Constitution*. It identified issues about which there was agreement and issues that were contentious, in accordance with section 30(1) of the Review Act.

In coming up with the draft constitution, the CoE took account of the September 2002 Constitution of Kenya Review Commission Draft, the draft that had emerged from the National Constitutional Conference on 15 March 2004 (the Bomas Draft), and the Proposed New Constitution of 2005 (the Wako Draft). It also consulted reports by various commissions established through the KNDR process, and a wide range of experts and stakeholders, including the Reference Group. It supplemented these consultations with public regional hearings as well as thematic consultations with caucuses and interest groups.

The law required the CoE to open the draft to public debate for 30 days. The draft received over one million submissions, in the light of which the CoE revised its draft.[509]

507 Committee of Experts on Constitutional Review (2010), *Final Report of the Committee of Experts on Constitutional Review*, Nairobi: CoE; Election Observation Group (2010), *The People's Verdict: Report of the Elections Observation Group on the Referendum on the Proposed Constitution of Kenya 2010*, Nairobi: ELOG; South Consulting, October 2009.

508 Section 32 of the Constitution of Kenya Review Act, No. 9 of 2008.

509 Election Observation Group (2010), *The People's Verdict: Report of the Elections Observation Group on the Referendum on the Proposed Constitution of Kenya 2010*, Nairobi: ELOG.

On 8 January 2010, the CoE submitted its second report to the PSC, together with the Revised Harmonized Draft Constitution (second draft). The *Report of the Committee of Experts on Constitutional Review Issued on the Submission of the Revised Harmonised Draft Constitution* described the publication and dissemination of the Harmonized Draft Constitution, summarized the feedback received during the public consultation, and listed the key areas where changes to the text had been made as a result. The PSC then retired to Naivasha from 18 to 28 January 2010 to consider the contentious issues.

At this point, the politics of the Grand Coalition influenced their work. While the President Kibaki faction insisted that the CoE's proposal to introduce an Office of the Prime Minister would create two centres of power,[510] the faction of Prime Minister Odinga supported a parliamentary system, with a devolved system of administration. The stalemate generated by these differences was defused abruptly when Prime Minister Odinga's group accepted the demands of President Kibaki's group.

On 2 February 2010, the Parliamentary Select Committee produced recommendations for the CoE to consider as it prepared its third and final constitutional draft. The PSC advised deleting Part 3 of the Bill of Rights on specific application of rights, except Article 67(1) and (2) on family, and proposed that provisions on this matter could be provided by enabling legislation. It recommended that a total of 290 constituencies should be subject to delineation by the Interim Independent Boundaries Review Commission (IIBRC). It recommended that the Senate should be the lower House of Parliament and that Presidential and Parliamentary elections should be held on separate days.[511]

The CoE submitted its third report, the *Report of the Committee of Experts on Constitutional Review Issued on the Submission of the Proposed Constitution of Kenya*, to the PSC on 23 February 2010, together with the *Proposed Constitution of Kenya* (PCK). The CoE, which was authorized to reject proposals from the Parliamentary Select Committee, re-introduced deleted sections of the Bill of Rights, enhanced the role of the Senate, removed assistant

510 Juma, L. and Okpaluba, C. (2010), "Judicial Intervention in Kenya's Constitutional review Process", Washington University Global Studies Law Review, Vol. 11(2): 287-364.

511 National Assembly (2010), *Report of the Parliamentary Select Committee on the Review of the Constitution on the Reviewed Harmonised Draft Constitution, Comprising the Recommendations agreed upon as a result of the deliberations of the Parliamentary Select Committee on the Review of the Constitution in accordance with Section 32(1) (C) of the Constitution of Kenya Review Act, 2008, and Presented to the Committee of Experts pursuant to Section 33(1) of the Constitution of Kenya Review Act, 2008, on 29 January 2010*, Nairobi: National Assembly.

ministers, and re-instated the provision that parliamentary and presidential elections would be held on the same day.[512]

At first, Parliament attempted to reach agreement on the proposed constitution by holding a retreat to discuss it (see below). When this effort failed, a full parliamentary debate took place on 2 March 2010. MPs proposed at least 150 amendments. They were given 30 days to debate the draft; a two thirds majority was necessary to introduce amendments. None met this threshold and on 2 April Parliament unanimously endorsed the CoE's Proposed Constitution of Kenya. The document then went to the Attorney General, who published it on 6 May 2010.

On the same day, the Panel warmly congratulated the National Assembly for having passed the draft constitution, welcoming in particular the strong support offered by the President and Prime Minister. The Panel asked all stakeholders to support the constitutional review process and come together to ensure that this important feature of Kenya's reform agenda was achieved.[513]

The completion and adoption of the Proposed New Constitution were important steps in the constitutional review process because the draft took account of revisions of the Harmonized Draft and public comments on it, and the Parliamentary Select Committee's comments. The draft had been produced without rancour between the CoE and the PSC.

Obstacles

The constitution-making process nevertheless faced challenges. The suspicion, cynicism and apathy generated by the 2005 referendum seriously impeded a smooth process, while the emergence of an anti-reform movement after the Bomas process made it difficult to agree the proposed constitution. Before the Harmonized Draft Constitution was published, the PSC demanded to see what it called a Zero Draft, which the CoE declined to produce. The PSC then chose to prepare its own revised draft, rather than consider and comment on the CoE's text.[514]

Ethnic, sectarian and individual interests also prevented agreement on amendments. Before it debated the draft in Parliament, the House adjourned to the Kenya Institute of Administration (KIA) to build consensus. However,

512 Kitonga, N. (2010), *Report of the Committee of Experts on Constitutional Review Issued on the Submission of the Proposed Constitution of Kenya, 23 February 2010*, Nairobi: Committee of Experts.

513 The Panel, press statement, 6 April 2010.

514 *Supra* note 483.

because MPs were not able to overcome regional, sectarian, ethnic, party and personal interests, the KIA retreat failed to agree on a single key amendment. The same differences marked the debate in Parliament.

The fact that the government was a coalition also influenced the constitution-making process. Despite displays of unity by the two Principals, the ODM and PNU lacked a common position on contentious issues. On the legislature, for example, the ODM sought a pure parliamentary system with an executive Prime Minister, whereas the PNU wanted a strong presidential system. A Grand Coalition Management Team co-chaired by the two Deputy Prime Ministers, Uhuru Kenyatta and Musalia Mudavadi, was formed to resolve such differences.[515]

To complicate matters, several court cases contested the mandate of the CoE, the results of the 2010 referendum, and the promulgation of the new constitution. These cases, which failed, are reviewed below (see the Interim Independent Constitutional Dispute Resolution Court). An important ruling by the High Court, barely two months before the referendum, also threatened to obstruct the CoE's preparations.

On 24 May 2010, the Court (Judges Joseph Nyamu, Anyara Emukule and Roselyn Wendoh) found that the establishment of Kadhi courts through the constitution, and related financial support for them, amounted to segregation and was sectarian, discriminatory and unjust. The case in question had been filed on 12 July 2004, was not heard until two years later, and judgement was delivered, mysteriously, four years after that. Because the reform process was cushioned by the Review Act from derailment, the judgement did not disrupt the referendum; but it gave sustenance to those opposing the draft constitution.[516]

Before publication, the Attorney General, the PSC and the CoE checked the text to ensure that it was clean of errors before it went to the Government Printer. As printing began, nevertheless, it was discovered that 'National Security' had been inserted in Article 24(1)(d) of the Bill of Rights.[517]

Delivering civic education presented the CoE with one of its most difficult challenges. The experts had limited time and resources and could not carry out

515 *Daily Nation*, 16 December 2009.

516 *Daily Nation*, 14 June 2010; Daily Nation, 15 June 2010; Juma, L., and Okpaluba, C. (2010), "Judicial Intervention in Kenya's Constitutional review Process", Washington University Global Studies Law Review, Vol. 11(2): 287-364; Election Observation Group (2010), *The People's Verdict: Report of the Elections Observation Group on the Referendum on the Proposed Constitution of Kenya 2010*, Nairobi: ELOG.

517 *Supra* note 483.

a far-reaching and effective civic education programme. The CoE was unable to produce sufficient copies of the draft in Kiswahili; insufficient information reached Turkana, Marakwet, Samburu and Kuria, among others; levels of public understanding remained low, due to high rates of illiteracy in English and Kiswahili; and in some areas the CoE did not receive support from local leaders, especially in regions such as the North Rift (Keiyo, Buret, Bomet, Sotik, Baringo), where communities took against the proposed constitution.[518]

This said, other individuals and organizations ran civic education programmes, including MPs, civil society organizations and some mainstream faith-based organizations. In many places, they were obliged to undo misinformation or misrepresentation, particularly about what the proposed constitution said concerning the right to life, termination of pregnancy, land (especially community land) and Kadhi courts.[519]

Relations between the CoE and the Reference Group were also complicated by the fact that interest groups constantly questioned the legitimacy and credibility of their representatives, the Reference Group was faulted for being Nairobi-based and elitist, and the churches and civil society were frequently unable to present an agreed and well-argued position to the CoE.

The Interim Independent Constitutional Dispute Resolution Court (IICDRC)

Social processes need arrangements for resolving disputes. Throughout the constitutional review process, citizens and other interest groups turned to the courts whenever they felt their rights were being infringed or that the review process was disregarding the law. Those involved in the KNDR process considered very carefully how the review process might be protected from interference. The Review Act and constitutional amendments sought to divest the High Court of power to examine disputes relating to the review process because its role in previous review processes (notably before the 2005 referendum) had been widely condemned. A special court, the Interim Independent Constitutional Dispute Resolution Court (IICDRC) was created, with exclusive jurisdiction to hear such disputes.

518 *Supra* note 477.

519 Committee of Experts on Constitutional Review (2010), *Final Report of the Committee of Experts on Constitutional Review*, Nairobi: CoE; Kenya Human Rights Commission (2010), *Wanjiku's Journey: Tracing Kenya's Quest for a New Constitution and Reporting on the 2010 National Referendum*, Nairobi: KHRC.

The Constitution of Kenya (Amendments) Act No. 10 of 2008 came into force on 29 December. It established the IICDRC by inserting section 60A into the (old) constitution. The role of the IICDRC was to hear and determine matters arising from the constitutional review process.

The IICDRC was composed of nine judges, of whom six were Kenyan and three non-Kenyan. The judges were all nominated by the Parliamentary Select Committee. Kenyan candidates went through a competitive recruitment process; foreign judges were proposed by the Panel. The Panel submitted a list of five candidates to the PSC, who recommended three for appointment.

The members appointed were: Justice Michel Bastarache (Canada), Justice Ms Unity Dow (Botswana), and Justice Alistair Cameron Abernethy (United Kingdom).

The IICDRC played a key role in the review process and delivered expeditious and impartial judgments in seven cases.[520] The most significant was *Priscilla Nyokabi Kanyua vs Attorney General and the IIEC*, in which the court ruled that prisoners had the right to register to vote in the referendum. Pursuant to this ruling, the IIEC registered 5,605 prisoners, the first time that prisoners had voted in Kenya's history.[521]

After the referendum had approved the proposed constitution, Mary Ariviza sought to declare the referendum result null and void. At the hearing, the Court learned that she had filed her petition on 19 August 2010 but it had not been served on the Interim Independent Electoral Commission (IIEC) until 24 August, one day after the IIEC released the results. In publishing the results, the IIEC had acted lawfully and within its mandate, unaware of the pending suit. The Court therefore ruled that the petitioner had not met the procedural requirement for bringing the action. Halting promulgation of the new constitution would amount to challenging or changing its provisions, which the court had no jurisdiction to do.[522]

520 Election Observation Group (2010), *The People's Verdict: Report of the Elections Observation Group on the Referendum on the Proposed Constitution of Kenya 2010*, Nairobi: ELOG.

521 Committee of Experts on Constitutional Review (2010), *Final Report of the Committee of Experts on Constitutional Review*, Nairobi: CoE.

522 Juma, L., and Okpaluba, C. (2010), "Judicial Intervention in Kenya's Constitutional review Process", Washington University Global Studies Law Review, Vol. 11(2): 287-364; Election Observation Group (2010), *The People's Verdict: Report of the Elections Observation Group on the Referendum on the Proposed Constitution of Kenya 2010*, Nairobi: ELOG.

The Referendum

The referendum process began when the Attorney General's Office published the proposed constitution. On 10 May 2010, the IIEC announced the rules and regulations that would govern the plebiscite. The Constitution of Kenya Review (Regulations) Act 2010 required the IIEC to publish: the referendum question; the symbols to be used by those campaigning for and against; its date and polling times; the campaign period; and referendum committees.[523]

The IIEC published the referendum question on 10 May, scheduled the campaign between 13 July and 2 August 2010, and set the referendum for 4 August. Symbols were announced on 17 May: green for those campaigning for and red for those campaigning against.

Following publication of the proposed constitution, the CoE ran a civic education programme at three levels: by the CoE itself, through the media, and in association with community-based organizations (CSOs). It used the slogan *Jisomee, Jiamulie, Jichagulie* (Read for yourself, decide and choose). Fifteen regional coordinators and 210 constituency civic educators were directly involved in the programme. In addition, the CoE funded some 85 CSOs.[524]

Campaigning for the new constitution was led by President Kibaki and Prime Minister Odinga. On 27 April 2010, the cabinet also pledged its support.[525] Despite the leadership of both Principals, however, their supporters were not able to transcend party differences. Though both the PNU and ODM supported the proposed constitution, they did not pull in the same direction. This prevented those in favour of the new constitution from launching an effective campaign.

Opposition came mainly from church leaders. Shortly after Parliament approved the text, the National Council of Churches of Kenya announced that it would oppose the proposed constitution because it did not state that life began at conception, and because the Kadhi Courts gave Muslims privileged status (though Kadhi courts also featured in the Independence Constitution). The Catholic Church adopted the same position.[526] William Ruto, then Minister for Higher Education, along with the Minister for Information and Communication, Samuel Poghisio, and former President Daniel arap Moi, also came out against. Claiming the document had unworkable foreign ideals, they

523 Government of Kenya, The Constitution of Kenya Review (Referendum) Regulations, 2010 (Legislative Supplement No. 20), 10 May 2010, Government Printer.

524 Election Observation Group (2010), *The People's Verdict: Report of the Elections Observation Group on the Referendum on the Proposed Constitution of Kenya 2010*, Nairobi: ELOG.

525 *Daily Nation*, 28 April 2010.

526 Rigon, A. (2010), "20 years of 'sweat and blood': Lessons from the constitutional review process in Kenya", ISPI Policy Brief No. 188.

considered its provisions on land were inappropriate and, like the churches, opposed its provisions on Kadhi Courts and abortion.[527]

In the run-up to the referendum, on 22 July 2010 the National Cohesion and Integration Commission (NCIC) hosted a national conference in conjunction with the other Agenda 4 Commissions (the CoE, IIEC, IIBRC, and the Truth, Justice and Reconciliation Commission). They jointly criticized the use of state resources and deployment of civil servants in the referendum; the creation of new districts that could be interpreted as an attempt to influence voters; distorted presentation of the proposed constitution; and hate speech and inflammatory language.[528] In a tense and volatile environment, the NCIC helped to ensure that ethnic incitement and violence were kept to a minimum during campaigning. The NCIC's motto was *Chagua Kenya, Chagua Amani* (Choose Kenya, Choose Peace).

The commission forwarded for prosecution the names of Kenyans who contravened the National Cohesion and Integration Act of 2008, particularly with regard to hate speech, and monitored the media for hate speech and incitement to violence in an attempt to ensure that political competition did not transform into ethnic-based violence as it did in 2008.[529]

On 4 August 2010, Kenyans voted. 68.55 per cent supported the new constitution. The vote symbolized promise and hope in a country where political tensions had remained high since the December 2007 general election.[530]

On 5 August, the Panel declared that it was greatly encouraged by the successful conclusion of the referendum and welcomed reports that it had been conducted in a free, fair and peaceful atmosphere. It noted that high voter turnout reflected the strong desire of Kenya's people to help shape their country's future. The results suggested that Kenyans had voiced overwhelming support for the new constitution.[531]

Adoption of the constitution was of immense historical significance to Kenya and a major achievement for the KNDR process. Comprehensive in scope, it has the potential to transform the state, public institutions and the practice of politics. Built on values and principles of governance that promote national unity, social justice, human rights and good governance, in line with the overall goal of the

527 Media Development Association and Konrad Adenauer Stiftung (2012), *History of Constitution Making in Kenya*, Nairobi: Media Development Association and Konrad Adenauer Stiftung.

528 *The Standard*, 21 July 2010.

529 National Cohesion and Integration Commission (2010), *Annual Report: 2009-2010*, Nairobi: NCIC.

530 *Supra* note 483.

531 The Panel, press statement, 5 August 2010.

KNDR,[532] it gave Kenyans a sense of optimism and created a new momentum for reform. Kenyans welcomed it with excitement, expecting concrete benefits. Hopes were high that it would provide the framework and impetus necessary to complete the reform agenda set out in the National Accord.[533]

At the invitation of the coalition government, Kofi Annan, Benjamin Mkapa and John Kufuor attended the ceremony promulgating the constitution at Uhuru Park in Nairobi on 27 August 2010. Amid the excitement and pageantry of the occasion, controversy erupted when President Al-Bashir of Sudan, against whom the International Criminal Court has issued a warrant of arrest, attended. Kofi Annan issued a statement in which he expressed his surprise at President Bashir's presence in Nairobi and said the government should clarify its position as a signatory of the Rome Statute and reaffirm its cooperation with and commitment to the ICC.[534] In many ways, Bashir's visit was a foretaste of difficulties to come, as Kenyans tried to realize the aspirations of their constitution.

Conclusion

Having tried unsuccessfully for two decades to deliver constitutional reform, how did Kenya promulgate one of the continent's most progressive constitutions within three years of the 2007-2008 crisis? Without question, the decision to place constitutional reform in Agenda Item 4 and prioritize it throughout the mediation helped to give new impetus to the issue. Once the National Accord had been signed, however, there was insufficient political will to drive through such major changes to the country's basic law.

An equally critical decision was therefore made on legislation mandating the constitutional review process. Foreseeing the stalemate that might occur in Parliament, the principal drafters ensured that the process would not stall even if Parliament failed to agree on the document. The legislation gave veto power to the people, who ultimately voted overwhelmingly to support constitutional change.

The 2010 constitution is of historical significance to Kenya. It is comprehensive in scope and seeks to radically transform the state, public institutions and the practice of politics. It also creates a viable governance structure. Its promulgation

532 Kofi Annan Foundation and African Union Panel of Eminent African Personalities (2011), *The Kenya National Dialogue and Reconciliation: Two Years On: Where are we?* Report of the Meeting, Nairobi 2-3 December 2010, Geneva: Kofi Annan Foundation.

533 Chair of the Panel, Opening Remarks at the Third KNDR Review Conference.

534 Kofi Annan, press statement, 29 August 2010.

on 27 August 2010, about two years after the KNDR agreements were signed is a major achievement of the mediation process.

Success was also due in part to the fact that the political elite were under immense pressure not to sabotage efforts to adopt a new constitution, the centrepiece of the KNDR reform agenda.

Finally, there was some convergence of interest between the two Principals. For President Kibaki, who was about to leave office, it was a good legacy to bequeath his country; while for Prime Minister Odinga, the main advocate for change, the new constitution would provide a solid platform on which to campaign for the country's highest office.

Chapter Nine

Fruits of a New Constitution

"Kenya has been struggling to get a new constitution for twenty years. Now they have it; the people believe in it; it is one of the most progressive constitutions on the continent and the envy of many countries. What is important is to give it life – to believe in it, to implement it, and implement it faithfully."

– Kofi Annan in a press interview, Nairobi, 11 October 2012

Introduction

The coalition government's mandate ended when the 2010 constitution had been in place for two years. This period is too short to evaluate the constitution's effect or to determine whether it has created conditions that enable Kenya to address the root causes of the 2007 post-election violence. This chapter examines whether the issues under Agenda Item 4 of the KNDR have been taken up adequately since the new constitution was adopted. What sort of start has been made?

Agenda Item 4 examined: constitutional, institutional and legal reform; land reform; poverty, inequity and regional imbalances; consolidation of national cohesion and unity; and transparency, accountability and impunity.

The chapter concludes that, although the constitution provides the elements required to address Agenda Item 4 issues, political commitment has not been

sufficient to generate tangible results, and Kenya has not yet definitively consolidated its constitutional reforms; there have been gains and reversals.

Breathing life into the new constitution

Kenya has a history of making good policies and laws but failing to implement them. This led the KNDR to include enforcement and monitoring mechanisms in the National Accord and led the Panel to remain engaged with implementation of the reform agenda processes long after the Accord was signed. For the same reason, those who drafted the constitution inserted a clause requiring the constitution to be promulgated 14 days after the referendum result was announced, as well as transitional clauses that set clear procedures for implementation, including the dates by which specific legislation and institutions needed to be in place. As a further safeguard, they stipulated that any failure or delay in enacting the required legislation would trigger Parliament's dissolution.

As a further guarantee, the drafters established an independent Constitution Implementation Commission (CIC).[535] Other key players in the implementation process included the National Assembly, the Parliamentary Select Committee for the Implementation of the Constitution (CIOC), the Kenya Law Reform Commission (KLRC), the executive, civil society and, of course, Kenya's people.

The CIC led the implementation process, ensuring that each stakeholder played its role. Wherever necessary, it took measures to make certain that the schedule, the implementation process and the spirit and letter of the constitution would be respected. It issued legal advice and press statements, audited laws and secured judicial interventions. Above all, the CIC acted consistently to ensure wide stakeholder involvement, especially by civil society and Kenya's people.

The implementation schedule was designed to ensure that the necessary laws and institutions were in place in advance of elections. If anything, the implementation process put too much emphasis on the electoral process. This probably reflected the fear that poorly conducted elections could trigger another crisis. At the start, therefore, the priority was to establish the Independent Electoral and Boundaries Commission (IEBC), responsible for conducting elections, and the Ethics and Anti-Corruption Commission (EACC), which was expected to vet candidates for elective and appointed posts, equip the judiciary to adjudicate on the electoral process, and draw up legislation to ensure that political parties were adequately prepared.

535 The CIC was appointed on 30 December 2010 and came into existence on 4 January 2011.

Other key reforms relevant to the electoral process, including reform of the police service, government devolution and legislation on leadership, were put in during the two years that followed the constitution's promulgation.

In fact, wrangles within the coalition meant that most of these institutions were established late and that consequently they were not fully prepared to manage when the 2013 elections arrived.

The preoccupation with elections drained attention away from other elements of the reform programme defined by the new constitution. Efforts to address institutional reform, transparency and accountability, poverty, inequality and regional imbalances, national cohesion and unity, and land reform were tackled less energetically than might otherwise have been the case. We turn to these Agenda Item 4 issues below.

Institutional reforms

Kenya has struggled to build institutions that can withstand political pressure. The "imperial presidency" dominated politics and the economy. No institution dared to stand against it. The President's word was often considered law, and both the judiciary and Parliament were subservient to the executive. Agenda Item 4 considered that institutional reform was vital to check the overweening influence of the executive.

The aims were to establish the judiciary's financial independence and entrench transparent and merit-based appointment procedures; and to strengthen parliamentary oversight, especially over key public appointments and national budget processes, and increase transparency by involving the public in Parliament's work. The constitution addressed these objectives in Chapter 9 (on the executive), Chapter 10 (on the judiciary), Chapter 8 (on the legislature), Chapter 11 (on devolution) and Chapter 15 (on commissions and independent offices). It also restored checks and balances by dispersing presidential powers horizontally (to Parliament, the judiciary and constitutional commissions) and vertically (to county governments). Critically, the constitution establishes that the country's new institutions would appoint their members independently and enjoy financial independence and security of tenure.

Chapter 15 creates two independent offices (the Auditor General and the Controller of the Budget) and 10 commissions: the Kenya National Human Rights and Equality Commission; the National Land Commission (NLC); the Independent Electoral and Boundaries Commission (IEBC); the Parliamentary Service Commission; the Judicial Service Commission (JSC); the Commission on Revenue Allocation (CRA); the Public Service Commission; the Salaries and

Remuneration Commission (SRC); the Teachers Service Commission (TSC); and the National Police Service Commission (NPSC).

The constitution guarantees the independence of these commissions by administratively and financially delinking them from the executive. Members are appointed by the President on the basis of an independent competitive recruitment process, which is subject to approval by the National Assembly. The constitution defines how public officers are appointed, how they execute their responsibilities, and how they are removed from office. The commissions' budgets are drawn from the Consolidated Fund, guaranteeing their financial independence.

In addition the constitution requires one third of members to be women. Recruitment interviews must be public and participatory. Candidates face televised interviews by selected panels and then Parliament, and members of the public may provide information on candidates they feel do not merit appointment.

One risk is that the National Assembly determines the funds that are allocated to the commissions. The 11th Parliament attempted to muzzle the independence of some commissions by exploiting this provision. As described in Chapter Ten, the judiciary is similarly vulnerable.

Parliament has been strengthened in several respects. It is separate from the executive, because cabinet members are no longer MPs. It controls its agenda because the President no longer decides when elections are held or when Parliament sits. It appropriates the budget of the government and other state organs and exercises oversight over national revenue and its expenditure. It oversees state institutions. It also approves key appointments that were previously approved by the President, including the appointments of Cabinet Secretaries, Principal Secretaries, and members of independent institutions. Parliament can compel the President to dismiss non-performing government officials, including members of the cabinet. In certain instances, presidential appointments must be drawn from a list provided by a professional body.

There is some evidence that these measures have enabled institutions to challenge the executive when it has exceeded its authority under the new constitution. The CIC has been able to ensure that legislation and institutions have been established as stipulated in the constitution, despite resistance by the executive. The Salaries and Remuneration Commission has set official salaries despite the efforts of MPs to protect their pay. The judiciary has reversed government decisions that were contrary to the constitution. Parliament has revoked executive decisions and appointments that failed to observe the procedures

established by the constitution, has approved and rejected the budgets of state institutions, and has summoned and censured ministers, three of whom were suspended during the Tenth Parliament for misappropriating funds.

Nevertheless, efforts to entrench these institutions and establish obedience to the new constitution faced determined resistance.

This threat first surfaced when President Kibaki named a chief justice without observing the procedures set down by the constitution.[536] Then, several institutions created by the constitution were only established after a long delay. The CIC, for example, was to be established within 90 days of the constitution's promulgation (i.e. by the end of November 2010) but was not appointed until 4 January 2011. The NPSC, EACC, NLC, and NPSC did not become operational for more than one year after legal approval. A Registrar of Political Parties had not been appointed two years after the post's legal approval. [537]

Efforts were also made to confine the activities of new institutions. The commissions were not funded adequately, nor consulted as required. New legislation was drafted bypassing the CIC; legislation was passed that set the remuneration of MPs and the retirement benefits of the President without referring to the SRC. An effort was made to empower the Inspector General of Police (IGP) at the expense of the NPSC.[538]

Three examples illustrate the tendency of the executive to seek to control independent institutions.

In the case of the National Land Commission (NLC), the Permanent Secretary in the Office of the President failed to gazette its commissioners, even after a challenge to their appointment was settled in the High Court on 12 October 2012.[539] The Attorney General twice implored the Office of the President to make the appointments (15 October 2012 and 14 January 2013), to no avail.[540] It took the intervention of the High Court, which gave the President a seven-day deadline on 4 February 2013, to appoint the commissioners after two citizens submitted a petition. Despite the court's deadline, the NLC was not appointed until 20 February 2013, and only as a result of pressure from

536 The Panel, Letter to the Principals, 21 February 2011.

537 South Consulting, February 2013; South Consulting, October 2012; South Consulting, May 2012.

538 Editorial, "Starving Auditor General of cash weakens anti-graft war", *Daily Nation*, 8 July 2013; Lillian Aluanga-Delvaux, "Commissions face cash crunch", *Standard on Sunday*, 4 August 2013; Stephen Makabila, "DPP cries foul over budget shortfall", *Standard on Sunday*, 23 July 2013.

539 Nicholas Waitathu, "Intrigues behind delay in implementing land reforms", *Standard on Sunday*, 10 February 2013.

540 Commission for the Implementation of the Constitution, press statement, "Failure by the President to Appoint the National Land Commission", 19 February 2013.

stakeholders in the land sector.[541] On being established, the NLC submitted its proposed budget, which was reduced by 95 per cent (from KES4.4 billion to KES241 million).[542] The underfunding is likely to cripple its activities and render it ineffective.

With respect to the Salaries and Remuneration Commission, an attempt to compel MPs to stick to salary scales determined by the SRC came to naught when MPs, with the support of the Deputy President, pressured the SRC to increase their allowances to the point where they were equivalent to the value of previous perks. The MPs threatened to disband the SRC if it did not acquiesce.[543]

The budget of the Transition Authority (TA) was cut by 79 per cent (from KES11,964 billion to KES555 million). In addition, despite being an independent statutory body, its budget vote was placed under the Ministry of Devolution and Planning.[544] The President ordered the immediate transfer of all functions under the Fourth Schedule of the Constitution without consulting the TA, though the constitution requires transfer of functions to be phased.[545]

Parliament itself has not fared well because MPs have continued to deliberate and vote on party lines. Under the Uhuru Kenyatta administration, key public appointments have not been rigorously vetted and have been made on the basis of names forwarded by the executive. Even when the vetting committee has expressed doubts with regard to certain candidates, they have nevertheless been appointed.[546]

These institutions have been in place for a little over two years and most of them are still struggling to establish themselves in a political environment in which they are expected to toe a political line. Some have succeeded in

541 Abiud Ochieng, "Lands team faces fresh hurdle", *Daily Nation*, 13 February 2013; Cyrus Ombati, Wahome Thuku, "President Kibaki finally heeds to court order, gazettes land commission", *The Standard*, 21 February 2013.

542 Billy Muiruri, "Land Commission given only 5 per cent of its annual budget", *Daily Nation*, 25 May 2013; Raphael Obonyo, "Slashing NLC's fund is sabotage", *The Star*, 7 June 2013.

543 Luke Amani, "What MPs considered in accepting Salaries and Remuneration Commission's pay", *The Standard*, 13 June 2013; David Herbling, "MPs win Sh1m monthly pay in backdoor deal", *Business Daily*, 12 June 2013; Alex Ndegwa, "Secrets of MPs pay deal", *Standard on Sunday*, 16 June 2013.

544 Transition Authority (2013), *Progress made towards Transition to Devolved System of Government*, Nairobi: TA.

545 Walter Menya, "Are counties being set up for failure through raid transfer of functions?", *Sunday Nation*, 11 August 2013; Jason Lakin, "Its job usurped by Uhuru, Transition Authority risks becoming irrelevant", *The East African*, June 29-July 5 2013; Alphonce Shiundi, "Executive out 'to muzzle' Authority", *Daily Nation*, 10 July 2013.

546 Kwendo Opanga, "Vetting of Cabinet nominees was a sham", *Sunday Nation*, 19 May 2013; Nzau Musau and Gideon Keter, "Is there any vetting going on in Parliament?", *The Star*, 06/07 July 2013; Vitalis Kimutai, "Parliament on the spotlight over vetting of nominees to public offices", *The Standard*, 23 July 2013.

withstanding political pressure while others have not. The experience of the IEBC, the judiciary and the police is described in other chapters.

Transparency, accountability and impunity

Failures of accountability have been at the heart of past conflicts. In recognition of this, the negotiating team agreed that action to promote transparency and accountability and prevent impunity would underpin reforms under Agenda Item 4.

It was planned to combat corruption using a range of strategies. They included *inter alia*: strengthening the policy, legal and institutional framework; developing a national anti-corruption policy; strengthening the national audit office; more active prosecution and adjudication of corruption and economic crimes; improving parliamentary oversight; monitoring the Public Officer Ethics Act; revitalizing public financial management; and strengthening the Public Complaints Standing Committee (the Ombudsman).

