

Testimony by David Mozersky, Horn of Africa Project Director, International Crisis Group to the Senate Committee on Foreign Relations' Subcommittee on African Affairs on "The Immediate and Underlying causes and Consequences of Flawed Democracy in Kenya."

I want to express once again the appreciation of the International Crisis Group for the attention of the Committee to the crisis in Kenya, and particularly the efforts Senator Feingold and Senator Sununu for submitting their recent legislation on Kenya's electoral crisis and for organising this hearing.

The announcement on 30 December that the incumbent President Mwai Kibaki was the winner of Kenya's presidential elections has plunged the country into an unprecedented political, security and humanitarian crisis. Within four days of the proclamation of the contested results by the Electoral Commission of Kenya (ECK), protest riots, repression by security forces and revenge killings by supporters of both camps had caused over 600 deaths and reportedly created over 250,000 internally displaced persons (IDPs). By 5 January 2008, the United Nations estimated that up to 500,000 Kenyans were in need of food. The country's economy came to a halt, and regional countries reliant on the Mombasa highway as their main supply route suffered shortages of fuel and other essential commodities. Beyond the loss of life, the loss for the Kenyan economy was evaluated by Minister for Finance Amos Kimunya on 8 January as Ksh 60 billion, close to one billion US dollars.

The violence that erupted in Nairobi and Mombasa slums and in the Rift Valley illustrate the depth of the wounds created by Daniel arap Moi's divide and rule policies during the nineties and the urgent need to address the redistribution of land and other sources of wealth in the country. There is no possible return to the business as usual and *laissez-faire* attitude favoured by Mwai Kibaki. Fundamental institutional and economic reforms are needed, a legitimately elected government should remain the goal and an internationally monitored transitional justice and disarmament process will be necessary to heal the wounds of two decades of inter-ethnic violence and prevent its resumption.

The international community reacted swiftly to contain the crisis and pressure Kenyan leaders to end the violence. After initially endorsing the results, the State Department backtracked and questioned their credibility. UK Prime Minister Gordon Brown called the rival parties to exercise restraint, end the violence and supported mediation efforts led by AU Chairman and Ghanaian President John Kufuor. Assistant-secretary of State for Africa Jendayi Frazer visited the country to support the international efforts towards a settlement. UN Secretary General Ban Ki-moon quickly condemned the violence and subsequently visited Nairobi. A first round of discreet shuttle diplomacy produced an agreement of principles on the process necessary to obtain a political settlement. However, hardliners in the Kibaki camp convinced the President to disown the document.

The international pressure and other appeals for calm from national leaders and civil society organisations led to a rapid halt to the violence which lasted for several weeks, as tens of thousands of Kenyans moved to unsupported and unsecured sites. By 22 January however, a spiral of revenge killings resumed in the Rift Valley bringing the death toll to over 1000. All Rift valley communities have been affected. The Kikuyu settlers of the Nandi Hills were initially targeted by Kalenjin youths supporting Raila Odinga's Orange Democratic Movement (ODM), but the crimes against humanity committed by these youths against women and children in and around the town of Eldoret have since been replicated by the mainly Kikuyu Mungiki sect in the towns of Nakuru and Naivasha, where Luo and Kalenjin women and children have also been

burnt alive. Kisii, Luo and Luhya settlers of the Rift Valley have also become the victims of Kalenjin youths, in a general environment of total collapse of State authority

The situation in the country remains extremely tense and volatile as the protracted political crisis endures. Before leaving Kenya, AU chairman Kufuor announced that former UN Secretary General and Nobel laureate Kofi Annan, former Tanzanian president Benjamin Mkapa and former Mozambican first lady Graca Machel would continue the negotiation. Soon after their arrival on 22 January, the Annan team convened a meeting between Raila Odinga and Mwai Kibaki. The two leaders committed to a negotiated settlement to the crisis, and to the official beginning of the negotiations at a later date based on a four point agenda: 1. Ending the violence; 2. Ending the humanitarian crisis and guaranteeing the resettlement of IDPs; 3. Finding a settlement to the political crisis; 4. Finding solutions to the unequal distribution of land and wealth in the country.

