



Situation Report

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Kenya – A Year after the Crisis: The Quest for Electoral Reform and Transitional Justice

Executive Summary

- The violence following the proclamation of the results of the December 2007 presidential election in Kenya was one of the most violent and destructive periods in the country's history. The Kenyan Commission of Inquiry into Post-Election Violence (CIPEV – the Waki Commission) was mandated to investigate the facts and circumstances surrounding the violence. Together with another inquiry body – the Independent Review of Elections Commission (IREC), the Waki Commission has highlighted the key issues that enabled a flawed election and generated the post-electoral in Kenya.
- The issue currently dominating the political agenda in Kenya is the implementation of the recommendations of both IREC (Kriegler Commission) and Waki Commissions. Specifically, the debate relates to issues around the conduct of the elections and administration of justice to the alleged organisers and perpetrators of violence. In effect, what is at stake is whether Kenya will adopt a process of transitional justice that will enable it to reform its electoral system, address the atrocities that were perpetuated and lay the foundation for the consolidation of peace in the country.
- On 11 December 2008 the Kenyan Parliament passed the International Crimes Bill that seeks to effectively domesticate the Statute of the International Criminal Court. The passage of this Bill now empowers the Kenyan state to investigate and prosecute international crimes committed locally or abroad in specified circumstances. The passage of this Bill was a key recommendation of the Waki Commission. The next step is the establishment of a Special Tribunal of Kenya to begin the process of adjudicating on the cases relating to the organisers and perpetrators of the post-electoral violence in Kenya. However, this process is fraught with difficulties because some political and business leaders are wary of being prosecuted by the Tribunal for the role they played in fomenting violence after the 2007 poll.
- The implementation of the Kriegler and Waki Commission recommendations presents a conundrum for politicians and society in Kenya. Failure to make an effort to implement these recommendations would constitute inaction in the face of the violent acts that followed the elections. This could lay the foundations for future violence and instability in Kenya, whereas the resolute implementation of Waki Commission recommendations would potentially require the bringing to justice of political leaders some of whom are serving in the Grand Coalition Government of Kenya. For the Kenyan Grand Coalition Government, this conundrum is captured by the fact that it will be a case of 'political-damnation-if-you-do', and 'political-damnation-if-you-do-not' implement the recommendations of the Kriegler and Waki Commissions.

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The results of the presidential elections held in Kenya on 27 December 2007 were heavily contested by the two main political parties, the ruling Party of National Unity (PNU) and the opposition Orange Democratic Movement (ODM). The election results were announced on 30 December and the incumbent President Mwai Kibaki was hastily sworn in as the President of the country amid protests from the ODM leader, Raila Odinga. The Chairman of the Electoral Commission of Kenya (ECK), Samuel Kivuitu, confessed after the fact that he was not certain who had won the presidential election. There were therefore grounds for ODM to contest the results of elections but PNU also continued claiming that it had won the election legitimately. The tension created by this dispute further fuelled the violent protests that afflicted the country in the early months of 2008. Specifically, the political disagreement over the outcome of the poll led to the outbreak of sporadic and widespread violence across Kenya which affected communities in the low-income areas of the capital city of Nairobi, as well as in key urban and rural centres, including Mombasa, Kisumu, Eldoret and parts of the Rift Valley, Nyanza, Western and Coastal Provinces. Over a six to seven week-period, an estimated 1,200 people were killed in the violent clashes that ensued and approximately 350,000 people were internally displaced as a direct result of the violence.

A National Accord and Reconciliation Agreement was brokered by the Kofi Annan-led Panel of Eminent Personalities under the auspices of the African Union (AU) on 28 February 2008. The Agreement stipulated the need to convene commissions of inquiry to assess the electoral process and also to investigate the post-electoral violence. These were duly convened as the Independent Review of Elections Commission (IREC), headed by the retired South African Justice Johann Kriegler, and the Commission of Inquiry into Post-Election Violence, under the chairmanship of the Kenyan Justice Philip Waki.

