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# Political violence in Kenya

## A study of causes, responses, and a framework for discussing preventive action

## INTRODUCTION

This paper focuses on political violence in Kenya. The rationale of the paper is to understand how such violence can best be prevented. To do this, we must first understand the history of political violence in Kenya and what factors in society contribute to a tendency of utilising violence as a means of obtaining political influence.

The present study is informed by a number of interviews with representatives of Kenyan civil society organisations which are involved in human security.[1] Moreover, it relies on an appraisal of studies and reports available on political violence in Kenya. In its discussions, the paper draws on transitional justice discourses.

The paper is structured as follows: Firstly, a definition of political violence is provided for. Secondly, the paper analyses how political violence has historically played out in Kenya. Thirdly, the paper identifies a variety of causes of political violence in Kenya. Fourthly, the paper turns to an appraisal of which responses can be deployed to prevent the recurrence (or persistence) of political violence. It does so by discussing initiatives that have already been implemented or which may be due to implementation. The paper thus presents an account of political violence in Kenya and the responses undertaken, while at the same time engaging more theoretically with the question of how to prevent political violence.

## CONCEPTUALISING POLITICAL VIOLENCE

Political violence is a so-called 'essentially contested concept', and the premise that a universal understanding ought to be utilised is not endorsed by all.[2] This section attempts to clarify how the notion can be utilised to the Kenyan context.

Where all forms of violence are said to relate to power, political violence has been defined as 'the commission of violent acts motivated by a desire, conscious or unconscious, to obtain or maintain political power'.[3] It is therefore the *pursuit* of political objectives (and not the end result of gaining or not gaining political power) that is at the core of the notion.[4] Defining political violence is typically contingent on a typology that separates the politically motivated from economically and socially motivated forms of violence. In this sense, political violence takes place in the collective sphere where acts of violence are typically committed by a multitude of individuals from one group against individuals from another group, primarily because the targeted individual happens to belong to this group. Political violence typically takes the form of murder, assaults, sexual abuse such as rape, forced pregnancy or sterilisation. Economic violence, on the other hand, is characterised by an individual (or a multitude of individuals) illegally pursuing financial enrichment by means of violence (or threats of violence), and typically manifests as street crimes such as robbery, drug related crimes or kidnapping. Social violence is said to pursue the empowerment of one individual over another, for example through domestic violence.[5]

Many observers, however, recognise that political violence should not analytically be disintegrated from economic and social violence because all forms of violence interrelate.[6] In Kenya, many of those consulted by the author understood political violence as violence that takes place in relation to 'political competition', but as a notion with strong economic and social underpinnings that may be the determinant for the prevalence of political violence.

It is worth keeping in mind that the term political violence is used for a broad variety of situations, ranging from terrorist attacks, armed revolution, violent demonstrations or attacks by citizens aimed at less than the overthrow of their government to humanitarian intervention and intra-state wars.[7] Political violence, therefore, is not confined to non-state actors' use of violent means to further a political agenda but can also relate to the state's exercise of force, both against its own citizens and against other states and their citizens. It is important to keep in mind that mass-scale violence is

sometimes portrayed as essentially apolitical while in reality being predominantly political. For example, some observers have characterised the Rwandan Genocide as a 'crime of hate', implying that it was brought about by irrational ethnic hatred,[8] when in fact the Genocide served (or was thought to serve) primarily a political agenda.[9] At the same time the Rwandan Genocide highlights how the incentive to carry out violence that is essentially political can be enhanced by ambitions to settle private scores or obtain material benefit, thereby exemplifying the difficulties in operating with a clear distinction between political, economic and social violence.[10]

The understanding that political violence relates to acts of violence that are carried out primarily as a means of achieving political influence or power and usually entails a 'group-component' is foundational for the present paper. It is, however, also accepted that political violence is a relative concept that depends on the context to which it is applied.

## POLITICAL VIOLENCE IN KENYA: A BRIEF OUTLINE

Political violence has played out in different manners throughout Kenya's history. When in 1888 the British East Africa Company (BEAC) obtained concessionary rights to the Kenyan coast from the Sultan of Zanzibar, Waiyaki Wa Henya, a Kikuyu chief was abducted and killed by the British after having burned down the fort of a BEAC official. Likewise, Kenyans' opposition to the building of the Uganda Railway, prompted the British to use violent means such as assassinations.

> Political violence relates to acts of violence that are carried out primarily as a means of achieving political influence or power

As a reaction to settlers' dominance over economic resources and political exclusion, in 1921, Kenya's first African political protest movement, the Young Kikuyu Association (later the Kenya African Union) was born. Both the colonialists and indigenous Kenyans used violence in their pursuit of political objectives, most clearly evident from the 1952-1960 Mau Mau rebellion and its repression.[11] As many of the Kenyans consulted by the author pointed out, it is important to keep in mind that British colonialism in Kenya was founded upon a strategy where effective rule of the colony relied on building alliances with certain ethnic groups and escalating tensions between these and other ethnic groups. Therefore, besides its immediate connection with political violence, colonialism through 'divide and rule' policies has brought about or escalated inter-community conflict, the effects of which may still have importance for the prevalence of political violence. Likewise, the construction of a colonial state is said to have sustained effects on inequality, land ownership, and regional differences. As discussed later on, these factors are relevant to take into account when examining political violence in present day Kenya.[12]

Also after the coming of independence in 1963, Kenya's political history was marked by violent uprising and repression. Following the Kenya African National Union (KANU) victory in the 1963 elections, Kenya became a *de facto* one-party state, with its leader and President of Kenya, Jomo Kenyatta, for example banning attempts of creating an opposition party associated with the Luo ethnic group. For some, this lead to the perception that Kenyatta, an ethnic Kikuyu himself, was promoting Kikuyu interests over national interests.[13]

According to many observers, when Daniel Moi took office in 1978 following the death of Kenyatta, he pursued policies that benefitted (parts of) his own ethnic group, the Kalenjin, while excluding individuals from other ethnic groups from gaining public office or access to state resources. To facilitate this, repression of the political opposition was common practice. Repression included excessive use of force, torture, indefinite detention, and other measures. In 1982, following a coup attempt, the Moi regime amended the Constitution and subsequently Kenya officially became a one-party state. Police and security forces dispersed demonstrations against this move forcefully. Only after intense donor-pressure did Moi allow multi-party elections to be held in 1992.[14] The election campaign, the election itself and its immediate aftermath were characterised by threats, harassments and the occurrence of violent clashes between supporters for different parties, claiming the lives of around 1,500 Kenyans and displacing more than 300 000.[15] Where Moi had warned that the return to multi-party politics would result in tribal clashes, some observers note that 'far from being the spontaneous result of a return to political pluralism, there is clear evidence that the government was involved in provoking this ethnic violence for political purposes and has taken no adequate steps to prevent it from spiralling out of control'.[16] Moi maintained power with the 1992 elections, and despite increased openness in the political system, commentators note that the Moi regime continued to repress the political opposition.[17]