The Raila Odinga led ODM, which won 99 of the 210 parliamentary seats against 48 for Kibaki's Party for National unity (PNU), put on hold its calls for mass action and for the boycott of Kibaki's establishment businesses and products. Emboldened by overwhelming national and foreign electoral observer's conclusions that the presidential polls were rigged and the declaration of Mwai Kibaki's victory was illegitimate, ODM has maintained that Kibaki should step down and its leader Raila Odinga be declared the winner, that a forensic audit of the polls results and the organisation of a rerun should take place within a short period of time.

Mwai Kibaki's PNU coalition, which includes the former ruling party KANU, and now ODM-Kenya, third-place presidential contender Kalonzo Musyoka's group, benefits from the *fait accompli* and the powers granted to the presidency by the Kenya constitution and is determined to gain time. Its leaders have called on the opposition to petition the courts and seek redress through the legal process. It accused ODM of having planned and premeditated the violence, and maintains that the situation is under control and there is no power vacuum in the country.

Although calm has partially returned and violence is now limited to skirmishes in some areas of the Rift Valley, reports of militia mobilisations and arming on both political sides have been confirmed. Kalenjin, Luo and Luhya gangs are being armed in the Rift valley, Nyanza and Western Kenya, while the Mungiki sect has renegotiated its support from the Kibaki establishment, and received finances and weaponry to execute revenge killings against opposition supporters. Both parties are gearing up for a possible violent showdown, which would spread much further than the outburst of violence witnessed in the immediate post-electoral period.

This violence has shattered Kenya's reputation as a haven of stability. It has undercut Kenya's vital role as a regional entrepot, a haven for refugees, and the site where other countries come to resolve their internal disputes. The grisly images of Kisumu city centre burnt to the ground, Nairobi slums on fire and a church compound with as many as 50 people inside torched by vigilantes in southern Eldoret suddenly have illustrated the fragility of a national fabric in which the disparity between the rich and the poor remains one of the biggest in the world. Kenya will need more than a political settlement to restore its people's trust in their government and rebuild the foundations of a stable democracy.

## **I. THE RIGGING OF THE PRESIDENTIAL ELECTION**

All national and international observers, including the Kenya Democratic Elections Forum (KEDOF), EU, the Commonwealth secretariat, the East African community, and IRI, reported in

their respective statements that while the vote and count of the ballots at constituency level largely took place in an orderly and satisfactory manner, the tallying and compiling of the results proved highly questionable and shed doubts on the validity ECK chair Samuel Kivuitu's announcement on 30 December.<sup>1</sup> The best and most detailed illustration of the rigging that occurred was provided in the testimony of four national observers who participated during the night of 29 to 30 December, with ODM, ODM-K, PNU party agents and five ECK commissioners in a review of the contested results within the premises of the Kenyatta International Conference Center (KICC) tallying centre in Nairobi.<sup>2</sup>

The delays in the announcement of presidential results were the first indicators reported by the parties, national and international observers that irregularities were most probably going on. The presidential ballots are traditionally counted and tallied first in polling stations and polling centers. Their late announcement, notably after the parliamentary results had already been announced, raised suspicions that the figures were being tampered with. The ECK chairman claimed on Saturday, 29 December that he had lost contact with some of his returning officers who had switched off their phones. He could not explain the delays in providing the returns as some of the expected results were from nearby constituencies, in Nairobi and Central province.<sup>3</sup> Under pressure from ODM agents pointing out that some results being announced by the ECK's tallying centre at KICC differed from those announced at constituency level, the ECK chair agreed to have an audit of the results already announced with two political party agents for each presidential candidate and five national observers.<sup>4</sup>

Despite the blatant irregularities and anomalies in the reporting of the presidential results brought to his attention on 29 and 30 December, ECK Chair Samuel Kivuitu announced the results of the contested constituencies on the morning of 30 December, disregarding the audit results performed during the night. He sanctioned as valid results which appeared to have been tampered with.<sup>5</sup> Sammy Kirui, an ECK contractor participating in one of the tallying teams located within the ECK national centre, came out to the media with ODM senior leaders soon after the results announcement and explained how in his team the results were indeed tallied illegally, unverified, unsupported by the required statutory documentation (form 16, 16A and 17) signed or stamped by

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<sup>1</sup> Kenya Elections Domestic Observation Forum (KEDOF), "Preliminary statement and verdict of the 2007 Kenya's general elections", 31 December 2007; European Union Elections Observation Mission (EUEOM), "Preliminary statement: Doubts about the credibility of the presidential results hamper Kenya's democratic progress", 1 January 2008; Commonwealth Secretariat, "Kenya General Election 27 December 2007: The Report of the Commonwealth Observer Group", January 2008; East African Community Observer Mission, "Report on the Kenya general elections December 2007", January 2008; International Republican Institute, "Statement on Post-Election Violence in Kenya", 2 January 2008

<sup>2</sup> Kenyans for Peace with Truth and Justice (KPTJ) coalition, "Countdown to deception: 30 hours that destroyed Kenya", 17 January 2008.