This Situation Report assesses the key issues raised by the Kriegler and Waki Commissions. In specific, it seeks to evaluate the challenges of implementing the recommendations pertaining to electoral reform and transitional justice. There is a political divide as far as the implementation of these recommendations is concerned. Some politicians view the implementation of the Waki Report as vital to the consolidation of peace through justice as well as crucial to laying the foundation for healing and reconciliation in Kenya. Other politicians have calculated that undermining the implementation of the Waki Report will work to their advantage and marginalise their opponents. In effect, Kenya is confronted with a 'Waki Conundrum' as far as instituting a transitional justice process is concerned. Yet, it can be argued that the future stability of the country hangs on the implementation of the recommendations of these commissions.

In order to effectively analyse the post-electoral crisis in Kenya, it is necessary to situate the events that were witnessed in December 2007 and early 2008 within a historical context. It would be limiting to analyse the post-electoral violence in 2007 as an aberration that spontaneously emerged. It would be more accurate to consider what happened as the logical consequence of the continuous political ethnic manipulation that had been taking place prior to the introduction of multi-party politics in 1992. Both the 1992 and 1997 elections were beset by violent ethnic clashes. The root causes of those clashes can be attributed to the twin problems of economic impoverishment and ethnic chauvinism. The tragedy of Kenya's situation is that the seeds of dissension that manifested after the elections in the form of spiralling violence were sown in the very fabric of the post-colonial nation-state, when the country inherited its current constitution, system of government and its electoral system from the British colonial administration.¹

Kenya has been plagued by the scourge of ethnic manipulation throughout its colonial and post-colonial history. Essentially, the problem in Kenya stems from the persistent and increasing 'ethnisation' of the political sphere. Linked to this process of ethnic manipulation is the instrumentalisation of political power to gain, secure and entrench economic advantage. Kenyan politics through the reign of its three post-colonial presidents – Jomo Kenyatta, Daniel arap Moi and Mwai Kibaki – has degenerated into a realm of ethnic contestation. Progressively, over

the 45 years of the country's independence an increasingly powerful presidency rendered the quest for political power a zero-sum game. Ethnic power blocks were ruthlessly manipulated by Kenyatta, Moi and Kibaki to maintain a stranglehold on government to the advantage of the groups favoured by the president of the time. This was to the detriment of the ethnic groups that were not able to obtain the patronage of the ruling president and party.

It is not surprising that neither Kenyatta, nor Moi or Kibaki saw the long-term political expediency or appreciated the necessity to change and transform the way in which political power is centralised in what is in effect an imperial and exceptionally powerful presidency. A Westminster electoral and governance model was adopted and perpetuated an acceptably high degree of competition and a winner-takes-all approach of interaction which entrenched the politics of exclusion. The Westminster model serves the interests of larger ethnic groups or coalitions of ethnic groups. Smaller ethnic groups therefore become consumed with their need for 'protection from majoritarian tyranny and the apportionment of political power to ensure minority participation'.² The Westminster model has the effect of consigning smaller ethnic groups in Kenya to the status of being a 'permanent minority'.³

As a consequence, the stakes in terms of controlling the presidency in Kenya are inappropriately and perversely high. Since independence in 1963, the three post-colonial presidents of Kenya have come from only two ethnic groups, the Kikuyu and Kalenjin. The first, Kenyatta, and the third, Kibaki, were from the Kikuyu ethnic group, while the second, Moi was from the Kalenjin ethnic group. It therefore goes without saying that the remaining 40 ethnic groups, out of Kenya's total of 42 ethnic groups, have a just basis upon which to feel indignant and impatient to take over the mantle of presidential power particularly given that all three presidents have tended to favour only members of their ethnic groups in allocations of public funds and appointments.

The fundamental problem with the system of government and elections in Kenya is that even though a minority of ethnic groups succeed in capturing state power, it will not alter the essential sense of exclusion that other groups will undoubtedly feel. In his book *The Wretched of the Earth* published in 1961, the Pan-Africanist thinker Frantz Fanon warned the post-colonial African states that were created held within their design all the seeds of a divisive and ultimately violent future for African people and societies. Fanon was observing the process of decolonisation as it unfolded in the early 1960s and noted that the political parties, which had taken over control from the colonial powers, were in fact strongholds for ethnic group power.