Like the 1992 elections, the 1997 elections were associated with violence. Six months prior to the elections, KANU party activists allegedly backed

armed gangs who attacked 'non-native ethnic groups' in the Coast Province, causing the death of more than 100 and leading to the displacement of more than 100 000.[18] Also after the elections, politically motivated violence between ethnic groups took place. According to Amnesty International, more than 120 Kenyans lost their lives in the Rift Valley when KANU supporters clashed with armed youths belonging to the Kikuyu ethnic group.[19] Amnesty International notes how political violence predominantly occurred in those areas where the Kikuyu-dominated opposition party, the Democratic Party, had won over the Kalenjin-dominated KANU.[20] Human rights organisations indicate that the violence in the Rift Valley, like the pre-election violence in the Coast Province, was endorsed and supported by political leaders, and responses from security forces to halter the violence were non-existent or too reluctant or delayed to have any meaningful effect.[21] In 2002, after Moi had held two terms and therefore was not allowed to run for president again, Uhuru Kenyatta (Jomo Kenyatta's son) was appointed as KANU's candidate. Dissatisfied with Moi's choice, a number of KANU members formed a faction, the Rainbow Coalition with Raila Odinga as its leader, which later formed a coalition with the Liberal Democratic Party (LDP). The 13-party coalition, the National Alliance Party of Kenya, joined fronts with the LDP under the name of the National Rainbow Coalition (NARC), headed by Mwai Kibaki as its presidential candidate and with Raila Odinga as its prime minister candidate. Although the election campaign (and its aftermath) was characterised by a significant decrease in political violence compared to its two predecessors, political rallies did on some occasions lead to violence.[22]

Kenya's Daily Nation reported how assassins with political motives had killed 26 high-profile Kenyans over the course of only two months

As the Guardian's Madeleine Bunting notes, observers of the violence following the 2007 elections have often referred to the violence as in contrast to an otherwise politically stable and peaceful country. It is, however, worth keeping in mind that most significant political activities and changes in leadership throughout Kenya's history as an independent state have been followed, and to some extent formed, by violence, usually framed along ethnic lines.[23]

Yet, the most recent post-election violence, because of its relationship to the contested election results and because of its speed and scale, seemingly came as a surprise and shock for many Kenyans and the outside world. The violence had erupted even before Kibaki was declared winner of the elections, but increased in scale after the announcement.[24] Estimates of casualties vary, but most observers cite the Waki Report's number of 1,133.[25] Moreover, around half a million Kenyans were forced into exile by the violence,[26] of which a significant number remains in internal displacement camps.[27]

It was in the Rift Valley – in particular around Eldoret – that violence first erupted, seemingly taking the form of ethnic-based clashes between Odinga's supporters, especially from the Kalenjin ethnic group, and supporters of Kibaki, mostly from the Kikuyu ethnic group. According to some observers, certain local politicians incited the violence.[28] Its carrying out was often brutal and simply directed against individuals according to their ethnic affiliation.[29] Partly in response to the violence in and around Eldoret, Kikuyus formed so-called 'self-defence forces'. These militias along with a criminal organisation formed in the 1980s, the Mungiki, carried out organised and large-scale violence in other parts of the country, including Naivasha, Nakuru, and Nairobi slums.[30] The violence was in most cases followed by looting and sometimes perpetrators were supposedly rewarded with money for taking part in the violence.[31] The level of the state agencies' responsibility for the occurrence of the election violence remains a disputed subject. The Waki Report notes that whereas the police in some areas of the country remained passive, either because they were unable or unwilling to stop the violence, in other areas, police shootings seemingly resulted in many of the casualties.[32] In some cases, such as in the slums of Kisumu, Human Rights Watch interviews with police officers suggest that an unofficial 'shoot-to-kill' policy was applied, apparently resulting in unarmed civilians being shot dead if assumed to be rioters.[33]

Political violence in Kenya, although often at its extremes during election periods, also exists as an 'everyday phenomenon'. Assassinations of political leaders, prominent businessmen, civil society leaders, and other figures that possess significant influence on the allocation of resources or political developments in the country are far from exceptional. In early May 2009, Kenya's Daily Nation reported how assassins with political motives had killed 26 high-profile Kenyans over the course of only two months.[34] Most of those Kenyans consulted by the author view such form of political violence as related to the violence surrounding election processes because it is many of the same factors that allow for their occurrence.

Whether violent crimes committed by criminal groups, such as the Mungiki sect, should be categorised

as organised economical or political when they do not occur in connection with election processes depend on the perspective taken. When the Mungiki sect was established in the 1980s, it had religious undertones and pursued a political agenda of 'defending the culture and traditions of the Kikuyu tribe'.[35] At that point, the sect is said to have aimed at protecting Kikuyu interests in the context of then president Moi's affiliation with the Kalenjin ethnic group. The Mungiki sect continues to be associated with the Kikuyu ethnic group. However, the agenda of the sect and its reasons for utilising violence are now primarily economical. The Mungiki applies 'mafia-like' methods to control the Kenyan public transport sector and bribes local business owners.[36]

> Like other instances of mass violence in the region, ethnic violence in Kenya connects to political manipulation of identity

Yet, Mungiki's actions remain associated with Kenyan politics in several ways. Firstly, Mungiki criminal activities associate with politics not only in the sense that violence is often directed towards 'political opponents' of the sect,[37] but also in the sense that both local vigilante groups and state security agencies have engaged in a low-scale armed struggle with the sect, leading to accusations of government-ordered extra-judicial killings.[38] Secondly, it was common perception among those Kenyans consulted by the author that Mungiki continues to enjoy (moral and financial) support from a number of parliamentarians. Thirdly – and closely related to the above – according to observers of political violence in Kenya, intimidation and violence by the Mungiki sect and a number of other violent gangs have been employed as political tools, both during election campaigns and beyond.[39] Perhaps ironically, as one scholar observes, it may well be that 'the informal repression or quasi-legitimisation of sectarian violence for political ends by the state, has transformed a "moral ethnic" movement into a "political tribal" one'.[40] Finally, the Mungiki sect exercises control as a 'state within the state' in certain parts of Kenya and uses violence to maintain such control.[41]

In many ways, violent crime employed by the Mungiki sect thus identifies as political. While violent crimes employed by organised gangs such as the Mungiki sect and vigilante group retaliation receive intensive cover in Kenyan newspapers,[42] to the extent that violence committed by such groups does not relate directly to the election process, systematic documentation of its scope and nature remains sparse.