<sup>3</sup> Crisis Group witnessed the statement.

<sup>4</sup> During the audit, party agents agreed that the results of 44 constituencies already announced were untrustworthy, as they were not supported by the adequate legal documentation. 19 additional results were yet to be announced. The ECK file for Maragwa in Central Province for instance, was presented to a national election monitor with 16A forms bearing a consistent turnout for the presidential election of 115 per cent for almost all polling stations. ECK officials later decided to manually change these results and make them credible, by reducing the figures to present ultimately a 85.27 per cent turn-out. Cf. KPTJ, « Countdown to deception », op. cit.

<sup>5</sup> See for all details of the recorded irregularities by constituency and the attitude of the ECK during that night, the detailed log of events recorded by National observers in KPTJ, "Countdown to deception" op. cit.

returning officers and confirmed by party agents, and then transmitted to the computer room for compilation by his team leader.<sup>6</sup>

Two instances of rigging appear to have taken place during the tallying process: one at constituency level and one at central ECK level. The first happened throughout the country, with the posting of returning officers by ECK commissioners in their respective provincial strongholds, who tampered with the results of the vote count and sent Nairobi inflated returns for their preferred candidate and deflated results for his opponent. The discrepancies between results and turn-outs of the parliamentary and presidential elections, the reported expulsion of party agents from tallying rooms and the extremely high turn-outs (over 95 per cent) recorded in some constituencies are the signs of such rigging, both in ODM and PNU strongholds.

The second instance of rigging was within the ECK premises in Nairobi. The results were arbitrarily changed to give Mwai Kibaki a 230,000 vote victory. The disappearance of returning officers in PNU strongholds in particular, and the lack of either stamps or proper signatures of party agents on the statutory forms presented in the last two days of the count are damning indications of rigging. From 29 December onwards, senior ECK officials heading tallying teams and running the computer rooms changed results coming from the constituency tallying centers or endorsed results which had already been changed, and gave instructions to subordinate staff to accept and compile them without the supporting documentation.<sup>7</sup> They succeeded in having ECK commissioners and its chair announce questionable results which ultimately reversed Raila Odinga's lead in the vote tallying and gave the victory to Mwai Kibaki.

As reported by national monitors, it is almost impossible to determine with certainty what would have been a faithful ballot tallying. Rigging occurred both at constituency and central level and only a recount of every ballot might be able to tell what the exact election results are, provided the ballots may not have been tampered with themselves. However, the discrepancy of 325,131 votes between the total presidential vote tally and parliamentary returns,<sup>8</sup> just slightly more than the margin by which Kibaki defeated Raila, and the fact that results announced by the ECK at KICC do not tally with those reported by the media and/or observed by KEDOF agents at the constituency tallying centers casts a significant doubt over Mwai Kibaki's victory.<sup>9</sup>

The day after the announcement, ECK officials publicly conceded as much. Four commissioners issued a press statement on 3 December recognizing that "some of the information received from some of our returning officers now cast doubts on the veracity of the figures".<sup>10</sup> The chairman himself added on 1 January: "concerns about these situations [i.e. turn-out discrepancies and alleged irregularities] cannot be dismissed off hand. They call for investigation".<sup>11</sup> The ECK officials, however, maintained that on 29 and 30 December, despite the reported irregularities and inconsistencies, they had no other choice than announcing the results as required by law, and that a settlement of the dispute would have to be found in front of a court of Law. Alternatively, the Chairman added "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

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<sup>6</sup> Crisis Group interview with Sammy Kirui, Nairobi, January 2008. Under threat, Sammy Kirui has been forced to flee the country.

<sup>7</sup> Crisis Group has seen copies of ECK statutory forms manually corrected to increase Mwai Kibaki's returns.

<sup>8</sup> It was of 50,192 votes in 2002.

<sup>9</sup> KPTJ, « Countdown to deception », op. cit.