Fanon observed that the typical political party 'which of its own will proclaim that it is a national party, and which claims to speak in the name of the totality of the people, secretly, sometimes even openly organizes an *authentic ethnical dictatorship*'.⁴ He argued that after such political parties captured state power they would seek to maintain and extend their power and dominion over other groups within states, or enter into alliances with a few select ethnic groups to consolidate their position. Fanon goes on to note that 'this tribalizing of the central authority, it is certain, encourages regionalist ideas and separatism. All the decentralizing tendencies spring up again and triumph, *and the nation falls to pieces, broken in bits*'.⁵ Fanon was prophetic in his analysis written in 1961. What he describes, and more, has come to pass in various regions of Africa, notably in Somalia, the Democratic Republic of Congo (DRC), Côte d'Ivoire, the Sudan and more recently in Kenya.

The fact that Fanon wrote this 47 years ago even before Kenya was independent is a testimony to his prophetic understanding of the challenge of governing the post-colonial African nation-state without altering how power is configured. Historically, the process of decolonisation left behind an arbitrary logic of statehood which has sown the seeds of the current instability and 'ungovernability' of several African states. Most of the existing boundaries were drawn by colonial administrations

without regard for, or knowledge of, pre-existing indigenous or cultural social political groupings. This arbitrary division of community created, and continues to sustain, the potential for tension and it also contributes toward the cycles of violence which plague a number of African countries.

It is evident that through the 'ethnicisation' of the Kenyan state, political elites were able to appropriate state power to advance their private accumulation.⁶ Asymmetrical economic development is a contributing factor to the exacerbation of ethnic chauvinism, particularly when ethnic coalitions utilise and instrumentalise the apparatus and machinery of the state to advance capital accumulation. Today, Kenyans are experiencing a country that Fanon predicted and described 47 years ago. The degree of ethnic animosity has been fuelled by years of misrule, economic mismanagement, and corruption. Effectively, the politics of polarisation in Kenya today have become manifest through the tragic confluence of this legacy, the deep seated sense of being aggrieved politically among some ethnic groups, a restless and anxious populace, and the inability of the ECK to fulfil its mandate effectively.

Flawed electoral processes have raised questions about the role of elites in promoting ethnic mobilisation in their drive for state power and the problems that face electoral politics across the continent. Stephen Ndegwa suggests that 'ethnic identity in Africa is a relatively recent phenomenon whose salience is largely a product of colonial rule and post-colonial dynamics in which elites have continued to reify ethnic identity for political mobilisation'.⁷ In effect, ethnicity is socially constructed and it is highly susceptible to manipulation in the formation of imagined or invented communities by ethnic entrepreneurs.⁸

In early January 2008, the then Chairman of the African Union Assembly of Heads of State and Government, President John Kuffor of Ghana, flew to Kenya to assess the situation and see what could be done to bridge the divide between the parties. The first sign of hope that a way forward could be found out of the Kenyan crisis emerged when the PNU and the ODM agreed to a dialogue and mediation process convened by the African Union through the form of an Eminent Panel led by Kofi Annan, the former UN Secretary-General, and supported by Benjamin Mkapa, former President of Tanzania, and Graca Machel, a former leader within the Mozambique freedom movement. Faced with the violence that was threatening to engulf the country, there was clearly a need to transcend the political stand-off and the unhealthy brinksmanship that persisted between the opposition and government. Several hardliners within both the PNU and the ODM were against the mediation process because they believed that their side had legitimately won the polls. However, in practical terms, there was no way to transcend this situation, unless the parties involved in this crisis were prepared to resort to force. An escalation of tension would have undermined the immediate prospects for restoring peace and tranquillity in Kenya.

On 28 February 2008, a peace agreement was signed between the PNU and ODM establishing a grand coalition between the two parties. The Annan-led mediation process culminated in the signing of an 'Agreement on the Principles of Partnership of the Coalition Government' and a 'National Accord and Reconciliation Agreement' as part of a wider set of agreements. Specifically, the Agreement on the Coalition Government noted that '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'.⁹ The Agreement committed the parties to enacting the National Accord and Reconciliation Act 2008, which made provisions for 'a Prime Minister of the Government of Kenya, with authority to coordinate and supervise the execution of the functions and affairs of the Government'.¹⁰ The Tenth Kenyan Parliament subsequently passed the National Accord and Reconciliation Bill 2008, which entrenched the Agreement into the Kenyan Constitution. The Bill became law and President Kibaki and Prime Minister Odinga are now leading a Grand Coalition Government of Kenya. In addition, the Agreement created two Deputy Prime Ministerial posts, as part of a 42-member cabinet that sought to establish a balance of Ministers from the coalition parties.