As should be clear from the above, both 'ethnic violence' and organised economic crime can be intimately associated with political violence. Political violence that unfolds along ethnic lines can serve as a 'tool in the toolbox' for political leaders who want to achieve influence.[43] Like other instances of mass violence in the region, ethnic violence in Kenya connects to political manipulation of identity. Likewise, organised economic crime is closely associated with political violence, in particular because agents of political violence are often involved in economic crime.

In order to establish a framework for understanding how political violence in Kenya may be countered it is useful first to dwell by the causes of political violence. The following section aims at identifying a variety of underlying factors that may be determinant for a political culture that, at times, sanctions the use of violence to reach political objectives.

## POLITICAL VIOLENCE IN KENYA: IDENTIFYING THE CAUSES

Identifying causes of political violence is a problematic task. Firstly, any attempt to 'explain' a phenomenon such as political violence can be subjected to the objection that attempting to establish causal connections to certain economic, social, or political realities is simply the wrong way of approaching political violence. Viewing political violence as an outcome of particular societal features easily gives way to the perception that the emergence of political violence is unavoidable.[44] Nonetheless, the reversed position is also problematic. Mass violence is not simply irrational and unexplainable, and it remains a fact that political violence seems to occur persistently in some countries and not – or to a much smaller extent – in others.[45] In any case, some scepticism is justified whenever studies pursue the 'explanation' or 'identification of causes' of a phenomenon such as political violence.

In the following, an overview is presented of conditions that may be consenting to political violence in Kenya.

### Strong executive powers, gaining political office as a 'struggle for survival', and manipulation of ethnicity

As implied in the above outline of political violence in Kenya, support and resistance to political leaders of the country have often followed ethnic lines. When forming government, some political leaders have rewarded and ensured advantages to individuals from supportive ethnic groups, while marginalising or excluding

individuals belonging to ethnic groups associated with political opponents. The Waki Report, for example, notes how 'Moi rewarded his supporters, particularly the Kalenjin, through appointments to political offices and with jobs in the public service and the military'.[46] The Waki Report also notes how during the 1980s and 1990s 'land grabbing and the allocation of public land as political patronage were part of the gross corruption of this period'.[47] In this way land allocation was often turned into a reward to 'politically correct individuals'.[48] Consequently, political power has been perceived as vital for obtaining access to public goods, and the distinction between individuals benefitting or marginalised from such access is viewed in ethnic terms.[49] Added to this, political leaders may have had a personal interest in obtaining power because large-scale corruption has become institutionalised.[50] In a sense, gaining political office has been seen as 'a struggle for survival': if power is obtained, the perception is that access to sparse resources is ensured, and if not; marginalisation and exclusion is reckoned to follow.

> The Waki Report notes that 'checks and balances normally associated with democracies are very weak in Kenya

This crisis of governance, where many leaders work not for the country as such but for themselves and their political supporters, is sometimes said to follow from a system where power has been centralised in the hands of few since independence.[51] Noting that Kenya's constitution, despite continuous talks of a fundamental amendment, is still based on its colonial-era form where the president is awarded with extensive powers, Human Rights Watch suggests that the risks of a 'winner-takes-all calculus' increases.[52] The Waki Report, in a similar vein, notes: 'power has been personalised around the presidency and this has been increased by changes in the Constitution under each President since independence. Laws are routinely passed to increase executive authority, and those laws seen as being in the way are often changed or even ignored'.[53] This is said to result in the perception that 'given the power of the president and the political class everything flows not from laws but from the president's power and personal decisions. This also has led the public to believe a person from their own tribe must be in power, both to secure for them benefits and as a defensive strategy to keep other ethnic groups, should these take over power, from taking jobs, land and entitlements. All of this has led to acquisition of presidential power being seen both by politicians and the public as a zero sum game, in which losing is seen as hugely costly and is not accepted'.[54]

Yet, as many of the Kenyans consulted by the author pointed out, the perception that ethnic groups, as such, benefit from 'one of their own' gaining presidency is highly miscalculated because only a very limited number of individuals actually benefit from these arrangements.

## Rule of law problems and the institutionalisation of political violence

Strong executive powers are also said to circumvent transparency and checks and balances, thereby decreasing the likelihood that the executive, or political supporters of the incumbent regime, are held accountable for political violence. The Waki Report notes that 'checks and balances normally associated with democracies are very weak in Kenya and are deliberately so. Individuals in various parts of government whether in the civil service, the judiciary, and even in Parliament, understand that, irrespective of the laws, the executive arm of government determines what happens'.[55] The argument often goes that beyond dubious or extra-legal acquisition of public goods, the executive may have interest in maintaining structures that diminish the rule of law, thus facilitating government action (or inaction) that may include political violence.[56]

Impunity in Kenya can be observed as playing out in three different, but yet related, ways.

Firstly, responsible agents of large-scale violence that correlate with a political agenda are seldom thoroughly investigated, arrested, or prosecuted. Commenting on political violence surrounding the 1992 election, Africa Watch notes how 'Kalenjin warriors', who backed then president Moi, were allowed to attack villagers from other ethnic groups with no or only little attempts of the police to intervene. Not only did the police according to Africa Watch refuse to take statements from victims of the violence, in some cases they also stood by passively while attacks were ongoing.[57] 'Kalenjin warriors' who were actually prosecuted often received lenient sentences or were acquitted because the executive interfered in the work of the judiciary.[58] Inaction from authorities again prevailed when political violence erupted after the 1997 elections. Some have suggests that the police had received orders from the political leadership not to intervene.[59] Despite judicial inquiries into these outbreaks of political violence that named several persons as involved and recommended prosecutions, it has been suggested that neither the Moi-administration nor its successor, the Kibaki-administration, had interest in prosecutions

commencing.[60] In a similar vein, violence committed prior to the 2007 elections did seldom result in perpetrators being held accountable. The EU monitoring commission notes: 'in most cases, abuses did not receive an appropriate response from the police and the judiciary and there was therefore impunity towards perpetrators'.[61] When the most recent election violence erupted in December 2007, perpetrators had good reason to assume that also this time politically motivated violence would go unpunished.[62] So far, they have not been mistaken: the Waki Report concludes that out of more than 1,000 homicides related to the election violence, only 19 were prosecuted.[63]

Widespread poverty, unequal distribution of resources, high unemployment rates and land disputes are pointed to as 'root causes' of political violence