<sup>10</sup> "Press statement" by Amb. Jack Tumwa, D.A. Ndambiri, S.K. arap Ngeny, J. Matagaro, 31 December.

<sup>11</sup> "Press statement by S.M. Kivuitu, Chariman, Electoral Commission of Kenya, Parliamentary election results", 1 January 2008.

power to make a finding as to the effect of any anomalies it may find. Their decision should be binding on the disputing parties”.<sup>12</sup>

Kenya thus found itself on the eve of 30 December 2007 in the middle of a dangerous political crisis. As Mwai Kibaki was hurriedly sworn in at State House and flown to a coastal military base<sup>13</sup>, the Minister for Internal Security suspended all live media broadcast in the country. ODM immediately rejected the results announced by the ECK chair and refused to recognize Mwai Kibaki as the new president of the country. It also dismissed election petition judicial procedures as having no credibility, the judiciary being under control of the incumbent President.<sup>14</sup> Parliamentary results comforted the opposition in its conviction that the presidential election had been rigged. PNU won only 43 seats – slightly over 20 per cent of the total number of elected seats in Parliament – with 18 of these seats being in Central Province and 25 in the rest of the country. ODM won 99 seats, 7 seats away from the absolute majority. Twenty three Cabinet Ministers lost their seats, often to complete newcomers, and the official ECK results named Raila Odinga the winner in six provinces out of eight.

## II. THE SECURITY CRISIS

Immediately after the ECK announcement, spontaneous riots broke out across the country, mainly in Nairobi, Kisumu, Eldoret and Mombasa. Supporters of Raila Odinga turned their anger on those they perceived to be supporters of Kibaki, mainly members of the Kikuyu tribe. The ferocity and speed of the violence caught many by surprise. Hundreds were killed in less than 24 hours. Houses and shops were set ablaze. Thousands of people began fleeing the clash-torn districts and towns. By the second day of the riots, Kenya appeared to be back to the dark days of state sponsored ethnic clashes under Daniel arap Moi.

The worst of the violence, in which hundreds have lost their lives and thousands have been displaced, stopped relatively rapidly. The lack of preparedness and reaction from the security services in the Rift valley province however, raises questions about their complicity in the attacks. The violence ended following calls by ODM leadership to stop it, not because the police or paramilitary services intervened efficiently to contain it.

### **A. Protest and Repression**

Much of the violence was sparked off by the outrage felt by ODM supporters who saw victory literally snatched from their leader on live television. This outrage quickly took on an ethnic character with Luo mobs venting their anger on their Kikuyu neighbours, and Kikuyu youths quickly assembling for revenge against any non-Kikuyu in their residential area. Nairobi’s Kibera slum, a predominantly ODM stronghold in Raila Odinga’s own parliamentary constituency, was the epicentre of much of the violence in the capital. Gangs of youth armed with machetes and clubs attacked their neighbours. Shops, kiosks, houses, and garages were set on fire. Close to 50 people were killed in the Kibera mayhem, according to estimates by the Kenya Red Cross and

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<sup>12</sup> “Press statement by S.M. Kivuitu”, op. cit.

<sup>13</sup> Crisis Group interview, Mombasa, January 2008.

<sup>14</sup> In the case of Mwau Kibaki’s petition against Daniela arap Moi’s election in 1997, the Court of Appeal decided to strike out the petition three years after it had been filed because Daniel arap Moi had not been served personally. “Moi Petition ruling criticised”, *The Nation*, 23 November 2000.

other aid agencies, mainly from machete and gunshot wounds. There have also been reports of dozens of women raped.

Other slum districts of Nairobi with a mix of Luo and Kikuyu residents, such as Mathare, Korogocho, Huruma, Kariobangi and Dandora, were also rocked by the violence. Dozens have been killed and police have been deployed there in large numbers to separate the warring groups. The officially outlawed Kikuyu Mungiki sect also emerged only hours after the presidential vote was announced, beheading and mutilating Luos and Luyha residents in the Kariobangi and Karindundu slum areas, near Korogocho. A police source told Crisis Group that on the morning of 31 December, police officers from Kasarani police station collected 38 bodies from the wider Kariobangi area, all believed to be Luos forcibly “circumcised” and left bleeding to death.<sup>15</sup>