The Agreement stipulated that ‘the composition of the coalition Government shall at all times reflect the parliamentary strength of the respective parties and shall at all times take into account the principle of portfolio balance’.¹¹ In effect, ‘Post-Accord Kenya’ will have to establish a qualitatively very different government, in terms of the distribution of political power, from those that preceded the electoral crisis of 2007 and 2008.

The Annan mediation effort also led to the parties to agree to establish a seven-member Independent Review Commission into the Kenyan elections, to be headed by the retired South African Judge Johann Kriegler.¹² Specifically, the Kriegler Commission was mandated to examine all aspects of the controversial 2007 presidential poll through consultations with officials of the ECK, election observers, politicians, and citizens. The mandate of the Kriegler Commission included reviewing ‘the organisation and conduct of the 2007 elections, extending from civic and voter education and registration through polling, logistics, security, vote-counting and tabulation to results-processing and dispute resolution’.¹³ In addition, the Commission was tasked with assessing ‘the structure and composition of the ECK in order to assess its independence, capacity and functioning’ and to ‘recommend electoral and other reforms to improve future electoral processes’.¹⁴ The ensuing recommendations would therefore play a vital role in re-establishing the confidence of the Kenyan people in the electoral system. The Kriegler Commission Report’s contribution to transitional justice will be measured by the extent to which the implementation of its recommendations will enable the establishment of an electoral legal framework that will avert the kind of crisis witnessed in 2007, in the next scheduled elections of 2012.

The Report concluded that the Kenyan voter register ‘is materially defective’ in a way that effectively impairs ‘the integrity of the election results’.¹⁵ Crucially, it also noted that the ‘numerous implausibly high turnout figures reported in the strongholds of both main political parties evidence extensive perversion of polling, probably ballot-stuffing, organised impersonation of absent voters, vote buying and/or bribery’.¹⁶ A disturbing feature of the controversial elections was the fact ‘that in many instances (in the strongholds of both main political parties), effectively only the majority party was represented during polling and counting’.¹⁷ This damning indictment of both the PNU and ODM voting strongholds illustrates that both the incumbent government and the opposition coalition committed voting irregularities. The Kriegler Commission Report further noted that ‘a likely facilitator and catalyst for ballot-stuffing ... was the indulgence granted by the ECK shortly before the elections for “black books” (in which the names of voters had been entered at the time of registration) to be used in certain circumstances and for double registrants to be allowed to vote, contrary to previous regulation’.¹⁸ The Report, in effect, accuses the current Electoral Commission of Kenya of incompetence, laxity and a dereliction of duty in the conduct of the presidential poll. This, in effect, makes its continuing existence untenable. Indeed, the Report also noted that ‘the manner of appointment of commissioners and the structure, composition and management system of the ECK are materially defective, resulting in such a serious loss of independence, capacity and functional efficiency as to warrant replacing or at least radically transforming it’.¹⁹

In terms of the integrity of the results, the Kriegler Report notes that ‘although there is room for honest disagreement as to whether there was rigging of the presidential results announced by the ECK, the answer is irrelevant, as (i) the process was undetectably perverted at the polling stage, and (ii) the recorded and reported results are so inaccurate as to render any reasonably accurate, reliable and convincing conclusion impossible’.²⁰ Ultimately, the Kriegler Commission concluded that ‘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’.²¹ The Report therefore recommends reconstituting the electoral legal framework to ensure fair and transparent political competition. Specifically, it recommends ‘that all laws relating to the operational management of elections should be consolidated under one statute’. In addition,

it urges 'that a separate law be enacted to facilitate the establishment of a special Electoral Dispute Resolution Court to handle appeal matters from the initial states of dispute resolution by the ECK'.²² It further notes that the 'culture of electoral lawlessness' which has become entrenched in Kenya over many years 'cannot be reversed without a concerted, non-partisan commitment to electoral integrity on the part of political leaders, which commitment will need to be sustained and monitored over time'.²³

The National Accord and Reconciliation Agreement articulated the mandate of the Commission of Inquiry into Post-Election Violence (CIPEV) to 'investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in the handling of it, and to make recommendations concerning these and other matters'.²⁴ CIPEV, also known as the Waki Commission, began its work on 23 May 2008 and investigated 'the facts and circumstances related to the acts of violence following the 2007 presidential elections' as well as 'the actions or omission of state security agencies during the course of the violence'.²⁵ However, the most important responsibility that the Waki Commission was tasked was to make 'recommendations concerning measures to be taken to prevent, control, and eradicate similar violence in the future; bring to justice those responsible for criminal acts; eradicate impunity and promote national reconciliation'.²⁶ Therefore, the Waki Commission recommendations will play a vital role in determining the institutionalisation of transitional justice in Kenya.