Chapter 6 of the constitution, on leadership and integrity, includes clauses on transparency and accountability and sets out standards for public officials. Article 75 of the constitution bars from public office any official dismissed for corruption or abuse of office. Legislation to give effect to Chapter 6 was anticipated. However, after amendments by the cabinet and MPs, it contained clauses that offend the letter and spirit of the constitution and cannot effectively enforce its integrity provisions. In particular, the cabinet removed the EACC's role in vetting candidates for public office, contrary to Article 79 of the constitution; and removed a section that required candidates for public office to declare their income, assets and liabilities. These excisions undermined Articles 99(1)(b) and 193(1)(b) of the constitution, which require candidates for public office to satisfy ethical standards, including standards of financial probity. The cabinet also deleted a provision prohibiting public officials from taking employment that would create a conflict of interest or would otherwise be incompatible with holding public office. This excision contradicted Article 77(1) of the constitution, which states "a full-time State officer shall not participate in any other gainful employment". Finally, the cabinet removed provisions empowering the EACC to issue compliance certificates to election candidates who meet all the integrity requirements set out in the constitution,

and exclude those who do not qualify from seeking election or appointment to public office.[547]

After dilution of the integrity law, it remains to be seen whether it will be possible to entrench a culture of accountability and transparency or combat impunity effectively. It is now possible to appoint and elect to office individuals who do not meet the integrity standards of the constitution. A report by the United States Department of State notes that official corruption and political violence remain prevalent and that "since President Kibaki assumed office in 2002, despite numerous scandals, no top officials had been successfully prosecuted for corruption".[548] Impunity at all levels of government also remains a serious problem, despite judicial reform and the vetting of all judges and magistrates.[549] Politicians fraudulently recruited members and changed parties without regard to the law as the 2013 general election approached; despite protests from citizens who were illegally registered, no political party was sanctioned (see Chapter Twelve).

In 2013, Parliament began to debate Constitution Amendment Bill No. 476 (2013). This bill would remove MPs, members of County Assemblies, governors, members of executive committees of County Assemblies, and judges and magistrates from the list of "State Officers", as defined by the constitution. If passed, the amendment would allow these officials to determine their own remuneration and would exempt them from the constitution's integrity provisions.

As the Panel noted during the second KNDR conference, what Kenyans want is "to see transparent and accountable decision-making; to feel the impact of reform in their daily lives; and for the national good to be put before narrow self-interest".[550]

Poverty, inequality and regional development

Tackling poverty and delivering equitable development are essential to ensure sustainable peace in the country. Inequality, in terms of income, regions and gender, remains a key challenge.

547 Kithure Kindiki, "Cabinet amendments to Integrity Bill contravene the supreme law", *Sunday Nation*, 19 August 2012; editorial, "Reject this mockery of the Leadership Bill", *Daily Nation*, 16 August 2012; Commission for the Implementation of the Constitution, "Opinion of the CIC on the Published Leadership and Integrity Bill 2012", 7 August 2012; Kegoro, G. "Cabinet changes to Bill questionable", *Daily Nation*, 17 August 2012.

548 United States Department of State (2013), *2012 Country Report on Human Rights Practices – Kenya*, Washington DC: United States Department of State, p. 32.

549 *Ibid*.

550 Kofi Annan, opening remarks, 2 December 2010.

Agenda Item 4 set out to achieve several outcomes. It sought to achieve equity and balanced development across all regions, with respect to job creation, poverty reduction, improved income distribution, and gender equity. It aimed to empower communities by devolving public funds for income generation and social programmes, and to develop local capacity to manage such funds. It planned to improve wealth creation opportunities for disadvantaged groups and regions by spending more on roads, water, sewerage, communications and the supply of electricity to poor communities and regions. Finally, it sought to create an environment in which poor communities could earn more by increasing access to affordable credit, savings programmes and useful technologies.

Kenyans have been ruled by a highly centralized state for nearly five decades, since the *Majimbo* system, a federal form of governance introduced in 1963, was abolished within a year of independence.[551]

The constitutional review therefore wanted to ensure the effective participation of citizens in their governance. As Yash Pal Ghai noted, the public believed, and statistics showed, that Kenya's centralized state had failed to promote widespread economic and political development; only a few areas and a small elite had benefited.[552]

To redress political and economic marginalization, the constitution seeks, through devolution, to involve the people more in government and ensure efficient and effective delivery of services.[553] It established 47 county governments with executive, legislative and financial powers and authority to run their counties.[554] Its Sixth Schedule provides for a phased transfer of functions to county governments within three years of their election. The roles of the national government and county governments were to be identified and defined during the first phase of transfer (July 2012-February 2013). Functions were then to be transferred from the national government to county governments during the second phase.

551 The *Majimbo* system provided a strong, even neo-federal form of political decentralization by creating eight regions that, on paper, were politically well-endowed. The regions shared power with the centre in every sphere of government activity, and had their own legislature, executive branch, dependable sources of revenue and security forces. See Oyugi, W.O. (2005), "The Search for an Appropriate Decentralization Design in Kenya: Historical and Comparative Perspectives", in Kindiki, K. and Ambani, O., *The Anatomy of Bomas: Selected Analyses of the 2004 Draft Constitution of Kenya*, Nairobi: Claripress.

552 Ghai, Y. (2007), "Devolution: Restructuring the Kenyan State", Lecture at the African Research and Resource Forum, Kenyatta International Conference Centre, Nairobi, 23 November 2007.

553 The objects and principles of devolved government are set out at Article 174 of the 2010 Constitution.

554 Kivuva, J. (2012), "Restructuring the Kenyan State", SID Constitution Working Paper Series No. 1.

The Transition Authority (TA) was created to facilitate and coordinate this process. The TA coordinated with the Commission on Revenue Allocation (CRA) and the National Treasury to: facilitate analysis and the phased transfer of functions; determine resource requirements for each of the functions; develop a framework for comprehensive and effective transfer of functions, as provided for under Article 15 of the constitution's Sixth Schedule; and facilitate the development of a budget for county governments during Phase One.

The Intergovernmental Relations Act 2012 established the National and County Government Coordinating Summit and the Council of County Governors. These bodies were designed *inter alia* to strengthen consultation and coordination and promote national cohesion and unity. The Summit brings together the President and the 47 governors to discuss intergovernmental relations. The Council brings together the 47 governors to discuss inter-county relations. In addition, a County Intergovernmental Forum, chaired by the governor, brings together the heads of all national government departments that deliver services in the county as well as members of the County Executive Committee. Its purpose is to harmonize the delivery of services by central and county government, and coordinate development activities in the county.[555]

The TA's first task was to evaluate the extent to which counties were equipped to run county governments. In mid-October 2012, in an interim assessment, the TA noted that 33 counties had the structures required. Fourteen counties[556] needed further assessment.[557] After consulting Parliament and other stakeholders, the CRA released a revised formula for sharing revenue between the national government and the county governments.[558] This raised the share of national revenue that would be allocated to the counties from 15 per cent to 33 per cent. Parliament approved the formula proposed for revenue allocation on 22 November 2012. It took into account population (45 per cent), basic equal share (25 per cent), the poverty index (20 per cent), land area (8 per cent) and fiscal responsibility (2 per cent).[559]

555 Walter Oyugi, "The political dimension of the devolved government in Kenya", *Weekend Star*, 11-12 May 2013; see also Section 54 of the County Government Act, 2012.

556 Lamu, Tana River, Kwale, West Pokot, Elgeyo Marakwet, Migori, Vihiga, Isiolo, Samburu, Taraka Nithi, Wajir, Marsabit, Turkana, and Mandera. Six counties (Kajiado, Bomet, Kitui, Nyamira, Kilifi and Garissa) were to be reassessed.

557 Transition Authority, Quarterly Report (October – December 2012), Nairobi: TA;"14 counties still lack offices ahead of polls", *Daily Nation*, 16 October 2012; "Transition Authority has a race against the clock", *The Standard*, 18 October 2012.

558 Initial allocations were based on population (60 per cent), poverty index (12 per cent), basic equal share (20 per cent), land area (16 per cent) and fiscal responsibility (2 per cent).

559 Commission on Revenue Allocation (2012), *Recommendations on Sharing of Revenue Raised by the National Government Between the National Government and County Governments and Among County Governments for the Financial Year 2013/2014*, Nairobi: CRA.

The county governments are still struggling to manage the challenges associated with devolution of power and resources from the centre. Governors have protested at the slow release of funds[560] (though protests about under-funding were resolved when central government increased the allocation to counties from KES198 billion to KES210 billion). The national government has continued to strengthen its presence at county level by creating offices such as county commissioners and regional coordinators; county commissioners were appointed and retained in defiance of a court ruling that their appointment was unconstitutional. National ministries have been slow to produce detailed transition plans that define what they will continue to do and what counties will do.[561] Poor infrastructure remains an issue. Finally, there is political pressure for a non-staggered transfer of functions.

Even before the 2013 general election, it was recognized that effective implementation of the constitution would not occur until appropriate governance structures were in place.[562] On 13 December 2012, the CIC, CRA and the TA expressed fears that the executive was creating laws and numerous semi-autonomous government agencies to circumvent the constitution's provisions on devolution. They warned that such manoeuvres would be costly, cause conflict, and set weak county governments at war with centrally created county structures.[563]

Other political challenges have slowed down the development of devolved governance structures. Salary complaints led members of county assemblies to boycott sessions and then move adjournment motions in the 47 county assemblies (on 8 May 2013), threatening to paralyze county governments. The consideration of budgets for various county governments and approval of nominees to executive committees were disrupted as a result.[564]

As the Panel pointed out during a visit in October 2011, devolution required a massive reshaping of policy and institutions and, more important, "a mind shift across the board".[565]

560 International Crisis Group (2013), "Kenya After the Elections", Africa Briefing Paper No. 94, 15 May 2013.

561 Jason Lakin, "The devolution train is leaving the station, but Kenya's not on board", *The East African*, July 27–August 2, 2013.

562 Mitullah, W. (2012), "Decentralized Service Delivery in Nairobi and Mombasa: Policies, politics and inter-governmental relations", United Nations University World Institute for Development Economics Research, Working Paper No. 2012/92.

563 Commission for the Implementation of the Constitution (2013), *Quarterly Report on the Implementation of the Constitution: October – December 2012*, Nairobi: CIC, p. 48.

564 Stephen Makabila, "Hiccups threaten Kenyans' dream for devolution", *The Standard*, 15 May 2013; Luke Anami, "County Reps boycott threatens devolution", *The Standard*, 12 May 2013.

565 The Panel, press statement, 21 October 2011.

National cohesion and unity

Recognizing that consolidating national cohesion and unity was a cross-cutting task that required the efforts of all parties, Agenda Item 4 proposed a range of reforms. It proposed, first of all, the creation of a National Cohesion and Integration Commission (NCIC). Parliament and the executive were called to initiate and sustain advocacy on ethnic and racial harmony; to establish and operationalize a Peace Building and Conflict Resolution Programme (PBCR); to establish an early warning mechanism on social conflict, with a PBCR monitoring and evaluation system and a restructured secretariat; and to enact an Alternative Dispute Resolution Bill. It was further recommended that the District Peace Committee framework should be extended to the entire country, and linked to District Security Committees. Parliament and the executive were expected in addition to finalize the Hate Speech Bill and review the Media Act to control incitement, undertake civic education on ethnic relations, inculcate a civic culture that respects diversity, encourage inter-ethnic cooperation through the school curriculum, and operationalize the Truth, Justice and Reconciliation Commission.

By means of a comprehensive and progressive Bill of Rights, the constitution protects equality of rights, entrenches gender equity and equality, and safeguards property rights (including intellectual property). By these means, and a devolved system of government that disperses power and resources to communities and minorities, it provides a framework for achieving social justice. The 2010 Constitution underpins an inclusive model of governance that is designed to ensure that Kenya's regional and ethnic diversity is reflected in public institutions, including the executive, the security sector and political parties.

However, it does not set out in detail how regional and ethnic diversity is to be realized.

By means of the Bill of Rights, and the chapters on the national executive, devolution and representation of the people, the constitution addresses the negative features of ethnicity by committing the country to principles of equality and non-discrimination. Article 130(2) stipulates that the composition of the executive (including the Kenya Defence Force, the National Police Service and constitutional commissions and independent offices) shall reflect the regional and ethnic diversity of Kenya's people. Article 27(4) of the Bill of Rights prohibits all forms of discrimination, including discrimination based on ethnicity

or social origin.[566] Article 56 obliges the state to establish affirmative action programmes. These should ensure that minorities and marginalized groups participate and are represented in governance and other spheres of life, and have special opportunities to access employment, and receive services (including water, health services and infrastructure). Article 22 empowers any person to institute court proceedings if they believe that a right or fundamental freedom enshrined in the Bill of Rights is threatened, or has been denied or violated.

The constitution stipulates that every political party shall have a national character and shall not be founded on a religious, linguistic, ethnic, gender or regional basis or seek to advocate hatred on any such basis. The Political Parties Act provides that, for a party to be registered, it must recruit 1,000 registered voters from more than half of the counties, to reflect regional and ethnic diversity, and must respect gender balance and represent minorities and marginalized groups. This composition should also be reflected in the party's governing body.[567]

Devolution also ensures a fairer distribution of scarce resources and reduces the influence of ethno-regional factionalism.[568] It fosters national unity by recognizing diversity and protecting the interests of marginalized communities.[569] Additionally, the formula for allocating revenue between counties helps to remedy discrimination by linking 20 per cent of the allocation to the poverty index.[570] In recognition of disparities in the provision of basic services between different regions, finally, the constitution establishes an Equalization Fund,[571] whose resources are to be shared between the most marginalized regions. This too reflects the effort to promote greater equality.[572] The CRA has classified 14 counties[573] as marginalized.[574]

566 Article 27 (4) prohibits discrimination on an extensive list of specified grounds: "race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religions, conscience, belief, culture, dress, language or birth".

567 Article 7 (2)(a-c).

568 Fitzgerald, J. (2010), "The Road to Equality? The Right to Equality in Kenya's New Constitution", *The Equal Rights Review*, Vol. 5: 56.

569 2010 Constitution, Article 174.

570 *Supra* note 558.

571 The Equalization Fund is pegged at 0.5 per cent of the last audited national revenue.

572 2010 Constitution, Article 204(1); Fitzgerald J. (2010), "The Road to Equality? The Right to Equality in Kenya's New Constitution", *The Equal Rights Review*, Vol. 5: 63.

573 Garissa, Isiolo, Kilifi, Kwale, Lamu, Mandera, Marsabit, Narok, Samburu,Taita Taveta, Tana River, Turkana, Wajir, West Pokot.

574 Commission on Revenue Allocation (2013), *Criteria for Identifying Marginalised Areas for Purposes of the Equalisation Fund*, Nairobi: CRA.

Realizing the constitution's objectives on reconciliation and cohesion remains elusive, nevertheless. Kenyans continue to divide politically on ethno-regional lines,[575] and political parties continue to be founded on ethno-regional platforms and to mobilize accordingly. The National Cohesion and Integration Commission (NCIC) conducted a diversity audit of the public service, inserted cohesion and integration principles in policies, legislation and the education curriculum, and developed the Kenya Ethnic and Race Relations Policy.[576] However, its initiatives have rarely been implemented. The NCIC's own reports show that section 7(2) of the NCIC Act, which stipulates that not more than one-third of any public agency's staff should belong to one ethnic community, is persistently violated. According to an audit report of the civil service released in 2012, more than half of Kenya's ethnic groups are marginally represented, only 20 of 40 listed Kenyan communities are statistically visible, and some 23 fill less than one per cent of posts in the civil service.[577]

Noting that recruitment to national executive positions does not reflect Kenya's diversity, the NCIC chair cautioned county governments against "excluding some ethnic groups and clans in their hiring of staff and thus posing serious dangers to national healing and cohesion".[578] The NCIC noted that a number of counties have failed to appoint non-indigenous residents of the county to at least 30 per cent of posts, the required threshold.[579]

The NCIC planned to introduce a binding regulation to curb the marginalization of minorities at county level. However, reaction to the release of TJRC's report suggests that it is most unlikely that, if implemented, this would heal the nation. As the Panel noted in December 2009 and again in October 2011, national reconciliation and healing remain fragile.[580]

Gender equality

Women have traditionally been marginalized in Kenya. They are the only marginal group whose representation the 2010 Constitution specifies.

575 Minutes of the Kenya National Dialogue and Reconciliation, Fourteenth Evaluation Session, 31 October 2012.

576 National Cohesion and Integration Commission (2012), *Annual Report 2010/2011*, Nairobi: NCIC.

577 National Cohesion and Integration Commission (2012), *Towards Cohesion and Unity in Kenya: Ethnic Diversity and Audit of the Civil Service*, Nairobi: NCIC.

578 "If taxes know no tribe, why this discrimination?", *The Standard*, 13 August 2013.

579 Walter Menya, Philip Bwayo, "Governors risk legal action over county jobs", *Sunday Nation*, 11 August 2013.

580 The Panel, press statement, 7 December 2009; Minutes of the Kenya National Dialogue and Reconciliation, Fourteenth Evaluation Session, 31 October 2012.

The constitution states that no more than two-thirds of all elective and appointed public positions should be occupied by one gender. It stipulates that 47 women are to be elected to represent counties in the National Assembly (13.5 per cent of the House) and that political parties must nominate 16 women to the Senate (26.7 per cent).

The constitution guarantees that women and men have the right to equal treatment and to participate without discrimination in political, economic, cultural and social activities.

The application of the one-third gender rule has already ensured that women are adequately represented in the independent institutions and constitutional commissions that were created under the 2010 Constitution. In the Ethics and Anti-Corruption Commission (EACC), the Independent Policing Oversight Authority (IPOA), the National Gender and Equality Commission (NGEC), and the Commission on Administrative Justice (CAJ), more than half the commissioners are women, and women head the Kenya National Human Rights and Equality Commission (KNHREC), NGEC, Public Service Commission (PSC) and Salaries and Remuneration Commission (SRC).

9.1. Representation of women in constitutional offices

Institution	Men	Women	Women's representation (%)
EACC	1	2	66.7
IPOA	3	5	62.5
NGEC	3	2	60.0
CAJ	2	2	50.0
SRC	7	6	46.2
PSC	5	4	44.4
TA	5	4	44.4
JSC	8	4	36.4
IEBC	6	3	33.3
CIC	6	3	33.3
NLC	6	3	33.3
NPSC	4	2	33.3
CRA	6	3	33.3

With regard to political parties, the Registrar of Political Parties is expected to ensure that, before registration, at least one third of the members and leaders of political parties are women. At the 2013 general election, all of Kenya's 58 registered political parties met the one third gender threshold, and some exceeded it. Women's representation in registered political parties is between 41 and 60 per cent. Their representation on governing bodies also met the one third gender rule – though women were a majority in only three.[581]

Women's representation and participation in political parties has therefore increased. Unfortunately, no proportionate increase has occurred in the number of women candidates, or women's influence.

Only a handful of women secured nominations to contest seats in the 2013 general election, and only one of eight presidential candidates was a woman. In no political party that contested elections for Parliament or governorships were women 10 per cent of the candidates. Of the 237 candidates for governorships, only seven were women (2.95 per cent). Of the 244 candidates for the Senate, 19 were women (7.79 per cent). Of 801 candidates for Parliament, 166 were women (20.7 per cent). Of 9,603 contestants for county assembly positions, 697 were women (7.26 per cent).

In the 2013 general election, no woman was elected to the Senate or to a governorship, and only 16 women were elected to the National Assembly (5.5 per cent of the 290 seats). The same number was elected in the 2007 general election, when fewer seats were contested. Elections in county wards returned only 77 women (5.3 per cent of the 1,450 positions).

The national and county legislatures do not meet the constitution's gender requirement. This is because the Supreme Court (by a majority, the Chief Justice dissenting) ruled that the one third rule will be implemented progressively between the 2013 general election and 27 August 2015. (The Court did not say how this should be done.)

Attaining the one third gender rule will continue to be a challenge while the executive, the National Assembly and the Senate remain uncommitted to it.

Land reform

Recognizing that land has been an economic, social, political and environmental issue for many years in Kenya, Agenda Item 4 stipulated a range of reforms. They included: to finalize the draft National Land Use Policy and enact attendant legislation; to harmonize land laws in one statute, to reduce the allocation

581 Registrar of Political Parties (2012), *Registered Political Parties*, Nairobi: IEBC.

of multiple title deeds; to adopt a geographic information system (GIS), and establish a transparent, decentralized, affordable and efficient GIS-based Land Information Management System and Land Registry at the Ministry of Lands (to include all local authorities); and to finalize the Land Dispute Tribunal Act.

The constitution built on this reform agenda by establishing the National Land Commission (NLC) and the Environment and Law Court to address historical land grievances. The NLC took over administration of public land, a responsibility previously shared by the President (in respect of unalienated government land) and a range of officials. Trust land became the responsibility of county governments.

The NLC is expected to: monitor and oversee land use planning; register and issue titles for all unregistered land within 10 years (from when the Act becomes operational); review previous allocations of public land within five years; recommend to Parliament legislation designed to resolve historical land grievances, within two years; introduce a modern Land Information Management System (LIMS), to make land transactions more efficient and reliable and reduce the number of duplicated titles; and establish offices and land management boards at county level.

Schedule Five of the constitution provides a timeline for enacting land legislation. It required: a System of Courts within one year; legislation on land within 18 months; legislation on community land within five years; regulation of land use and property within five years; agreements relating to natural resources within five years; and legislation regarding the environment within four years.

Four laws have been enacted: the Environment and Land Court Act, the NLC Act, the Land Act, and the Land Registration Act. Work continues on other legislation and rules and regulations, following appointment of two task forces by the Ministry of Lands. One is charged with preparing regulations, rules and guidelines for operationalizing the Land and Land Registration Acts,[582] the other with formulating a Community Land Bill and an Evictions and Resettlement Bill.[583]

The NLC was sworn in on 27 February 2013. It has already had to contend with delays, including late provision of funds.

582 Republic of Kenya, Technical Committee for Preparation of Rules and Regulations, Special Gazette Notice No. 10604, 19 July 2012.

583 Republic of Kenya, Task Force on the Formulation of Community Land and Evictions and Resettlement Bill, Special Gazette Notice No. 13557, 21 September 2012.

Challenges facing the 2010 Constitution

The 2010 Constitution addressed the underlying causes of the post-election violence that occurred in 2007-2008 but its effectiveness has been hampered by vested interests. Kenya's political culture has changed slowly because political ownership of the constitution remains weak.[584] Those who benefit from the status quo naturally decline to curtail the Presidency's unfettered powers, while many institutions are characterized by poor governance, weak commitment to the rule of law, and lack of accountability.[585]

Attempts were made to amend the constitution and derail its implementation even before it had been tested. They included: a proposal to abolish the Senate before it had been established, and restore a unicameral Parliament; a move to amend Articles 101, 103, 177 and 180, to change the election date; and an amendment to Article 97 (allowing nomination of special seats to ensure that no more than two-thirds of members of the National Assembly belong to the same gender). The proposal to abolish the Senate was abandoned; courts dealt with the other matters.

Legislation has been amended, both by the executive and Parliament, in a manner that has undermined the spirit or letter of the constitution.[586] The anti-corruption and integrity laws were weakened to the extent that they no longer serve the purpose intended by those who framed the constitution. Advisory opinions of the Commission for the Implementation of the Constitution (CIC) were ignored.[587] Amendments to the Political Parties Act and the Elections Act curtailed constitutional regulation of party discipline at elections.[588] In some instances, the executive altered the content of bills that had been finalized by the CIC and implementing agencies (Office of the Attorney General, the KLRC, and line ministries) before forwarding them for publication.

Through the Office of the Attorney General, the executive has persistently disregarded constitutional procedures requiring consultation with the CIC, KLRC and other stakeholders before bills are tabled in Parliament. In 2011, 13 out of 33 Acts were enacted without involving the CIC or the public, and in

584 Minutes of the Kenya National Dialogue and Reconciliation, Seventh Evaluation Session, 16 November 2010.

585 Kofi Annan Foundation and African Union Panel of Eminent African Personalities (2011), *The Kenya National Dialogue and Reconciliation: Two Years on, Where are We?*, Report of the Meeting, Nairobi, 2-3 December 2010, Geneva: KAF and PEAP.

586 Commission for the Implementation of the Constitution (2012), *2011/2012 Annual Report*, Nairobi: CIC, p. 26.

587 Commission for the Implementation of the Constitution (2011), *Quarterly Report on the Implementation of the Constitution: July-September 2011*, Nairobi: CIC, p. 52.

588 The Panel, press statement on the second anniversary of Kenya's Constitution, 26 August 2012.

2012, 21 out of 39. The CIC has consistently flagged this issue, without securing consistent compliance. The cabinet and legislature disregarded constitutional procedure when they passed both the National Government Loans Guarantee Act and the Contingencies Fund and County Government Emergency Fund Act. Parliament passed both bills, and the President assented to them, despite court orders that restrained their tabling.[589]

Delays in publishing and gazetting, by design or default, have slowed the implementation of legislation. The Independent Electoral and Boundaries Commission (IEBC) provides an example. The IEBC bill was published on 7 April 2011. It was then tabled in Parliament after six weeks (on 31 May 2011). Assent was granted over a month later (5 July 2011) and it was gazetted two weeks after that (18 July 2011). Further delays occurred in the appointment of members of the IEBC Selection Panel, who were not sworn in until 8 August 2011.[590] The government was well aware of the proximity of elections; the slow passage of legislation that created the country's electoral management body evidently did not improve their preparation.

Public debate and participation have also been discouraged because Parliament has rushed bills through to meet constitutional deadlines. Bills are normally presented in Parliament for discussion after 14 days, then reviewed for 10 days by the relevant parliamentary committee. A bill should then be debated before going to a Committee of the Whole House for approval, before being transmitted to the President. Delays in drafting bills caused them to be tabled in Parliament very near to constitutional deadlines, sometimes only a week or a few days beforehand. Parliament was compelled to reduce the time it allowed for debate and consideration, weakening the quality of bills and preventing the public from following parliamentary discussions or discussing the issues itself.

The executive's willingness to bypass other institutions, in disregard of constitutional procedures, has caused persistent wrangles with the CIC, which has repeatedly accused the Attorney-General of formulating bills without the CIC's involvement, and inordinate delay in publishing and presenting bills to Parliament.

Implementing ministries and state institutions have only intermittently submitted quarterly reports in response to the Process Circular. Only 16 of 43 ministries submitted implementation status reports in the second quarter of 2011;[591]

589 *Supra* note 586, p. 32.

590 *Supra* note 586.

591 Commission for the Implementation of the Constitution (2011), *Quarterly Report on the Implementation of the Constitution: January-March 2012*, Nairobi: CIC, p. 43.

23 did so in the third quarter,[592] eight in the fourth,[593] and 14 in the first quarter of 2012.[594] Key institutions, such as the Office of the President and the Office of the Attorney General, had not submitted a single report by December 2012. This frustrated the CIC's efforts to fulfil its oversight responsibilities.

Some ministries have also stated that they were not given a sufficient role in preparing priority bills for constitutional implementation.[595]

Conclusion

Many lessons can be drawn from the way in which Kenya's constitution has been implemented.

In the words of Hans Corell, legal advisor to the Panel: "Constitutions do not make society work. Rather, it is the people who make constitutions work."[596] No matter how progressive, a constitution is unlikely to have the effects its framers intended if an unchanged political culture obstructs its implementation. The 2010 Constitution did address grievances that Kenyans believed were responsible for causing the post-election violence of 2007-2008. It called for institutional reforms; action to promote transparency and accountability and end impunity; policies to remedy poverty, inequity and regional imbalances; policies to promote national cohesion and unity; and land reform.

It is no doubt too early to judge whether the steps taken to implement the constitution will be adequate to address these grievances. However, the signs are not encouraging. As the Panel noted in mid-2008: "If Agenda Item 4 issues are not effectively addressed in their own right, the country will become increasingly vulnerable to similar or even worse crises than the one experienced in 2008."[597]

Constitutional institutions have been weakened, causing a steady loss of faith and confidence in them. After the 2013 general election, the country remains deeply divided. The IEBC's conduct of the elections, especially the counting and tallying process, aroused concern, as did the Supreme Court's response to the presidential election petition. If not handled carefully, such doubts may undermine public confidence in both institutions. The SRC's inability to

592 *Supra* note 586, p. 49.

593 *Supra* note 590, p. 57.

594 *Supra* note 590, p. 17.

595 *Supra* note 590, p. 46.

596 Kofi Annan Foundation and African Union Panel of Eminent African Personalities (2011), *The Kenya National Dialogue and Reconciliation: Building a Progressive Kenya*, Report of the Meeting, Nairobi, 5-6 December 2011, Geneva: KAF and PEAP, p. 68.

597 The Panel, letters to the Principals, 26 June 2008.

control the salaries of MPs, and their threat to dissolve it, have created a similar risk. The law that operationalized the constitution's Leadership and Integrity chapter has watered down its provisions on accountability and impunity, while the EACC's power to vet individuals who seek public office has been removed. Devolution, the primary instrument for tackling poverty, inequity and regional imbalances, has made imperfect progress. The NLC, charged with land reform, is underfunded.

As the APRM report concluded in 2006: "There is a need for the healing of the nation. The process of national healing and reconciliation is unlikely to proceed as long as society is still polarized. In addition, without also addressing past crimes, corruption, marginalization and poverty, it is unlikely reconciliation can be achieved."[598]

A constitution requires a schedule for its implementation, a self-actualizing mechanism, and an implementing organ to protect it against efforts to derail implementation. However, these are insufficient to ensure its full realization.

First, Kenyans themselves need to be vigilant. They must take it on themselves to make sure that their constitution remains on track.

Second, the constitution will not fulfil its potential unless the different entities involved in its implementation co-operate. Political will remains paramount. The constitution must be championed by officials in the highest offices.

Third, a constitution should not focus too much on the electoral process. Many other constitutional issues, equally important, require political attention and implementation.

Fourth, entrusting implementation of Agenda Item 4 and the constitution to officials who have a direct interest in the outcome of elections undermines implementation. In Kenya, the political elite has amended vital legislation to accommodate local, short term or personal interests.

Fifth, the architects of a new constitution need to take account of a country's history, tradition, and institutional and political context when they establish mechanisms for its implementation. In Kenya, such factors have influenced, and continue to influence, efforts to introduce devolution.

598 Africa Peer Review Mechanism (2006), *Country Review Report of the Republic of Kenya*, Durban: NEPAD.

Chapter Ten

Judicial Reform and Human Rights

"The independence and integrity of the new judiciary has given hope to the people and restored their respect for, and faith in, the rule of law. Obviously reform is not an event, it is a process and it will take time."

– Kofi Annan speaking at a press conference, Nairobi, 9 October 2012

Historical background

Kenya's judiciary was created by the colonial administration, which established a dual system, composed of courts for colonial settlers and a Native Court for Africans. The Native Court was part of the Native Authority, which was essentially a tool to control the population. This architecture was inherited intact at independence.[599] In 1967, the two systems were merged into one. However, the emerging monist, Africanized system remained undemocratic, like its predecessor. The judiciary continued to adopt a pro-government stance, creating a situation in which the judiciary depended on government and both the judiciary and executive operated above the law.[600]

Under the 1963 Constitution, the President made senior judicial appointments without checks. The Chief Justice and judges served at the President's pleasure. The judiciary was an executive department under the Attorney General, and

599 Mamdani, M. (1996), *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton NJ: Princeton University Press, p. 7.

600 Mwangi, P. (2001), *The Black Bar: Corruption and Political Intrigue within Kenya's Legal Fraternity*, Nairobi: Oakland Media Service, pp. 104-107.

lacked financial autonomy since its budget was controlled by the Ministry of Finance.[601] The judiciary was not placed under the Chief Justice, delinked from the civil service, until 1989.