The role of the police in quelling the riots has been questionable, with considerable evidence that officers have been taking sides in the violence. Kikuyu youths in Mathare 4A area report that non-Kikuyu policemen watched helplessly as their houses were torched and property looted. The most police officers did, they claim, was to fire in the air to scare away mobs. Non-Kikuyu victims make similar claims citing numerous examples of people being hacked with machetes and their property looted as policemen merely watched or mocked the victims. In many cases, decisive action from the police came only when officers thought their tribesmen or people who voted alongside their own communities were under siege.<sup>16</sup>

One of the towns worst affected by the violence is the lake-side town of Kisumu in western Kenya, the heartland of Raila Odinga. Again most of those killed and displaced are Kikuyus, although scores of Luo youngsters are said to have been shot dead by the police. The police in Kisumu are blamed for contributing to the high number of fatalities. A BBC reporter said he counted 40 bodies in Kisumu general hospital morgue, most of them with bullet wounds. 44 fatal casualties from bullet wounds have been confirmed by the Nyanza general hospital.

## **B. Escalation in the Rift Valley**

The region that has been most affected by the post-election violence in Kenya is the Rift Valley. There has been widespread violence in the North-Rift region of western Kenya, principally in Eldoret and the surrounding districts. This region is another ODM stronghold; the base of key Raila ally and opposition firebrand, William Ruto. The new violence in the North-Rift region, though triggered by the disputed elections, has its roots in a deeply-entrenched and a long-festering anti-Kikuyu sentiment within certain segments of the Kalenjin, particularly the Nandi and Kipsigis communities, who felt aggrieved by the preference given to the settlement of Kikuyu settlers in their home areas after independence.<sup>17</sup>

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<sup>15</sup> Crisis group interviews, Nairobi, January 2008.

<sup>16</sup> There are many exceptions. A police officer in charge of Dandora police post is singled out by all interviewed, for ordering his men to form a human barrier between combatants from the Luo and Kikuyu communities. The officer managed to avert fighting between the Kikuyu who reside in Dandora areas 1, 2 and 3 who wanted to attack their Luo neighbours who dominate the area.

<sup>17</sup> Daniel arap Moi, a Tugen from Baringo, was appointed vice-president by Jomo Kenyatta in 1969 precisely to quell Nandi and Kipsigis opposition to the settlement schemes that brought tens of thousands of Kikuyu settlers into the north Rift Valley. The land which was redistributed to the Kikuyu settlers and grabbed by senior Kenyatta government officials in the north Rift is part of the traditional Nandi and Kipsigis homeland from which they had been forcibly removed by the colonial powers to create space for the white settlers. After independence, Nandi and Kipsigis landless peasants became deeply aggrieved against Kenyatta and Moi as they believed they were being submitted to a second oppression to the benefit of a new type of foreign settlers,

It is certainly possible that some of the violence was indeed organised. A militia group called the Kalenjin Warriors, whose membership and leadership is blamed for orchestrating much of the anti-Kikuyu violence in the Rift Valley, seems to have been reactivated. Several senior Kalenjin figures in power in the nineties, and now ODM leaders, have been linked to this militia.<sup>18</sup>

In other areas of western Kenya and the Rift Valley, underlying motivations for the violence were not necessarily election related but may also have been linked to the long-standing competing interests for the access to land and jobs in the country. In Kitale, violence has been directed mainly against the homes and food reserves of workers for commercial farms, but has left the commercial infrastructure largely untouched. Sabotage Land Forces have reportedly driven out non-Kalenjins (including Luhyas, Luos, Kikuyus) to take over their lands and jobs in the Mount Elgon area. Kipsigis mobs targeted all non-Kipsigis workers in the tea estates of the Kericho area, including Luos, Luhyas and Kisiis.

The violent hotspots in the Rift Valley like Burnt Forest, Molo, Enosupukia, are old fault-lines where a complex mix of anti-Kikuyu feeling, land hunger, poverty and government insensitivity has created a veritable tinderbox, which explodes whenever politicians give the go-ahead and provide the necessary logistical and financial support. What makes the violence this time around different seems to be the amount of anger and mutual resentment exposed by the election between the two main tribes, the Kikuyu and the Luo, as well as the rise of Nandi ethnic nationalism in the Rift valley. This alarming increase in anti-Kikuyu and anti-Luo feelings and Nandi determination to reclaim their land and leadership in the Rift Valley, could eventually precipitate further ethnic clashes unless urgent measures are taken to address the root causes.