The Waki Report noted that following the election-related clashes of 1992 and 1997 'the main perpetrators of systemic violence have never been prosecuted'.²⁷ The Waki Report further noted that 'the violence surrounding elections has been ethnically directed, this has increased distrust among different groups and vastly eroded any sense of national identity. Hence, ethnicity has now taken on a dangerous and negative connotation'.²⁸ The Report further notes that 'currently Kenya is at a critical juncture. Violence is endemic, out of control, and is used routinely to resolve political difference'.²⁹ This is in effect an early warning of the potential escalation of politically motivated violence in the future. Specifically, the Waki Report notes that 'because of the ethnic nature of the post-election violence, ethnic fears and hatred have been elevated in importance and could turn violent again even more easily than has happened in the past'. The Report warns that 'the individuals and institutions who have benefited in the short-term from the chaos and violence need to give up the methods they have used or Kenya could become a failed state'.³⁰

The Waki Report also notes that state security agencies 'failed institutionally to anticipate, prepare for, and contain the violence'. In some instances, 'individual members of the state security agencies were also guilty of acts of violence, and gross violations of the human rights of citizens'.³¹ The Report also raises doubt about the integrity of the judicial system to remedy the violence and the electoral irregularities that plagued the country after the elections. In particular, the Waki Report states that the judiciary is not sufficiently understood by the public at large and has therefore 'acquired the notoriety of losing the confidence and trust of those it must serve because of the perception that it is not independent as an institution'.³² The Report takes this as the reason why, for example, the leadership and members of the ODM refused to submit to the jurisdiction of the courts to resolve the dispute that arose after the general elections.³³ In terms of its operational efficiency, the Waki Report notes that the judiciary 'has also been accused of delays in the administration of justice and for non-transparency in its functions'.³⁴ To remedy this fact the Waki Report rightly recommends that 'nothing short of comprehensive constitutional reforms will restore the desired confidence and trust in the judiciary'.

Kenyan politicians and the society have been discussing the controversial issue of whether the perpetrators of violence following the presidential poll on 27 December 2007 should be prosecuted in accordance with the law or granted amnesty. The Waki Report defines amnesty as 'the act of an authority (eg. Parliament or government) by which the State restores those who may have been guilty of an offence against it to the position of innocent persons'. Specifically,

the Report states that amnesty 'includes more than a pardon, in as much as it obliterates all legal remembrance of the offence'.³⁵ The application of amnesty raises issues of justice. The Kenyan Minister of Justice, Martha Karua, has argued that perpetrators have to be prosecuted in order to uphold the rule of law. Karua is also a key actor within the PNU, which was the only ruling party before the elections and is now a member of the Grand Coalition Government. In contrast this, a key advocate of the call for amnesty is the Kenyan Minister of Agriculture, Mr. William Ruto. Ruto is a member of the Orange Democratic Movement (ODM) camp, which is led by the Prime Minister Odinga and also a partner in the Coalition.

A significant number of individuals have been arrested by the authorities in connection with the post-election violence. For example, in January 2009, several hundreds of youths were still being held in police custody in the Rift Valley Province. They were being held on suspicion of participating in the violent acts that followed the elections. The Kenyan police in the Province have revealed the number of those who have been arrested and charged. The police have also indicated the number of those who are awaiting trial and those who have been convicted.

The amnesty debate is complicated because it has been difficult to ascertain whether some of the violence was orchestrated by political elites in order to pursue and achieve their self-interests. The notion that the violence was entirely spontaneous has been challenged, with evidence emerging that some of the militia were systematically armed and manipulated by as yet un-identified actors and agents. This situation is delicate and precarious because Kenya's stability depends on ensuring that the populace continues to engage in national healing and reconciliation and that the politicians maintain their support for the political compromise that is at the heart of the Grand Coalition Government.