Even after 1989, however, the executive continued to influence judicial officials, who in turn regularly consulted the Attorney General on matters they addressed. Through the Chief Justice (appointed by the President), the executive determined how cases were handled and distributed between judges, and influenced judges' verdicts. In certain instances, the executive compelled judges to redraft their rulings in terms that favoured the executive's interests. To the same end, pro-government judges were appointed to hear applications brought against it.[602]

Several constitutional amendments subsequently strengthened the executive in relation to the judicial and legislative branches. The President acquired the power to appoint judges in an acting capacity; and, after their security of tenure was revoked in 1988, judges could be sacked at the President's discretion. Judicial dependence reached its lowest point when courts refused to enforce the Bill of Rights on the grounds that the Chief Justice had not published rules of procedure for parties to approach the courts.[603]

The President would also routinely use the judiciary to investigate public issues that threatened to destabilize the regime. Twenty-five judicial commissions of inquiry were established between 1963 and 2010. Their recommendations were rarely implemented, and in some cases their reports were not made public.[604]

The first three decades of independence saw little reform, apart from Africanization of the Bar. During this period, the judiciary served by and large to protect the regime; protection of the public interest was secondary or peripheral. This was most visible in the political arena where the state used the courts to contain and restrain political dissidents and resolve political disputes in a manner that favoured the state's interests rather than individual rights.[605]

601 Akech, M., *et al.* (2011), *Judicial Reforms and Access to Justice in Kenya: Realising the Promise of the New Constitution*, Nairobi: Pact and Act.

602 *Supra* note 599, pp. 109-111.

603 Thiankolu, M. (2007), "Landmarks from El Mann to the Saitoti Ruling; Searching a Philosophy of Constitutional Interpretation in Kenya", *Kenya Law Review*, Vol. 1:188, p. 1.

604 Mbote, P., and Akech, M. (2011), *Kenya: Justice Sector and the Rule of Law*, Nairobi: Open Society Initiative for Eastern Africa, p. 10.

605 Mulei, C. (1998), "Human Rights Democracy and the Rule of Law", in Kibwana, K. (ed), *Readings in Constitution and Law and Politics in Africa: A Case of Kenya*, Nairobi: Claripress, p. 289.

The courts dismissed a number of sensitive cases, including election petitions, on frivolous grounds.[606]

The judiciary's handling of election petitions led observers to believe that an election petition served against an incumbent official was unlikely to be settled satisfactorily.[607] Petitions were filed after both the 1992 and 1997 elections. In 1992, Kenneth Matiba's petition against Daniel arap Moi's victory was struck down because Matiba had not personally signed it.[608] In 1997, Mwai Kibaki's petition against Moi was dismissed on the grounds that Moi had not personally received the papers, even though evidence was produced to show that the security forces had violently frustrated all attempts to deliver them.[609] An appeal against the ruling was decided three years later. At parliamentary level, several petitions remained unresolved until the succeeding election.

From 1990 onwards, as pressure for democratic reform mounted, the judiciary came to be perceived as an institution that constrained democratic space.[610] Between the return of multiparty politics in 1992 and promulgation of the 2010 Constitution, no less than 12 committees were established to reform it. Many of the reports were honest in their assessment and made robust recommendations; but most were not implemented.[611]

Public dissatisfaction was reflected in a proposal to the Constitution of Kenya Review Commission in 2002 that all serving judges and magistrates should retire and be freshly appointed.

Public confidence in the administration of justice was therefore very low when the National Rainbow Coalition came to power in 2003. Many members of the new government had good working relationships with civil society, which had been clamouring for reform, and it was anticipated that efforts would be made to restore the judiciary's independence. President Kibaki's administration suspended the Chief Justice, Bernard Chunga. His replacement, Evan Gicheru, formed an Integrity and Anti-Corruption Committee in 2003, headed by Justice Aaron Ringera, which reported that it had received credible evidence of

606 Juma, D. (2010), "The Normative Foundation of Constitution-Making in Kenya: The Judiciary Past, Present and Future", in Murungi, C.J. (ed), *Constitutional Change, Democratic Transition and the Role of the Judiciary in Government Reform: Questions and Lessons for Kenya*, Nairobi: Kenya Section of the International Commission of Jurists, p. 228.

607 South Consulting, May 2012.

608 *Matiba v Moi & 2 others (No. 2)* (2008), 1 KLR (EP), 670.

609 *President Kibaki v Moi, No. 3*, Civil Applications No. 172 & 173 Consolidated, 1999.

610 Oseko, O.J. (2012), *Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform*, PhD Thesis, Leicester: University of Leicester, pp. 196-197.

611 UNDP Kenya (2010), "Judicial Integrity and the Vetting Process in Kenya", *Amani Papers*, Vol. 1, No. 6, September 2010, p. 2.

corruption on the part of five of nine Court of Appeal judges (56 per cent), 18 of 36 High Court judges (50 per cent), and 82 of 254 magistrates (32 per cent).[612]

After the names of those concerned were leaked to the media, the Chief Justice called on them to resign. Fifteen judges did so but two Court of Appeal judges and six High Court judges preferred to face tribunals. Three judges were later reinstated. Of the 82 magistrates named in the report, 70 were 'retired' by the Judicial Service Commission (JSC) in the public interest.

In spite of this action, the judiciary did not become impartial and independent. The President continued to appoint judicial officials unilaterally. His decision to appoint five new judges shortly before the 2007 elections further eroded public confidence and led subsequently to claims that the judiciary was not independent enough to adjudicate the disputes that arose from that election.

Setting the stage for meaningful reforms

Public confidence in the judiciary collapsed during the crisis that gripped Kenya after the 2007 election. Before and during the mediation process, the PNU insisted that Raila Odinga and the ODM should resolve their election dispute in court. The ODM pointedly refused this option, on the grounds that the judiciary was neither independent nor impartial,[613] most judges having been appointed by the incumbent President.[614] The standoff demonstrated more clearly than ever that Kenya's judiciary required reform which would guarantee its political independence.

The KNDR subsequently agreed that amendments to electoral laws should increase the speed with which courts processed petitions and that presidential electoral petitions should be given priority.[615] The PNU accepted that violence had erupted partly because, rightly or wrongly, people felt that it was futile to take their grievances to court.

The mediation process went on to identify several areas of reform. These included: (a) constitutional review that would make arrangements to (i) guarantee the judiciary's financial independence; (ii) establish a transparent and merit-based appointment system and system for disciplining and removing judges; (iii) entrench a commitment to human rights and gender equity; (iv) reconstitute a truly independent Judicial Service Commission to include other

612 Republic of Kenya (2003), *Report of the Integrity and Anti-Corruption Committee*, Nairobi: Government Printer.

613 Republic of Kenya (2008), *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007*, Nairobi: Government Printer.

614 Minutes of the Kenya National Dialogue and Reconciliation, Ninth Session, 11 February 2008.

615 Minutes of the Kenya National Dialogue and Reconciliation, Fifth Session, 7 February 2008.

stakeholders; (b) enact a Judicial Service Act, with provisions for peer review and performance contracting; and (c) streamline the operations of legal and judicial institutions (by adopting a sector-wide approach to recruitment, training, planning, management and the implementation of programmes and activities).[616]

A Task Force on Judicial Reforms was established on 29 May 2009 to recommend measures to enhance the effectiveness and independence of the institution. The majority of its recommendations subsequently found expression in the 2010 Constitution.

Reforms instituted before promulgation of the 2010 Constitution mainly targeted judicial corruption, the administration of justice, and terms and conditions of service for judicial officials. These changes were essentially administrative and technical, and insufficient to restore the judiciary's credibility.[617]

Reforming the judiciary after 2010

The 2010 Constitution created an elaborate institutional architecture for an independent and accountable judiciary. It required an immediate reorganization and expansion of the Judicial Service Commission, the resignation of the Chief Justice within six months, and the establishment of a Supreme Court with jurisdiction to hear and address presidential election petitions. It also provided a lustration mechanism for vetting judges and magistrates who were in post before the constitution came into force.

The framework was instituted during the first half of 2011, when the Judicial Service Act, the Vetting of Judges and Magistrates Act, and the Supreme Court Act were enacted. The Judicial Service Act promotes efficiency and effectiveness in judicial service delivery and puts in place a merit-based system for recruiting, appointing, disciplining and removing judicial officials. The Vetting of Judges and Magistrates Act sets out a legal framework for vetting the suitability of serving and prospective judicial officials. The Supreme Court Act establishes the Supreme Court as the highest court in the country.

An independent judiciary is at the heart of any democracy and ensures compliance with the constitution. Independence is ensured by rigorous appointment and review processes that prevent bias, and constitutional guarantees to prevent interference or influence by other arms of government, such as the executive.

616 Kenya National Dialogue and Reconciliation (2008), Agenda Item 4: Long-term Issues and Solutions: Matrix of Implementation Agenda.

617 Mbote, P. and Akech, M. (2011), *Kenya: Justice Sector and the Rule of Law*, Nairobi: Open Society Initiative for Eastern Africa, p. 47.

Chapter 10 of Kenya's 2010 Constitution guarantees the judiciary's institutional and financial autonomy. It spells out the need for: an appropriate appointment procedure; security of tenure; satisfactory conditions of service that the executive cannot adversely affect; provision of adequate financial resources; and appropriate terms and conditions of service for all those involved in the administration of justice.

The constitution achieves this by vesting judicial authority in the judiciary, and establishing an independent Judicial Service Commission (JSC) to oversee administrative, managerial and operational reform in the judiciary and the Supreme Court. The judiciary's independence is concretized by ensuring judicial officers are not appointed by the President. The Chief Justice and Deputy Chief Justice are selected and nominated by the JSC, which forwards their names to the President, who transmits them to Parliament for approval and appointment. Judges are nominated by the JSC and their names forwarded to the President for appointment.

Under the new constitution, judicial appointments have been made following a competitive and transparent process and interviews for senior positions have been conducted in public. The Chief Justice, the Deputy Chief Justice, the Chief Registrar of the Judiciary, and judges of the Supreme Court, Court of Appeal and High Court were competitively hired. The Chief Justice and Deputy Chief Justice were sworn into office on 29 June 2011; the Chief Registrar on 22 August 2011; and judges of the Supreme Court on 26 August 2011.

The constitution guarantees the judiciary's financial autonomy by establishing a Judiciary Fund administered by the Office of the Chief Registrar. Each year, the Chief Registrar is required to prepare estimates of expenditure for the following year and submit them to the National Assembly for approval. Expenditure is a direct charge on the Consolidated Fund, which pays the amount directly to the Judiciary Fund. The judiciary is also permitted to receive grants from various sources. This has enhanced its operational autonomy because it is in control of its finances.

With respect to vetting, one of the early agreements to emerge from the first review of the constitution at the Bomas of Kenya (2002) was a proposal to retire all serving judges and magistrates and recruit a fresh bench. This aggressive approach turned the judiciary against constitutional reform. The Review Act passed after the National Accord specifically stated that disputes regarding constitutional review were outside the courts' jurisdiction; it established an Interim Independent Constitutional Dispute Resolution Court (IICDRC) instead. The new constitution laid down that all judges and magistrates who were in post before its promulgation should be vetted.

Vetting audits the integrity and competence of judicial officers. The Judges and Magistrates Vetting Board commenced work on 23 February 2012 after numerous court challenges. The Board was expected to vet 53 judges on the Court of Appeal and the High Court, 352 magistrates, the Registrar of the High Court, and the Chief Court administrator, all of whom had been in post before the new constitution came into force. At the time of writing, the completion date for vetting had been amended twice and vetting was expected to end on 31 December 2013.

Four of the nine judges on the Court of Appeal were found to be unsuitable (44 per cent), and 11 of 44 judges in the High Court (25 per cent). Two of these were reinstated after review, however. In all, 13 of 53 judges were declared unsuitable (25 per cent). Of these, three were faulted principally for lack of impartiality, five for lack of integrity or failure to maintain propriety, and three because of their work style or temperament. One judge was faulted for lack of good judgement and for denying access to justice; and one for lacking competence and diligence.

The board began vetting magistrates in December 2012. Six of 45 magistrates had been found unsuitable at the time this report was written.

To enable the judiciary to resolve electoral disputes efficiently and deal with electoral offences, on 10 May 2012 the Chief Justice appointed a Judiciary Working Committee on Election Preparations. It was asked to design and implement a programme for building the capacity of judges, magistrates and other judicial staff on electoral matters and suggest ways of working with other stakeholders. The committee advised the judiciary on setting up an effective and efficient dispute resolution for the 2013 general election.[618] Anticipating numerous cases, the committee trained magistrates, legal researchers, judicial officials and judges from the Court of Appeal, the High Court, the Land and Environment Court, and Industrial Courts. Supreme Court judges did not undergo training.[619]

The committee identified and remedied gaps in the law through the Miscellaneous Amendments (Number 2) Act 2012, which came into force on 4 January 2013.[620] To enhance election dispute resolution, the committee proposed amendments: to Section 75 of the Elections Act (providing that petitions arising from County Assembly elections will be heard and determined by magistrates courts); to the

618 Judiciary Working Committee on Election Preparations (2012), *Interim Report of the Judiciary Working Committee on Election Preparations (Quarterly Report)*, Nairobi: Judiciary, p. 5.

619 Judiciary Working Committee on Election Preparations (2013), *September 2012 – February 2013: Pre-Election Report*, Nairobi: Judiciary, pp. 23-27.

620 *Ibid*, p. 16.

Elections Act (providing time limits of six months for hearing and determining appeals and the scope of appeals against decisions of magistrates or the High Court); and to Section 96 of the Elections Act (giving the Rules Committee of the High Court the power to make rules regarding election petitions).[621]

By March 2013, when the general election took place, the judiciary had established an elaborate electoral dispute mechanism in accordance with guidelines set out in the 2010 Constitution and in the Elections Act, the Independent Electoral and Boundaries Commission Act, and the Political Parties Act.

Progress

The Judiciary Transformation Framework 2012–2016 consolidated all the previous reports that had proposed judicial reforms. When published on 31 May 2012, it set out three key objectives: to reset the relationship between the judiciary and other arms of government; to change the judiciary's organizational culture, adapt it to social realities, and modernize its leadership style; and to become a service institution focused on the needs of people.[622]

Many of the administrative activities undertaken under the Transformation Framework are reported in the Annual State of the Judiciary report. The Judicial Service Act now requires that the Chief Justice reports annually to the nation and to Parliament on the state of the judiciary. His report is an opportunity to audit publicly the institution's activities and check for possible misuse or abuse, internally or by other arms of government.

The Chief Justice presented the inaugural State of the Judiciary and Administration of Justice report on 19 October 2012. The report demonstrated the judiciary's progress in many areas where it had been deficient in the past. Of 428,827 cases filed between July 2011 and July 2012, 421,134 cases had been completed, sharply reducing the backlog. 251 senior staff had been hired, largely rectifying a problem of understaffing. The Judiciary Fund had improved operational autonomy. The Office of the Judiciary Ombudsperson had started to receive and investigate complaints against legal officials.

Empowered by new laws, the judiciary also began to assert its independence. It made rulings on matters that, before the 2010 Constitution, had been deemed the preserve of the executive. For the first time, the judiciary ruled on the date of the 2013 general election. It also overturned executive appointments that did not meet constitutional requirements. Notably, it reversed President Kibaki's decision to pre-emptively nominate candidates to the posts of Court of Appeal

621 *Supra* note 617, p. 18.

622 Judiciary (2012), *Kenya State of Judiciary Report, 2011-2012*, Nairobi: Judiciary.

Judge, Chief Justice, Attorney General, Director of Public Prosecutions (DPP), and Controller of the Budget. Concerted pressure from the JSC, constitutional bodies, civil society and the Panel compelled the President to revoke his appointments in the interest of the rule of law.

The judiciary has played a prominent role in interpreting the 2010 Constitution. Since its promulgation, the High Court, the Court of Appeal and the Supreme Court have declared unconstitutional more than 15 old and new pieces of legislation; these have been deleted from the statute books.

The JSC has assumed responsibility for removing judges, in accordance with the constitution, which outlines a procedure and the grounds on which a judge may be removed from office. Essentially, oversight of and control over the judiciary is in the hands of the JSC. The executive does not become involved unless the JSC petitions the President to constitute a tribunal to initiate a removal.[623]

With respect to electoral law, the judiciary compiled the Elections (Parliamentary and County Elections) Petition Rules 2013 and the Supreme Court (Presidential Election Petition) Rules to guide dispute resolution and ensure fast settlement of petitions.[624]

The Judiciary Working Committee on Election Preparations engaged with other stakeholders in the electoral process, including the IEBC, the DPP, the National Police Service Commission (NPSC), civil society and the public, to develop a uniform approach to managing electoral disputes. After September 2012, it actively participated in the Inter-Agency Committee (IAC; composed of the DPP, the IEBC, the NPSC and JSC). It publicized a range of available options for dealing with electoral disputes, and encouraged party members who had grievances to petition their own parties, then the IEBC and the Political Parties Dispute Tribunal, before going to court.[625]

As the 2013 general election approached, the judiciary fast-tracked cases touching on the electoral process. It determined 100 election-related cases between 2011 and March 2013. Matters raised included: contentious delimitations of constituency and ward boundaries (136 cases); the election

623 At the time of writing, this mechanism had been implemented twice. The first case concerned Hon. Justice Nancy Makokha Baraza. See, Republic of Kenya, Tribunal to Investigate the Conduct of the Deputy Chief Justice and Vice-President of the Supreme Court of the Republic of Kenya, 2012, *Report and Recommendation into the Conduct of Hon. Justice Nancy Makokha Baraza*, Nairobi: Government Printer. In the second case, the High Court suspended an investigation of Justice Joseph Mbalu Mutava in June 2013 after Mutava applied to set aside a decision by the President to suspend him.

624 Judiciary Working Committee on Election Preparations (2013), *September 2012 – February 2013: Pre-Election Report*, Nairobi: Judiciary, p. 16.

625 *Ibid.*, pp. 34-41.

date; gender representation in elective bodies; disputes after the first round of presidential elections; and disputes associated with political party primaries and decisions of the IEBC. The judiciary overturned several decisions of the IEBC, which did not obey all court orders. In a governorship case, for instance, the IEBC did not list Mabel Muruli as an independent candidate for a county governorship, as ordered by the court.[626]

2013 election petitions

When presidential election results were announced on 9 March 2013, the Coalition for Reform and Democracy (CORD) candidate, Raila Odinga, and two voters (Gladwell Wathoni Otieno of the Africa Centre for Open Governance (AfriCOG) and Zahid Rajan of the Kenyan Asian Forum (KAF)), petitioned the Supreme Court to invalidate the election and order a fresh one. Another 188 election petitions were filed in the High Court and magistrates' courts. 39 judges and 59 magistrates were selected to judge the petitions. In line with the constitution, they were given six months (until October 2013) to reach a decision on these cases.

10.1. Status of petitions

	Position	Petitions filed	Judgements delivered	Petitions withdrawn	Petitions struck out	Petitions allowed	Pending Hearing
1	Governor	24	22	0	2	3	0
2	Senator	13	7	2	4	2	0
3	Member of Parliament	70	54	5	11	9	0
4	Women Representative	9	3	1	5	0	0
5	County Assembly Representative	67	51	7	8	9	1
6	Speaker of County Assembly	5	2	2	1	1	0
	Total	**188**	**139**	**17**	**31**	**24**	**1**

Source: Judiciary Working Committee on Election Preparations

626 Judiciary Working Committee on Election Preparations (2013), *Synopsis of Select Electoral-Related Cases (2012/2013)*, Nairobi: Judiciary.

Seventy-three per cent of petitions filed were concluded, demonstrating that the judiciary successfully determined most cases brought before it. Only 7 per cent of cases were struck out; the rest were withdrawn. Of 139 delivered judgments, 17 per cent (24 cases) were successful and 83 per cent were dismissed.

On 30 March 2013, 14 days after the presidential election petitions were filed (and within the term set by the constitution), the Supreme Court unanimously dismissed the petitions by Prime Minister Odinga, Ms Otieno and Mr Rajan and further ruled that the election had been free and fair and in compliance with the constitution, that Uhuru Kenyatta and William Ruto had been validly elected as President and Deputy President respectively, and that rejected votes should not have been included when calculating the final tallies of presidential candidates.[627] The Supreme Court indicated that it would issue a full judgment in two weeks.

The Supreme Court ruled, first, that the failure of the electronic transmission system to properly transmit results was the fault of IEBC but was not a mischievous attempt to manipulate the election. It ordered the prosecution of those involved in procuring ineffective electronic materials.[628] It ruled, second, that removing party agents from tallying did not undermine its credibility because the motive was to ensure a peaceful tallying process and the agents were provided with the necessary documents for verification purposes.[629] Third, it ruled that the register "is not a single document" but an amalgam of documents intended to facilitate voting. On this ground, the court concluded that the voter registry was properly handled and that the IEBC had properly explained all discrepancies. With respect to changes made in the number of registered voters, the court noted that there were many irregularities in information-capture during the registration process but these were not sufficiently substantial to affect the credibility of the electoral process.[630]

The court's ruling was controversial. In general, reform had enhanced public confidence in the judiciary, which enjoyed high approval ratings in polls conducted between late 2011 and the 2013 general election. After the ruling, public opinion divided over whether judicial reform had taken root.

627 The ruling was in response to three separate petitions: one filed by Gladwell Otieno and Zahid Rajan challenging the credibility of the electoral process; one filed by presidential candidate Raila Odinga and the Coalition for Reforms and Democracy challenging the results of the election; and one filed by three individuals on whether rejected votes ought to have been included in the final presidential results.

628 Supreme Court of Kenya, 2013, *Order of the Court in the Supreme Court of Kenya Presidential Election Petition, Nairobi*: Supreme Court, p. 86.

629 *Ibid.*, p. 89.

630 *Ibid.*, pp. 90-93.

Some argued that the court's ruling was sound and indicated that judicial reforms were on track. Others concluded that its reasoning fell below constitutional standards and that the Supreme Court was still upholding the political status quo.

The ruling raised several fundamental issues. It was argued, first, that the court drew on discredited jurisprudence from jurisdictions in which the conduct of elections has been abysmal. Second, it was claimed that, contrary to the court's judgement, the discrepancies unearthed during the scrutiny of Forms 34 and 36, and the effects of recounting votes from 22 contested polling stations, were sufficient to overturn the validity of the election outcome. Third, it was asserted that the court's decision, stating that no single document represented the Principal Register of Voters, created room for manipulation. Fourth, critics said that the court had failed to take account of evidence that different results had been announced at the National Tallying Centre and at the County Tallying Centre (in Nyeri and Bomet counties, for example).

One commentator has argued that the Supreme Court failed to adhere to the letter and spirit of the constitution, specifically Article 159 (2)(d) which says that "justice shall be administered without undue regard to procedural technicalities". In order to respect the constitution's deadline for responding to presidential petitions, the court acted swiftly and so exposed itself to the criticism that its review of the evidence was cursory. This raises a question as to whether 14 days is sufficient to conclude presidential election petitions.

Conclusion

The mediation's focus on judicial reform had the effect of increasing public confidence in the judiciary and enabled the judiciary to arbitrate political disputes that were liable to mutate into violence, a challenge the majority of African countries continue to grapple with. The overriding objective has been to establish the judiciary's independence, for which it must enjoy institutional and financial autonomy, a transparent and merit-based appointment system, and security of tenure.

The constitution established mechanisms to achieve these purposes. The judiciary is directly funded from the Exchequer, its members and staff are recruited independently of the executive, the JSC controls removal and disciplining of judges, while judges who were in office before promulgation of the 2010 Constitution have been vetted. (At writing, magistrates were still undergoing vetting.)

Several lessons may be drawn from the implementation of Kenya's judicial reforms.

One, merit-based appointment and security of tenure have emboldened judges to make independent decisions even in matters of keen interest to the executive. After the executive lost control over judicial appointments and procedures, judges delivered impartial decisions and were seen to do so.

Two, financial autonomy has enabled the judiciary to run its affairs and plan reforms without undue external influence. This has greatly enhanced its operational independence and performance. The former bureaucratic budgeting process exposed the judiciary to manipulation by the executive.

Three, the judiciary's efforts to put in place coherent mechanisms for electoral dispute resolution have encouraged political contestants to use the courts to settle disputes. A fast-track mechanism to ensure petitions are delivered quickly has strengthened the electoral dispute resolution process. Though some people continue to have misgivings, there has not been strong public criticism of court rulings.

Four, the reforms have been in place for two years, too short a time to conclude whether they have taken root. Several trends have the potential to undermine public confidence in the judiciary and its reform.

The executive has shown reluctance to implement some court orders and Parliament has attempted to interfere in disciplinary actions of the JSC; it is not certain that judicial independence has been fully accepted by other arms of government.

The doctrine of separation of powers embedded in the 2010 constitution is new to Kenyan politicians, who will need time to internalize its consequences and adjust. The system of checks and balances is already under stress, as the Senate and National Assembly as well as Parliament and the judiciary seek to establish their respective spheres of authority.

Chapter Eleven

The Security Sector

"We must insist that every society be built on three essential pillars:
peace and security, development and the rule of law.
For there can be no long-term development without security
and there can be no long-term security without development.
At the same time, no society can long remain prosperous
without respect for human rights and the rule of law."

– The Panel's message to Kenyans, 17 October 2008

Introduction

Participants in the KNDR team were puzzled as to why the police had been unable to contain the violence, having been informed that violence was likely. One explanation was that the police were overwhelmed. It was noted that police stations were absent from some areas. The ODM recommended strengthening police presence in areas that lacked police stations, while the PNU believed mobile units were the solution.[631] Presentations to the negotiating team demonstrated that the police had been overstretched. In Burnt Forest, for example, just five policemen served a population of thousands at the start of the crisis.[632] One of the first measures taken was to create 32 additional police stations in affected areas.[633]

Both negotiating teams wanted to address the question of impartiality. The ODM argued that the police had overstepped their authority and had

631 Minutes of the Kenya National Dialogue and Reconciliation, Third Session, 1 February 2008.

632 Minutes of the Kenya National Dialogue and Reconciliation, Fourth Session, 4 February 2008.

633 African Union Panel of Eminent African Personalities, Second Progress Report to the African Union Chair, 18 February 2008.

perpetrated some of the violence.[634] It cited the case of two officers who were arrested on 28 November 2007 carrying propaganda material against Prime Minister Odinga.[635] It noted that many of those killed had been killed by police, and said that documentary evidence appeared to show that the police had been under orders to shoot to kill, violating citizens' rights.[636] The PNU said that it had received information that the police service was politically divided and taking sides. In some instances police had allegedly participated in burning the houses of communities other than their own.[637] It argued that the root causes of police misconduct were low morale and low salaries, whereas the ODM believed that other reasons should be considered.

Politicization in the police service is rooted in Kenya's history of undemocratic rule by an insecure state determined to protect itself against criticism of all kinds. The state consistently used the police to oppress opposition. In the period leading up to the 2007 general election, it used the Administration Police (AP) to do so because the AP was better equipped than the regular police.[638]

The police had felt they could act with impunity because past atrocities by the security services were not prosecuted. The ODM noted that prosecutions had not occurred even when evidence in the form of television footage was available.[639] It argued that all those who had perpetrated crimes, including police, should be brought to justice, and that guidelines should be issued to police on the use of force. It added that the security services had committed numerous offences since 1963, and that these should be investigated, including detentions in Nyayo House and inquiries held *in camera*. All crimes should be brought into the open because, when they remained hidden, it gave impunity to state officials and institutions, placing them above the law.[640]

Eventually, the negotiating teams agreed that police reform was a component of constitutional reform because it could not be considered in isolation.[641] It agreed that lack of confidence in the police could be attributed to: failure to address the crisis and enforce law and order; excessive use of force against demonstrators; lack of accountability for past violence and associated excessive use of force; and the unrepresentative composition of security forces, which

634 Minutes of the Kenya National Dialogue and Reconciliation, Twentieth Session, 4 March 2008.
635 Minutes of the Kenya National Dialogue and Reconciliation, Sixth Session, 6 February 2008.
636 *Supra* note 633.
637 *Supra* note 630.
638 The AP received funding from the Governance, Justice, Law and Order Sector (GJLOS) reform programme.
639 *Supra* note 630.
640 *Supra* note 633.
641 *Supra* note 633.

encouraged a perception that they were partisan. It agreed to reform the police service and make it answerable to a statutory commission rather than politicians.[642] It also agreed to form a Commission of Inquiry that would identify and investigate those who had committed (or had caused others to commit) violence, and recommend the prosecution of those against whom a case could be established.

The National Accord and Reconciliation Act made a number of reforms that were designed to democratize the security sector. Police reform was included under Agenda Four on the grounds that less post-election violence and associated destruction would have occurred had the police responded in a professional and non-partisan manner.

Of the three key services in the security sector, only the police service received specific attention during the mediation, largely because of its role in the crisis. Reference was made to the military when the Panel asked the government to deploy troops to deter and contain the violence. Reference was made to the intelligence service when the negotiating teams noted that the police had failed to act on intelligence reports of impending violence. Reforms of the military and intelligence were also not considered because these services had undergone some reform under the Moi government.

After the KNDR agreements, a Commission of Inquiry into the Post-Election Violence (CIPEV) was asked to investigate actions or omissions by state security services during the violence and make recommendations. CIPEV found that the police were responsible for most of the killings that had occurred during the crisis. The majority were gun-related incidents in which victims had been shot in the back. Police were further accused of engaging in a range of criminal acts, including murder, gang rape and looting. In Rift Valley Province, one police officer had shot and killed at least five people; a similar incident was reported in Nairobi. Police officers had gang raped eight women in Nairobi, Eldoret and Kisumu (five in their homes, two within their local environs and one whilst in flight from violence). None of the officers in question had disguised his identity, implying a powerful sense of impunity.[643]

CIPEV's findings indicated that the police service had been unprepared to deal with the violence. The Commission's report cited: lack of professional, timely and competent planning; poor investigative capacity; the absence of joint

642 Minutes of the Kenya National Dialogue and Reconciliation, Eighth Session, 8 February 2008.

643 Republic of Kenya (2008), *Report of the Commission of Inquiry into the Post-Election Violence*, Nairobi: Government Printer, pp. 396-398.

operational arrangements between state security services; and failure to act on available intelligence.[644]

Following CIPEV's recommendations, the government set up a National Task Force on Police Reforms (headed by retired judge Philip Ransley) to examine existing policy, review institutional, legislative, administrative and operational structures, systems and strategies, and recommend comprehensive reforms. The Task Force was asked to take account of the recommendations set out in Agenda Item Four, and the reports of the Independent Review Commission (IREC) and CIPEV, as well as other police-related reports. Its objectives were to enhance the efficiency, effectiveness, professionalism and accountability of the police service.[645]

The task force had eighteen members. In addition to Hon. Justice (Rtd.) Philip Ransley (Chair), Peter Gastrow (Vice-chair, recommended by the Panel), Hon. Justice (Rtd.) Sarah Ondeyo, Col. (Bishop) Alfred Rotich, Mohamud Ali Saleh, Macharia Njeru, Kyalo Mbobu, Rev. Mike Harries, Attorney General Amos Wako, the task force included the Permanent Secretaries from the Ministries of Provincial Administration and Internal Security, Justice, National Cohesion and Constitutional Affairs, the Office of the Prime Minister, Finance, and Public Service, and the Chairperson of the Law Reform Commission, the Director of the Kenya Institute for Public Policy Research and Analysis, the Chairperson of the Kenya National Commission on Human Rights and the Director-General of the National Security Intelligence Service.[646]

The task force recommended a range of reforms. It called for a constitutional review to establish an Independent Police Commission, and a legislative review to redefine the role of the police with regard to security and policing. The latter would: set up an independent complaints commission; establish citizen oversight of the police; enhance information disclosure; improve human resource management; and build capacity. To align policing with democratic norms, it also recommended that a National Security Policy should be completed and rolled out; and that more police officers should be recruited and trained, raising the police/population ratio to United Nations standards.[647]

644 *Ibid*.