Credible sources have told Crisis Group that some senior government figures have begun mobilizing the Mungiki sect, a Kikuyu religious cult, with a long history of involvement in brutal killings and organized crime. The plan, these sources say, is to equip and train the Mungiki so that it can become a powerful auxiliary force for the government. Already, many of the gruesome killings which occurred in the Nairobi slums and in the towns of Nakuru and Naivasha between 24 and 27 January when the violence spiralled out of control, have been attributed to members of the sect.

The return of Mungiki and the Kalenjin Warriors to the national scene is sending dangerous signals to other politicians who might come under pressure to revive their own defunct or “sleeping” militia groups such as the Chinkororo (in southwestern Kenya), the Baghdad Boys and the Taleban (whose membership is predominantly Luo). Kenya would then be at risk of a speedy escalation of ethnically based violence leading to pogroms and revenge killings all over the country.

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the Kikuyu. Throughout the seventies and eighties, Moi only tolerated the rise of Nandi leaders if they accepted the landaggiornamento he had sealed with Kenyatta. Others, like John Marie Seroney in the seventies or Bishop Alexander Muge in the eighties, were severely repressed or killed.

<sup>18</sup> There are credible reports some of the youngsters who were setting Kikuyu houses and shops on fire were brought by lorries to some of the scenes of the attacks. There are also reports some of these young men killed by the police were then found with “wads of crisp banknotes” in their pockets. All these suggest there may have been a level of logistical planning behind some of the violence in Eldoret and the surrounding areas.

### III. THE SEARCH FOR POLITICAL SOLUTIONS

The imbalance of power relations between an entrenched head of state and a leader of the opposition makes the negotiation of a political settlement to the crisis extremely difficult. Kenya's political and institutional forces are slanted toward and facilitate the goals of the PNU coalition. The Kenya constitution does not provide a credible judicial process for the settlement of electoral disputes. Once announced as winners, presidential and parliamentary candidates prepare themselves for lengthy court proceedings if election petitions are filed, but in the meantime they enjoy all the benefits of being in office.

#### A. The Balance of forces

President Mwai Kibaki and his aides are firmly in control of the state machinery. They have appointed most senior government officials in the past five years – from judiciary to police, intelligence services, administration and the army – and even if discontent may exist within the lower ranks, the prospect of a mutiny, coup attempt or rebellion of a section of the state machinery is unlikely at this stage. The most significant disobedience that has and may still occur is a section of the security services turning a blind eye on the violence or not obeying orders.

The group that controls decision-making at State house<sup>19</sup>, and benefits from state patronage, seems determined to stay in office for the next five years with little changes to its system of governance. The PNU leadership's current strategy appears to have six components:

- tame the ODM bloc through the systematic use of force, extra-judicial killings, and intimidation, so as to provide a demonstration of strength, and show ODM it should not expect any concessions;
- claim that ODM prepared the Rift Valley violence long in advance and that ethnic-based violence had always been their agenda
- give priority to finding peace and reconciliation while maintaining that all electoral disputes can only be settled in courts;
- restore a "business as usual" running of government, so as to progressively weaken the internal and external pressure on the government and increase its legitimacy through a lasting *fait accompli*;
- invalidate any claim that the election results may be illegitimate, using its allies within the electoral commission and supporters within the print and electronic media;
- consolidate a political alliance with the leadership of the central and eastern parts of the country (Kalonzo Musyoka, who hails from Eastern Province, was appointed as Vice-

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<sup>19</sup> Five individuals are reputed to currently control access to Mwai Kibaki and are responsible for the decision-making process: Minister for Constitutional Affairs Martha Karua (Kikuyu), Minister for Finance Amos Kimunya (Kikuyu), a frontman for hawkish businessman and Nairobi university Vice-Chancellor Joe Wanjohi (Kikuyu), Minister for Roads John Michuki (Kikuyu), former Minister of State for Defense Njenga Karume (Kikuyu), and presidential advisor Nathaniel Kang'ethe (Kikuyu).

president while reinforcing its own power-base and giving it the edge over its “perceived” enemies.