Secondly, impunity has played out as a matter of state agencies' excessive and sometimes extra-legal use of violence, with other authorities ignoring or for other reasons failing to address responsible agents. For example, when the police responded to the violence following the 2007 elections, they did so in a partial manner where extensive use of force was deployed in areas dominated by Odinga-supporters.[64] The Waki Report assumes that more than one third of the total casualties during the election violence results from police shootings.[65] The report also concludes that in many instances the use of lethal force by the police targeted individuals who were seemingly posing no immediate threat. In Kisumu, for example, the Waki Report found that 30 out of 50 casualties of police shootings had been shot from behind.[66] The Waki Report also concludes that some police officers were involved in criminal acts such as sexual violence and looting.[67] Despite allegations that Kenyan police officers have violated the criminal code, according to the Waki Report, the Kenyan police force has not initiated any comprehensive internal investigations into the behaviour of police officers during the election violence,[68] and, apparently no police officers have yet been prosecuted for extra-legal use of force related to the election violence.[69]

Thirdly, impunity has prevailed historically in Kenya in the sense that political figures that have called for or sponsored violence have seldom faced criminal accountability. The Waki Report notes how recommendations of the commission established to investigate the ethnic/ political violence in the 1990s (the Akiwumi Commission) to further investigate certain political leaders was halted by lack of commitment in government circles and by a legal sector structured in such a way that prosecutions of high-profile political figures were unlikely to commence.[70]

The rule of law has thus tended to be put aside in contexts of political competition.[71] This is likely to have led to the presumption for next generation perpetrators that committing acts of violence in a context that relates to political competition will remain not accounted for.[72] Representatives of Kenyan civil society consulted by the author all pointed to impunity and lack of commitment to the rule of law as imperative to take into account if attempting to understand the prevalence of political violence in Kenya.

Continuous political violence in Kenya may also have had a reinforcing effect in other ways. Political violence in the 1990s resulted in many of the persecuted Kikuyu's leaving their homes in the Rift Valley and settling in Nairobi. Some joined the Mungiki sect which – as pointed to above – has been an important agent of political violence.[73] Such institutionalisation of political violence may have had the side-effect that violent behaviour has become normalised. According to some, non-political violent crimes, especially in larger urban areas, in part results from violent gangs being called upon by political leaders in the struggle for political influence.[74] In this way, political violence is closely related to other forms of violence.

## Socioeconomic causes: poverty, unequal distribution of resources and land issues

The sidelining of the rule of law in contexts of competing for political power, the impunity for both instigators and on-the-ground perpetrators and a political tradition that has, in many cases, implied that forming a government is deemed essential for obtaining access to resources cannot stand alone as explanations of political violence. Socioeconomic factors such as widespread poverty, unequal distribution of resources, high unemployment rates and land disputes have often been pointed to as 'root causes' of political violence in Kenya.[75]

There seems to be a sense among some observers that agents of political violence in Kenya are fundamentally dissatisfied with social and economic conditions of life. Kenya has an estimated two million unemployed youth. Joining a gang may for some be seen as a 'way of life' that can increase possibilities.[76] When these gangs engage in political violence, members are sometimes promised payment for their activities, and also less organised perpetrators can benefit from looting. Some

commentators on the recent election violence argue that poverty and opportunism had a significant impact on villagers' and shantytown dwellers' willingness to engage in political violence.[77] For many of the perpetrators, political agendas may thus be less relevant than prospects of enrichment.

Participation in political violence is said to be furthered by a widespread sense of dissatisfaction in the distribution of wealth. Distribution of wealth is extremely unequal in Kenya. According to a 2004 report, Kenya is the 10th most unequal country in the world, and the richest 10 percent of the population controls 42 percent of the country's wealth, while the poorest 10 percent own less than 1 percent. Access to resources varies highly from region to region.[78] With these lenses, political violence is a way of demonstrating dissatisfaction with the cruel conditions of life that stand in contrast to the elite's comfortable way of life which is perceived by the poor to result from political connections and corruption.[79]

> 'land is a national cake, and everybody should have at least a small piece'

In particular, questions related to land distribution and ownership are central in explaining political violence in Kenya. Despite several attempts of reforms, land grievances dating back to the colonial era continue to constitute a major obstacle to peaceful cohabitation in Kenya. The problem can be summarised as follows: when Kenya became independent in 1963, the most fertile areas that had been occupied by white settlers were handed over to the new government instead of the people who had lived there before. Besides selling pieces of this land on market terms, Kenyan governments have continuously allocated these areas to shifting supporters for patronage purposes. Moreover, because colonial laws were never fundamentally changed, there are no provisions for collective land rights, thus complicating ownership for communities that have traditionally been pastoralists.[80]

At least two dimensions are relevant when considering land distribution and ownership as a cause of political violence. First, many families can barely make a living from the small piece of land they own. As pointed out by one of the Kenyans consulted by the author, 'land is a national cake, and everybody should have at least a small piece. But where some have plenty, most have little'.[81] Shortage and unequal distribution of land can lead to dissatisfaction with governance and violence may be a means of expressing frustrations.[82] Second, long-lasting problems of land ownership and distribution have created tensions between communities. In the Rift Valley, some Kikuyus have allegedly acquired land through connections to the political elite.[83] According to the Waki Report, Kenyans who belong to the Kalenjin ethnic group tend to view the most recent election violence as a result of land injustices.[84]

Political violence in Kenya has tended to concentrate in the Rift Valley, often with the Kikuyu ethnic group on the one side and the Kalenjin ethnic group on the other.[85] Disputes over land ownership are historically related to colonial and post-independent regimes' unfair taking and allocation of land (and the colonialists' forceful resettlement of individuals from certain ethnic groups). Such disputes remain an unsolved problem that political leaders can escalate by making reference to ethnicity. By doing so, the problem acquires potential for inter-community conflict, as has indeed been a characteristic of political violence throughout Kenya's history.[86]

In drawing on transitional justice discourses, the paper now turns to an appraisal of how political violence in Kenya can be countered. The analysis should be seen as a contribution to ongoing discussions on what actions are required to prevent the recurrence of political violence in Kenya. The analysis takes into account key developments in Kenya following the outburst of violence following the 2007 elections.

## RESPONDING TO POLITICAL VIOLENCE: ACTION TAKEN AND A FRAMEWORK FOR ENGAGEMENT

### Transitional justice as a framework for analysing preventive measures to political violence in Kenya

The idea that to avoid the recurrence of political violence and other forms of mass atrocity, societies must confront these legacies through legal and quasi-legal measures has only in recent decades obtained a central place in discourses on conflict prevention, human rights, and democratisation. Prior to the Latin American transitions in the 1980s, human rights activists tended to rely on a methodology that emphasised the exposure of political violence. In the early 1990s, activists and scholars alike increasingly began to advocate for the need to retrospectively confront perpetrators of state-sponsored violence.[87] It is along this activism that the so-called 'transitional justice' scholarship has been formed. The scholarship, at this point dominated by international lawyers, engaged with the question: 'how should nascent democracies address the human rights violations that plagued their societies' recent past?'[88] A dichotomy between punishment and amnesty provided the initial

foundation for answering the question. Parts of the scholarship, however, soon started to advocate that 'dealing with the past' could entail other responses than putting to trial perpetrators of state-sponsored violence, or doing nothing.