645 Republic of Kenya (2009), *Report of the National Task Force on Police Reforms*, Nairobi: Government Printer.

646 Launched on 7 May 2009, the task force was expected to complete its work on 31 July 2009. President Kibaki granted it an additional 60 days, extending the completion date to 30 September 2009. The task force submitted its interim report on 25 August and its final report on 29 October 2009.

647 *Supra* note 644.

The task force made some 200 recommendations under five main themes: organizational re-structuring; professionalism and terms and conditions of service; logistical and operational preparedness; community policing and partnerships; and enhancing national security.[648]

Senior police officers took issue with the task force on three matters: the fact that the police service was not represented on it; its recommendation to vet police officers; and the proposal to remove officers who failed vetting. They argued that structural issues should be addressed, including inadequate resources and capacity (vehicles and personnel), policy gaps, welfare and training.[649] Their opposition frustrated initial efforts to reform the police before and after promulgation of the 2010 constitution. Most of the changes made were therefore administrative.

Reforming the police service has been an arduous process, involving gains and reversals. This chapter examines the degree to which police reforms have effectively changed the performance of the security services and the behaviour of the state; and the degree to which institutions established under the reforms have increased democratic control over the security sector. In doing so, it discusses challenges that arose and opportunities that were missed as police reforms were implemented.

Implementing police reforms

Implementation began with the formation of the Police Reforms Implementation Committee (PRIC) on 8 January 2010. It was mandated to coordinate, supervise and provide technical guidance and facilitation during implementation of police service reforms, and to sustain, monitor and evaluate the progress of police service reforms as recommended in the task force's report.[650] The committee achieved a great deal by identifying priorities, as well as legislative and curriculum needs.

It spearheaded the preparation of several bills on police reform, later enacted into law. These included the Independent Policing Oversight Authority (IPOA)

648 *Op. cit.*

649 South Consulting, October 2009.

650 The governments of Sweden, the United Kingdom and the United States seconded Police Advisers to the Committee, which was technically supported by a secretariat and four working groups. PRIC's mandate ended in mid-May 2012.

Act 2011;[651] the National Police Service Commission (NPSC) Act 2011;[652] the National Police Service Act 2011;[653] the National Coroners' Service Bill, 2011;[654] and the Private Security Industry Regulation Act 2010.[655] Constitutional deadlines were not met because of delays in publishing these laws, especially the National Police Service and the NPSC Acts. For instance, the National Police Service Act was gazetted with a delay to allow formation of the NPSC, so that timelines for appointing the Inspector General of Police (IGP) could be respected.

With the legislative framework in place, the government began forming the principal implementing institutions: the IPOA, the NPSC,[656] and the IGP.[657] These offices were to be created as soon as laws had been enacted. Unfortunately, due to political differences within the government, their creation was put on hold for over a year.[658] This significantly delayed police reform.

Indeed, they were not able to commence their work before the 2013 general election. As a result, police reforms to date have focused on capacity-building and efficiency. The issues of democratic control and accountability which CIPEV identified remain contested.

A number of reforms were nevertheless implemented. Interviews for the IPOA, NPSC and for the IGP and his two deputies were held in public; those for the

651 The Act establishes an oversight authority mandated to deal with complaints against the police, conduct disciplinary and criminal investigations, and make recommendations for disciplinary action or criminal sanctions.

652 The Act establishes a civilian board to oversee the recruitment and appointment of police officers, review standards and qualifications, and receive complaints from the public which it refers to IPOA and other government entities for remedy.

653 The Act regulates the administration, functions and powers of the IGP, Deputy Inspector Generals (DIGs), the police service, and the Directorate of Criminal Investigations (DCI). It gives the police a robust mandate, strengthens internal accountability, and includes provisions to curtail interference in police operations.

654 The bill integrates forensic medical services in the coroner system and sets out the functions and powers of coroners.

655 The Act regulates the private security industry.

656 The NPSC is responsible for recruitment, promotions, transfers and disciplinary sanctions in the police service and is mandated to stop political interference with police appointment practices and personnel management.

657 The 2010 Constitution enhanced police accountability by giving the IGP security of tenure for four years. In addition, the 2010 Constitution gives the IGP operational independence, and outlaws political interference with police investigations, law enforcement against individuals, and hiring, promotion and disciplinary sanctions. The IGP fully controls the Administration Police, unlike his predecessors. Amnesty International (2013), *Police Reform in Kenya: "A Drop in the Ocean"*, Nairobi: AI.

658 The NPS Act received presidential assent on 27 August 2011 but the IGP was not appointed until December 2012. The NPSC Act received presidential assent on 30 September 2011 but the NPSC was appointed in October 2012. The IPOA Act received assent on 11 November 2011 but the IPOA was appointed in June 2012.

IGP were broadcast live.[659] IPOA was appointed on 4 June 2012 but did not start work until November 2012.[660] The NPSC was sworn into office on 9 October 2012. The delay in forming the NPSC was due to a dispute between the two Principals.[661] The IGP was to have started work by 27 August 2012 (according to Schedule Six of the constitution) but was finally sworn in on 24 December 2012, shortly before the 2013 general election, while his two deputies (Police and AP) and the head of the Directorate of Criminal Investigations were appointed on 25 January and sworn in on 13 February 2013.[662]

A Code of Conduct for the police service was rolled out, which established standards of professional behaviour for all officers and was designed to foster mutual trust and respect between the police service and the public.[663]

A new training curriculum was also introduced, which emphasizes human rights, gender, public relations and communications, values and ethics, service, and customer focus. The curriculum is expected to transform the work ethic of the police, change their attitudes and improve service delivery to the public.

The length of police training has been revised in line with the new curriculum. Professional and graduate officers now train for 21 months, while non-professional officers train for 15 months (rather than six).[664]

The Ministry of Higher Education has qualified the Kenya Police Service Training College at Kiganjo, the General Service Unit (GSU) Training School at Embakasi, the AP Training College at Utawala, the AP Senior Staff College at Emali, and the Criminal Investigations Directorate (CID) Training School

659 The three days which the NPSC set aside to review public feedback on its decision was not considered adequate. See, Amnesty International (2013), *Police Reform in Kenya: "A Drop in the Ocean"*, Nairobi: AI.

660 The IPOA is responsible for investigating complaints by or against a police officer; monitoring and investigating policing operations affecting members of the public; monitoring and auditing investigations and actions taken by the Internal Affairs Unit; conducting inspection of police premises; cooperating with other institutions on issues of police oversight; and reviewing patterns of police misconduct.

661 Interviews for NPSC Commissioners were conducted in February 2012. Raila Odinga rejected President Kibaki's list, claiming that some nominees had not been agreed by both Principals. Separately, two NGOs obtained a court order to restart the appointment process on the grounds that it had been discriminatory. For technical reasons, the Parliamentary Committee on Administration and National Security ignored the court order and vetted the nominees; but MPs then rejected them and asked the Principals to prepare a fresh list.

662 In this case, Raila Odinga rejected the appointments because he said he had not been consulted; he raised unspecified integrity issues as well. IPOA also opposed the appointment of Ndegwa Muhoro as director of the DCI, on integrity grounds.

663 Republic of Kenya (2012), *Universal Periodic Review of the United Nations Human Rights Council: National Mid-Term Report*, Nairobi: Government Printer.

664 International Crisis Group (2012), *Kenya's 2013 Elections*, Africa Report No. 197, Nairobi/Brussels: ICG.

in Nairobi to issue diplomas, enabling officers to acquire professional qualifications.[665]

Implementation was nevertheless extremely slow. A report by the Police Reforms Monitoring Project of the Usalama Forum noted that, of CIPEV's 32 specific recommendations, only eight had been implemented, incompletely. Fifteen were pending, five had been blocked, and action on four had yet to start.[666] A separate report by the Forum noted that, of the task force's 207 recommendations, only nine per cent (18 recommendations) were on track. Almost half (102) were awaiting full implementation or faced challenges, 16 per cent (35) were stalled or blocked, while one quarter (52) had not been acted on.[667]

In addition, although the IPOA, NPSC and IGP were operational, they had to contend with attempts to contain them. Senior police officers resisted efforts by the NPSC to vet them. This exercise was to have been finalized by August 2012 but at the time of writing was not expected to start before the end of 2013.[668] By law, an Internal Affairs Unit (IAU) was to have been created, to receive and investigate complaints against police officers by the public or by the police: it had not been constituted and existed only in name.[669] Community policing had not started. New rules that limit the use of force and firearms, regulate arrest and detention, and enhance internal accountability had not been applied. The IPOA had received many complaints and had started investigations, but its findings had not been made public and no police officer had been held to account.[670]

665 J. Kiarie, "Police training schools to offer diploma courses", *The Standard*, 20 August 2012.

666 Usalama Forum (2013), *Police Reforms Monitoring Project: Election Security Preparedness*, Nairobi: Usalama Forum.

667 Usalama Forum (2012), *Police Reforms Monitoring Project: Preparedness of the Police to Combat Insecurity and Crime*, Nairobi: Usalama Forum.

668 Vetting of senior officers started in May 2011 but was suspended after civil society organizations objected that stakeholders in the police reform process were not consulted and that vetting was being done by the police themselves. Human Rights Watch (2011), *Turning Pebbles: Evading Accountability for Post-Election Violence in Kenya*, Washington DC: HRW.

669 The Unit is expected to promote uniform standards of discipline and good order in the service and to keep a record of complaints and investigations.

670 Amnesty International, 2013, *Police Reform in Kenya: "A Drop in the Ocean"*, Nairobi: AI.

The police service therefore continues to experience challenges that impede it from fulfilling its mandate. Low wages[671] and lack of resources[672] both affect its performance.[673] Police officers are not adequately equipped. Limited improvements in management and human resource management have been reported. Training of police officers in senior command and middle-level management has been slow. As of June 2012, only 446 police officers at the rank of inspector and above had been trained.[674] The current ratio of one police officer to 850 citizens falls far short of the UN-recommended ratio of 1:450.[675]

Nor does the evidence suggest that, as yet, police reforms have significantly improved behaviour. Recent incidents include alleged abuse of ethnic Somalis in Eastleigh, Nairobi and other areas; failure to contain a conflict in Tana River County; and the death of 42 police officers in Baragoi, Samburu County.[676] Human rights organizations estimate that police officers were responsible for approximately 1,000 extra-judicial executions between 2008 and 2012.[677] In a visit to Kenya in 2009, the UN Special Rapporteur on Extra Judicial, Arbitrary and Summary Executions documented many cases, as well as the existence of death squads. He reported that internal and external police accountability mechanisms were lacking and that human rights defenders who cooperated with him had been intimidated.[678]

671 The National Task Force on Police Reforms recommended increasing salaries in three annual increments of 28 per cent. Salaries rose by this amount in 2010, but only by 14 per cent in 2011. In 2012, the police went on a go-slow in protest at the delay. In May 2013, a decision to increase salaries by 42 per cent (backdated to 2012) was not implemented. Githae, Wanjohi, "Police officers get huge pay hike backdated over one year", *The People*, 21 May 2013; "Police reject 8.5 per cent salary increase", *Weekend Star*, 3 November 2012; Ombati, Cyrus, "Police still on go-slow, jam communication", *The Standard*, 8 November 2012.

672 The police service has no forensic laboratory, and lacks both vehicles and funds for fuel. In May 2013, President Kenyatta requested that KES4 billion should be set aside annually to purchase equipment for the police.

673 International Crisis Group (2012), *Kenya's 2013 Elections*, Africa Report No. 197, Nairobi/Brussels: ICG.

674 Usalama Forum (2012), *Police Reforms Monitoring Project: Preparedness of the Police to Combat Insecurity and Crime*, Nairobi: Usalama Forum.

675 Mbote, P., and Akech, M. (2011), *Kenya: Justice Sector and the Rule of Law*, Nairobi: Open Society Initiative for Eastern Africa; Furuzawa, Y. (2011), "Two Police Reforms in Kenya: Their Implications for Police Reform Policy", *Journal of International Development and Cooperation*, Vol. 17, No. 1.

676 Noyes, A. (2013), "Securing Reform? Power Sharing and Civil-Society Relations in Kenya and Zimbabwe", *African Studies Quarterly*, Vol. 13, Issue 4.

677 United States Department of State (2012), *Country Reports on Human Rights Practices – Kenya*, 19 April 2013. At: http://www.refworld.org/docid/517e6e1d9.html.

678 Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Philip Alston, 26 May 2009 (A/HRC/11/2/Add.6).

Police extra-judicial executions were reported in 2010, 2011 and 2012.[679] In 2011, the Independent Medico-Legal Unit (IMLU) found that the police service had been responsible for 54 per cent of documented torture cases, and the AP for 7 per cent.[680] On 17 July 2012, the UN High Commissioner for Human Rights expressed concern over Kenya's failure to prosecute police officers who had tortured, been bribed, made arbitrary arrests or otherwise failed to observe the rule of law.

To address these challenges, the IGP formed several teams. They included: the Police Reforms Committee; the Task Force on Maintenance of Law and Order on Roads; the Training Strategies, Training Institutions and Centres Committee; the County Policing Authority, Command Structure and Reporting Mechanisms Committee; the Police Stations and Operations Audit Committee; the Police Housing, Stalled Projects and Welfare Audit Committee; and the Research Collaboration Partnerships and Early Warning Committee.

Financially, the National Police Service was granted KES67 billion to implement the reform process. KES4 billion was for the purchase of security equipment, KES4.5 billion to enhance operations, KES1.5 billion to strengthen crime research and investigations, KES3 billion to lease 1,200 police cars every year, and KES1.2 billion to build 2,000 new houses for police officers.[681]

Police reforms are likely to progress at a faster pace after the formation of a Police Reform Working Group in 2011, a civil society lobby that works on security sector reform. The relative absence of civil society from the reform process had slowed progress.

The relationship between the NPSC and IGP

The constitution gave the NPSC and IGP concurrent powers and duties with regard to recruiting, promoting and disciplining members of the police service. Whereas Section 245(4)(c) of the 2010 Constitution states that no person may give direction to the IGP with respect to the employment, assignment, promotion, suspension or dismissal of any member of the police service, Section 246(3)(a) empowers the NPSC to recruit and appoint persons to positions in the police service, to confirm appointments and to determine promotions and transfers. Predictably, there have been repeated wrangles between the two institutions.

679 Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Philip Alston, 21 May 2010 (A/HRC/14/24/Add.7); Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Christof Heyns, 26 April 2011 (A/HRC/17/28/Add.4).

680 Independent Medico-Legal Unit (2011), *Upscaling Torture Prevention and Response in Kenya: National Torture Prevalence Survey Report*, Nairobi: IMLU.

681 Fred Mukinda, "Kimaiyo given Sh167bn to wage war on crime", *Daily Nation*, 14 June 2013.

Differences began as soon as the IGP was sworn into office and became public in early 2013, when the NPSC promoted three junior officers to senior posts.[682] The decision sparked discontent among senior officers who had been passed over.[683] The IGP declined to confirm the appointments; his own appointments were upheld.[684] The IGP would later appoint a North Eastern PPO, Leo Nyongesa, to be director of the IAU without consulting the NPSC.

After mediation by the Internal Security Permanent Secretary, Mutea Iringo, on 2 February 2013 the NPSC chair and the IGP signed a joint statement which declared that the NPSC had suspended promotions, appointments and the design of new emblems for the police until after the 2013 general election.[685] The Attorney General issued an advisory defining the functions of the two entities; in a letter dated 1 February 2012, he recommended that the NPSC should not interfere with the IGP's independent command and overall operational control of the police.[686]

Differences resurfaced, nevertheless. In May 2013, when the NPSC began recruitment of 141 county police commanders (47 for the Kenya Police Service, 47 for the CID and 47 for the AP), the IGP issued a memo, before the deadline for applications, informing police officers that the planned recruitment had been put on hold and that they should therefore not apply for the positions.[687] It emerged that new requirements for senior posts (including the possession of a university degree, which most senior police officers lack[688]) were opposed by senior officers, who perceived they would be used to remove them from the police. To allay this fear, the NPSC chair indicated that experience in management (over 15 years in a senior police position) would also be considered. Subsequently, the IGP unilaterally made the appointments without consulting the NPSC. These appointments were accepted at a press conference which the

682 Anthony Munga was appointed police spokesperson, Charles Owino director of the IAU, and Sicily Gatiti head of the Directorate for Human Resources.

683 Fred Mukinda, "Kimaiyo and Kavukudi row over top jobs", *Daily Nation*, 8 February 2013.

684 Zadock Angira, "Kimaiyo fights police agencies", *Daily Nation*, 9 April 2013.

685 Cyrus Ombati, "Kavuludi team halts police promotions, appointments", *Standard on Sunday*, 3 February 2013.

686 Kamore Maina, "AG steps in to end police infighting", *The Star*, 18 February 2013.

687 The IGP said that he acted because no structure was in place for county police commanders. In a letter to the NPSC, he called for a County Policing Authority, to include the County Kenya Police Service, AP Police Service and Criminal Investigation Officers. In an earlier letter to NPSC on 16 April 2013, however, he recommended recruiting county commanders to replace provincial police officers. Peter Leftie, "Security risk as police bosses fight for power", *Daily Nation*, 29 May 2013; Gitonga, Antony, and Ombati, Cyrus, "Kavuludi, Kimaiyo clash over hiring of county police chiefs," *The Standard*, 29 May 2013.

688 Zadock Angira, "Top police bosses face the sack as new education rules begin to bite", *Saturday Nation*, 18 May 2013.

Cabinet Secretary for Interior and Coordination of National Government held, together with the IGP and the NPSC, after a meeting to iron out the dispute.

The National Assembly has debated amendments to address this problem. They were expected to empower the IGP at the expense of the NPSC. If the amendments are passed, the IGP will no longer have to act on recommendations from IPOA, and the directors of criminal investigations and internal affairs will be answerable only to him. The NPSC will no longer vet applicants or evaluate performance.

Security during elections

Police are expected to enforce the law before, during and after polling day. However, since the re-introduction of multiparty politics in 1992, police have frequently been implicated in human rights violations that disenfranchise the opposition during but also between elections.[689] In the light of Kenya's experience, efforts were therefore made to depoliticize the conduct of the police and improve policing during elections.

As the 2013 general election approached, the slow pace of police reform and the police service's inability to guarantee security led an increasing number of Kenyans to arm themselves. A study conducted jointly by the government and the Geneva-based Small Arms Survey in 2012 reported the presence of between 530,000 and 680,000 illegal firearms in the country.[690] These may have contributed to politically-instigated inter-communal conflicts that occurred before the election. Between 2012 and early 2013, over 447 people were killed, another 250 injured and 118,000 displaced from their homes. Districts in Eastern, North Eastern, Rift Valley and Coast regions were particularly affected.[691]

In Tana River County 180 died, followed by Turkana/West Pokot (82 dead) and Samburu (67). In Baragoi (Samburu County), 42 officers were killed on 10

689 During the rule of president Moi (1992-2002), opposition political rallies and tours were regularly disrupted or banned, especially in areas that were considered KANU strongholds. Even in opposition areas, the security forces were often under orders to find an excuse to disrupt opposition gatherings. Oyugi W.O. (2003), "The Politics of Transition in Kenya, 1992-2003: Democratic Consolidation or Deconsolidation", in Oyugi W.O., et al., (eds), *The Politics of Transition in Kenya: From KANU to NARC*, Nairobi: Heinrich Böll Foundation.

690 Wepundi, M. et al. (2012), *Availability of Small Arms and Perceptions of Security in Kenya*, Geneva: Small Arms Survey.

691 UN Office for the Coordination of Humanitarian Affairs (2012), *Kenya: 2012 Inter-Communal Conflict by District*, Nairobi: OCHA; Human Rights Watch (2013), *High Stakes: Political Violence and the 2013 Elections in Kenya*, Washington DC: HRW.

November 2012. Ten had been killed exactly a month earlier in Tana River,[692] and many other officers died in Coast, North Eastern and Nairobi provinces.[693]

Problems associated with violent movements and criminal gangs also resurfaced,[694] partly because comprehensive measures had never been taken to prosecute or act against them. The Mombasa Republican Council (MRC)[695] was considered a particular threat to the election because it had targeted several activities of the Independent Electoral and Boundaries Commission (IEBC). It disrupted a mock election in Malindi County,[696] a civic education campaign in Kilifi County,[697] and an electoral boundaries discussion forum in Kilifi County.[698] In mid-May 2012, unidentified raiders killed three people during an attack on IEBC offices in Kwale County.[699] On 4 October 2012, the MRC was alleged to have been responsible for an attack on the Fisheries Minister, Amason Kingi, in Mtwapa Village (Kilifi County), in which five people were killed. The police also blamed the MRC for three other attacks in the region.[700] In 2012, the MRC lost a court case in which it sought to stop the 2013 general election in Coast Province. Nevertheless, it continued to push for secession, not least by intimidating people who organized or participated in the general election in the region.

692 UN Office for the Coordination of Humanitarian Affairs (2012), *Kenya: 2012 Inter-Communal Conflict by District*, Nairobi: OCHA; Lilian Aluanga-Delvaux, "Baragoi, Tana murders lowest times in year's security profile", *Standard on Sunday*, 30 December 2012.

693 In the last quarter of 2012, over 60 police officers were killed in Tana River, Samburu, North Eastern region and the urban counties of Nairobi and Mombasa. Independent Medico-Legal Unit (2013), *Alternative Report in Response to the Second Periodic Report by Kenya to the Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Nairobi: IMLU.

694 Over 73 criminal gangs are known to operate in Kenya; many provided protection services to politicians. Usalama Forum (2012), *Police Reforms Monitoring Project: Preparedness of the Police to Combat Insecurity and Crime*, Nairobi: Usalama Forum.

695 The High Court overturned a Government ban on the MRC in July 2012. The ban was later reinstated and warrants were issued for the arrest of MRC leaders.

696 The exercise ended in confusion when a mob wielding crude weapons descended on St Andrew's Primary School polling station and destroyed voting materials. A policeman was beaten up and robbed of his firearm. The attackers chanted that IEBC had no right to hold the exercise in Coast "which is not part of Kenya".

697 A rowdy group disrupted a civic education campaign in Chonyi and set fire to a van hired by IEBC officials.

698 "MRC headache for polls body", *Sunday Nation*, 21 April 2012; Daniel Nyassy, "Outlawed gang disrupts mock Malindi polls", *Saturday Nation*, 24 March 2012.

699 Amina Kibirige, "Three killed as gang raids IEBC offices", *Daily Nation*, 14 May 2012.

700 An assistant chief, Salim Shomba, was killed in Kwale on 10 October. An administration police camp in Likoni was attacked on 20 October. Freretown police station was attacked on 20 October. Human Rights Watch (2013), *High Stakes: Political Violence and the 2013 Elections in Kenya*, Washington DC: HRW.

Other militias emerged or regrouped as the 2013 election approached, including the Mungiki in parts of Central Province and the China Squad and American Marines in Kisumu.[701] The Mungiki, a significant force in the 2007 post-election violence, had transformed itself into a political party (the Mkenya Solidarity Party) and fielded candidates in 2013.[702]

The police response to these killings, including the killings of police, were milder than in the past. A number of police officers are alleged to have said that they were unwilling to use excessive force because they were afraid of ending up before the International Criminal Court (ICC). The former Police Commissioner, Hussein Ali, was investigated by the ICC for crimes against humanity during the post-election violence, but charges against him were subsequently dropped.

At the 2013 general election, the police deployed some 99,000 officers in polling centres to maintain security.[703] More than 300 police officers were deployed to the IEBC to guard its premises, and 70 others to monitor the count in tallying centres.[704] The police trained 500 officers to monitor political rallies for hate speech and deployed them to all 47 counties in partnership with the National Cohesion and Integration Commission (NCIC).

Despite the heavy police presence, 20 violent incidents related to the election were confirmed. Twelve people were killed in Kwale, Mombasa and Kilifi Counties, allegedly by the MRC, of whom 10 were police officers and one an IEBC official. The government responded by deploying 400 more officers.[705] Other attacks on election day were noted in North Eastern Province. These targeted polling stations and were conducted with improvized devices and small arms.[706]

After the result was declared and presidential petitions filed, the IGP issued a ban on political meetings and demonstrations. The High Court's decision on presidential petitions led to protests in informal settlements in Kisumu and

701 American Marine appeared to support Raila Odinga while China Group appeared to support Kenyatta. Violence erupted between the two gangs in September 2012 after a visit to Nyanza by Kenyatta, and the police failed to intervene. Human Rights Watch (2013), *High Stakes: Political Violence and the 2013 Elections in Kenya*, Washington DC: HRW.

702 *Supra* note 675.

703 23,681 were special officers from various government agencies: male recruits from the three police training colleges (2,517), National Youth Service (11,007), Prisons (8,191), Kenya Forestry Service (1,452), and Kenya Wildlife Service (514).

704 Zadock Angira, "Special officers to man election", *Daily Nation*, 1 March 2013.

705 "12 killed by MRC", *The Standard*, 5 March 2013.

706 "400 extra officers flown to Mombasa after terror raid", *Daily Nation*, 5 March 2013.

Nairobi. The police used excessive force and live ammunition to suppress these demonstrations, resulting in the deaths of six people.[707]

Conclusion

Reform of the police service was essential to reduce police excesses, politicization of the service, lack of impartiality, and failure to prosecute past crimes committed by the security services, which fuelled impunity. It has been a daunting task and so far has not delivered what the country seeks: democratic control of the security sector.

Power struggles and lack of political will have been blamed for the slow rate at which the security sector has been democratized and made accountable. The state continues to exercise influence over the police and police officers continue to operate outside the rule of law. Wrangling between the NPSC and the IGP has hampered the progress of reform significantly.

Following Otwin Marenin,[708] several lessons may be drawn.

One, disentangling a close relationship between a police service and the political elite is likely to be resented by both parties, who will go to great lengths to block it. To some extent, the police will always be perceived to be partisan because they work under the direction of the state.

Two, legal, organizational, and structural reforms are not sufficient in themselves. Effective, accountable organizations will emerge only if the change process creates occupational cultures that accept and implement the goals and values of the reform. This requires changes in attitude, culture and mindset within the police service.

Three, reform of the police service needs to be integrated with wider reform of the criminal justice system as a whole, including penal institutions and the DPP. This not only requires considerable political will, but public support – to gain which the police service needs to establish a relationship of trust between itself and the community.

707 Two died in Kisumu, one in Mathare, and three in Dandora. "Police defend the use of live bullets", *Daily Nation*, 1 April 2013; Mangoa Mosota, Dennis Onyango, "Riots break out in Nyanza after court endorses Uhuru win", *Sunday Standard*, 31 March 2013.

708 Marenin, O. (2007), "Implementing Police Reforms: The Role of the Transnational Policy Community", in Goldsmith, A. and Sheptycki, J. (eds), *Crafting Transnational Policy*, Oxford: Hart.

Chapter Twelve

The Electoral Boundaries Commission and the 2013 General Election

"Nascent institutions have the potential and ability to revive public confidence in the way Kenyans are governed. But the burden of these institutions is to show that it is no longer business-as-usual."

– Kofi Annan speaking at the Conference "Kenya National Dialogue and Reconciliation 2011: Building a Progressive Kenya", Nairobi, 5 December 2011

The 2010 Constitution made it necessary to replace the Interim Independent Electoral Commission (IIEC) and the IIBRC (Interim Independent Boundaries and Review Commission) by the Independent Electoral and Boundaries Commission (IEBC). The aim was to establish the new body in a manner that would guarantee its independence. As Chapter Five showed, by the time IIEC's tenure lapsed, Kenyans had regained some confidence in the electoral process; it was hoped the IEBC could consolidate it.

The IEBC is tasked under the constitution to conduct and supervise referenda and elections to any elective body or office established by the constitution, and any other elections prescribed by law. Its duties are broad and include: continuous registration of citizens as voters and regular revision of the voters' register; delimitation of constituencies and wards; regulation of the process by which political parties nominate candidates for elections; settlement of electoral disputes, including disputes relating to or arising from nominations

(but excluding election petitions and disputes after the declaration of election results); registration of candidates for election; voter education; regulation of the amount of money that may be spent in the course of elections by or on behalf of a candidate or political party; development and enforcement of a code of conduct for candidates and political parties that contest elections; and investigation and prosecution of electoral offences by candidates, political parties or their agents.

The establishment of the commission[709] through the IEBC Act[710] put in place the legal environment for the 2013 general election, setting clear guidelines and dates by which different electoral obligations were to be met. These obligations included enactment of the Political Parties Act 2011[711] (to streamline political parties' operations), and the Elections Act 2011[712] (governing the conduct of elections). These two laws came into effect in the last two months of 2011. Remaining uncertainties included the date of the general election and whether a one-third gender quota would be applied to elected seats; both these issues were later adjudicated by the courts.

IEBC started to prepare for voter registration and final delimitation of constituency and ward boundaries. Though the IIEC secretariat was retained within the new IEBC, the latter had a different operational framework and proceeded to organize the 2013 general election independently, without making use of its predecessor's programmes. It established a new voters' register, rather than develop the IIEC's pilot biometric registration of voters in 17 constituencies, and rolled out a new nationwide biometric voter registration exercise which suffered setbacks caused by delays in procuring equipment (see below).

709 The IEBC has a chair and eight members, who were appointed on 8 November 2011 for a non-renewable period of six years. Commissioners are appointed by the President in consultation with the Prime Minister after selection by an independent panel and approval by the National Assembly. They are responsible for policy direction and strategic oversight;a secretariatmanages day-to-day operations. The secretariat is composed of achief executive officer, two deputies, nine directors, 17 managers, 17 regional election coordinators and 290 constituency election coordinators. The nine directorates include Voter Education and Partnerships, Voter Registration and Electoral Operations, Information Communication and Technology (ICT), Finance, Human Resources and Administration, Legal and Public Affairs, Research and Development, Risk and Compliance, and Registrar of Political Parties. The IEBC also established 17 regional offices, 47 county offices, and 290 constituency offices, each run by an IEBC Coordinator.

710 Enacted on 5 July 2011, the IEBC Act came into force on 18 July 2011. The Act provides for the appointment of members of the IEBC and its effective operation.

711 The Political Parties Act 2011 came into force on 2 November 2011.

712 The Elections Act 2011 came into force in December 2011.

The legal and institutional framework for elections

The majority of electoral laws were in place by the time of the general election. They included Kenya's new constitution, the Political Parties Act 2011, the Elections Act 2011, the IEBC Act 2011, the National Cohesion and Integration Commission (NCIC) Act 2008, and the Leadership and Integrity Act 2012.[713] The only piece of legislation not enacted in time was the Campaign Financing Bill, 2012, which was meant to regulate political campaign financing.

The IEBC's mandate included clear timelines, but respecting them became very difficult, because Parliament repeatedly amended both the Elections Act 2011 and the Political Parties Act 2011. This complicated administration of the election because almost all its processes were sequential; delay at one point delayed processes elsewhere.

The IEBC was also responsible for delays. Regulations relating to elections were presented to Parliament two days before the deadline permitted by law, making it necessary to introduce an amendment to enable Parliament to consider, debate and approve them. Delayed procurement of Biometric Voter Registration (BVR) kits also caused the start of voter registration to be postponed five times, halving the time allotted for registration to 30 days. Late procurement of Electronic Poll Books prevented the IEBC from testing them. Election regulations were not approved six months before the 2013 general election, as scheduled. The accumulation of these delays began to undermine the IEBC's credibility.