On the other side of the political realm, and despite its victory in parliament for the election of the speaker, ODM seems to have little option but to use mass action, violence and the internationalization of the crisis to pressure the government. Its calls for mass action, although not bringing large numbers of demonstrators on to the streets, have produced enough negative images in the international media to keep the international attention alive, maintain the travel ban decided by tourist associations, and generate continuing international political and diplomatic pressure. However, senior ODM officials are also convinced that unless they hurt the Kibaki establishment where it matters most – i.e. their sources of income and properties – they will not agree to make any concessions. The ODM leaders know that time is playing against them, and that they need quick progress to sustain any chance of preserving the possibility of a power-sharing agreement.

ODM’s negotiation strategy starts with the invalidation of the presidential results, the logical basis for their claim to a share of the executive powers. Once the results are declared invalid and the principle of a power-sharing agreement is obtained, they will be in a position to consolidate and build a stronger majority in parliament, as they too would then have appointments and positions to distribute to smaller parties, possibly to reach the two-thirds majority necessary for constitutional review.

The ODM team has determined that at this juncture, the repetition of the Rift Valley violence against Kikuyu communities would be endangering its political legitimacy and weakening international leverage on the government. But the situation on the ground remains extremely tense, and the Kalenjin warriors are unlikely to easily accept the return of the displaced Kikuyu families to pieces of land they want to acquire. Similarly, Raila is under pressure from hardliners within his base in Kisumu to settle for nothing else but the presidency so that revenge can be obtained for the destruction suffered in the recent spite of violence – and the perceived 40 years of marginalization suffered by the Luo community in the country. Both camps have their extremists and militias preparing for a new confrontation. ODM calculates that in case the international mediation fails, its only hope of keeping alive a political negotiation will lie in its capacity to generate nuisance and create leverage through violence.

## **B. Creating leverage for a political settlement**

Soon after the violence started a discreet attempt at securing a political agreement between ODM and PNU was initiated with the support of influential members of the Kikuyu business community, facilitated by the World Bank resident representative, Colin Bruce. This negotiation was already well advanced when US Assistant-Secretary for African Affairs Jendayi Frazer arrived on 5 January. The signature of a document detailing principles of agreement was planned the day of AU Chairman John Kufuor’s departure, on 10 January, to establish the basis of a process designed to address the root causes of the violence, the electoral dispute, and to provide a solution for a political settlement. But before the signature ceremony could take place, the hardliners surrounding Kibaki prevailed on him not to sign and terminated the deal.

This document provided two of the essential pillars for the resolution of the crisis: an independent investigation into the validity of the presidential results, with recommendations on the measures and timeframe to be respected to organize a re-run in the event invalidity was found; and the negotiation of a power-sharing agreement between ODM and PNU while the necessary reforms and preparations for the re-run are being carried out.

In view of the atrocities already committed in the country, and the risks of renewed violence through the mobilization of armed ethnic militias, a transitional justice process as well as disarmament program would be necessary additions in the short term. In addition, it is necessary to address the plight of landless communities and reduce tensions related to the settlement of migrant communities both in Coast Province and in the Rift Valley.

The missing elements to force PNU to make concessions are external pressure, and guarantees that some of the interests and the security of its constituencies, notably Kikuyu businessmen and migrant communities, will be safeguarded. International pressure has already been applied but needs to increase.

The U.S. government should play a leading role in this respect and follow-up its initial statement that “business as usual” would not be tolerated with clear and direct pressure on the individuals blocking the political process. Targeted sanctions (travel bans and asset freezes) against individuals influencing PNU decision-making in the corridors of power should be considered. These sanctions should include close family members, and the groundwork should be laid for the possible international blacklisting of financial institutions belonging to the establishment, if necessary. An aid freeze is a good political message, but is unlikely to deliver results rapidly, if at all. Threats of international legal prosecutions against the individuals responsible for the crimes against humanity committed both in the Rift Valley and in Nairobi should also be considered, by bringing to Kenya representatives of the office of the prosecutor of the International Criminal Court.

But external leverage alone may not be enough to achieve a breakthrough. The critical additional factor is the business community. Additional pressure from the Kikuyu business establishment should be supported by creating bridges between it and ODM. In order to exercise maximum pressure on the Kibaki clique, Kikuyu business leaders must be given assurances about ODM’s economic policies, commitment to liberal reforms and to the provision of security to properties and businesses established in the Rift Valley. It could be proposed that their corporate representatives, including the Kenya Association of Manufacturers and Kenya Federation of Employers be brought into that part of the negotiation which would address the economic policy of the transitional government.