The issue of amnesty has been proposed as a means to ensure that the forgiveness of all perpetrators is applicable to those in the political ranks who may have instigated, as well as citizens who may have indulged in perpetuating violence. The idea currently being proposed is to ensure that the amnesty is as inclusive as possible. However, in order for amnesty to work, impunity must not be tolerated for grave crimes committed against innocent civilians. In other words, the perpetrators or instigators have to confess their planning or execution role in order to receive amnesty and a timeframe has to be placed on those who come forward to reveal their roles in perpetuating the violence. There is of course the danger that this issue of amnesty might become a political weapon for the opposing elements within the Grand Coalition to seek their advantage whilst undermining their opponents.³⁶

To confront impunity, the Waki Report calls for the establishment of a Special Tribunal of Kenya to try suspected sponsors and organisers of the post-electoral violence. This would serve as an in-country legal framework for the adjudication and administration of justice for the alleged suspects. However, there has been prevarication among a number of politicians in implementing this recommendation. Some analysts have argued that there is an attempt by spoilers within and outside of the Grand Coalition Government to undermine the implementation of some recommendations of the Report, and in particular those pertaining to the Special Tribunal to suit their own agendas.

Astutely, the Waki Commission ensured that the recommendations in its report were accompanied by sunset clauses that would initiate consequences for inaction or intransigence. Specifically, the Report states that if 'an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted', then a list containing names of, and relevant information on, those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Prosecutor of the International Criminal Court (ICC). The Report further states that Prosecutor of the ICC shall be requested to analyse the seriousness of the information received

The Challenges of Implementing the Waki Commission Recommendations

with a view to proceeding with an investigation and prosecuting such suspected persons.³⁷ By establishing these conditionalities the Waki Commission effectively indicated that it was prepared to internationalise Kenya's transitional justice process, if the domestic politicians failed to institute a viable process. This sunset clause has had the effect of keeping the process in check.

The Waki Report has generated a conundrum for Kenya's politicians. Specifically, the Waki Report insists that 'it is imperative to guard against further encouragement of the culture of impunity by granting blanket amnesty to all and sundry in the post-election mayhem'.³⁸ However, a number of senior political figures have been implicated in the organising and instigating violence. Therefore, it will be politically difficult to implement any sanctions against such people. Astutely, the undisclosed list of names of individuals suspected of war crimes is held by Kofi Annan, in his capacity as the head of international mediation effort to resolve the crisis in Kenya. If it becomes necessary, the report recommends that this list be forwarded to the ICC.

This has created a conundrum for Kenya's politicians and security agencies because it is not clear who is implicated in this undisclosed list. If the list were to be released, it is possible that a number of these politicians could be identified as allegedly having played a role in instigating the post-electoral violence. As a consequence, the political camps are divided between those who support the implementation of the Waki Report and those who are inclined to ignore it and wish that the issues it raises will fade from the conscious of the populace. Hypocritically, some politicians are calling for the implementation of the recommendations of the Report because they believe that their opponents will be sanctioned. This suggests that the calls for its implementation are not necessarily driven purely by a concern to see an effective transitional justice process in Kenya.

The Kenya Truth, Justice and Reconciliation Commission

The National Accord and Reconciliation Agreement also proposed the establishment of the Kenya Truth, Justice and Reconciliation Commission (TJRC). The Waki Commission was also mandated to make such suggestions to the Truth, Justice, and Reconciliation Commission as it deemed necessary. The Kenyan Parliament duly passed the TJRC Bill, which may offer a way out of the political stand-off caused by the issue of amnesty because it addresses the issue of the need for perpetrators to confess their atrocities, and the need to request for amnesty before it can be granted. Therefore, there are specific conditions under which amnesty can be sought and granted. The political stand-off created by the amnesty issue needs to be addressed by the Grand Coalition Government. In particular, the more moderate and pragmatic politicians will need to manage and negotiate the adversarial positions that have been adopted by Karua and Ruto. What will be of interest is the number of politicians who will take advantage of this Truth, Justice and Reconciliation mechanism to come to terms with their own complicity in plunging Kenya into violence after the elections.

Is Kenya's Transitional Justice in Peril?