With the proliferation of truth commissions in the 1990s, many academics started to suggest that trial and punishment are insufficient in addressing the root causes of conflict. For these observers, truth commissions are seen as a response enabling enhanced roles of victims and possibly paving the way to healing, reconciliation and peace, in a way that criminal justice cannot facilitate.[89] Others, however, suggest that compared to criminal trials, truth commissions constitute a 'second-best option'.[90]

Besides criminal trials and truth commissions, reparations to victims of past violations; vetting processes intended to rid state institutions from known human rights perpetrators; and – but more marginally – legal and institutional reform, are often considered within an analytical framework of transitional justice.[91]

> For Kenya to overcome the legacies of political violence, it has only two choices: justice or impunity

The term 'transitional justice' was initially reserved for justice that deals with gross human rights violations in times of fundamental (liberal) regime change. Contemporary transitional justice discourses have expanded to cover questions of how societies should deal with past civil war and other forms of large-scale intra-state violence, also in cases where a fundamental political transition is absent. The assumption is that many of the challenges of doing justice which face these societies are not that different from cases of fundamental and liberalising political transition.[92] From that also follows that the field now embraces dealing with large-scale violence committed by state actors as well as non-state actors. The use of transitional justice discourses in connection with attempts to deal with atrocities in northern Uganda is illustrative of this trend.[93] The importance of dealing with past violations is said to flow from a variety of normative claims, such as reconciliation, victims' healing, and the consolidation of the rule of law. Most of these objectives are related (or ought to be related) to preventing the recurrence of large-scale rights-violations.[94]

Although it is problematic to argue that a profound political transformation has taken place in Kenya, transitional justice discourses offer useful tools for appreciating how Kenya can tackle political violence.

The paper now turns to an outline of what actions have been undertaken; is underway; or may prospectively be embarked upon in Kenya to deal with legacies of political violence and prevent its recurrence.

## Trial and punishment

Most of the debates on how to address political violence in Kenya have focused on prosecuting and punishing responsible agents for the violence surrounding the 2007 elections. Executive Director of Human Rights Watch, Kenneth Roth notes that for Kenya to overcome the legacies of political violence, it has 'only two choices: justice or impunity'.[95] Roth argues that pursuing criminal justice for the most recent election violence is crucial for ending a culture of impunity.[96]

Likewise, the parties to the Kenyan National Dialogue and Reconciliation (the parties) and a variety of Kenyan observers have noted the importance of using criminal justice to prevent political violence from recurring. The parties recognised that their final goal is the achievement of 'sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights'.[97] They agreed that reaching this goal required the parties to conduct further discussions on how to ensure 'the impartial, effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty are brought to justice'.[98] The need to prosecute perpetrators of the 2007 election violence was further recognised in a public statement of the parties on February 14 2008: to solve the political crisis surrounding the election violence, the parties agreed that reconciliation and healing was imperative, and reaching this end was said to require the 'identification and prosecution of perpetrators of violence'.[99] Likewise, the Waki Commission set up by the parties highlighted the role of impunity as a cause of the election violence and recommended the establishment of 'special tribunals' with specific jurisdiction over the election violence and a judicial staff made up of both Kenyans and foreigners. The Waki Report requested the parties to reach an agreement on the establishment of such tribunals and put forward a bill in Parliament. The request was made under threat that failure to comply within a timeframe of 60 days after the Waki Report was made public, would result in a list of names with high-profile Kenyans, which the Waki Commission suspected to be responsible for the violence, would be handed over to the prosecutor of the International Criminal Court (ICC).[100] Yet, a bill on the establishment of special tribunals put forward in

Parliament on February 12 2009 was voted down. The bill was criticised by some observers for failing to ensure the proposed tribunals' independence from the executive and for being drafted with insufficient input from Kenyan civil society.[101]

At the time of writing, debates continued on how, where and whether efforts to prosecute those responsible for the most recent election violence should commence, but the Kenyan government appeared to be under pressure from various sides to domestically deal with the question. Kofi Annan, the chief mediator of the Kenyan National Dialogue and Reconciliation has handed over the list of alleged high-profile perpetrators to ICC prosecutor, Luis Moreno-Ocampo. Ocampo is attempting to push the Kenyans to take actions, but there is profound disagreement among Kenyan decision-makers and it is far from certain that steps to prosecute domestically will be taken.[102]

Debates continue on how, where and whether efforts to prosecute those responsible for the most recent election violence should commence

It is useful at this point to dwell by the implications of prosecuting perpetrators of the post-election violence internationally or nationally.

The establishment of the ICC has often been praised by legal scholars. Cees Flinterman, for example, noted on the existence of the ICC: 'it is hoped [this] will end forever the culture of impunity, thereby deterring the commission of gross human rights violations in the future'.[103] Should criminal prosecutions related to the Kenyan elections violence commence before the Hague tribunal, the advantage, compared to domestic prosecutions, is usually perceived as deriving from the independence of the ICC from national authorities, thereby increasing the likelihood that high-profile Kenyans will be convicted if evidence confirms their guilt.[104]

On the other hand, pursuing accountability before international tribunals is often said to have significant flaws. First, it is clear that prosecuting before the ICC is likely to include only a very limited number of perpetrators and possible convictions are likely to occur only after several years. It is worth keeping in mind that since its establishment in 2002, despite investigations into atrocities in the DRC, Northern Uganda, Darfur, and the Central African Republic, at the time of writing, only one case has reached its trial hearings (prosecutor vs. Thomas Lubanga Dyilo). In other cases, however, arrest warrants have been issued and some cases are in their pre-trial stage. Investigations against Lord's Resistance Army in Uganda have resulted in the ICC issuing altogether five arrest warrants (but proceedings against one have been terminated due to his decease). Besides the case against Dyilo, two cases related to crimes committed in the DRC have reached their pre-trial stage with the accused in custody. One case against a citizen of the Central African Republic is at its pre-trial stage. Finally, the UN Security Council referral of crimes in Darfur to the ICC has led the court to issue arrest warrants against four Sudanese citizens, including President Bashir. One of the Sudanese accused has appeared voluntarily before the pre-trial chamber and the rest remain at large.[105] As follows from this outline, it is extremely improbable that ICC investigations into the recent election violence in Kenya would lead to arrest warrants being issued against more than a couple of instigators. Should these Kenyans happen to be incumbent ministers, members of parliament, or high-profile civil servants, their actual handing over to The Hague to stand trial are far from guaranteed. Moreover, any possible conviction of Kenyans responsible for the election violence in The Hague is likely to occur only after several years. Besides these pragmatic concerns, international tribunals are often criticised for externalising justice because those affected by mass violence, including victims, have little influence on (and perhaps understanding of) the proceedings; because trials take place far away from the communities affected, thus making them inaccessible to the general public; and because those notions of justice that international tribunals enforce are not necessarily corresponding with notions of justice in the communities affected by violence.[106]