The starting point of the negotiation remains the recognition of electoral irregularities by both parties and the invalidation of the election results. The crafting of a power-sharing agreement to guide a transitional phase leading to new elections then follows. Politicians on both sides are likely to be more interested in consolidating their own share of power than providing the new foundations of Kenya’s democracy. Hence the negotiation agenda for a period of transition should not only be about the sharing of executive powers between ODM and PNU, but should include a complete institutional reform agenda, including the creation of an effective oversight mechanism for parliament and genuine independent judicial capacity to counterbalance the powers of the executive. This constitutional overhaul should similarly be accompanied by a complete review of the electoral regulations so as to prevent any repetition of the December 2007 scenario.

The content of a comprehensive political settlement should therefore include:

- The launch of an internationally supported investigation into the extent of the electoral fraud leading to recommendations regarding: the impact of the fraud on the validity of the announced presidential and parliamentary results; options for a

settlement of the election dispute (recount, re-tallying, or rerun); the identification of ECK officers involved in the fraud so as to start judicial prosecutions against them; the legal and constitutional reforms necessary to prevent such fraud in the future and restore the credibility of the Kenya electoral process, including detailed procedures of appointment for ECK officials and other reforms necessary so that the Kenyan judiciary becomes a credible arbitrator of electoral disputes (procedures involved and appointments of judges);

- A political agreement on the institutional arrangement to be set-up for the period of transition during which the legal and constitutional reforms necessary to restore democratic governance in the country are going to be carried out, including: a power-sharing deal between ODM and PNU within the executive branch of government with the creation of a position of Prime Minister and the clear definition of his executive powers, particularly on the allocation of government resources, and the appointment of senior government officials; the distribution of ministerial portfolio between the parties; the joint designation of key officials running the Civil Service, Central Bank, Treasury, permanent secretaries, senior officials running the police, the General service unit and the intelligence services, provincial commissioners, and diplomatic representatives. A constitutional amendment will have to be passed for the abovementioned institutional arrangement to be institutionalized;
- An agreement on the Constitutional reform process to take place during the transition, addressing the rebalancing of power relations between the branches of government and the necessary devolution of powers between the Central Government and its local authorities;
- An agreement on the economic policies to be implemented during the period of transition, determined in consultation with key economic stakeholders of the country;
- An agreement on the precise framework and policies to be implemented during the transition, to facilitate the resettlement of IDPs and address the land grievances of communities who supported the violence;
- The establishment of an internationally supported judicial commission of inquiry with the mandate to collect information on the responsibilities in the violence that started on 29<sup>th</sup> December 2007 and recommend the vetting of any politician and civil servant found implicated in the perpetration of crimes against humanity from holding any public office, pending the conclusion of criminal proceedings;
- The establishment of an independent and internationally supported Truth, Justice and Reconciliation commission, to find a long-term solution to the ethnic violence that regularly rocks the country. This commission, which has already been endorsed by the parties, should aim to provide accountability and healing for the crimes committed in the post-election violence.
- The establishment of a credible institutional framework and process for the negotiated disarmament and dismantlement of all party supported militias. Kenya cannot afford to have Kalenjin warriors, Baghdad boys and the Mungiki sect armed and organized ahead of a new electoral contest. If these militias are not effectively disbanded and disarmed, any new electoral campaign would run the risk of renewed extreme violence.

#### **IV. CONCLUSION**

The uneasy calm that currently prevails in Kenya should not be misunderstood for a return to normalcy. The country's protracted political crisis is deeply entrenched and could easily lead to renewed episodes of extreme violence. There is, moreover, more at stake in Kenya than just the collapse of yet another African country. It is the entire liberal agenda- economic and political – which is being tested. If Kenya's economy and democratic process go down the drain ,it could create a sense of hopelessness throughout the continent of Africa.

The regional consequences of the crisis have probably yet to be fully understood. Kenya provides the platform for relief operations in Somalia, Sudan and is a key anchor for the long-term stabilization of Rwanda, Uganda and Burundi. Not only would the paralysis of its infrastructure deprive these countries from access to basic commodities, but they would also suffer in the mid to long term from a sustained reduction of foreign investment and see their economic growth seriously hampered. The quicker a solution to the crisis can be found, the better the prospects will be for the entire region to recover and the Kenyan people to regain hope in the future of their country.