Moreover the Registrar of Political Parties and the IEBC failed to enforce the Political Parties Act 2011. Politicians continued to hop between political parties, and to express support for parties other than their own, even though in law they could not belong to more than one political party at a time.[714] Some political parties allegedly bypassed legal procedures and recruited members fraudulently; observers reported seeing membership lists containing the names of individuals who did not know they were members.[715] Despite complaints by the public, the Registrar of Political Parties and the IEBC failed to punish such abuses, or to discipline the behaviour of political parties.[716]

713 African Union Election Observer Mission (2013), *4 March 2013 General Elections in Kenya: Preliminary statement*, Nairobi: AU-EOM.

714 Section 14(4) of the Act states that a person shall not be a member of more than one political party at the same time and Section 14(5) states that a person shall be "deemed" to have resigned from a political party if that person: (a) forms another party; (b) joins in the formation of another party; (c) joins another party; (d) in any way or manner, publicly advocates for the formation of another party; or (e) promotes the ideology, interests or policies of another party.

715 South Consulting, May 2012.

716 South Consulting, February 2013.

Voter registration and education

Completion of the boundaries' review set the stage for voter registration, which was due to take place together with voter education. The plan involved mapping the existing and creating new polling stations, coding them and registering new voters. Voter registration was to have commenced in August 2012 but eventually began in November.[717]

When the IEBC failed to procure BVR kits successfully, it cancelled the tender (23 July 2012)[718] and announced it would use the Optimal Mark Reader instead. The executive then took over the procurement of BVR kits through a bilateral arrangement with the Canadian government. It was perceived that this was likely to compromise the IEBC's independence, since the IEBC was dependent on the executive to start voter registration. To ensure registration remained legal, the executive also initiated an amendment to the Elections Act 2011, setting back the date at which voter registration closed from 90 to 45 days before the election.

A total of 14.3 million voters were eventually registered in 25,000 centres across the country between 19 November and 18 December 2012 (against a target of 18 million).[719] The provisional lists were displayed from 12 to 26 January 2013; individuals could verify their details by means of a dedicated SMS system.[720] The three-month delay in voter registration nevertheless compromised the outcome.[721] It became apparent (after the election) that the final register was not used during the 2013 general election. In addition, observers were unable

717 Though procurement began in February 2011 with an "invitation for bids", little progress had been made by September 2012, over 18 months later. Some bidders challenged the procurement process through the Public Procurement Oversight Authority (PPOA). The PPOA concluded that the IEBC had breached procurement laws and had failed to abide by the terms it had set, and, but for the public interest, it would have stopped the procurement. "The many questions IEBC needs to clear with Kenyans over the elections", *Saturday Nation*, 16 March 2013.

718 The tender for electronic poll books was also marred by controversy. A review by the PPOA noted that the IEBC had awarded the tender to Face Technologies although the company did not meet mandatory requirements. The IEBC had priced the company's items itself and Face Technologies had been permitted to present a different device at a second demonstration after failing a first "proof of concept" showing. PPOA allowed the contract with Face Technologies to stand on the grounds that, stopping the tender for voter identification devices 10 weeks before the election, or ordering a re-evaluation, would not be in the public interest. Wafula, P., "Chaotic tender process led to faulty kits", *Standard on Saturday*, 23 March 2013.

719 The figure included 1,700 diaspora voters registered in Uganda, Tanzania, Rwanda and Burundi. Initially, all diaspora members were to be registered but, for lack of time and logistical constraints, the IEBC concentrated on East Africa. Kenyans in the Diaspora petitioned the High Court to compel the IEBC to enable them to participate in the elections; the High Court dismissed their petition.

720 *Supra* note 712.

721 African Union Election Observer Mission (2013), *Preliminary Statement: Kenyans demonstrate strong commitment to democratic decisions*, 6 March 2013.

to audit it because the register was not accessible. It was still unavailable to domestic observers on 28 February 2013.

The 2013 general election therefore took place on the basis of an uncertain voters' register. At the Supreme Court hearing to consider presidential election petitions, the IEBC disclosed that it ran three registers: the principal register, the special register (for those without biometrics), and the Green Book (a manual compilation easily susceptible to manipulation). The discredited Black Book of the 2007 general election, against whose use IREC had warned, had returned with a new name and colour. IREC had concluded that the Black Book provided opportunities for ballot-stuffing and double registration. It had recommended that it should no longer be used and that tendered votes should be used by individuals who were not listed in the voters' register.

IEBC also failed to roll out voter education in time. Many observers asked why voter education had started late and lasted for a limited period. In its election monitoring report, the Kenya Human Rights Commission (KHRC) concluded that the IEBC did not do enough to educate the public on the new units of political representation, and the electoral process in general, including with respect to four new ballots that voters would cast. Its monitors discovered that, during registration, the IEBC recruited educators whose main work was to direct voters to registration centres and mount IEBC posters.[722] The European Union Election Observation Mission (EU-EOM) reported little evidence of voter education until the IEBC launched its ward-based programme a month before polling.[723] This failure may have contributed to the high number of rejected votes in the 2013 election.

Political party nominations and dispute resolution

Section 4(c) of the IEBC Act empowers the commission to settle electoral disputes, including disputes relating to or arising from political party nominations, but excluding election petitions and disputes that follow the declaration of results. A number of mechanisms were established to deal with complaints and disputes that arose from nominations. They included the Political Parties Dispute Tribunal (PPDT);[724] the Electoral Code of Conduct Enforcement

722 Kenya Human Rights Commission (2013), *Countdown to the March 2013 General Elections: interim election monitoring Report*, Nairobi: KHRC.

723 *Supra* note 720.

724 The tribunal resolves disputes between party members as well as between parties. Its decisions can be appealed in the High Court. At the time of the 2013 general election, the tribunal had heard three cases.

and Compliance Committee;[725] the IEBC Dispute Resolution Committee;[726] the Political Parties Liaison Committees;[727] the Peace Committees;[728] and the Investigation and Prosecution Unit.

Political parties were required to nominate candidates by 18 January 2013. Most political parties scheduled their nominations for 17 January 2013 to stem defections by unselected candidates.

The primaries showed that parties were poorly organized, and unable to regulate internal political competition or enforce electoral laws. Reports of fraud and manipulation were widespread.[729] There were cases of violence, disruption of voting and removal of ballot boxes. In some polling stations, ballot boxes and papers were burned. Vote buying and bribery were rampant. A number of candidates and their agents were seen dishing out money to potential voters. Some candidates ferried voters to the polling stations. Some parties adopted the queue system (*mlolongo*) as a voting method.

Three factors contributed especially to the failure to conduct free, fair and credible primaries: vague party membership;[730] weak party structures; and extension of the deadline for changing parties.[731] The IEBC's late delivery of the voters' register compounded these problems. Political parties alleged that they received a soft copy of the voters' register at 3 am on 17 January 2013 – the day on which primaries commenced.

Under the constitution, the IEBC is responsible for regulating party nominations for elections. However, it failed to execute this function, leaving political parties to their own devices, and dealt only with disputes that arose from the nominations.

The IEBC had issued guidelines on how to deal with disputes arising from nomination. Complaints were to be heard and addressed within three days by the parties' own dispute resolution mechanisms, as regulated by their constitutions

725 Set up to receive complaints related to the Code of Conduct for Elections.

726 Settles disputes about nomination of candidates. Its decisions can be appealed to the High Court.

727 Established both at national and county level.

728 Peace committees function like informal dispute resolution bodies. They were present in each constituency.

729 Godwin Murunga, "We must address the mess in party primaries to clean up our politics", *Saturday Nation*, 19 January 2013.

730 No guidelines were provided on how voters were to prove their identity. Any person could walk into a polling station and vote, whether they were registered members of a political party or not.

731 Kennedy Masime, "Delaying voting to stem defection was the straw that broke the camel's back", *Daily Nation*, 23 January 2013; Mike Mwangi, Peter Obuya, "Chaos leads to late closure of voting centres", *Saturday Nation*, 19 January 2013; "Rigging claims and chaos mar vote", *Saturday Nation*, 19 January 2013.

and nomination rules. Unresolved grievances could be lodged with the IEBC, which undertook to determine them, also within three days. For the 2013 general election, therefore, all primary disputes were to be addressed between 19 and 25 January. In practice the parties did not complete nominations by the deadline, compelling the IEBC to shift the date,[732] and weak party mechanisms for resolving disputes caused an upsurge of appeals that swamped the IEBC.

The existence of a parallel dispute resolution process further complicated matters. The Political Parties Dispute Tribunal had considered that its mandate extended to disputes between party members, including nomination disputes. With two dispute resolution processes in play, candidates went forum shopping, pursuing the same disputes in both forums.

Nomination disputes could also be taken to the High Court, and were. Though most cases were dismissed, in some instances the Court ordered the IEBC to include candidates' names on ballot papers. The IEBC did not comply with such court orders in two cases, claiming that it was too late to make the changes required. One case involved Mabel Muruli in the Kakamega election for governor; the other involved John Chacha in the Kuria East parliamentary election.

Voting

Polling day was largely peaceful but characterized by an unusually high voter turnout (85.9 per cent of registered voters), lengthy queues and innumerable logistical challenges.

The IEBC's failure to properly organize streams at polling stations and communicate the arrangements in good time caused long queues. The recruitment of polling staff and distribution of materials were complicated by a failure to determine the locations of polling stations. (The Election Regulations imply locations should be gazetted three months before polling day, but the regulations themselves were not gazetted in time for the 2013 election.)

732 This illustrated IEBC's failure to regulate. Political parties did not meet their deadline under the Elections Act for submitting nominees. The IEBC extended it from 19 to 21 January 2013. Some political parties had still not submitted their list by 25 January.

It was discovered on polling day that ballot papers in four wards had been misprinted;[733] county assembly elections in these wards were therefore postponed.[734]

Polling was scheduled to take place from 6 am to 5 pm. Some polling stations opened late[735] for a variety of reasons: late delivery of election materials; power failure and poor lighting; malfunction of the biometric voter identification equipment; failure to communicate post voting information.[736]

In roughly half of polling stations, the electronic voter identification kits failed to function. In many instances, the electronic poll books used to verify the biometric data of registered voters did not work at all (due to software failure) or stopped when their batteries ran out of power.[737]

The failure of the electronic voter identification system led IEBC officials to fall back on a manual register.[738] Where voters' names were not listed in the poll books or recorded in the manual register, in some cases the Returning Officers approved the creation of supplementary lists of voters, provided that voters could show proof of registration.[739] This introduced irregularities in the voting process. ROs failed to follow voter identification procedures or verify correctly; some voters were not listed in the electronic or manual registers and others were listed at a different polling station than the one at which they registered.[740]

733 Elections did not take place in three wards in Kuria East (Nyabari West and Gokeharaka wards) and Samburu North (Angatananyokie ward) constituencies because of a mix-up in the names of candidates. The areas held polls to choose the county ward representatives on 18 March.

734 European Union Election Observation Mission to Kenya (2013), *General Election 2013*, Nairobi: EU-EOM.

735 When polling stations opened late, most Presiding Officers (POs) extended voting hours to compensate.

736 Commonwealth Secretariat (2013), *Report of the Commonwealth Observer Group: Kenya General Elections 4 March 2013*, London: Commonwealth Secretariat; The Carter Centre (2013), *Post-election Statement on Tabulation and Announcement of Final Election Results*, Nairobi: The Carter Centre.

737 The electronic systems failed in various ways. The most common problems were passwords and batteries. Batteries generally lasted for less than half of the hours during which polling stations were open.

738 African Union Election Observer Mission (2013), *Preliminary Statement: Kenyans demonstrate strong commitment to democratic decisions*, 6 March 2013; The Carter Centre (2013), *Post-election Statement on Tabulation and Announcement of Final Election Results*, Nairobi: The Carter Centre.

739 Commonwealth Secretariat, *supra* note 735.

740 To prevent double voting using manual procedures, it is necessary to ensure that a voter's name appears once in a single register and that all clerks cross off names as people vote. The poor organization of manual registers in 2013 raised questions about whether voters' names were listed only once in one register. Africa Great Lakes Initiative (AGLI) and Friends Church Peace Teams (FCPT) (2013), *Africa Great Lakes Initiative Report on Observation of March 2013 Kenya National Elections*, Nairobi: AGLI and FCPT.

In all, four different voters' registers were used: the voters' register in the poll books; the lists printed for individual polling stations; the list of people whose biometric data had not been captured; and, finally, the Green Book, a manual record of entries made during voter registration.[741]

Counting and tallying

IEBC procedures require that, in all elections, votes are tallied at the constituency and county levels before they are transmitted for final tallying and compilation at national level. On completion of the count at polling stations, the Presiding Officer (PO) types the results into a handheld device that transmits the information to a central server at the IEBC's National Tallying Centre (NTC).

For the 2013 election, the IEBC's electronic results transmission system was set up to display provisional results as they arrived, without filtering or verification. In an effort to make this process transparent, the media received figures at the same time as the IEBC.

Electronic transmission of the results from polling stations was hampered by the failure of the mobile encrypted systems. EU-EOM observers reported that many polling stations had difficulty in sending in the results electronically.[742] This hobbled IEBC's ability at national level to communicate results consistently and reliably.[743] Information displayed was often inaccurate, showing figures that did not match those on the screen. Changes made overnight were also not explained.[744] There were allegations of hacking or sabotage; but it is possible that the system failed because not enough time was available after the machines were delivered to configure and deploy them, and train staff.[745]

The electronic results transmission system was jettisoned after it had been used to receive and display some 14,000 polling station results online and across the media.

Failure of the electronic voter identification kits did not necessarily imply fraud, but removed a key element in the IEBC's fraud prevention plan. The kits were designed to verify a registered voter's identity using biometric data,

741 *Supra* note 733.

742 European Union Election Observation Mission to Kenya (2013), *General Election 2013*, Nairobi: EU EOM; The Carter Centre (2013), *Post-election Statement on Tabulation and Announcement of Final Election Results*, Nairobi: The Carter Centre.

743 Commonwealth Secretariat (2013), *Report of the Commonwealth Observer Group: Kenya General Elections 4 March 2013*, London: Commonwealth Secretariat.

744 The Carter Centre (2013), *Post-election Statement on Tabulation and Announcement of Final Election Results*, Nairobi: The Carter Centre.

745 European Union Election Observation Mission to Kenya (2013), *Republic of Kenya: General Elections 2013*, Interim Report Number 4, Nairobi: EU-EOM.

and to prevent a registered voter from voting more than once.[746] Similarly, the electronic results transmission system was designed to check manual returns. Its failure meant that it became impossible, as promised, to have provisional results within 48 hours.

These systems failures undermined the IEBC's ability to guarantee the integrity of the election.[747]

During the announcement of provisional results, two controversies emerged. One concerned the high rate of rejected votes (at one point averaging 5 per cent of all votes); the other was over how to report the vote (whether a candidate's vote should be calculated on the basis of all votes cast or all valid votes cast).

The returns on 5 March 2013 showed that more than 300,000 ballots had been rejected; this number was reduced overnight to 30,000. The IEBC initially attributed the high number of rejected ballots to the complexity of holding six simultaneous votes, but stated later that a server malfunction had incorrectly multiplied spoilt votes by a factor of eight.

On the second issue, the IEBC said at first that it would calculate the vote obtained by presidential candidates in terms of all votes cast. The provisional results were then presented as a percentage of all valid votes. It was unsettling to see the electoral framework being determined as results streamed in.[748]

From 7 March 2013, IEBC returned to manual tallying of votes. This produced what were described as the final official results.

746 Africa Great Lakes Initiative and Friends Church Peace Teams (2013), *Africa Great Lakes Initiative Report on Observation of March 2013 Kenya National Elections*, Nairobi: AGLI and FCPT.

747 The IEBC commissioned Next Technology to assess and provide ICT support. Its report noted that the IEBC's computer system was incomplete and untested before the elections, and that one of the two servers required was not installed until a day before the elections and was not tested. The report described many other failures of software and hardware in counties across the country, including: faulty configuration of mobile phones; spoiled mobile phones; absence of batteries or SIM cards; passwords that failed to work on mobile phones; and laptops that could not receive results from mobile phones and were not able to show certain results. Other problems included: failure of a server; poor choice of mobile network in some cases; and faulty laptop batteries. Alex Kiprotich, "IT audit report reveals what went wrong in the polls", *Standard on Sunday*, 14 April 2013; Isaac Ongiri, "Report reveals why polls system could have failed", *Daily Nation*, 15 April 2013.

748 Commonwealth Secretariat (2013), *Report of the Commonwealth Observer Group: Kenya General Elections 4 March 2013*, London: Commonwealth Secretariat.

The election results

The constitution states that, to be elected President in the first round, a candidate must win more than 50 per cent of the total votes cast, and 25 per cent of votes in at least half of the 47 counties.

Eight candidates contested the presidential election in 2013.[749] Uhuru Kenyatta was declared President-elect on 9 March, having received 6,173,443 votes (50.07 per cent of the total votes cast), including over 25 per cent in 32 counties. Raila Odinga obtained 5,340,546 votes (43.31 per cent). Uhuru Kenyatta qualified for a first-round win by 8,419 votes, a close margin given the number of discrepancies and errors in voting and tallying.[750] In third place was Musalia Mudavadi, who obtained 3.93 per cent; the other five candidates each received less than 1 per cent of the vote.[751]

The Elections Observation Group (ELOG) reported that the results announced were within the ranges of its Parallel Vote Tabulation (PVT) projections.

The Coalition for Reform and Democracy (CORD), Raila Odinga's platform, challenged the validity of the presidential result and petitioned the Supreme Court to overturn it.[752]

Observers' assessment

The 2013 general election was observed by the Elections Observation Group (ELOG),[753] which brought together domestic civil society groups, and international observers sent by the Africa Great Lakes Initiative and Friends Church Peace Teams (AGLI/FCPT),[754] the Commonwealth Observer Group

749 James ole Kiyiapi, Martha Karua, Mohammed Dida, Musalia Mudavadi, Paul Muite, Peter Kenneth, Raila Odinga and Uhuru Kenyatta.

750 International Crisis Group (2013), "Kenya After the Elections", Africa Briefing Paper, Number 94, 15 May 2013.

751 Musalia Mudavadi obtained 483,931 votes, Peter Kenneth 72,786 votes, Mohamed Dida 52,848, Martha Karua 43,881 votes, James ole Kiyiapi 40,998 votes and Paul Muite 12,580 votes.

752 For more on the Supreme Court judgement on the presidential petitions, see Chapter Ten.

753 Over 50 Kenyan observer organizations were accredited by the IEBC, among which the Elections Observation Group (ELOG) was the largest and oldest. ELOG monitored the entire election process and, to do so, deployed 542 long-term observers to monitor and report on the pre-election environment. It deployed 580 constituency supervisors and over 7,000 observers on election day, of whom approximately 1,000 acted as Parallel Vote Tabulation (PVT) observers in selected polling stations.

754 AGLI/FCPT had a total of 265 observers concentrated in western Kenya. They also trained 1,030 community observers, many of whom served as citizen reporters. Community observers reported through a call-in centre via text messages. The team monitored 83 polling stations in western Kenya.

(COG),[755] the European Union (Election Observation Mission), The Carter Centre,[756] the African Union (Election Observation Mission).[757] A joint mission was sent by the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Intergovernmental Authority on Development (IGAD).[758] The IEBC accredited 2,600 international observers, 20,000 domestic observers, and 5,000 local and international representatives of the media.

Most observers reported that polling was conducted in a credible manner. This said, a local observer mission reported that the IEBC failed to correctly complete manual procedures and the AGLI/FCPT observed irregularities in 41.5 per cent of the polling stations observed.[759] These included: inappropriate behaviour;[760] denying access to observers; failure to correctly complete manual procedures; limited or no use of electronic systems; failure to provide secrecy for voters;[761] bribery;[762] and the issue by IEBC officials of multiple or unstamped ballot papers for the presidential race.[763]

755 The Commonwealth Observer Group was led by Festus Mogae (former President of Botswana) and comprised 17 eminent persons. It was supported by a six-person staff team from the Commonwealth Secretariat. It arrived in Kenya on 25 February 2013, met with various stakeholders and deployed its team from 2 to 6 March 2013. Teams were based in seven different areas across the country.

756 The Carter Centre launched its election observation mission in Kenya in January 2013 with the deployment of 14 long-term observers. They were joined by 38 short-term observers to observe voting and counting. The mission was led by former Zambia President Rupiah Banda and Carter Centre Vice President for Peace Programmes, Dr John Stremlau.

757 The AU-EOM was led by Joaquim Chissano, former President of Mozambique. It had a team of 60 observers and was supported by experts from the AU Commission, the Pan-African Parliament and the Electoral Institute for Sustainable Democracy in Africa (EISA).

758 The joint mission was led by Ambassador Dr Simbi Veke Mubako, Abdulrahaman Kinana and Ambassador Dr Berhane Ghebray. It deployed 21 teams from 28 February 2013 to 5 March 2013. Beforehand, it ran a three-day refresher training as well as stakeholder consultations.

759 AGLI/FCPT ran into problems with IEBC over accreditation. Its coordinator made five different trips from Kakamega to Nairobi to collect badges. When they became available on 24 February, six were spoiled and 20 mismatched names and photos; IEBC did not have time to correct them. During the election, 10 AGLI/FCPT observers were refused access to 12 polling stations.

760 Inappropriate behaviour covered campaigning in the polling station, telling voters how to vote, and being uncooperative.

761 In some cases, the way poll booths were constructed failed to protect privacy; in others, crowds of voters or agents were able to observe voters as they marked their ballots.

762 Incidents of bribery were reported in the vicinity of 7.3 per cent of the polling stations observed.

763 Thirty-one instances of failure to correctly complete manual procedures were reported. The most serious involved the issue of improper ballots. A voter in Mount Elgon reported to AGLI/FCPT interviewers that he had been given 10 presidential ballot papersand that a police officer had been given 30.Two similar cases were reported to Presiding Officers (POs) who took corrective action. Two clerks were reported to have failed to stamp ballot papers, causing them to be rejected during counting.

One case of fraud reported by an AGLI/FCPT observer occurred at Eldoret West Social Hall in Turbo Constituency. The observer saw an IEBC clerk issue multiple presidential ballot papers to voters. When this was reported, the Presiding Officer notified the police, who arrested the clerk. AGLI/FCPT observers also saw clerks issue multiple ballots in three other polling stations. Other clerks did not stamp ballot papers or assisted voters to place ballots in the wrong boxes.[764] Inking of fingers is used to prevent duplicate voting: AGLI/FCPT received reports of failure to ink fingers in 3.6 per cent of the polling stations observed. Some observers noted that the set up in some polling stations did not ensure that all those who voted were inked.[765]

With regard to counting at constituency and county level, most observers reported that counting lacked transparency. EU-EOM observers reported that, although they and party agents had access to constituency and county tallying centres, they were not able to see how tallying was carried out.[766] In many polling stations, AGLI/FCPT observers noted that agents and election observers could not clearly see that a clerk crossed off names and could not validate that this was done consistently.[767]In nearly a quarter of counts observed by the Carter Centre, the result form was not publicly posted (as required by the IEBC), removing a counting safeguard.[768] When constituency result forms arrived at the national tallying centre, observers were confined to a balcony overlooking the hall; agents attended the tallying of 16 constituency results forms but were then expelled from the centre for disputing the process. Rather than provide access to the tally centre, IEBC gave parties the constituency tally aggregation form before announcing the results.[769]

Several international observers pointed out worrying indicators with respect to tallying at national level. The EU-EOM reported that many of the results tallied at lower levels were not signed by agents and some were mathematically inconsistent.[770] The Carter Centre noted discrepancies in the final results of presidential elections (recorded on Form 36): in some cases, the recorded number of ballots cast at the same polling station for different elections differed by hundreds or even thousands; the number of registered voters for

764 Africa Great Lakes Initiative and Friends Church Peace Teams (2013), *Africa Great Lakes Initiative Report on Observation of March 2013 Kenya National Elections*, Nairobi: AGLI and FCPT.

765 *Op. cit.*

766 *Supra* note 744.

767 *Supra* note 763.

768 The Carter Centre (2013), *Post-election Statement on Tabulation and Announcement of Final Election Results*, Nairobi: The Carter Centre.

769 *Supra* note 744.

770 *Supra* note 744.

the presidential election released by the IEBC on 9 March 2013 differed from the voter statistics per county published by the IEBC on 24 February 2013; and the provisional list of registered voters published on 18 December 2012 varied from voter statistics per county published by the IEBC on 24 February 2013.

A number of IEBC Returning Officers were caught engaging in malpractices. In Mombasa, one officer was arrested stuffing ballot boxes with marked ballot papers; in Endebess, another was arrested in a cyber café doctoring the results she was meant to relay to the national tallying centre; ata tallying centre in Mathare constituency (Nairobi County), an officer was arrested for stuffing ballot boxes and altering records; on 5 March 2013 ballot boxes containing ballot papers meant for Westlands constituency were found dumped in Ruai, Embakasi.[771]

The variance of some 100,000 voters between the two voters' registers required scrutiny. Additional discrepancies in the number of registered voters emerged from the tabulation process. A significant number of registered voters recorded on Form 36 by Returning Officers in constituency tallies differed from those listed in the voters' register. While the number of voters recorded on Forms 36 should have matched the voter register, it did not always do so.[772]

These discrepancies prompted the Africa Centre for Open Governance (AfriCOG), a local observer, to petition the High Court to stop the results tabulation process and direct the IEBC to use Form 34 (used for primary declaration of results at polling stations) rather than Form 36 (which was used to declare results at constituency level). The High Court dismissed the petition on the grounds that presidential elections were outside its jurisdiction, and the preserve of the Supreme Court.

Further discrepancies were noted when the presidential results were published by the IEBC on 15 March 2013. In a number of cases, the results showed similar figures for candidates in several constituencies. In two constituencies in Kitui County (Mwingi West and Kitui East constituencies), six of the eight presidential candidates obtained the same result in each constituency. In Nairobi County, similar figures were reported for Embakasi Central, Embakasi North, Embakasi South, Westlands, Roysambu and Kasarani constituencies; and for Murangi County, in the constituencies of Wajir North and Wajir East

771 Wanjala, D. (2013), "Petition the Toughest Test Yet for Judiciary", *The Nairobi Law Monthly*, 4:3; International Crisis Group (2013), "Kenya After the Elections", Africa Briefing Paper, Number 94, 15 May 2013.

772 *Supra* note 767.

and Mathioya, Kigumo and Kandara. The IEBC later corrected the results in Kitui County, but offeredno explanation for the other constituencies.[773]

Notwithstanding these issues, some observers concluded that the 2013 general election in Kenya were credible. AGLI/FCPT concluded, in contrast, that fraud on a wide scale could have occurred, and probably did.

Conclusion

The 2013 general election in Kenya was the first to be held after the post-election crisis of 2007/2008 and also the first under a new constitution. It was therefore an election of many firsts that tested the resolve of the Kenyan people and the new institutions established by the KNDR and constitutional reforms.

The IEBC took some positive measures, but did not effectively address others, and this raised some questions about the conduct of the 2013 elections.

As part of its preparations for the elections, the commission successfully concluded the boundaries delimitation process, recruited personnel to oversee the elections, conducted voter registration within the timeframe stipulated by law, and engaged stakeholders in consultations in the run-up to the elections.

Shortcomings in performance included: infighting between the commissioners and secretariat;[774] a botched procurement process that seriously undermined voter registration, the commission's independence, and the entire ICT infrastructure for the 2013 elections; internal delays in processing regulations, which compromised election timelines and election preparations; lack of transparency in tallying, whichled to accusations of bias. The failure of electronic voter identification kits on election day, and the collapse of the electronic results transmission devices, undermined both confidence in the vote and the IEBC's ability to monitor and detect fraud in polling stations and during transmission of results.

A concerted effort is required to rebuild the credibility of the electoral commission and restore confidence in the electoral process. The IEBC should have consolidated the work of the IIEC and faithfully implemented the recommendations of IREC, rather than establish new systems and procedures. Electoral reform needs to be pursued over the long term, adapting to, but not influenced by, the electoral cycle.

773 Benjamin Muindi, "Poll results show anomalies in data for top candidates", *Saturday Nation*, 16 March 2013.

774 Commissioners spent the better part of their first months in office attempting to remove the chief executive officer, James Oswago. The matter ended up in court, with some voters challenging the process of hiring a new Secretary/CEO.

The IEBC should establish a sound voter register, and develop a robust and secure technology for electoral processes.

The IREC Report should be implemented fully. Without genuine reform, future elections will continue to pose a threat to peace and stability.

Chapter Thirteen

Drawing Lessons from the Kenya Mediation Process

"Unless the entire reform agenda is effectively pursued, Kenya will remain vulnerable and liable to repeat the horrific violence witnessed earlier this year. It is the nation's longstanding problems and deep-seated grievances that allowed the electoral dispute to take on such catastrophic proportions."

– The Panel's message to Kenyans, 17 October 2008

Introduction

Mediation, particularly of internal conflicts, remains an art, better understood in terms of specific cases rather than general rules. There are some good reasons for this. International mediators insist, rightly, that each conflict is unique. For this reason, they benefit more from guidance than they do from regulation; from shared principles more than accountable requirements. At the same time, each conflict presents challenges from a list that is familiar from other conflicts.

There is another good reason for this somewhat tentative approach: the mediator's own personality, experience and behaviour have a large impact on what happens.

Nowhere has this been truer than in the Kenya mediation. The skills and wisdom of the Panel were essential to the success of the process. We can learn from this experience but we must therefore be cautious in suggesting

it is replicable. Earlier chapters of this book have suggested what was done well and what was less effective, and why. These are insights but not always lessons. This chapter will reflect on the mediation, focusing particularly on the period from President Kufuor's arrival in Nairobi on 8 January 2008 to the completion of the National Accord on 4 March 2008. It assesses the importance of the mediation's successes and failures, and where appropriate comments on whether these might be replicable in other conflicts.

First steps: getting it right

A mediation is most vulnerable at the beginning. Getting it right at the outset is vital – and must be achieved when the mediation is untried and the team may be unknown, particularly to the parties in dispute. In Kenya's case, the first steps were genuinely sure-footed and, equally important, taken decisively. What were they?

First, President Kufuor, as chair of the African Union, acted with determination and exceptional timing. His visit, barely welcome, was designed to benefit from previous advocacy in favour of mediation. He came well-prepared, having already spoken with his compatriot Kofi Annan in Ghana. He refused to be unsettled by the unseemly protocol imposed on him as he shuttled between the intransigent Principals. He moved to establish the Panel before it had been formally accepted by the parties, and his selection of panellists was masterly. He put his office and dignity on the line, and imported a necessary sense of urgency. It is rare to witness, and a pleasure to praise, such deft diplomacy.

Second, the Panel not only arrived quickly (see below) but came well prepared. Kofi Annan and his fellow panellists already knew Kenya well, though they were to devote considerable time to listening and consultation. Kofi Annan had worked out the strategy he intended to pursue; and had marshalled international support for the initiative. The Panel also acted fast: two days after they arrived, Kofi Annan, Benjamin Mkapa and Graça Machel had contrived the first 'handshake' between the Principals and the talks opened five days later.

Third, the Panel invested heavily in generating an international consensus. President Kufuor brought African support. Annan made sure that, from the very beginning, Kibaki and Odinga heard a single consistent message from the international community: settle your differences and do so through and with the Panel.

Fourth, on arriving in Nairobi, the Panel moved decisively to secure a public meeting between the Principals and acceptance of a single mediation process. In achieving these goals, Annan confirmed his diplomatic skills, which

partly reflected his culture but were also an effect of the brutal testing that he experienced as Secretary-General of the United Nations. His finesse was evident as he neutralized a distracting initiative led by President Museveni and applied his moral authority to bring the Principals together, in an equitable manner, on 24 January.