The Kenyan Parliament was due to pass a Bill establishing a Special Tribunal on 17 December 2008. However, at the time that this Situation Report was going to press, the Parliament had not succeeded in achieving this for some of the reasons stated above. However, continuous failure to establish the Tribunal will, as indicated above, initiate another process which could find Kenyan political and business elites indicted by the ICC, in the Hague. In the absence of an effective process of transitional justice and the complete transformation of the constitutional framework to ensure that there is adequate ethnic accommodation, the future sustainability of the Kenyan state will remain in doubt.³⁹ The issue of how to govern multi-ethnic societies is not unique to Kenya or Africa; it is in effect a global problem.⁴⁰ It may be the case that post-colonial African governments should as a matter of principle only operate on the basis of governments of national unity so as to prevent the politics of ethnic exclusion which inexorably leads to the fragmentation of the nation-state.⁴¹

The Kenyan state has a responsibility to protect its citizens based on a number of international declarations that it has signed up to as well as its membership of the

African Union (AU) whose Constitutive Act as well as its Protocol on Democracy, Elections and Governance calls for an explicit adherence to the rule of law and upholding of human rights.

The lost confidence in the institutions of governance in Kenya as a result of this political crisis must be restored. On 16 December 2008, the Kenyan Parliament passed the Constitution of Kenya Amendment Bill. In order to lay the foundations for a stable system of government, the constitutional review process will need to consider the 'ethnicisation' of the Kenyan state, the effects of authoritarian rule in fostering economic impoverishment, and design a framework of governance that addresses previous logic of designing electoral power on the basis of ethnic groupings. The principle that should guide the re-constitution of the Kenyan state should focus on ensuring ethnic accommodation by ensuring minority participation and mitigating against majoritarian domination. In order to curtail the inevitable drive of the executive to consolidate and centralise power within itself to the detriment of other institutions, the legislative and judiciary need to be constitutionally independent and sufficiently endowed with the power to implement a system of checks and balances to constrain the potential excesses of the executive.

At the time when politicians were locked in an impasse immediately following the December elections and in early January 2008, it was Civil Society Organisations (CSOs) that took the initial lead to encourage mediation and peacebuilding. In the aftermath of the violence, CSOs played a significant role in implementing relief operations for internally displaced people. They were also involved in making submissions to the Kriegler and Waki Commissions. In particular, Kenyan civil society organisations were able to provide both Commissions with information, contacts and expertise related to the electoral crisis and post-election violence. They also provided the commissions background material and reports, and gave access to their records of witnesses they had interviewed. With reference to the Waki Commission, CSOs also provided 'contacts with local community leaders, individual victims, and other key contacts in communities where they had established trust and credibility'.⁴²

Ultimately, any hope of resolving the situation in Kenya will require the active participation of civil society and the media. Civil society will also have an important role to play in the implementation of the peace agreements that emerged from the Kofi Annan-led mediation process in the short-term. They will therefore need to continue monitoring the implementation of both the Kriegler and Waki Commission recommendations. In the medium to long-term, they will need to undertake country-wide reconciliation and civic-education initiatives to ensure that a commitment to transitional justice is sustained.

Kenya has been a beacon of stability in the East Africa region. However, the recent post-electoral crisis has undermined this record of tranquillity. The political situation in Kenya will now be susceptible to internal pressures which will undermine its ability to play a constructive role in the region in the short- to medium-term. In political terms, the country's leadership in the Sudanese and Somali peace processes remains vital for the future stability of these countries. In economic terms, the inability for the goods to travel across Kenya in December 2007 and January 2008 led to significant shortages in Uganda and Burundi. Kenya's internal stability is therefore intricately linked to the political and economic development of the region. Internationally, Kenya also continues to serve as a hub and a base from which to undertake humanitarian intervention in the Horn and Great Lakes regions.