Finally, and perhaps most important for the question of local vs. international prosecutions for the Kenyan election violence, one must realise that the key argument for pursuing criminal accountability for the violence surrounding the 2007 elections usually rests on the assumption that it requires punishment of perpetrators to 'eradicate impunity'.[107] In the current debate on political violence in Kenya, eradicating impunity is generally supposed to be a necessary step to prevent the future occurrence of political violence, because only so will prospective perpetrators be deterred from engaging in political violence and only so can the rule of law be reinforced. The Waki Report notes: 'the eradication of impunity will […] not only blow off the cover for persons who break the law of the land but also deter others who may contemplate similar deeds in future'.[108] Logically, any deterrent effect must depend on how prospective perpetrators perceive the chances of being

held accountable.[109] If prosecutions in The Hague lead to the conviction of one, two, or maybe three perpetrators of political violence, the chances of being 'caught and convicted' for future political violence – perhaps except for those holding the highest offices – will be perceived small since the signal sent is that the Kenyan state is unable or unwilling to deal with the question domestically and will not prosecute political violence; at worst a few leaders are prosecuted internationally. Moreover, putting to trial perpetrators of political violence is sometimes said to reinforce the rule of law symbolically by bringing about 'collective appreciation of the rule of law'.[110] The symbolic effect on the rule of law would be much greater if 'Kenyans prosecute Kenyans', and in numbers far exceeding what the ICC would enable. Nevertheless, reinforcing the rule of law by domestically prosecuting perpetrators of the recent election violence is dependent on the process' legitimacy in the eyes of the general public, and to the extent the set-up of special tribunals fails to secure independence from the executive (or others' interference) and fails to bring to account also members of the political elite, the process is likely to be judged as flawed and holds little potential for strengthening the rule of law.[111]

> Eradicating impunity is generally supposed to be a necessary step to prevent the future occurrence of political violence

Despite commentators' enthusiasm for commencing processes of criminal justice, there are, however, good reasons to question the assumption that trying perpetrators of the most recent election violence will automatically lead to the prevention of future political violence in Kenya. The key argument for trial and punishment in the Kenyan context stipulates that only by punishing perpetrators of past violations can we avoid future violations. This utilitarian justification for punishment finds support beyond the Kenyan context.[112] However, some commentators have pointed out that there is not necessarily a correlation between failing to punish perpetrators of past violations (for example by granting them amnesties) and the recurrence of large-scale violations, as such. Post-Franco Spain and post-civil war Mozambique are often quoted as examples.[113]

On the other hand, it seems clear that in a country such as Kenya where political violence has been sparked off not by one major single event where the rule of law was extra-ordinarily put aside, but instead reveals as a phenomenon that has played out with impunity continuously since independence, putting to trial (a significant proportion of) those allegedly responsible for more recent acts of political violence may have a symbolic effect on the rule of law. In this way, criminal accountability for recent acts of political violence may help bring about profound change in political culture.

The question of whether and how criminal accountability as a preventive measure ought to be utilised as a response to the latest outbreak of large-scale election violence in Kenya should be debated, but not from an ideological viewpoint where criminal justice is seen as the solution to all problems. Instead, the question should be assessed from a viewpoint where possible benefits of prosecuting alleged perpetrators are discussed in conjunction with potential flaws of the process' set-up and with an assessment of other actions that can be taken to 'combat impunity'.

Should Kenya fail to prosecute domestically perpetrators of the post-election violence in the near future, it is important to keep in mind that ICC action does not preclude a domestic process at a later stage.

## Legal and institutional reform

Predominantly focusing on trial and punishment as the response that can end impunity and establish or reinforce the rule of law, may lead to neglect for other structural changes that are profound for altering those conditions that allow disrespect for the rule of law. It is obviously not a question of either/or: holding accountable perpetrators of the recent election violence can and should go hand in hand with a reform process that aims at transforming institutions into more accountable, transparent, efficient and rights-oriented entities. But, framing the transitional justice debate primarily as an issue of 'backward-looking' punishment can lead to disregard for the importance of changing those structures that are generally believed to enable political violence.

A possible failure to see criminal justice unfold in Kenya risks bringing about the impression that transitional justice, as such, has failed. Whether or not prosecutions commence domestically, the debate ought not to be disrupted from engaging further with questions of how political violence can be prevented, for example through 'deep' legal and institutional change.

Most of the Kenyans consulted by the author suggested that legal and institutional reforms are most central means in changing those conditions that make possible political violence. The challenge is that certain structures in Kenyan governance render difficult accountability for political violence. The parties to the Kenyan National Dialogue and Reconciliation recognised that addressing

underlying causes of political violence (the so-called 'long-term issues and solutions' as entailed in 'agenda item 4') is essential and depends on the undertaking of constitutional, legal and institutional reform.[114] Since then, the parties have confirmed the importance and their commitment to profound legal and institutional changes. The parties' statement of 14 February 2008 concludes that a broad reform agenda is necessary to address the root causes of the political crisis that had enabled political violence to erupt following the 2007 elections. According to the parties, this reform agenda includes for example 'comprehensive constitutional reforms'; 'comprehensive electoral reform'; 'parliamentary reform'; 'police reform' and 'legal and judicial reforms'.[115]

A possible failure to see criminal justice unfold in Kenya risks bringing about the impression that transitional justice has failed

Reflecting this acknowledgement, on 4 March 2008, the parties issued a statement that acknowledges the importance of a constitutional review process based on inclusiveness, and recalled the need for its urgent undertaking by stating it should be completed within 12 months.[116] The July 2008 Implementation Matrix laid down the overall framework according to which state institutions should be reformed and put forward deadlines for their undertaking. Besides reconfirming the commitment to concluding the constitutional reform process within 12 months, it was noted that reforms of the judiciary should strengthen its independence and commitment to human rights. Moreover, a review process related to police reform was to be finalised within six months; the constitutional review to establish an independent police commission within 12 months; and recruitment and training of police officers to bring the police-to-population ratio to UN standards by 2012. Finally, a number of legislative reforms targeting the civil service were envisioned to take place following the coming into force of a new constitution, and the Kenyan Parliament was to be subjected to reforms that aim at increasing its oversight with the executive. This review process was stipulated to take place within six months.[117]