A final achievement should be noted from this early period: the Panel moved at once to establish its independence and freedom of manoeuvre. It did so by issuing public statements and meeting early on with civil society and other stakeholders. Kofi Annan stated clearly that the panel had come to serve Kenya, not just its masters. He promised to publicize all agreements immediately and to keep an open door for Kenyans (although not foreign VIPs, whom he asked to stay away).

Some of these issues reappear below. The point to emphasize is the value of getting a few key things right at the beginning. This does have lessons for mediators. For example, it is useful to arrive with a fairly well developed set of objectives; to establish at the outset the independence of the mediation; to make it accountable to those who are most affected by the conflict, not just those who created it; and to spend time building and consolidating international support for the mediation and its approach. These are not new insights, but Kenya underlined their relevance.

The value of early intervention

For those who lost family members or were driven from their homes in the explosion of violence that followed the 2007 election, it may give cold comfort to be told that the negotiations launched on 29 January 2008 prevented further violence and misery. They did have this result, however, because the two Principals decided to negotiate their differences and reach a political settlement. How did the mediators create conditions that encouraged this decision?

As we have noted, President Kufuor deserves considerable credit for conceiving the Panel of Eminent African Personalities, and establishing it so fast. His other main achievement was to blunt the unwillingness of the Principals (especially President Kibaki) to accept external mediation.

Their reluctance was no surprise. It is the expected reaction of parties (especially governments) that are sensitive to the prerogatives of sovereignty. In Kenya's case, the party in government (the PNU) also believed it had most to lose.

It was fortunate that President Kufuor's efforts to persuade the parties to accept mediation were supported, and had been preceded, by diplomatic and other initiatives that pushed in the same direction.

First, the international community made it clear that business would not continue as usual if Kenya's leaders failed to demonstrate that they were ready to settle their political differences. The mid-January visit of Louis Michel (coordinated with Annan prior to his own arrival) was decisive.

Second, the African context was key, a point explored below. In particular, Article 4(h) of the African Union's Charter provided for precisely this kind of intervention, making its legitimacy easier for national leaders to accept.

Third, Kenyan civil society and the media became increasingly insistent that their political masters must act to stop the spiral into violence and put the country back on its feet.

Fourth, the election had almost generated a hung parliament. Each of the Principals knew that he could not govern without some understanding with the other. Accepting the assistance of distinguished African figures would make the necessary compromises a little more palatable, a little more noble.

Taken together, these factors made mediation more acceptable to the Principals. But President Kufuor still had to prepare the ground and create the means for a mediation, and the Panel he created needed to be ready to drop all other business at once and for an open-ended period. They arrived in Nairobi only 11 days after the mission was announced – and would have arrived a week sooner had Annan not fallen seriously ill on his way to the airport on 16 January.

He used the time lost to call international leaders from his hospital bed, and obtain from them the diplomatic support that he needed.

The Panel's promptness and assiduity had the desired effect. Even though there were many calls for mass action after the Panel's arrival and during the first days of negotiation, and violence was an ever present threat, a fragile calm was restored. The Panel's urgent calls for calm, and the swift agreement reached on Agenda Items 1 and 2 probably averted another calamity. Nothing that the mediators or negotiators did was more important. It took an exceptional effort as well as political courage, and gave Kenya another chance.

Kenya therefore makes a very clear case for early intervention, and challenges those who doubt the value of mediation. Once again, nevertheless, we should be highly cautious about drawing a general prescription. Mediation literature is full of examples of initiatives that failed because of poor timing, or lack of legitimacy, or because the situation was not ripe and key actors were not ready to cooperate.

Kenya provides an example of a mediation which did well to arrive early and which concentrated its first efforts very effectively on defusing an immediate

crisis. Hindsight tells us that Kenya was 'ripe' for this intervention, even if later events were to show that it may not yet be ready to make the enduring changes in political culture that must occur if another tragedy is to be avoided in the future.

A single mediation

Mediators hate competition. The term coined to describe it is deliberately pejorative: 'forum shopping'. The convention is that parties to a conflict should not be allowed to choose between mediators, or choose mediators that suit their interests, because this inevitably delays serious engagement and real negotiations. A single unchallenged mediation process is considered essential to success and any distraction from it, even if it involves the curtailment of a party's natural rights, is to be avoided. Kenya, however, falls squarely within the norm: a flowering of proposals is quickly succeeded by a single dominant initiative, which the international community then exclusively supports.

Kofi Annan understood the importance of this very clearly, probably as a result of sometimes dismal experience in the United Nations. The Panel had a clear mandate from the AU. The standing of the panellists, and Annan in particular, also had the consequence that their mediation would be unique or would cease. President Museveni and President Kibaki took a little longer than others to understand this, but on this matter Kofi Annan was unyielding. He would accept no compromise and he was proved right. Fortunately the initiative was also successful.

Kenya reminds us of the need to support a single mediation. The international community, and the Panel, knew this, and at the beginning it was vital to insist on its importance.

The African context

Africa has suffered more than its fair share of internal conflicts. However, out of this suffering has emerged a system and practice of positive intervention. African leaders, born in cultures of local mediation, have often cooperated to resolve conflicts on the continent and an offer of mediation, usually by a senior statesman from the neighbourhood, is considered less insulting than in some other regions of the world. Reflecting this, Article 4(h) of the African Union's Constitutive Act endorses such involvement in a State's internal affairs. In the African Peer Review Mechanism (APRM), African governments also voluntarily submit to the judgements of peer states on the continent; like the 2006 peer review of Kenya led by Panelist Graça Machel, these can be severe.

Africa has therefore made signal efforts to draw on solidarity to solve problems of stability. In a number of cases, as the case of Kenya confirms, they have been beneficial. In this sense, the Responsibility to Protect (which Kofi Annan introduced while he was Secretary-General of the United Nations) codified and extended a notion of solidarity that African leaders had been exploring. We return to this below.

The Kenya mediation was about Africa, even though it drew on resources and support from other continents. The mandate was African, the panellists were African, and the style of the negotiation (albeit with a nod to Anglo Saxon legal practice) was as African as a village council, including the joshing respect paid to the Elder, even if he was called a "fox" and a "dictator". A German technical expert advised on coalition government, but the job description of the key position of Prime Minister was skilfully elicited from the President of Tanzania. Perhaps most symbolically, the final meeting of the Principals, in the presence of Kofi Annan, Benjamin Mkapa and President Jikaya Kikwete would have been hard, if not impossible, to imagine on a different continent. Only Latin America might tolerate a similar level of public regional involvement in national bargaining processes.

The Kenya mediation therefore benefited from an unusual, though not unique, convergence of African experience and commitment. We learn from this, if we did not know it already, that Africa can draw benefits from its continental identity, which can trump national exceptionalism.

The same lesson tells us that the mediators, the process they adopted, and the instruments they used, might not be transferable to another continent.

Institutional support

When Kofi Annan accepted Kufuor's invitation to lead the Kenya mediation, he did so without sparing a thought for the support such a task might require. He had neither staff nor budget available, and the African Union was not in a position to contribute either quickly. Yet there is no evidence that Annan had any doubts that both would soon be forthcoming. In this, he was entirely correct. The Panel was to benefit from an unusual combination of talents in its Secretariat.

The United Nations had capacity to spare and supported the Panel without hesitation. It played a notably self-denying role in support of the mediation. The UN Secretary-General made it clear that he expected the UN system to respond positively to any Panel request, without seeking public recognition. The visit, at very short notice, of Craig Jenness, head of the UN's Electoral Assistance

Division, provides a good example. His dispassionate technical analysis helped to convince the negotiators that recounting or rerunning the election were not feasible options, a decision that enabled the Panel to move the discussion away from the past and towards solutions.

The African Union also provided one staff member to the Secretariat, as did the Centre for Humanitarian Dialogue. Throughout, the success of this hybrid arrangement was essentially due to the personal charisma and reputation of Kofi Annan, whose insistence on collegiality, and complete disregard of nationality, inspired cooperation.

Is a hybrid Secretariat better equipped for Kenya-like mediations than one that is monocultural or drawn from a single institution? This is hard to say. Drawing on staff from different agencies meant that the Secretariat assembled quickly. It was assisted to do so by the UN's willingness to advance funds against donor pledges, though this is not always replicable. What can be confirmed is the vital importance of a talented Secretariat, unconstrained by bureaucracy, able to execute quickly and without demur the instructions of the Panel. Nowhere was this effectiveness more evident than in the extraordinarily rapid production of a final text for signature, within one hour of the completion of the marathon last meeting of the Principals on 27 February.

An effective Secretariat, able to draw on support from virtually any source, was evidently an important asset. Perhaps as important was the freedom of manoeuvre which the AU accorded the Panel. The Panel was given complete freedom to determine its modus operandi. Kofi Annan was pleased with the mandate, especially its brevity ("almost one line"). Nor did the AU seek to amend in any respect the conclusions and agreements that emerged from the 41 days of negotiation, even though some regarded power-sharing as a controversial outcome. Kofi Annan commented later that if the United Nations had drafted the mandate, he would have been subject to continuous guidance from members of the UN Security Council. Kenya makes a very strong case for giving good mediators the space and independence that they require to bring disputing parties to a settlement.

The virtues of inclusion

Kenya has an active and sophisticated civil society, comparatively free media, and (in this crisis at least) a corporate sector that can communicate its views. All mediators are aware that they need to consult and include these groups in any process of conflict resolution, especially on reforms that will have a transformative impact on the society.

The Panel immediately insisted on a rapid tempo of meetings, consultations and briefings, which constantly fed and supported the negotiations. While the tempo slowed after the first 41 days, consultation remained a key element of the Panel's work. In particular, three annual conferences to take stock of progress gave representatives of these sectors an opportunity to talk directly to Kenyan decision-makers about the agreements and their implementation.

In this work, the Panel drew on each member's strengths. Graça Machel advocated forcefully on behalf of Kenyan women. The ability of Benjamin Mkapa to communicate in Swahili gave the Panel a much wider reach. Annan's capacity to listen, despite a hectic schedule, reassured interlocutors of the Panel's seriousness.

The Panel used what it heard; perhaps more important, it made fearless use of the media, particularly the Kenyan media. The negotiations never left the front pages of the national press, and were generally (if not always) given a respectful and constructive hearing. Today, more use would be made of social media, a significant tool in Kenya; the mediation occurred just before international officials and leaders came to understand their importance.

It is appropriate to describe the Panel's approach as "fearless" because mediators are often more constrained, by their mandates or bureaucracy, or because they lack the charisma and authority of the Kenya panellists. Not many mediators would employ civil society and the media in the course of a negotiation to encourage and sometimes criticize the Parties. In many other circumstances, where the government can impose its authority, or political parties are in a position to intimidate dissent, such boldness would not work.

Kenya nevertheless demonstrates the value, and also utility, of an inclusive approach. Every mediation should be asked: have you reached out, and if not, why not? The panellists may not have got civil society into the negotiating room and did not want to do so; but its impact was considerable.

Tactics make a difference

International mediators tend to reject regulation, but all are avid for examples of tactics that have got Parties to the table, kept them there, or secured positive agreements – or failed to do so. In the Oslo Forum, an international meeting of mediators, the most popular item is often 'In the Mediator's Studio', a session at which a prominent mediator is interviewed off the record about his or her experience.[775] The participants home in on details and tactics.

775 Kofi Annan was interviewed in 2007; Mutula Kilonzo and William Ruto were interviewed together in 2008.

The Kenya Mediation is a rich source of tactical experience. What can be learned merits listing, even if many points have been made in earlier chapters.

- Kofi Annan decided that the Principals should be one step removed from daily negotiations, to lower the risk of confrontation. This move was successful. Detailed negotiations could be sustained for a lengthy period, and, more important, the Principals were held in reserve. They became vital when Kofi Annan deftly suspended talks on 26 February and met the Principals the following day to close the final most difficult obstacles to an agreement.
- The negotiations prioritized what one observer called "low hanging fruit". Agenda Items 1 and 2 (on ending the violence and organizing a humanitarian response) were agreed within days (on 1 and 4 February 2008). This increased public confidence and gave the negotiators a sense of purpose and achievement.
- The Panel employed a deductive sequential approach to some sensitive issues. To discuss the election and its outcome, helped by Craig Jenness, Kofi Annan led the negotiators step by step through each option towards a conclusion that he had reached before coming to Kenya, that a recount or a rerun were unfeasible and would have damaging consequences. Applying a rational and logical approach to a particularly emotive question helped to neutralize passions on both sides.
- The Panel judiciously delegated controversial issues to bodies created to address them. The negotiators created commissions to investigate the post-election violence, review the election and electoral arrangements, establish accountability for crimes, structure a new constitution, and so forth, and therefore did not have to argue these contentious issues out between themselves.
- Confronted by an intractable disagreement, the Panel brought in technical experts. The German State Minister Erler advised the negotiators on coalition government. Hans Corell, a Swedish judge and former Legal Counsel at the UN, eased discussion of power-sharing by reducing the topic to a *technical* discussion of clauses *in a working group*. In a less sophisticated context, such tactics might amount to sleight of hand. In the Kenyan case, the negotiators understood the device. Though they were still unable to resolve their differences, Corell narrowed the gap, making it possible to hold a well-informed discussion.

- The Panel moved negotiations from the Serena to Kilaguni Lodge, described by the Panel as "a conducive environment". This worked up to a point. It enabled the negotiators to start technical discussions and adopt a workshop approach, but it did not produce a breakthrough. The negotiators knew each other well, and were not easily seduced by form; change of location did not induce them to bridge very entrenched differences.
- Kofi Annan consistently adopted positive language, aware that this encouraged the negotiators but, equally important, maintained public confidence in the process.
- The Panel was careful not to presume to answer the questions under negotiation and did not disclose the details of its strategy. Kofi Annan nevertheless chose to float the idea of a "Grand Coalition" when he addressed Parliament, with Graça Machel, on 8 February. In effect, he combined two tactics. He proposed, as a third party, a solution that might have been rejected immediately if put forward by one of the negotiating parties; and he appealed over the heads of the negotiating parties to political and public opinion.

These tactics are not new, and are not culturally or geographically specific. In Kenya, nevertheless, they were well used, with excellent timing. 26 February provides perhaps the best example. Kofi Annan announced the suspension of talks to a shocked and unprepared room of negotiators, then made an immediate public declaration in which he insisted that this was not bad news but a necessary change of gear. He had precisely planned his actions, including the vital invitation to President Kikwete to join Annan and Mkapa in the Principals' meeting the following day. It was at once a display of authority and a calculated gamble. Fortunately, it worked. Kofi Annan said subsequently that he was confident the Principals would realize they had little choice, although he went on to say that if they had not cooperated he would have had to resign.

If timing was critical, so was the sustained presence of the Panel for the first 41 days. The pace was brisk, and the Panel's efforts ensured that the negotiators generally turned up. This was less true after Annan handed over to former Foreign Minister Adeniji, which had a direct and negative impact on the treatment of Agenda Item 4 (long-term issues). The Panel members have said themselves that it was important to stay for the first 41 days, and to remain engaged during the five and a half years that followed. Kofi Annan came to be described as "the Prisoner of Peace" but it would probably have been better had he stayed a little longer in 2008 to steer through agreement on Agenda Item 4.

Few mediators have remained in continued negotiation for such a long period, let alone followed up over such a long period. Focused and sustained attention of the kind that took place in Kenya is too rare. It should be a more frequent practice, and mediators should be recompensed and supported appropriately for continued engagement.

Power sharing: the right solution for Kenya

The Kenya negotiation has been criticized on the grounds that it promoted in Africa a model of power-sharing after flawed elections, thereby undermining democracy. Zimbabwe's coalition government was formed shortly after Kenyan Accords, and power-sharing was mooted as a political solution in Cote d'Ivoire.

However, two features of Kenya's situation explain why the coalition solution was sustainable and necessary. The first is that the 2007 election was so flawed that a clear winner could not be declared; IREC called its results "irretrievably polluted". The second is that power-sharing was not considered an end in itself. When they agreed to create a coalition government, the parties committed to a far-reaching reform agenda that was designed to prevent the recurrence of violence and create conditions for peace and prosperity. The coalition government went on to implement a number of reforms, and promulgated a new constitution.

Implementation: staying the course

The Panel continued its work for six years. At the beginning, Kofi Annan said the first three Agenda Items could be negotiated rapidly, but that Agenda Item 4 might take one year. This was a rare miscalculation, but, to the panellists' great credit, they stayed the course. Each chapter of this study reaches specific conclusions about the reasons for success or failure of particular initiatives. Here, we ask a more general question: did the Panel play an effective role while the Accord reforms were being implemented between formation of the coalition government and the 2013 general election?

To begin with, the AU was right to extend the Panel's mandate, so that it could assist Kenyans to implement the reform programme articulated in the Accords. It was also sensible to establish the Coordination and Liaison Office (CLO) in Nairobi. The CLO was a necessary resource, and its presence reminded the Parties of the obligations they had assumed.

The CLO was instrumental in selecting international experts for the various bodies set up under the KNDR. Its dialogue meetings and annual conferences

brought together a wide range of Kenyans, who asked tough questions of those entrusted with reform and reconciliation.

The decision to hire an independent consultancy to provide the Panel and others with regular evaluations of progress was also a sound innovation – one that other mediators should consider.

The panellists visited Kenya regularly, but did so with caution because they did not wish to distract Kenyans from focusing on the accountability of their leaders. If visits were deliberately rare, however, contact was fairly constant. Kofi Annan, in particular, called frequently and was often asked to intervene on particular issues – notably the question of ICC involvement. He continues to argue that the court should investigate accountability for crimes committed after the 2007 elections, in view of the government's repeated failure to establish a national judicial mechanism.

The panellists were not compensated for the time they devoted to Kenya. This imposes an unreasonable burden and is not sustainable if mediation is intense and prolonged, as it was in Kenya. Organizations that generously fund mediations should include support for mediators who work for any extended period to resolve a crisis.

This study has made clear that the mediation's success in defusing the crisis in the first months of 2008 has not been matched by efforts to address its underlying causes. The Panel's analysis was accurate. The reform mechanisms that the negotiators designed have generally, if not always, been workable – and some have worked well. IREC and the constitutional process should be singled out. However, Kenya's competitive political culture, based on ethnic advantage, remains a potent force for instability and violence. Kenya survived 2007-2008 but it could happen again.

Accountability for this dangerous failure lies finally with Kenya's politicians and the people who elect them. Some believe that the mediation could have done more to monitor implementation of the Accord. In our opinion, Kenya received exceptional and sustained help from the Panel and continued support from the international community, which financed an expensive election in 2013.

The Panel itself frequently emphasized that it is for Kenya's people to determine their future. In the end, Kenyans are responsible for the political society they create, including its political institutions.

Personality

President Kufuor identified the Panel of Eminent African Personalities. He was clear that Kofi Annan should lead it, and sought his agreement on the task and the Panel's members. Kofi Annan then called Graça Machel and Benjamin Mkapa.

It was an entirely felicitous combination. They knew each other well enough to appreciate their different talents, and Graça Machel and Benjamin Mkapa were secure enough to give Annan his head.

Graça Machel was the voice of passion and conscience; her history is one of consistent and positive activism for the excluded, and women in particular.

Benjamin Mkapa stood for the understanding neighbour. Based on the singular experience of presidency, he knew the minds and motives of politicians, but also understood and was gifted in communicating with people. He provided reassurance and hope for a return to ordinary living.

Kofi Annan personified the mediation. He would carry the blame if it failed (he spoke later of "the reliance on me"). It was his vision, leadership, vitality and diplomatic skill that ultimately made the difference on each exhausting day.

Every mediator recognizes the giddy feeling of private exultation when a process he or she is steering moves forward. Unusual inner confidence, properly contained, is probably a quality that mediators need to possess. It is an element in the alchemy that, at some point in every successful mediation, turns enemies into co-conspirators for peace. Kofi Annan was completely single-minded in his efforts to achieve this alchemy; it was a remarkable performance. He was on stage each day and most evenings for 41 days. Each act was premeditated, no act was casual, every step was directed to the achievement of specific, immediate goals that would advance the negotiations towards one overall, complicated objective. This could not have been done if he had not been clear from the beginning where the parties needed to go. He said later: "I had some general ideas of what I would want to see, but it crystallized as I went along"; this was almost certainly an understatement.

Annan was also lucky. The Parties were highly sophisticated and experienced negotiators. They would not be easily manipulated, a danger of Annan's approach in a less self-conscious environment. The risk was nevertheless ever present that, if the mediation failed, Annan would be accused of trying to railroad a deal of his own making.

The mediation did not fail, at least with regard to the first three Agenda Items. It did not do so because Annan and the Panel understood Kenya and its inherent instability. They did not misunderstand the problem, and their experience led them in the direction of a particular solution. The magic lay in getting the Parties there and in time.

Conclusion

The Responsibility to Protect is a doctrine that is controversial partly because it has been widely misunderstood. It permits states, under certain conditions, to make phased interventions to protect civilian populations in third countries using diplomatic, humanitarian and other measures; a military phase may be deployed under the doctrine, but only as a last resort. As we have seen, Africa has independently put elements of the doctrine into effect.

Kenya saw the best of R2P and its limits. The rapid convergence of an African and international consensus on the need to offer (and insist on) external mediation was very positive.

The limits of R2P were revealed by the international community's subsequent inability to induce Kenya's political leaders to implement the reforms they had brought into being.

The AU's founding document and R2P gave the mediation legitimacy. It was reinforced by evidence of popular support. The negotiations were the focus of national attention and agonized hope.

Dialogue worked. It resolved differences which had been so bitter that they almost destroyed the country. Superbly managed discussions brought out the best and the most generous instincts of the leaders involved. However, when the dialogue ceased, baser political habits re-emerged.

Kenya is the poorer for this. Its experience remains a tragedy, shot through with examples of courage and the best of human endeavour. Kenyans may have to wait a generation until the fruits of the mediation and the KNDR become apparent.

Annexes

Annex One

Structure and Terms of Reference (TORs) of the Panel of Eminent African Personalities

Nairobi, February 5 2008

1. Preamble

We, the members of the Panel of Eminent African Personalities (The Panel), together with the Parties to the National Dialogue and Reconciliation, having met in Nairobi on February 4, 2008:

MINDFUL of the fact that the task of finding a just and lasting peace in Kenya is monumental and that the need for a speedy solution to the crisis is of paramount importance in view of the magnitude of human suffering caused by it;

PURSUING the goal of achieving peace, stability and justice for all Kenyans and becoming a reconciled nation;

NOTING the positive role played by the Panel so far in initiating and expediting the resolution of the crisis in Kenya;

REAFFIRMING our commitment to pursue a solution to the crisis in Kenya in line with the agreement between the two leaders, His Excellency Mwai Kibaki and Honourable Raila Odinga, as publicly announced on 24th January and reaffirmed on 29th January 2008 at County Hall in Nairobi;

RECALLING the agreement to negotiate under the facilitation of the Panel which may establish and locate any meetings in any institution within Kenya and, as may be necessary, any other neutral venue;

CONVINCED that it may be necessary to establish solid institutional foundations for the implementation of agreements reached by the Parties. This may entail legislative action;

AGREED to adopt the following Structure and Terms of Reference for the Panel of Eminent African Personalities on the crisis in Kenya.

2. The Panel of Eminent African Personalities

2.1 The Panel shall offer its services to resolve the political crisis in Kenya with full moral authority and with the integrity that such facilitation requires.

2.2 In offering its good offices, the Panel shall assume the collective responsibility of assisting and facilitating the National Dialogue and Reconciliation.

2.3 The Panel shall reach decisions by consensus.

2.4 The Eminent Personalities shall collectively, and through their Panel Chairman, consult with the leaders of the Parties, with the view to providing the necessary guidance to the proceedings of the National Dialogue and Reconciliation.

2.5 The Panel undertakes to ensure the highest professional standards of advice on matters on the Agenda of the National Dialogue and Reconciliation in this regard, it may draw on independent expertise, as may be necessary, for the process. It may also contract, on the basis of need, independent consultants and advisers from the region, or from outside the region, in consultation with the two Parties.

3. Chairman

3.1 Parties accept with gratitude H.E. Mr. Kofi Annan as the Chairman of the Panel mandated by the African Union to mount a concentrated, co-ordinated and continuous mediation effort until a resolution to the crisis is found.

3.2 The Panel Chairman shall liaise and keep in constant contact with the Chairman of the African Union, to report on the progress in the resolution of the crisis and ensure the smooth and efficient running of the Kenyan national Dialogue and Reconciliation.

3.3 The Panel Chairman, in consultation with other Members of the Panel, will designate a Session Chair and a Co-Chair, who will, for all intents and purposes of the Kenyan National Dialogue and Reconciliation, represent the Panel and the Panel Chairman and act on their behalf, in accordance with the TORs and the Rules of Procedure, and as agreed with the Parties.

3.4 The Panel Chairman, the Session Chair or the Co-Chair, shall preside over the National Dialogue and Reconciliation, as agreed upon by the Parties. He/She shall chair the proceedings of the Plenary, conduct informal consultations

with the Parties to the crisis and provide general guidance for the conduct of the National Dialogue and Reconciliation.

3.5 In the event that the Panel Chairman is not available to discharge his duties, he shall designate one of the members of the Panel, the Session Chair or Co-Chair to do so on his behalf.

3.6 The Panel Chairman, the Session Chair or Co-Chair, shall be responsible for providing competent staff for the meetings.

4. Session Chair and Co-Chair

4.1 The Session Chair and Co-Chair are a plenipotentiaries of the Panel and its Chairman in the process of the National Dialogue and Reconciliation.

4.2 The Session Chair and Co-Chair are delegated by the Panel to exercise full discretion over the matters related to the mandate and activities of the Panel in the process of the National Dialogue and Reconciliation.

4.3 The Session Chair and Co-Chair shall, at all times, display the highest level of integrity and commitment towards the goal of the National Dialogue and Reconciliation.

4.4 The Session Chair and Co-Chair represent the Panel, and its Chairman, in speaking engagements and public functions, and in all other activities related to the National Dialogue and Reconciliation, including organization of in-house workshops and seminars.

4.5 The Session Chair and Co-Chair may designate persons to chair and moderate dedicated committees, as may be decided during the National Dialogue and Reconciliation by the Panel, in consultation with the Parties, having regard for the experience, impartiality and integrity required for such positions.

4.6 The Session Chair or Co-Chair may undertake to form dedicated Task Forces, as need arises, in consultation with the Parties, to address specific issues and urgent needs during the National Dialogue and Reconciliation.

4.7 The Session Chair (and in his absence, the Co-Chair) shall be the executive manager of the Secretariat of the Panel, including on matters of administration.

5. Spokesperson

5.1 The Panel Chairman shall designate, in consultation with other members of the Panel, an official Spokesperson of the Panel.

5.2 The Spokesperson shall be answerable to, and will receive guidance from, the Chairman, the Session Chair or Co-Chair, as the case may be.

5.3 The Spokesperson shall be responsible for everyday interaction with the Parties and the media1 to ensure integrity of the information on the proceedings of the National Dialogue and Reconciliation. The Spokesperson will undertake to brief the accredited media, as regularly as may be required, on the process of negotiations.

6. Secretariat

6.1 The Panel will establish a Secretariat to run its day-to day activities. The Secretariat will be staffed with personnel of the Panel's choice. The functions of the Secretariat in the facilitation process shall be the responsibility of the Panel. The Secretariat shall be based at the venue of the negotiations.

6.2 The Chairman, in consultation with other Eminent Personalities, shall designate a co-ordinating Secretary, who shall lead and supervise the small administrative team assigned to undertake the servicing of the negotiations and run the daily affairs of the Secretariat. He will also act as a secretary to the Panel and co-ordinator of office activities. The Co-ordinating Secretary shall be answerable to the Chairman, the Session Chair and Co-Chair.

6.3 There shall be a clear linkage between the Panel, the Session Chair and Co-Chair, the Parties and the Secretariat.

6.4 The Secretariat shall be responsible for the provision of office space, communication and transport facilities, other requisite resources, to the members of the Panel, as needed.

7. Finance

7.1 The cost of all operational expenses of the Panel shall be covered from the Government of Kenya funds and the Trust Fund for the Kenyan National Dialogue and Reconciliation, to be established by the UNDP and managed by the Panel Secretariat. The Government of Kenya, other Governments, the UN, EU and AU and other interested parties will be contributing to this Trust Fund. Their contributions will not come with any conditionalities.

Annex Two

Modalities for the Kenyan National Dialogue and Reconciliation

Goal:

To ensure that the National Dialogue and Reconciliation is carried out in a continuous and sustained manner towards resolving the political crisis arising from the disputed presidential electoral results as well as the ensuing violence in Kenya, in line with the agreement between His Excellency Mwai Kibaki and Honourable Raila Odinga, as publicly announced on 24th January and reiterated on 29th January 2008 at County Hall in Nairobi.

The final goal of the National Dialogue and Reconciliation is to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.

Modalities:

i. The National Dialogue and Reconciliation (Dialogue) shall be based on the proposed and mutually agreed upon Agenda submitted by the Panel of Eminent African Personalities (The Panel) that shall be further developed by the Parties to resolve, in the spirit of fairness and amicability, the issues that led to the current crisis.

ii. The Parties to the National Dialogue and Reconciliation are: The Government of Kenya/Party of National Unity (Government/PNU) and the Orange Democratic Movement (ODM). Each Party to the National Dialogue and Reconciliation shall provide four (4) delegates, of whom one should be a woman, mandated to negotiate and take decisions on their behalf. Final decisions will be made by the leaders of the Parties.

iii. In addition, each Party will indicate one Liaison Officer, who will attend all Sessions of the National Dialogue and Reconciliation without having the right to vote or take the floor. The Liaison Officers will ensure continuous liaison with the Secretariat of the Panel. The Liaison Officers may be replaced by alternate Liaison Officers.

iv. The deliberations of the Parties to the National Dialogue and Reconciliation shall be guided by the Terms of Reference (TORs) and the Rules of Procedure for the National Dialogue and Reconciliation suggested by the Panel and agreed upon by the Parties.

v. The quorum, at all times, shall be as provided for in the Rules of Procedure.

vi. The Panel will appoint a Session Chair and Co-Chair, in consultation with the Parties who will convene and chair the meetings of the Dialogue.

vii. The Panel shall draw on outside independent expertise, in consultation with the Parties, as may be necessary, and m accordance with the TORs.

viii. If and when necessary in the course of the National Dialogue and Reconciliation, the Panel may convene an in-house participatory workshop, whereby the Parties, with the assistance of independent experts, will elaborate and define the problem at hand, with a view to incorporating the outcomes of such workshops into the formal negotiations.

ix. The Panel may establish Committees and Task Forces, to discuss specific issues and make recommendations, as necessary.

x. The National Dialogue and Reconciliation shall be organized in an expeditious and time-sensitive manner. The Parties will deliberate on the basis of the time-table agreed with the Panel to be attached to the Agenda.

xi. All agreements reached by the Parties in the course of the National Dialogue and Reconciliation shall be put in the public domain.

xii. The Parties agree to be bound by the outcome of the process and commit to its implementation.

xiii. In their contacts with the media during the National Dialogue and Reconciliation, the Panel and the Parties shall not disclose any information on the sensitive issues being discussed at the meetings. Only the Secretariat of the Panel will issue official communications regarding the National Dialogue and Reconciliation through the Office of the Panel Spokesperson.

xiv. The Parties shall refrain from making public statements that could endanger the success of the National Dialogue and Reconciliation.

DONE THIS DAY 5th February 2008, IN NAIROBI, KENYA.