The economic consequences of the post-electoral crisis have been substantial. Kenyan citizens have experienced a net increase in the prices of basic commodities such as bread, milk, flour and vegetables.⁴³ Nationally, the loss of revenue from regional and international trade as well as tourism and exports of agricultural produce was estimated at close to US\$30 million a day or approximately US\$2 billion over the two-month period from the end of December 2007 to February 2008. When the losses to neighbouring countries are factored in, the cost of the violence would be even higher.⁴⁴

The Waki Report makes a dire warning that left unchecked the forces behind the 2007 post-electoral violence in Kenya could lead to the country becoming 'a failed state'. This is not hyperbole because similar trends have been witnessed elsewhere in Africa, notably in Côte d'Ivoire, the DRC and Somalia. Whether the institutions of the Kenyan state are robust enough to manage the necessary transition to deeper democratic governance and ethnic inclusiveness remains to be seen. The Grand Coalition Government is composed of a motley crew of some well-intentioned as well as some unscrupulous politicians. Some of these politicians have cast themselves as self-anointed ethnic chieftains and are not intent on resting their laurels until they have captured the presidency. One way to reduce the intensity of this drive to ultimate power is to use the constitutional review process that is stipulated in the National Accord and Reconciliation Act to systematically dismantle the powers of Kenya's imperial presidency. A highly devolved system of government must be created so that majoritarian tyranny will not undermine the political and socio-economic development of the smaller ethnic groups in Kenya.

The violent confrontation that this report dealt with echoed the communal violence that took place following the re-institution of multiparty elections in 1992 and the presidential polls of 1997.⁴⁵ In an important sense, the 2007 violent confrontations are an additional warning sign that there is a need to re-open the debate on how to establish democratic institutions that can manage ethnic cleavages and moderate the instrumentalisation of ethnicity as a tool for achieving political power.⁴⁶ Kenya now needs to develop institutions that are appropriate to governing a multiethnic democracy.⁴⁷ In other words, the Kenyan system of governance has to be reconstituted in order to balance the competing ethnic interests that have threatened and that remain a threat to the future peace and stability of the country. This will require the country's politicians to transcend their narrow partisan interests to work for national unity.

These spoilers and detractors may seek to take advantage of the ethnic animosity that has been activated by the recent crisis to advance their political self-interests. They may also seek to frustrate the successful implementation of the Agreement and the effective functioning of the Grand Coalition Government. However, the overwhelming sentiment among the majority of the Kenyan populace is to move beyond the post-electoral crisis and stabilise the country. The regional and international communities are also keen to see the consolidation of peace and security in Kenya. This was underlined by the intervention led by the African Union, and supported by the United Nations in the aftermath of the elections. There is a need for regional and international actors to continue to play a vigilant role in terms of making sure that the spoilers and detractors do not succeed in undermining the fragile peace in Kenya. Specifically, the African Union and the United Nations will need to closely monitor the actions of the coalition government and the implementation of other aspects of the National Accord and Reconciliation Agreement.

The implementation of the Kriegler Commission recommendations should be hastened to ensure that the ineffective Electoral Commission of Kenya is replaced by an independent institution that will be above reproach in adjudicating forthcoming elections in the country. The establishment of an independent court to arbitrate future electoral disputes is absolutely vital to restore the confidence of the Kenyan citizenry in the necessity of participating in polls.

Undoubtedly, the implementation of the Waki Commission recommendations will be pivotal to the future stability and cohesion of Kenya through its institution of a process of transitional justice. The fact that there are spoilers seeking an opportunity to undermine their implementation illustrates the short-sightedness of some of Kenya's political and business elite. If the post-electoral violence illustrated anything, it is that the country is in a transitional period and has not yet consolidated a post-ethnic identity. Following the crisis, the fault-lines of the national body politic are still very much defined along ethnic lines. Several politicians are already positioning themselves to capture the presidency in the

2012 elections. Unless concrete measures are taken, the nefarious forces that manifested themselves will most likely re-surface as this period approaches to haunt the Kenyan society. Whether Kenya witnesses a repeat of the 2007 post-electoral violence will depend on the commitment to transitional justice within the political, business elite and the wider society.

The immediate operationalisation of the Special Tribunal of Kenya to confront impunity, and the Truth, Justice and Reconciliation Commission to ensure an appropriate amnesty process is therefore vital and will determine national survival. Intransigence and obfuscation among Kenya's politicians will only lay the foundations for state fragmentation and disintegration in the future.

Civil society will also have its vital role to play in continuing with humanitarian relief, promoting civic education and reconciliation across the country. These efforts will not succeed without the mobilisation of resources to facilitate the revival of the livelihoods of the internally displaced people. In addition, the implementation of the Agreement will require urgent financial support particularly the promotion of country-wide dialogue and reconciliation as well as the strengthening of governance programmes, Parliament and the genuine integration of the Office of Prime Minister into the governing structures of the country.

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