Because most profound reforms are preconditioned on a new constitution, many of these commitments to institutional change are, however, yet to be implemented. To facilitate the constitutional reform, parliament passed the Constitution of Kenya Review (amendment) Act 2008 which established a committee of experts on constitution review to prepare a draft constitution and present it to parliament.[118]

Controversy has surrounded the committee's commencement. On 23 May 2009, for example, Kenya's Daily Nation reported that the committee was complaining that it had not yet seen disbursement of funds to make the committee fully operational.[119] Moreover, some commentators have questioned whether parliament, based on its current composition, can agree on putting to referendum a constitution that complies with the 'deep' reforms first envisioned by the parties.[120]

Constitutional reform is deemed important by a large majority of Kenyans. According to a January 2009 survey, 90 per cent strongly agree or agree that 'the coalition government must give Kenya a new constitution'.[121]

Reforming the Kenyan police is by many observers deemed among the most crucial aspects of the reform process. Such reforms are said to hold potential for significantly strengthening respect for the rule of law.[122] In May 2009, a task force was established to facilitate this reform but there seemed to be lack of clarity on exactly what the task force should address and how 'deep' its proposals for police reform should be.[123]

A key challenge facing the prospects for legal and institutional change is that, unlike measures that pursue accountability for perpetrators of past political violence, such reforms relate less directly to 'confronting the past' and their implementation is typically a long-term and technical process. This may make a reform process seem less urgent than criminal trials. At the same time, while putting to trial perpetrators of gross human rights violations is supported by requirements in international law, requirements to undertake legal and institutional reform have a much looser legal foundation, if any.[124] What is more, some stakeholders have little interest in 'deep' structural change taking place. Strong executive powers, for example, can be seen as enabling a system where those who gain power can benefit excessively from holding office, therefore potentially leaving incumbent cabinet members and top-level civil servants with little interest in strengthening the independence of the judiciary and in other ways reforming the set-up of state institutions.

Kenyans consulted by the author generally held that many politicians are part of an elite group that benefit from state structures as they are, and will therefore pursue a *status qu*o – or at best a limited and superficial reform agenda. Compared to criminal justice it is not only more difficult for civil society to push for legal and institutional reform because the legal language of state obligations is difficult to evoke, but stakeholders in the reform process may also perceive profound reform as offering few short-term benefits and prefer to deal with the past in a lighter and less structural way.

Yet, because of the centrality of the institutional set-up of state institutions in allowing political violence, engagement with preventing political violence in Kenya ought to place legal and institutional reform at the very core. Doing so requires that we scrutinise how the reform process unfolds. It also requires that political leaders remain under pressure to put into effect their commitments to profound reform. Because 'deep' reform is not an overnight undertaking but a long and complicated process, it also requires some amount of patience. Sticking to deadlines can be less important than pursuing a compromise that is broadly accepted and at the same time engages substantially with the issues at stake. In any case, the active involvement of Kenyan civil society is imperative for the reform process to gain legitimacy and for effectively scrutinising that political leaders use its context not as a means of gaining personal or group advantages or as a smoke-screen for maintaining compromised structures and institutions under the cover of 'reform'. The reform process must ensure that state institutions are profoundly transformed; an undertaking that will eventually benefit Kenyans, as such. It is, as always, important that democracy realises through engagement and works in a transparent way – and not as an exclusive top-down and oblique process. It is also important, however, that the compromises of democracy do not end up functioning as an excuse for diminishing the agenda of 'deep' reform.

> It is vital for strengthening the rule of law that state officials are sufficiently trained and that recruitment is based on qualifications

For these reforms to effectively change structures that enable political violence, transitional justice discourses can provide valuable input. It is increasingly acknowledged that a legalistic top-down approach to transitional justice is insufficient and entails a number of risks.[125] While constitution-making is obviously about law and inevitably will involve some degree of 'top-down' decision-making, scholars such as Kirsten McConnachie and John Morrison have argued that 'if constitution-making is to maximise its transformative potential in the reconstitution of societies, it must seek a more dynamic task than merely a re-shuffling of elites as the traditional institutions of formal government are re-populated'. It is argued that 'transformation must occur at an ethical level where the level of conduct is being considered', and constitution-making should be seen only as a first stage in creating some of the conditions in which […] negotiation and re-negotiation of how we wish to govern ourselves is carried out'.[126] Besides the importance of a participatory process that aims at substantial societal change, perhaps the most important lesson for the Kenyan reform process lies in asking the question whether a technical approach to legal and institutional change will actually transform the way institutions function and relate to one and another, and to Kenyan citizens. Constitutional and legal change sometimes looks good on paper, but yet creates little on-ground change. According to some of the Kenyans consulted by the author this is already a problem. One civil society representative noted that 'Kenya already has good laws; what we need is their implementation and the government's respect for the rule of law'.[127] From one perspective this is exactly the problem that a constitutional review can solve, for example by strengthening the independence of the judiciary and facilitating that state institutions work in a transparent way.

However, this is not enough. As also recognised by the parties to the Kenyan National Dialogue and Reconciliation, it is vital for strengthening the rule of law that state officials are sufficiently trained and that recruitment is based on qualifications.[128] For example, it makes little sense to reform the police by establishing legal provisions for increased accountability and internal oversight mechanisms if police officers are not trained to implement these changes.

Some transitional justice scholars have suggested that to reform state institutions and prevent the recurrence of human rights violations, it is necessary to rid these institutions of known human rights perpetrators. The argument goes that only if high-level officials who have accepted and perhaps endorsed an institutional culture where it is common practice that its agents violate the law and well-known on-the-ground perpetrators are vetted can these institutions undergo the needed change and again be perceived as legitimate in the eyes of citizens.[129] Heated debates about vetting leaders of certain state institutions in Kenya have already unfolded. The UN Special Rapporteur on extrajudicial, summary and arbitrary executions, Philip Alston, recommends that both the Police Commissioner and the Attorney General resign. The Kenyan government responded that the Rapporteur is exceeding his mandate by making such recommendations,[130] but has later transferred the Police Commissioner to another post.[131] For state institutions that have a reputation for failing to respond effectively and in a rights-oriented manner to political violence, or are themselves a part of the problem, the starting

point must be that agents who are proved responsible for violating the criminal code are punished according to the law, and that those who are not will maintain their post unless they for other reasons disqualify. Vetting should not be applied as a measure of punishment but as a tool that may strengthen state institutions' respect for the rule of law, integrity, and legitimacy in the eyes of the general public. Because vetting state officials for the individual in question in many ways resemble a court conviction, any process that aims at removing rough elements known or assumed to have been involved in serious human rights violations must provide individuals with guarantees against arbitrary or collective dismissal. A possible vetting process in Kenya should therefore not be based on removing entities simply because they are alleged to have been involved in political violence or because they are seen as constituting an obstacle to reform,[132] but ought to be based on due process guarantees, in particular the presumption of innocence.[133] In any case, it should be up to Kenyan stakeholders to initiate a possible vetting process, and foreign involvement must be careful not to advocate for importing off-the-shelf models. Nonetheless, vetting state institutions can be imperative for bringing about legitimacy for compromised and disregarded institutions.