Annex Three

Annotations to the Suggested Agenda

1. We came here to listen, learn and contribute our efforts in the search for a just and durable solution to the current political crisis. In essence, we sought to hear the different perspectives on the key issues, possible solutions and their implications, and modalities of implementation of such solutions. We have no preconceived ideas or magic formulas. We simply believe that sustainable peace and stability can only be restored through constructive dialogue and the reconciliation among Kenyans themselves.
2. We reached out to a large cross-section of the Kenyan society to get a clear understanding of the issues at hand. We have met political leaders, women's groups, religious leaders, youth groups, community-based organizations, representatives of the business community, legal and human rights groups and other civil society bodies. We also sought the views of the diplomatic community, namely the African Union, the European Union and the United States.
3. We have visited the affected communities in the Rift Valley. We have heard stories of fear, pain and helplessness. We have stared at the face of the suffering of the daughters and sons of this land. We have seen how violence is ripping apart families and communities and destroying the lives and livelihoods of the Kenyan people. We realized that the economy of this country is on the verge of collapse.
4. Both sides to this crisis must understand that resolving this crisis politically is a matter of immediate priority. It constitutes a responsibility they should not, and cannot, avoid.
5. The suggested Agenda reflects the sentiments and ideas our interlocutors shared with us.

Agenda Items 1 And 2: Immediate Action to Stop Violence and Restore Fundamental Rights and Liberties; Measures to Address the Humanitarian Crisis, Promote Reconciliation, Healing and Restoration.

6. Violence must stop immediately; the security and protection of the population must be enhanced; the respect for the sanctity of life must be restored and the gross and systematic violations of human rights must be investigated without delay; the assistance to the affected communities and individuals has to be delivered more effectively; the freedom of expression, press freedom and the right to peaceful assembly must be upheld; the lifting of the ban on live coverage is currently being considered in the High Court; and the processes of healing, reconciliation and restoration must start at once. In this regard, political leaders and parliamentarians must play a key role by, inter alia, conducting joint visits to the affected areas and jointly appealing for peace and harmony among their respective supporters.

   The mass media in general must be encouraged to broad cast messages of peace, while the radio stations, especially those transmitting in vernacular languages, must stop broadcasting hate messages; the moral authority of religious leaders must also be brought to bear in this endeavor; the grass-roots reconciliation and healing initiatives must be promoted and widely publicized; the Government has already established a compensation fund and other restoration measures should be implemented to address the suffering of those directly affected by the violence.

7. The Parties must reiterate their public commitment to dialogue with a clear timetable.

Agenda Item 3: How to Overcome the Current Political Crisis

8. The current crisis revolves, in large measure, around the issues of power and the functioning of state institutions. Every group we met wanted a solution to the crisis that unifies the country. This will require adjustments to the current legal and institutional frameworks. We shall assist the Parties to negotiate and agree on a solution to the post election stalemate. The following suggestions capture the ideas provided in the written submissions by both Parties and their commitment to addressing their differences regarding the results of the presidential elections:
   - In a time sensitive manner, find a political solution to their differences regarding the results of the presidential elections;
   - Examine and review the Constitution and other legal instruments, including the electoral legislation. In this regard, we note that substantial work has already been done by politicians and the parliament;
   - Examine and reform electoral institutions.

Agenda Item 4: Long-Term Issues and Solutions

9. Poverty and equitable distribution of resources as well as perceptions of historical injustices and exclusion on the part of segments of the Kenyan society constitute the underlying causes of the prevailing social tensions, instability and cycle of violence. All representations we received to address these long-standing problems strongly recommend that the Parties should consider the following steps among others:
   - Undertaking a land reform;
   - Tackling poverty and inequality, as well as combating regional development imbalances;
   - Tackling unemployment, particularly among the youth;
   - Addressing issues of accountability and transparency;
   - Consolidating national cohesion and unity.

Annex Four

Public Statement
Kenya National Dialogue and Reconciliation
Mediated by H.E. Kofi Annan and the Panel of Eminent African Personalities

Feb 1, 2008

Preamble:

Goal:

To ensure that the National Dialogue and Reconciliation is carried out in a continuous and sustained manner towards resolving the political crisis arising from the disputed presidential electoral results as well as the ensuing violence in Kenya, in line with the agreement between His Excellency Mwai Kibaki and Honourable Raila Odinga, as publicly announced on 24th January and reaffirmed on 29th January 2008 at County Hall in Nairobi.

The final goal of the National Dialogue and Reconciliation is to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.

Noting with concern the situation of insecurity in the country;

We need to take the following steps to immediately halt the violence:

1. To the Police:

   a) The police must act in accordance with the Constitution and the law and in particular the Police Act and the Force Standing Orders. While the police are entitled to use reasonable force to protect vulnerable populations and in case of self defence, live bullets must not be used on unarmed civilians in unjustifiable circumstances.

   b) The security forces must carry out their duties and responsibilities with complete impartiality and without regard to ethnicity, political persuasion, or other partisan consideration.

c) The deployment of the security agents must at all times promote and reflect national integration and harmony.

d) In order to harmonize security activities at all levels, there is a need for the cross flow of information between administrative units and the leadership at every level.

2. To the Public:

a) All leaders should embrace and preach the peaceful coexistence of all communities and refrain from irresponsible and provocative statements.

b) Mobilize local community, religious, political, business and civil society leaders to hold joint meetings to promote peace and tranquility and stand up for justice and fairness.

c) All Kenyan citizens should stop acts of violence.

d) All illegal armed groups and militias should be demobilized and disbanded.

e) We appeal to all youths throughout the country not to participate in acts of lawlessness particularly those leading to harm or loss of human life and destruction of property.

f) We call upon the victims and those affected by violence to exercise restraint and avoid any acts of revenge or retaliation.

3. As to the restoration of fundamental rights and civil liberties:

a) Ensure that the freedom of expression, press freedom and the right to peaceful assembly are upheld. A suitable code of conduct on live coverage broadcasts, should be developed promptly by the Media Council in consultation with the Ministry of Information and implemented forthwith. This should include punitive measures against abuse.

b) Peaceful assembly as guaranteed by the Constitution should be protected and facilitated. Leaders and the public attending such meetings must ensure that meetings are peaceful, orderly and conducted in conformity with the law.

c) Impartial, effective and expeditious investigations on all cases of crime and police brutality and/or excessive use of force should be undertaken forthwith.

d) Enforce law and order to protect life and property, and to ensure that roads and railways are open and safe for people, goods and services. Major transit routes must be secured and safe passage on all internal road networks throughout the country be guaranteed.

e) All workers, both public and private, must be assisted to return safely back to their places of work. Reopen all institutions of learning and assist teachers and children to return in an environment of safety.

f) All internally displaced persons should be protected and assisted to return safely to their homes and places of work and their rights to reside anywhere in the country be upheld.

g) In order to promote food security, displaced farmers should be assisted to return to their farms. All farmers affected by the crisis should be assisted and encouraged to safely resume their farming activities.

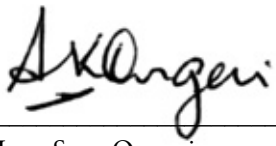
h) Hate and threatening messages, leaflets, sms, or any other broadcasts of that nature must cease forthwith.

i) All criminal activities, particularly those of a violent nature, should be prosecuted forthwith.

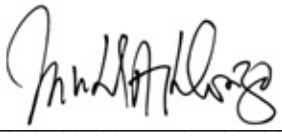
Signed on this day, February 1, 2008

On behalf of Government/PNU:

Hon. Martha Karua



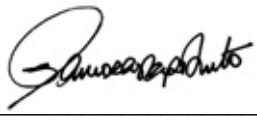
Hon. Sam Ongeri



Hon. Mutula Kilonzo

On behalf of ODM:

Hon. Musalia Mudavadi



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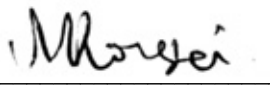
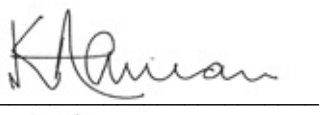


Hon. Sally Kosgei

Hon. James Orengo

Witnessed by:
For the Panel of Eminent African Personalities



H.E. Kofi A. Annan
Chairperson

Annex Five

Kenyan National Dialogue and Reconciliation Through the Mediation of H.E. Kofi A. Annan and the Panel of Eminent African Personalities On the Resolution of the Political Crisis Annotated Agenda and Timetable

At the fourth session held on 1 February 2008 under the chairmanship of Mr. Kofi Annan, of the Panel of Eminent African Personalities, the Parties to the Kenyan National Dialogue and Reconciliation on the resolution of the political crisis and its root causes, namely the Government of Kenya/Party of National Unity and the Orange Democratic Movement, agreed on the following Agenda for the dialogue:

a) Annotated Agenda

1. Immediate Action to Stop Violence and Restore Fundamental Rights and Liberties

Both Parties understand that resolving this crisis politically is a matter of immediate priority and have reiterated their commitment to finding a just and durable solution. Discussions on Agenda item 1 will be conducted to identify and agree on the modalities of implementation of immediate action aimed at:

- Stopping the wave of violence that has gripped the country since the announcement of the results of the Presidential Elections;
- Enhancing the security and protection of the population and their property;
- Restoring the respect for the sanctity of human life;
- Ensuring that the freedom of expression, press freedom and the right to peaceful assembly are upheld.

2. Immediate Measures to Address the Humanitarian Crisis, Promote Reconciliation, Healing and Restoration

Discussions will be conducted to identify and agree on the modalities of implementation of immediate measures aimed at:

- Ensuring that the assistance to the affected communities and individuals is delivered more effectively;
- Ensuring the impartial, effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty are brought to justice;
- Ensuring that the processes of national healing, reconciliation and restoration start at once.

3. How to Overcome the Current Political Crisis

Under this Agenda item, the Parties will negotiate and agree on a solution *towards resolving the political crisis arising from the disputed presidential electoral results as well as the ensuing violence in Kenya.*

The current crisis revolves, in large measure, around the issues of power and the functioning of state institutions. Its resolution may require adjustments to the current constitutional, legal and institutional frameworks.

4. Long-Term Issues and Solutions

Poverty, the inequitable distribution of resources and perceptions of historical injustices and exclusion on the part of segments of the Kenyan society constitute the underlying causes of the prevailing social tensions, instability and cycle of violence. Discussions under this Agenda item will be conducted to examine and propose solutions for long-standing issues such as, *inter alia:*

- Undertaking constitutional, legal and institutional reform;
- Tackling poverty and inequity, as well as combating regional development imbalances;
- Tackling unemployment, particularly among the youth;
- Consolidating national cohesion and unity;
- Undertaking a land reform;
- Addressing transparency, accountability and impunity.

b) Timetable

The Parties agreed that Agenda items 1, 2 and 3 would be resolved within a period of between 7 and 15 days from the date of commencement of the Dialogue, while Agenda item 4 would be resolved within a period of one year after the commencement of the Dialogue (launched on 28 January 2008).

Done in Nairobi, Kenya, on 1 February 2008

For the Government/PNU Delegation

For the ODM Delegation

Witnessed by

For the Panel of Eminent African Personalities
H.E. Kofi A. Annan

Chairperson

Annex Six

Public Statement
Kenya National Dialogue and Reconciliation
Mediated by H.E. Kofi Annan and the Panel of Eminent African Personalities

Feb 4, 2008

Preamble:

Goal:

To ensure that the National Dialogue and Reconciliation is carried out in a continuous and sustained manner towards resolving the political crisis arising from the disputed presidential electoral results as well as the ensuing violence in Kenya, in line with the agreement between His Excellency Mwai Kibaki and Honourable Raila Odinga, as publicly announced on 24th January and reaffirmed on 29th January 2008 at County Hall in Nairobi.

The final goal of the National Dialogue and Reconciliation is to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.

1. With Respect to Immediate Measures to Address the Humanitarian Crisis:

   a) Assist and encourage displaced persons to go back to their homes or other areas and to have safe passage and security throughout.

   b) Provide adequate security and protection, particularly for vulnerable groups, including women and children in the camps.

   c) Provision of basic services for people in displaced camps:

      - Ensure that there is adequate food, water, sanitation and shelter within the affected communities – both those in displaced camps and those remaining in their communities.
      - Provide medical assistance with a special focus for women, children, people living with HIV and AIDS and the disabled, currently in displaced camps.

- Ensure all children have access to education. This will involve reconstruction of schools, encouraging return of teaching staff and provision of teaching materials, and assistance for children to return to their learning institutions.

d) Provide information centres where the affected can get easy access to information regarding the assistance that is available to them and how to access it, for example, support for reconstruction of livelihoods, or tracing of family members.

e) Operationalize the Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post 2007 Election Violence expeditiously by establishing a bi-partisan, multi-sectoral Board with streamlined procedures to disburse funds rapidly.

f) The Fund is open to public contributions and all citizens and friendly countries, governments and international institutions to donate generously.

g) Ensure close linkages with the ongoing national and international assistance to enhance the effectiveness of delivery.

h) Ensure that victims of violence in urban areas are not neglected in the implementation of the above.

i) In order to promote food security, displaced farmers should be assisted to return to their farms. All farmers affected by the crisis should be assisted and encouraged to safely resume their farming activities.

2. <u>With Respect to Immediate Measures to Promote Reconciliation, Healing and Restoration:</u>

a) Joint peace rallies should be convened by all leaders of parties to promote peace and reconciliation.

b) Ensure that the freedom of expression, press freedom and the right to peaceful assembly are upheld.

c) Peaceful assembly as guaranteed by the Constitution should be protected and facilitated.

d) All-inclusive Reconciliation and Peace building Committees at the grassroots level should be established. The committees should involve the provincial administration, council of elders, women, the youth, conflict resolution/civil society organizations.

e) Counseling support should be provided to those affected communities.

f) A national resettlement programme should be developed.

g) The law on registration of persons should be reviewed to remove the emphasis on ethnicity.

h) A Truth, Justice and Reconciliation Commission that includes local and international jurists should be established.

i) Welcome and encourage the United Nations High Commissioner for Human Rights investigatory team.

3. Recommendation to Parliamentarians:

Request the Speaker of Parliament to urgently convene a meeting of all members (Kamukunji) so that the Committee has the opportunity to inform Parliamentarians of the progress of the National Dialogue and Reconciliation.

4. Briefing on Progress to the Principals:

The Panel of Eminent African Personalities will provide periodic joint briefings to H.E. Mwai Kibaki and Hon. Raila Odinga.

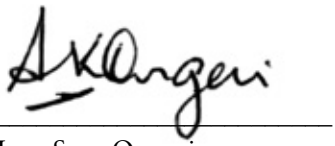
5. Implementation of Recommendations:

Weekly progress reports on implementation of these and other recommendations to be made to the Committee by the relevant parties/institutions.

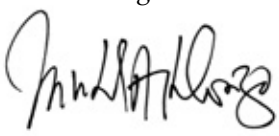
Signed on this day February 4, 2008

On behalf of Government/PNU:

Hon. Martha Karua



Hon. Sam Ongeri

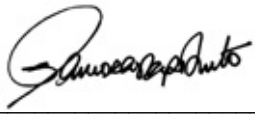


Hon. Mutula Kilonzo

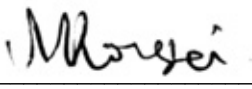
Hon. Moses Wetang'ula

On behalf of ODM:

Hon. Musalia Mudavadi



Hon. William Ruto



Hon. Sally Kosgei

Hon. James Orengo

Witnessed by:
For the Panel of Eminent African Personalities

H.E. Kofi A. Annan
Chairperson

Annex Seven

Kenya National Dialogue and Reconciliation

Mediated by H.E. Kofi Annan and the Panel of Eminent African Personalities

Agenda Item Three: How to Resolve the Political Crisis

14 February 2008

I. Preamble:

Reaffirming the Goal of the National Dialogue and Reconciliation:

> *To ensure that the National Dialogue and Reconciliation is carried out in a continuous and sustained manner towards resolving the political crisis arising from the disputed presidential electoral results as well as the ensuing violence in Kenya, in line with the agreement between His Excellency Mwai Kibaki and Honourable Raila Odinga, as publicly announced on 24th January and reaffirmed on 29th January 2008 at County Hall in Nairobi.*
>
> *The final goal of the National Dialogue and Reconciliation is to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.*

Recognizing under Agenda Item Three that, in large measure, the current crisis revolves around the issues of power and the functioning of state institutions, and also recognizing that its resolution may require adjustments to the current constitutional, legal and institutional frameworks, the parties negotiated and agreed on a solution *towards resolving the political crisis arising from the disputed presidential electoral results* as well as the ensuing violence in Kenya.

II. Regarding the disputed presidential electoral results, we examined the following options:

(a) Complete Re-count of the Presidential Elections

We agreed that any re-count, to be considered credible in the eyes of the Kenyan people, would need to be nation-wide, involving a ballot by ballot scrutiny of all of the more than 11,000,000 ballots cast on December 27th. We agreed that all ballots and electoral materials would have been made available at counting centres across the country before announcing a re-count. A re-count would need to be conducted under the full scrutiny of trained observers and party agents, who would have the right to scrutinize the counting and verify each and every ballot.

We agreed that a re-count would need to be overseen by a specially appointed independent body that enjoys the trust and broad support of all Kenyans.

We considered the timeline for a possible re-count. We agreed that the preparatory work required to make a re-count credible in the eyes of the Kenyan people and in keeping with international best practices could take up to three months.

We were concerned that a delay of several months could significantly increase existing tensions and delay resolution of the current crisis, and we recognize that the result of a re-count might not further Kenyan unity, and we therefore decided to review other options.

(b) Re-tally

We agreed that any re-tally, to be considered credible in the eyes of the Kenyan people, would need to be nation-wide, involving full scrutiny and re-tally of results sheets from all of the more than 27,500 polling station tally sheets and 210 constituency tally sheets. We agreed that all forms would have to be made available across the country before announcing a re-tally. A re-tally would need to be conducted under the full scrutiny of trained observers and party agents, who would have the right to scrutinize the conduct of the process and the validity of each tally sheet, and would need to be overseen by a specially appointed independent body that enjoys the trust and broad support of all Kenyans.

While we agreed that a re-tally could successfully identify problems or irregularities in the tally sheets, a re-tally could not however identify the correct result in those stations or constituencies where problems or irregularities were identified.

For these reasons stated above, we decided to review other options.

(c) Re-run of Presidential Elections

We were not in agreement on the need for a re-run of the Presidential elections.

We agreed however that, to safeguard the trust and confidence of the Kenyan people in the democratic process, the next election should take place only after electoral reforms, including but not limited to the reform of the Electoral Commission of Kenya, finalization of the work of the Independent Review Committee (see below), updating of the Voters' List, establishment and improvement of dispute resolution mechanisms and effecting measures to ensure enfranchisement of Internally Displaced Persons and refugees have been implemented.

We considered the timeline for these reforms, which would be essential to make the process credible in the eyes of the Kenyan people, and in line with international best practices, would be substantial and would take at least one year.

We recognized that Kenyans could not wait that long for a resolution of the crisis, and we therefore decided to review other options.

(d) Judicial Process

We agreed that a judicial process was no longer an option as the legal time limit had expired, and we therefore decided to review other options.

(e) Forensic Audit

We considered a forensic audit of the electoral process. We agreed that an audit would have the advantage of investigating and making findings regarding the conduct of the 2007 election. We agreed that an audit will not reduce tension and violence and will not result in a solution to the crisis, and that the legal basis for such an audit was unclear.

We further agreed that the functions of a forensic audit would be best undertaken by an Independent Review Committee (see below).

(f) Independent Review Committee

We agree to establish an Independent Review Committee that would be mandated to investigate all aspects of the 2007 Presidential Election and would make findings and recommendations to improve the electoral process.

The Committee will be a non-judicial body made up of Kenyan and non-Kenyan recognized electoral experts of the highest professional standing and personal integrity.

The Committee will submit its report within 3-6 months and it should be published within 14 days of submission. The Committee should start its work not later than 15 March 2008.

The findings of the Independent Review Committee must be factored into the comprehensive electoral reforms that are envisaged.

III. Regarding the need for a political settlement to resolve the current crisis, we agree on the following points:

We recognize that there is a serious crisis in the country, we agree a political settlement is necessary to promote national reconciliation and unity.

We also agree that such a political settlement must be one that reconciles and heals the nation and reflects the best interests of all Kenyans. A political settlement is necessary to manage a broad reform agenda and other mechanisms that will address the root causes of the crisis.

Such reforms and mechanisms will comprise, but are not limited to, the following:

- Comprehensive Constitutional reforms;
- Comprehensive electoral reform – of the electoral laws, the electoral commission and dispute resolution mechanisms;
- A truth, justice and reconciliation commission;
- Identification and prosecution of perpetrators of violence;
- Respect for human rights;
- Parliamentary reform;
- Police reform;
- Legal and Judicial reforms;
- Commitment to a shared national agenda in Parliament for these reforms;
- Other legislative, structural, political and economic reforms as needed.

We have only one outstanding issue under this Agenda Item, the governance structure, which is being actively discussed. Several options have emerged and the parties are going to consult their principals and leadership on these options and will revert to the Chair shortly.

We also agree that the issues in Agenda Item Four are fundamental to the root causes of the crisis, and are closely linked with Agenda Item Three. The implementation of the following reforms should commence urgently in concert with reforms of Agenda Item Three. However, these processes may continue beyond the timeline of the next election.

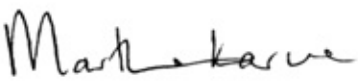
- Consolidating national cohesion and unity;
- Land reform;
- Tackling poverty and inequity, as well as combating regional development imbalances, particularly promoting equal access to opportunity;
- Tackling unemployment, particularly among the youth;
- Reform of the Public Service;
- Strengthening of anti-corruption laws/public accountability mechanisms;
- Reform of Public Finance and Revenue Management Systems and Institutions;
- Addressing issues of accountability and transparency.

We recognize that this settlement is not about sharing of political positions but about addressing the fundamental root causes of recurrent conflict, and we reaffirm our commitment to address the issues within Agenda Item Four expeditiously and comprehensively.

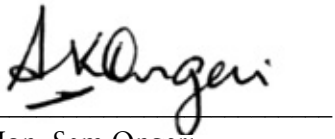
Milestones and benchmarks for the implementation of the reform agenda will have to be defined.

Signed on this day, 14 February, 2008

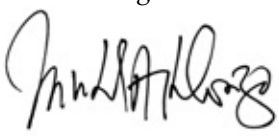
On behalf of Government/PNU:



Hon. Martha Karua



Hon. Sam Ongeri

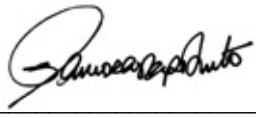


Hon. Mutula Kilonzo

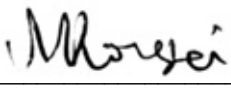
Hon. Moses Wetang'ula

On behalf of ODM:

Hon. Musalia Mudavadi



Hon. William Ruto



Hon. Sally Kosgei

Hon. James Orengo

Witnessed by:
For the Panel of Eminent African Personalities

H.E. Kofi A. Annan
Chairperson

Annex Eight

Acting Together for Kenya
Agreement on the Principles of Partnership of the Coalition Government

Preamble:

The crisis triggered by the 2007 disputed presidential elections has brought to the surface deep-seated and long-standing divisions within Kenyan society. If left unaddressed, these divisions threaten the very existence of Kenya as a unified country. The Kenyan people are now looking to their leaders to ensure that their country will not be lost.

Given the current situation, neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation process.

With this agreement, we are stepping forward together, as political leaders, to overcome the current crisis and to set the country on a new path. As partners in a coalition government, we commit ourselves to work together in good faith as true partners, through constant consultation and willingness to compromise.

This agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far-reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all.

To resolve the political crisis, and in the spirit of coalition and partnership, we have agreed to enact the National Accord and Reconciliation Act 2008, whose provisions have been agreed upon in their entirety by the parties hereto and a draft copy thereof is appended hereto.

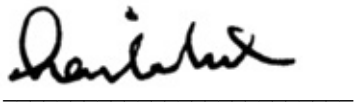
Its key points are:

- There will be a Prime Minister of the Government of Kenya, with authority to coordinate and supervise the execution of the functions and affairs of the Government of Kenya.
- The Prime Minister will be an elected member of the National Assembly and the parliamentary leader of the largest party in the National Assembly, or of a coalition, if the largest party does not command a majority.
- Each member of the coalition shall nominate one person from the National Assembly to be appointed a Deputy Prime Minister.
- The Cabinet will consist of the President, the Vice-President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers. The removal of any Minister of the coalition will be subject to consultation and concurrence in writing by the leaders.
- The Prime Minister and Deputy Prime Ministers can only be removed if the National Assembly passes a motion of no confidence with a majority vote.
- The composition of the coalition government will at all times take into account the principle of portfolio balance and will reflect their relative parliamentary strength.
- The coalition will be dissolved if the Tenth Parliament is dissolved; or if the parties agree in writing; or if one coalition partner withdraws from the coalition.
- The National Accord and Reconciliation Act shall be entrenched in the Constitution.

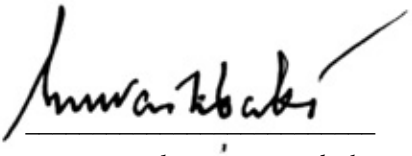
Having agreed on the critical issues above, we will now take this process to Parliament. It will be convened at the earliest moment to enact these agreements. This will be in the form of an Act of Parliament and the necessary amendment to the Constitution.

We believe by these steps we can together in the spirit of partnership bring peace and prosperity back to the people of Kenya who so richly deserve it.

Agreed this date 28 February 2008



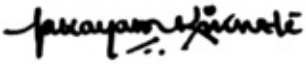
Hon. Raila Odinga
Orange Democratic Movement



H.E. President Mwai Kibaki
Government/Party of National Unity

Witnessed By:

H.E. Kofi A. Annan
Chairman of the Panel
of Eminent African Personalities



H.E. President Jakaya Kikwete
President of the United Republic
of Tanzania and Chairman of the
African Union

Annex Nine

The National Accord and Reconciliation Act 2008

Preamble:

There is a crisis in this country. The Parties have come together in recognition of this crisis, and agree that a political solution is required.

Given the disputed elections and the divisions in the Parliament and the country, neither side is able to govern without the other. There needs to be real power sharing to move the country forward.

A coalition must be a partnership with commitment on both sides to govern together and push through a reform agenda for the benefit of all Kenyans.

Description of the Act:

An Act of Parliament to provide for the settlement of the disputes arising from the presidential elections of 2007, formation of a Coalition Government and Establishment of the Offices of Prime Minister, Deputy Prime Ministers and Ministers of the Government of Kenya, their functions and various matters connected with and incidental to the foregoing.

1. This Act may be cited as the National Accord and Reconciliation Act 2008.

2. This Act shall come into force upon its publication in the Kenya Gazette which shall not be later than 14 days from the date of Assent.

3. (1) There shall be a Prime Minister of the Government of Kenya and two Deputy Prime Ministers who shall be appointed by the President in accordance with this section.

(2) The person to be appointed as Prime Minister shall be an elected member of the National Assembly who is the parliamentary leader of:

> (a) the political party that has the largest number of members in the National Assembly; or

(b) a coalition of political parties in the event that the leader of the political party that has the largest number of members of the National Assembly does not command the majority in the National Assembly.

(3) Each member of the coalition shall nominate one person from the elected members of the National Assembly to be appointed a Deputy Prime Minister.

4. (1) The Prime Minister:

(a) shall have authority to coordinate and supervise the execution of the functions and affairs of the Government of Kenya including those of Ministries;

(b) may assign any of the coordination responsibilities of his office to the Deputy Prime Ministers, as well as one of them to deputize for him;

(c) shall perform such other duties as may be assigned to him by the President or under any written law.

(2) In the formation of the coalition government, the persons to be appointed as Ministers and Assistant Ministers from the political parties that are partners in the coalition other than the President's party, shall be nominated by the parliamentary leader of the party in the coalition. Thereafter there shall be full consultation with the President on the appointment of all Ministers.

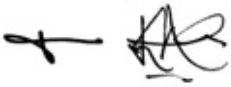
(3) The composition of the coalition government shall at all times reflect the relative parliamentary strengths of the respective parties and shall at all times take into account the principle of portfolio balance.

(4) The office of the Prime Minister and Deputy Prime Minister shall become vacant only if:

(a) the holder of the office dies, resigns or ceases to be a member of the National Assembly otherwise than by reason of the dissolution of Parliament; or

(b) the National Assembly passes a resolution which is supported by a majority of all the members of the National Assembly excluding the *ex-officio* members and of which not less than seven days' notice has been given declaring that the National Assembly has no confidence in the Prime Minister or Deputy Prime Minister, as the case may be; or

(c) the coalition is dissolved.



(5) The removal of any Minister nominated by a parliamentary party of the coalition shall be made only after prior consultation and concurrence in writing with the leader of that party.

5. The Cabinet shall consist of the President, the Vice-President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers.

6. The coalition shall stand dissolved if:

(a) the Tenth Parliament is dissolved; or

(b) the coalition parties agree in writing; or

(c) one coalition partner withdraws from the coalition by a resolution of the highest decision-making organ of that party in writing.

7. The Prime Minister and Deputy Prime Ministers shall be entitled to such salaries, allowances, benefits, privileges and emoluments as may be approved by Parliament from time to time.

8. This Act shall cease to apply upon dissolution of the Tenth Parliament, if the coalition is dissolved, or a new constitution is enacted, whichever is earlier.

Annex Ten

Kenya National Dialogue and Reconciliation Independent Review Committee Terms of Reference

The members of the Panel of Eminent African Personalities (The Panel), together with the Parties to the National Dialogue and Reconciliation;

Recalling the 14 February 2008 agreement by the Parties, witnessed by H.E. Kofi Annan for the Panel of Eminent African Personalities, to establish an *Independent Review Committee,* a non-judicial body, which would be mandated to investigate all aspects of the 2007 Presidential Election and make findings and recommendations to improve the electoral process;

Agreed that the Independent Review Committee (IREC) will be established under the Commissions of Inquiry Act, and will conduct its mandate in accordance with the following Terms of Reference:

Key Activities

The activities of the IREC shall be:

a. Analysis of the constitutional and legal framework to establish the basis for the conduct of the 2007 elections and to identify any weaknesses or inconsistencies in the electoral legislation;
b. Examination of the organizational structure, composition, and management systems of the Electoral Commission of Kenya (ECK) to assess its independence, capacity and functioning during the preparation and conduct of the 2007 elections;
c. Examination of the public participation in the 2007 electoral process and the electoral environment, including the roles and conduct of the political parties, media, civil society and observers;
d. Investigation of the organization and conduct of the 2007 electoral operations including: civic and voter education; training; voter registration; logistics and security; polling and counting; vote tabulation and results processing; and dispute resolution;

e. Investigation into the vote counting and tallying for the entire election with special attention to the presidential elections in order to assess the integrity of the results and make recommendations for improvements, adjustments or overhaul of the system;
f. Assess the functional efficiency of the ECK and its capacity to discharge its mandate;
g. Proposal of recommendations on electoral reform including constitutional, legislative, operational and institutional aspects, as well as on accountability mechanisms for ECK Commissioners and staff pertaining to electoral malpractices, in order to improve future electoral processes;
h. Presentation of its findings on the above activities;
i. Any other tasks that the IREC may deem necessary in fulfilling its mandate.

National Cooperation

All national authorities whose activities have a substantive relationship to the above activities are requested to extend maximum cooperation to the IREC. The IREC shall be permitted access to all electoral materials.

Composition

The IREC will comprise seven members, including a Chair, all of whom having the highest professional standing and personal integrity. The Chair will be an internationally recognized eminent jurist. The other members of the Committee will be experienced electoral experts:

- Four will be Kenyan, two of whom will be nominated by the Government/PNU and two nominated by the ODM.
- The remaining three members will be international experts, nominated by the Panel, following consultation with the Government/PNU and the ODM.

A Support Office will be established to provide substantive and administrative support to the Committee. It will be based in Nairobi and headed by an international electoral expert.

Methodology

In the performance of its functions, the Committee:

a. Shall hold public hearings in Nairobi and at such other places as it shall deem necessary for the proper discharge of its mandate;
b. May hold private hearings whenever it becomes necessary to instill confidence in the people appearing before the Committee or to allay their fears of adversity or reprisals;
c. May carry out or cause to be carried out such studies or research as may inform it on its mandate;
d. May receive written memoranda from individuals and groups on all issues relevant to its mandate;
e. Shall have access to all the electoral and related documents necessary for the effective discharge of its mandate;
f. Shall publish its rules of procedure in the Kenya Gazette; and
g. Subject to the foregoing, the Committee shall develop its own work plan and procedures.

Outputs and Timeline

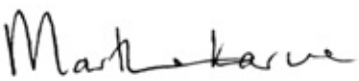
The IREC should start its work no later than 15 March, 2008. Within three to six months of the commencement of its work, the IREC will produce a final report of its findings and recommendations that will be submitted to the President, with a copy to the Panel. The report will subsequently be made public, in English and Swahili, within 14 days of submission.

Financing/Logistics

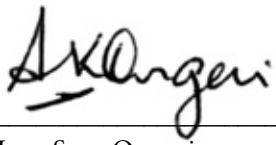
The Committee will be funded by the Kenyan Government and the Trust Fund for National Dialogue and Reconciliation, and with logistic support from the African Union and the United Nations.

Signed on this day, 4 March 2008:

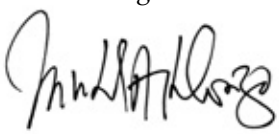
On behalf of Government/PNU:



Hon. Martha Karua



Hon. Sam Ongeri

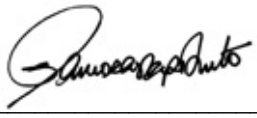


Hon. Mutula Kilonzo

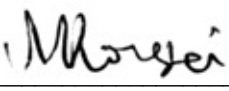
Hon. Moses Wetang'ula

On behalf of ODM:

Hon. Musalia Mudavadi



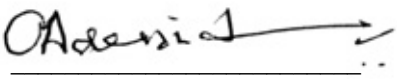
Hon. William Ruto



Hon. Sally Kosgei

Hon. James Orengo

Witnessed by:
For the Panel of Eminent African Personalities



H.E. Oluyemi Adeniji
Session Chair

Annex Eleven

Kenyan National Dialogue and Reconciliation Commission of Inquiry on Post-Election Violence

Background

Recalling that the Parties have previously agreed to:

Identify and agree on the modalities of implementation of immediate measures aimed at:

- Ensuring the impartial, effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty are brought to justice.

And have expressed a commitment to:

- Identification and prosecution of perpetrators of violence, including State security agents.
- Addressing issues of accountability and transparency.

The Parties to the National Dialogue and Reconciliation, together with the Panel of Eminent African Personalities (The Panel), agree to the establishment of a *Commission of Inquiry on Post-Election Violence* (Commission of Inquiry).

This Commission of Inquiry will be a non-judicial body mandated (i) to investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 Presidential Election, (ii) investigate the actions or omissions of State security agencies during the course of the violence, and make recommendation as necessary, and (iii) to recommend measures of a legal, political or administrative nature, as appropriate, including measures with regard to bringing to justice those persons responsible for criminal acts. The Commission of Inquiry aims to prevent any repetition of similar deeds and, in general, to eradicate impunity and promote national reconciliation in Kenya.

Key Activities

The activities of the Commission shall be:

- To investigate the facts and circumstances related to the violence following the 2007 Presidential election, between December 28, 2007 and February 28, 2008.
- To prepare and submit a final report containing its findings and recommendations for redress, any legal action that should be taken, and measures for future prevention.
- To make recommendations, as it deems appropriate, to the Truth, Justice, and Reconciliation Commission.

National Cooperation

Kenyan authorities, institutions, parties, and others shall fully cooperate with the Commission of Inquiry in the accomplishment of its mandate, in response to requests for information, security, assistance or access in pursuing investigations, including:

- Adoption by the Government of Kenya of any measures needed for the Commission and its personnel to carry out their functions throughout the national territory with full freedom, independence and security;
- Provision by the Government of Kenya and all Kenyan State institutions of all information in its possession which the Commission requests or is otherwise needed to carry out its mandate, with free access provided for the Commission and its staff to any archives related to its mandate;
- Freedom for the Commission to obtain any information it considers relevant and to use all sources of information which it considers useful and reliable;
- Freedom for the Commission to interview, in private, any persons it judges necessary;
- Freedom for the Commission to visit any establishment or place at any time; and
- Guarantee by the Government of Kenya of full respect for the integrity, security and freedom of witnesses, experts and any other persons who help in its work.

The Parties call upon States, relevant UN and AU bodies and, as appropriate, national and international humanitarian or other nongovernmental organizations to provide information to the Commission of Inquiry related to post-election violence, to make such information available as soon as possible and to provide appropriate assistance to the Commission.

Composition

The Commission of Inquiry will be composed of three impartial, experienced, and internationally respected jurists, or experts in addressing communal conflict or ethnic violence. Two of these shall be international, and one shall be Kenyan. They shall be selected by the Panel following consultation with the Government/PNU and the ODM, and appointed by the President.

A Support Office, based in Nairobi and with adequate expert staff, will be established to provide support to the members of the Commission.

Methodology

The Commission of Inquiry shall develop its own work plan and procedures. These will be guided in all respects by principles of fairness, impartiality, transparency, and good faith.

Outputs and Timeline

The Commission of Inquiry will start its work within 30 days following the appointment of its members. It will operate for three months, with an additional month if required. At the conclusion of its work it will submit a final report of its findings and recommendations to the President of Kenya, with a copy to the Panel. Main findings of the report will be made public within 14 days of submission, although certain aspects of the report or annexes may be kept confidential in order to protect the identity of witnesses or persons accused.

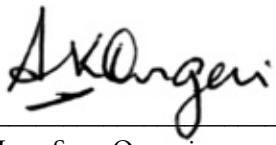
Financing/Logistics

The Commission of Inquiry will be funded by the Kenyan Government and the Trust Fund for National Dialogue and Reconciliation, including support from donor states or foundations. It will receive logistical support from the AU and the UN.

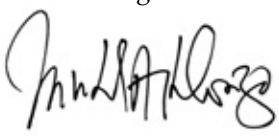
Signed on this day, 4 March 2008:

On behalf of Government/PNU:

Hon. Martha Karua



Hon. Sam Ongeri

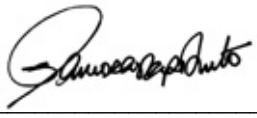


Hon. Mutula Kilonzo

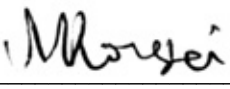
Hon. Moses Wetang'ula

On behalf of ODM:

Hon. Musalia Mudavadi



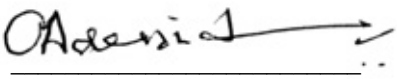
Hon. William Ruto



Hon. Sally Kosgei

Hon. James Orengo

Witnessed by:
For the Panel of Eminent African Personalities



H.E. Oluyemi Adeniji
Session Chair

Annex Twelve

Kenyan National Dialogue and Reconciliation Truth, Justice and Reconciliation Commission

Background

Recalling the 14 February 2008 agreement by the Parties for a Truth, Justice and Reconciliation Commission, and in a spirit of reconciliation and national healing;

The Parties to the Kenyan National Dialogue and Reconciliation agree to the following general parameters and principles for the establishment of such a commission:

General Parameters

A Truth, Justice, and Reconciliation Commission ("the Commission") will be created through an Act of Parliament, which will be adopted by the legislature within the next four weeks.

The Commission will inquire into human rights violations, including those committed by the state, groups, or individuals. This includes but is not limited to politically motivated violence, assassinations, community displacements, settlements, and evictions. The Commission will also inquire into major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, especially as these relate to conflict or violence. Other historical injustices shall also be investigated.

The Commission will inquire into such events which took place between December 12, 1963 and February 28, 2008. However, it will as necessary look at antecedents to this date in order to understand the nature, root causes, or context that led to such violations, violence, or crimes.

The Commission shall receive statements from victims, witnesses, communities, interest groups, persons directly or indirectly involved in events, or any other group or individual; undertake investigations and research; hold hearings; and engage in activities as it determines to advance national or community reconciliation. The Commission may offer confidentiality to persons upon request, in order to protect individual privacy or security, or for other reasons.

The Commission shall solely determine whether its hearings shall be held in public or in camera.

No blanket amnesty will be provided for past crimes. Individual amnesty may be recommended by the Commission in exchange for the full truth, provided that serious international crimes (crimes against humanity, war crimes, or genocide) are not amnestied, nor persons who bear the greatest responsibility for crimes covered by the Commission.

The Commission will complete its work and submit a final report within two years. The final report shall state its findings and recommendations, which will be submitted to the President and will be made public in fourteen days and tabled in Parliament.

Guiding Principles

The Commission will reflect the following principles and guidelines, taking into account international standards and best practices:

Independence: The Commission shall operate free from political or other influence. It shall determine its own specific working methodologies and work plan, including for investigation and reporting, and will set out its own budget and staff plan.

Fair and balanced inquiry: In all of its work, the Commission shall ensure that it seeks the truth without influence from other factors. In representations to the public through hearings, statements, or its final report, the Commission shall ensure that a fair representation of the truth is provided.

Appropriate powers: The Commission shall be given powers of investigation, including the right to call persons to speak with the Commission, and powers to make recommendations that shall be considered and implemented by the government or others. These recommendations may include measures to advance community or national reconciliation, institutional or other reforms, or whether any persons should be held to account for past acts.

Full cooperation: Government and other State offices shall provide information to the Commission on request, and provide access to archives or other sources of information. It is urged that other Kenyan and international individuals and organizations also provide full cooperation and information to the Commission on request.

Financial support: The Parties encourage strong financial support to the Commission. It is expected that the Government of Kenya will provide a significant portion of the Commission's budget. Other funding may be obtained by the Commission from donors, foundations, or other independent sources.

Selection and Composition

The Commission will consist of seven members, with gender balance taken into account. Three of the members shall be international. The members shall be persons of high moral integrity, well regarded by the Kenyan population, and shall include a range of skills, backgrounds, and professional expertise. As a whole, the Commission shall be perceived as impartial in its collectivity, and no member should be seen to represent a specific political group. At least two but no more than five of the seven commissioners should be lawyers.

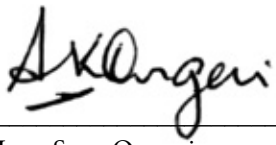
In keeping with international best practices, and to ensure broad public trust in and ownership of the process of seeking the truth, the national members of the Commission shall be chosen through a consultative process. The Commissioners shall be named no more than eight weeks after the passage of the Act that establishes the Commission.

The three international members shall be selected by the Panel of Eminent African Personalities, taking into account public input.

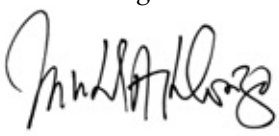
Signed on this day, 4 March 2008:

On behalf of Government/PNU:

Hon. Martha Karua



Hon. Sam Ongeri

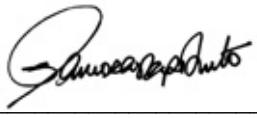


Hon. Mutula Kilonzo

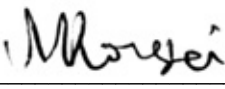
Hon. Moses Wetang'ula

On behalf of ODM:

Hon. Musalia Mudavadi



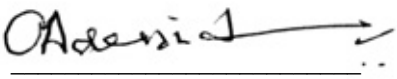
Hon. William Ruto



Hon. Sally Kosgei

Hon. James Orengo

Witnessed by:
For the Panel of Eminent African Personalities



H.E. Oluyemi Adeniji
Session Chair

Annex Thirteen

Kenya National Dialogue and Reconciliation
Longer-Term Issues and Solutions: Constitutional Review

Background

Recalling the 1 February 2008 agreement by the Parties to deal with long-term issues and solutions that may have constituted the underlying causes of the prevailing social tensions, instability and cycle of violence, and recalling the substantial discussions that have been held concerning constitutional reform over recent years, the Parties to the Kenyan National Dialogue and Reconciliation agree to the following general parameters and principles for the establishment of a constitutional review processes.

General principles and stages of the process

The parties accept that the Constitution belongs to the people of Kenya who must be consulted appropriately at all key stages of the process, including the formation of the process itself, the draft, the parliamentary process and any final enactment.

There will be five stages in the review of the Constitution and there will be consultation with stakeholders at each stage:

1. An inclusive process will be initiated and completed within 8 weeks to establish a statutory Constitutional Review including a timetable. It is envisaged that the review process will be completed within 12 months from the initiation in Parliament.

2. Parliament will enact a special 'constitutional referendum law' which will establish the powers and enactment processes for approval by the people in a referendum.

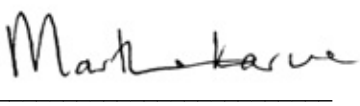
3. The statutory process will provide for the preparation of a comprehensive draft by stakeholders and with the assistance of expert advisers.

4. Parliament will consider and approve the resulting proposals for a new constitution.

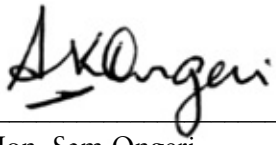
5. The new Constitution will be put to the people for their consideration and enactment in a referendum.

Signed on this day, 4 March 2008:

On behalf of Government/PNU:



Hon. Martha Karua



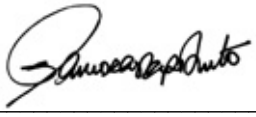
Hon. Sam Ongeri

Hon. Mutula Kilonzo

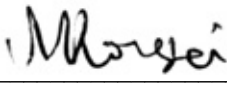
Hon. Moses Wetang'ula

On behalf of ODM:

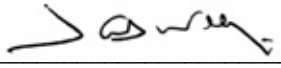
Hon. Musalia Mudavadi



Hon. William Ruto

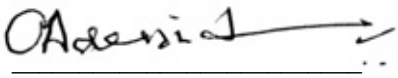


Hon. Sally Kosgei



Hon. James Orengo

Witnessed by:
For the Panel of Eminent African Personalities



H.E. Oluyemi Adeniji
Session Chair

Annex Fourteen

Kenya National Dialogue and Reconciliation
Mediated by H.E. Kofi Annan, Chair of the Panel of Eminent African Personalities
Statement of Principles on Long-term Issues and Solutions

I. Preamble

Reaffirming that the final goal of the National Dialogue and Reconciliation is to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.

Recalling that, in the Annotated Agenda and Timetable for the National Dialogue and Reconciliation signed on 1 February 2008, we recognized that poverty, the inequitable distribution of resources and perceptions of historical injustices and exclusion on the part of segments of Kenyan society constituted the underlying causes of the prevailing social tensions, instability and cycle of violence. We also agreed that discussions under Agenda Item Four would be conducted to examine and propose solutions for long-standing issues.

Further recalling that, in the 14 February 2008 Agreement on Agenda Item Three *(How to resolve the political crisis),* we reaffirmed our commitment to address the issues within Agenda Item Four expeditiously and comprehensively. We also noted that milestones and benchmarks for the implementation of the reform agenda would have to be defined.

Recalling also that the Agreement on the Principles of Partnership of the Coalition Government, signed by His Excellency President Mwai Kibaki and the Right Honorable Prime Minister Raila Odinga on 28 February 2008, recognized that the crisis triggered by the 2007 disputed presidential elections had brought to the surface deep-seated and longstanding divisions within Kenyan society, which, if left unaddressed, threatened the very existence of Kenya as a unified country. The 28 February 2008 agreement provided the means to implement a coherent and far-reaching reform agenda, address the fundamental root causes of recurrent conflict, and create a better, more secure, more prosperous Kenya for all.

Recognizing the need for an agreed framework for moving forward in addressing the long-term issues.

II. We re-affirm our commitment to addressing the long-term issues. In this regard, we agree on the following principles.

A. Constitutional, institutional and legal reform

We reaffirm our commitment to complete the comprehensive constitutional review process within twelve months in accordance with the roadmap agreed to on 4 March 2008.

We agree that the institutional reforms should include, *inter alia*, the following components: Police reform, parliamentary reform, judicial reform, executive reform and civil service reform.

We commit to chart a way forward for these institutional reforms, which should take into account studies and recommendations already made on each issue, and analyze why the recommendations have not been implemented. We commit to consult Kenyans at all stages of the process.

B. Land reform

We recognize that the issue of land has been a source of economic, social, political and environmental problems in Kenya for many years. We agree that land reform is a fundamental need in Kenya and that the issue must be addressed comprehensively and with the seriousness it deserves. Towards this end, we agree to fully support efforts to establish the factors responsible for conflicts over land and to formulate and implement actionable short, medium and long-term recommendations on the issue.

C. Poverty, inequity and regional imbalances

We recognize that to ensure sustainable peace in the country, poverty eradication and equitable development are essential. We further recognize that issue of inequality, manifested along income, regional and gender lines, remain key challenges for Kenya.

In harmonizing our manifestoes, we shall ensure poverty alleviation and equitable development are top priorities for the Coalition Government. We shall utilize the National Accord implementation mechanisms and we commit ourselves to a consultative process and identify short-term, medium-term and long-term strategies to fight poverty.

D. Unemployment, particularly among the youth

We agree that unemployment in Kenya, particularly among the youth, is a serious concern that must urgently be addressed. We acknowledge that the lack of effective opportunities that integrate the majority of Kenya's youth into mainstream economic activities contributed to the destructive role played by the youth during the post-election violence.

Ensuring that all citizens have the opportunity to be gainfully employed is not only crucial for the nation's economic growth, prosperity and social stability, but is also vital for enabling each individual to develop their full potential and to live in dignity.

We therefore commit ourselves to advocate for the development of a comprehensive strategy on combating youth unemployment, and to explore all possible means of supporting the creation of an appropriate policy environment for the expansion of opportunities for youth in the formal and informal sectors of the economy.

E. Consolidation of national cohesion and unity

We recognize that consolidating national cohesion and unity is a cross-cutting task that will require the efforts of all Parties, all Ministries, civil society and all Kenyans. Apart from the creation of the National Ethnic and Race Relations Commission, we propose the introduction of legislation to fight discrimination and ensure equal opportunities for all.

We agree that the relevant Ministries will work with the Office of the President and the Office of the Prime Minister and other relevant bodies to oversee unity-building efforts and initiatives. They would also help coordinate joint peace and reconciliation initiatives countrywide and liaise with local peace building efforts.

F. Transparency, accountability, impunity

We agree that transparency and accountability in the affairs of the Government, together with the fight against impunity, are essential if the country is to make progress in addressing all the challenges mentioned above. Indeed, transparency, accountability and the fight against impunity and corruption must underpin the entire reform agenda. In addressing these issues, it will be particularly important to ensure that the recommendations of the Truth, Justice, and Reconciliation Commission are implemented.

III. Implementation arrangements:

The Coalition Government shall lead the process of the implementation of the reform agenda, working with Parliament whenever appropriate. In addition, the Kenyan people, who should be the beneficiaries of the agenda, must be regularly consulted and their views sought.

The implementation process will only succeed if all Kenyans work together to build trust in the leadership and institutions of governance. For this reason, we are committed to help ensure the wide and meaningful participation of all Kenyans in the process.

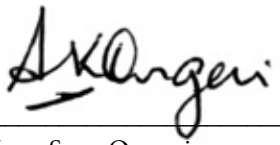
We shall, when necessary, seek international community expertise and support and request the Panel to continue to provide, on a need basis, support in the implementation of these and previous agreements, including assistance to the various Committees and Commissions provided therein.

Accordingly, we adopt the implementation framework on long-term issues outlined in the Annex to this Statement of Principles, as a working roadmap for the resolution of the six foregoing issues, which were underlying causes of the post-election national crisis.

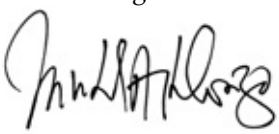
Signed on this day, 23rd May 2008:

On behalf of Government/PNU:

Hon. Martha Karua



Hon. Sam Ongeri



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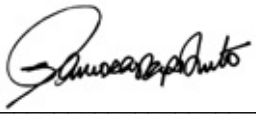
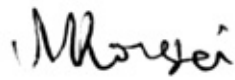
On behalf of ODM:

Hon. Musalia Mudavadi



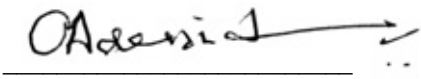
Hon. William Ruto



Hon. Sally Kosgei

Hon. James Orengo

Witnessed by:
For the Panel of Eminent African Personalities



H.E. Oluyemi Adeniji
Session Chair

Kenya National Dialogue and Reconciliation Agenda Item 4: Long-Term Issues and Solutions Matrix of Implementation Agenda

Issue	Actions	Timeframe	Focal Point
Constitutional reform	As described in Agreement signed on 4 March 2008: - Consultation with stakeholders. - Parliament to enact Constitutional Review Statute, including a timetable. - Parliament to enact referendum law. - Draft Constitution prepared in consultative process, with expert assistance. - Parliament to approve. - People to enact through a referendum.	Consultations launched and review statute enacted by end of August. Constitutional reform to be completed in 12 months from the date of enactment of statute.	Ministry of Justice, National Cohesion and Constitutional Affairs
Institutional reform: **The Judiciary**	a) Constitutional review to anchor judicial reform measures including: i) financial independence, ii) transparent and merit- based appointment, discipline and removal of judges, iii) strong commitment to human rights and gender equity, iv) reconstitution of the Judicial Service Commission to include other stakeholders and enhance independence and autonomy of the Commission. b) Enact Judicial Service Commission Act, with provisions for: - peer review mechanisms, - Performance Contracting. c) Stream line the functioning of legal and judicial institutions by adopting a sector-wide approach to increase recruitment, training, planning, management and implementation of programmes and activities in the justice sector.	Constitution to be adopted in 12 months. Judicial Services Bill passed to implement the constitutional provisions within 3 months.	Ministry of Justice, National Cohesion and Constitutional Affairs

Issue	Actions	Timeframe	Focal Point
Institutional reform: **The Police**	a) Constitutional review to establish an independent Police Commission. b) Review and define the role of the Administration Police. c) Review laws and issues related to security and policing (including the independent complaints commission, citizen oversight of police services, enhanced information disclosures, human resource management and capacity building) to make them consistent with modern democratic norms. d) Finalization and rollout of the National Security Policy to enable relevant sectors to develop their specific sectoral policies. e) Recruit and train more police officers to raise the police-to-population ratio to the UN standard.	Constitution to be adopted in 12 months. Review process to be completed within 6 months. Recruitment and training to be completed by 2012.	Ministry of Justice, National Cohesion and Constitutional Affairs Office of the President Ministry of Internal Security

Issue	Actions	Timeframe	Focal Point
Institutional reform: **The Civil Service**	a) Parliament to pass bill incorporating civil service reform measures from past proposed draft constitutions. b) Continue with on-going administrative and financial reforms. c) Results-Based Management (RBM) and Performance Contracting to cover all persons paid from public funds. d) Review the Anti- Corruption and Economic Crimes Act 2003 and the Public Officer Ethics Act 2003. e) Review the legal framework for declaration of incomes, assets and liabilities with a view to establishing an efficient and devolved administrative, compliance and analysis institutional framework. f) Appropriate constitutional and legal reforms will be undertaken to facilitate parliamentary vetting of senior public appointments. g) New legislation on whistle-blower protection, freedom of information, and operationalization of the Witness Protection Act 2006. h) Review recruitment legislation to institutionalize national character in the public service. i) Review Standing Orders to ensure parliamentary oversight over membership of committees is based on competency and integrity.	Bill to be passed by Parliament within 12 months of the coming into force of the new Constitution. RBM and Performance Contracting to be entrenched in the new Constitution. The various legislations to be adopted by Parliament within 6-8 months of promulgation of the new Constitution.	Ministry of State for Public Service/ Public Service Commission Ministry of Justice, National Cohesion and Constitutional Affairs

Issue	Actions	Timeframe	Focal Point
Institutional reform: **The Parliament**	a) Comprehensive review of Parliamentary Standing Orders and procedures to enrich quality and output of Parliamentary debates and strengthen multi-party democracy. b) Parliament's Research Centre to be strengthened. c) Live coverage and electronic voting to be introduced. d) Enhance oversight role of Parliament over the national budget. e) Review Standing Orders to create a Monitoring and Implementation Committee. f) Introduce stricter and timelier deliberations on reports by institutions such as the Kenya Anti-Corruption Commission, Kenya National Audit Office, State Law Office, and Kenya National Commission on Human Rights. g) Strengthen organs of Parliament such as Parliamentary Accounts Committee and Parliamentary Investments Committee to promote transparency and accountability in the utilization of public resources. h) Improve transparency of MPs by creating a register of interests and opening up parliamentary committee work to the public.	Review to be completed within 6 months.	Parliament

Issue	Actions	Timeframe	Focal Point
Land reform	a) Constitutional review to address fundamental issues of land tenure and land use. b) The development and implementation of land policies should take into account the linkages between land use, environmental conservation, forestry and water resources. c) Finalization of the draft National Land Use policy and enactment of attendant legislations. d) Land laws to be harmonized into one statute to reduce multiple allocations of title deeds. e) Establishment of a transparent, decentralized, affordable and efficient GIS-based Land Information Management System and a GIS-based Land Registry at the Ministry of Lands including all local authorities. f) Land Ownership Document Replacement for owners affected by post-election violence. g) Development of a National Land Use Master Plan, taking into account environmental considerations. h) Land Reform Transformation Unit in the Ministry of Lands to facilitate the implementation of the land reform programme as outlined in the National Land Use policy. i) Strengthen local-level mechanisms for sustainable land rights administration and management. j) Finalize the Land Dispute Tribunal Act.	Land reform process to be factored in the constitutional review process within 12 months.	Ministry of Lands

Issue	Actions	Timeframe	Focal Point
Poverty, inequality and regional imbalances	a) Ensure equity and balance are attained in development across all regions including in job creation, poverty reduction, improved income distribution and gender equity. b) Increase community empowerment through devolved public funds for both social and income programmes, and develop local capacity to manage devolved funds. c) Implementation of policies and programmes that minimize the differences in income opportunities and access to social services across Kenya, with special attention to the most disadvantaged communities in the Arid and Semi-Arid Districts, urban informal settlements and pockets of poverty in high potential areas. d) Improve wealth creating opportunities for disadvantaged groups and regions through increased infrastructure spending in roads, water, sewerage, communications, electricity targeting poor communities and regions. e) Increase availability of affordable and accessible credit, savings programmes and appropriate technologies to create an enabling environment for poor communities to take part in wealth creation. f) Develop an Affirmative Action policy and enhance the Women 's Enterprise Fund. g) Improve health infrastructure in underserved areas of the country through construction or rehabilitation of community health centres.	Implementation of measures to be reviewed within 2-3 years.	Ministry of Planning, National Development and Vision 2030

Issue	Actions	Timeframe	Focal Point
Unemployment, particularly among the youth	a) Generate an average of 740,000 new jobs each year from 2008-2012. b) Youth polytechnics to be revitalized and expanded in all districts to facilitate the training of young people in technical, vocational and entrepreneurial skills to equip them with relevant skills to participate fully in productive activities. c) Youth Empowerment Centres to be rehabilitated or established in all constituencies. d) Upgrade existing National Youth Service institutions and establish three new ones. e) Development and enactment of a National Youth Council Bill. f) Establish Youth Enterprise and Employment Programme to promote SMEs and self- employment among the youth. g) Youth Enterprise Development Fund to be increased and mechanisms put in place for easier access to credit and collateral. h) Some 5,000 youth to be recruited to National Youth Service to be employed in labour intensive road projects, tree planting programmes and other productive activities.	Review progress of implementation of the various measures within 12 months.	Ministries of Roads, Public Works, Youth, Special Services and Gender

Issue	Actions	Timeframe	Focal Point
Consolidating National Cohesion and Unity	a) Finalize and support enactment of the Ethnic and Race Relations Bill by Parliament. b) Parliament and the Executive to initiate and sustain advocacy role on ethnic and racial harmony. c) Establish and operationalize a policy and institutional framework for a Peace-Building and Conflict Resolution Programme (PBCR) and early warning mechanisms on social conflict, including a PBCR monitoring and evaluation system and a restructured Secretariat, and enactment of the Alternative Dispute Resolution Bill. d) Extend District Peace Committee framework to entire country and link it to District Security Committees. e) Finalize the Hate Speech Bill and review the Media Act to control incitement attempts. f) Undertake civic education on ethnic relations. g) Inculcate a civic culture, which tolerates diversity and encourages inter-ethnic cooperation, through the school curriculum. h) Operationalization of the Truth, Justice and Reconciliation Commission.	Ethnic Relations Bill to be passed by Parliament within 3 months. Review progress in implementation of the various measures within 12 months.	Ministry of Justice, National Cohesion and Constitutional Affairs Office of the President Ministries of Education and Information

Issue	Actions	Timeframe	Focal Point
Transparency, accountability, impunity	a) Strengthen the policy, legal and institutional framework for increased public transparency and accountability, anti-corruption, ethics and integrity, including through the development of a national anti-corruption policy, enactment of necessary legislation, and systems and capacity enhancements to strengthen the National Audit Office. b) Undertake programmes to support improved prosecution and adjudication of corruption and economic crimes, and improved oversight and consideration of anti-corruption and audit reports by Parliament. c) Enhancing capacity and performance in the Investigation and Asset Tracing Programme, the Civil Litigation and Asset Recovery Programme, the National Anti-Corruption Awareness Campaign and District Anti-Corruption Civilian Oversight Committees. d) Continuous monitoring of the Public Officer Ethics Act. e) Revitalize Public Financial Management including the management of devolved funds such as the CDF, LGTF and Road Maintenance Levy. f) Expand capacity of District Anti-Corruption Civilian Oversight Committees to monitor management of devolved funds and stigmatize corruption. g) Review the effectiveness of the Public Procurement Authority. h) Undertake structural reforms focusing on prevention, investigation and recovery of corruptly acquired assets. i) Review the effectiveness of the Privatisation Commission. j) Full operationalization and capacity-building of the Public Complaints Standing Committee (the Ombudsman). k) Finalize and operationalize the GJLOS policy framework and establish a comprehensive GJLOS policy review and update process. l) Sustain the APRM process by ensuring assessment of government (executive, legislative and judiciary) performance and accountability.	Review progress in implementation of various measures within 12 months.	Ministry of Justice, National Cohesion and Constitutional Affairs Ministry of Finance Attorney-General's Office KACC Judiciary

30 July, 2008

Back from the Brink was written by the Liaison Office that supported the African Union Panel of Eminent African Personalities from its arrival in January 2008 to the end of 2013.

The authors draw on daily observations of the post-election crisis, primary records of the mediation, and subsequent efforts to implement the reform plan to which the KNDR (Kenya National Dialogue and Reconciliation) gave rise.

The perspectives of the Panel members, and individuals closely associated with the process, bring to life this extraordinary story of intervention and political transformation.

Front cover photo: Gallo Images/Getty Images/Bloomberg
Back cover photo left: Gallo Images/AFP
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"If we had brokered only a deal between leaders, our intervention would have been a plaster on a wound that would weep again tomorrow. We had to look, in the truest sense of the word, for a resolution. A peaceful, stable and prosperous Kenya was one that could be delivered only through responsible, accountable leadership, a culture of respect for human rights, institutions of good governance, fairer distribution of wealth and power, and most importantly, the sanctity of the rule of law. Kenya's future relies on this. Whether it will achieve these things remains to be seen but it has pointed itself in a direction that all of Africa must take."

Kofi Annan from his memoir *Interventions*

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