> Remedying victims of mass violence is not only a question of doing justice, but also serving the purposes of reconciliation and peace

## Victim redress and confronting socioeconomic causes of political violence

Transitional justice discourses often emphasise the need to redress victims in the aftermath of gross human rights violations. Questions related to reparation for victims have historically been central to the scholarship.[134] International standards recognise victims' rights to reparation and stipulate how reparation can take a variety of forms including, but not limited to, financial compensation for harm suffered, restitution and different forms of rehabilitation.[135] Recent accounts tend to extend victims' rights and often formulate transitional justice processes such as criminal trials as a right of victims to see perpetrators brought to account.[136] For some commentators, remedying victims of mass violence is not only a question of doing justice for the victims, but is also seen as serving purposes of reconciliation and peace.[137] Reparations, even if mainly justified as a means of restoring victims' dignity, can therefore potentially also play a role in preventing the recurrence of political violence.

Questions related to victims' redress have received little attention in debates about addressing political violence in Kenya. The Commission of Inquiry on Post-Election Violence was established to 'prevent any repetition of similar deeds and, in general, to eradicate impunity and promote national reconciliation in Kenya' and was mandated 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'.[138] Yet, its recommendations focus primarily on how to bring these perpetrators to justice and on how a variety of legal and institutional reforms should be undertaken. However, the detailed Human Rights Watch report on the 2007 election violence entails recommendations for the international community to provide support for initiatives aimed at 'compensation for historical and current human rights violations', and for the Kenyan government to ensure the establishment of 'a process of compensation for those who have lost their homes and property' in connection with the election violence.[139]

The parties to the Kenyan National Dialogue and Reconciliation in their February 2008 agreement stated that 'discussions will be conducted to identify and agree on the modalities of implementation' of measures aiming at 'ensuring that the assistance to the affected communities and individuals is delivered more effectively'.[140] Efforts to redress victims of political violence in Kenya have mainly concentrated on facilitating the return of IDPs following the most recent election violence. A Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post 2007 Election Violence has been set up. The fund aims at reconstructing houses and replacing household effects for those people who suffered material damages during the violence.[141] Compensating individual victims of political violence, including victims of sexual violence have not been prioritised to the same extent.[142]

Difficult questions of reparation often arise in the aftermath of large-scale political violence: should the focus be on compensating individual persons who have been victims of rights-violations or should a collective approach be taken where victims are defined in group terms and obtain increased access to certain resources, such as health care and education; what rights-violations should result in compensation (only violations of civil and political rights or also violations of economic, social and cultural rights); how far back should we go in

defining who is a victim; who should pay for compensation schemes; and many more difficult questions arise.[143]

From a preventive perspective, it is important that Kenya addresses questions of how victims of political violence can be redressed. The question must be approached not only in terms of the most recent election violence but also as a wider problem where groups that have historically been exposed to political violence or marginalised receive reparations. The development of such policies requires much more than the adoption of a backward-looking approach where victims of the recent election violence are compensated. It requires also a future-oriented approach where the key objective is to ensure that individuals and groups who have historically been subjected to injustices become less marginalised, for example by increasing access to education, health care, and land. Reconciliation between communities can be important for preventing future political violence because it potentially leaves both individuals and groups with a sense that they can overcome tensions of the past and move forward.[144]

From a preventive perspective, it is important that Kenya addresses victims of political violence

The parties' agreement to set up a 'Truth, Justice and Reconciliation Commission' may prove important for these objectives.[145] The commission is mandated to inquire into historical injustices, including political violence, community displacement and grand corruption, and it is envisioned that it can 'promote peace, justice, national unity, healing, and reconciliation among the people of Kenya.[146] The commission is intended to provide a platform for victims to be heard and restore their dignity; make recommendations on how to redress victims of these injustices; and more generally make recommendations for the prevention of political violence and other violations.[147] The commission is also mandated to grant amnesties to perpetrators who make full disclosure of human rights violations and economic crimes committed.[148]

The process that has led to the establishment of the commission has been criticised for failing to consult sufficiently with civil society, and the law itself has been described as flawed, for example because it allows for amnesties, because it fails to secure independence from other state institutions, because it lacks provisions for implementation the commission's recommendations.[149]

It has often been a problem that recommendations of truth commissions are not sufficiently implemented. In South Africa, for example, commentators regret that many of the Truth and Reconciliation Commission's recommendations have not been attended to.[150]

The Kenyan commission has potential to contribute to the reform agenda discussed above as well as to other forms of preventive actions. For this to happen, it is important that the commission's work is followed closely and debated in public. It is also important that its recommendations are discussed openly and leaders take their implementation seriously.

Beyond the Truth, Justice and Reconciliation Commission, a number of important initiatives have been discussed which may further an agenda of attending to socioeconomic causes of conflict. Agenda Item 4, as decided upon by the parties to the Kenyan National Dialogue and Reconciliation, recognises the need for 'tackling poverty and inequity, as well as combating regional development imbalances'; the need for addressing 'unemployment, particularly among the youth'; and the need for undertaking land reforms'.[151] According to the parties' Implementation Matrix, fundamental land reforms are to be facilitated by the Constitutional review process and a number of other mechanisms to be implemented to deal legally and administratively with problems related to land allocation and ownership.[152] The same document envisions that action be taken to address poverty, inequality, regional imbalances and unemployment. Among many other activities, the Implementation Matrix stipulates that action must be taken to 'ensure equity and balance are attained in development across all regions in job creation, poverty reduction, improved income distribution and gender equity'; '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'; and 'generate an average of 740 000 new jobs each year from 2008-2012'.[153]

While transitional justice as an analytical framework has historically tended to neglect dealing with the past by addressing socioeconomic causes of conflict, the importance of such means is increasingly being realised in the scholarship.[154] The fact that the Kenyan framework for preventing the recurrence of political violence outlines a detailed agenda and set of action needed to reverse socioeconomic factors that are recognised as contributing to conflict in many ways stand out in comparison to attempts in other countries of dealing with past injustices.

Accepting that prevention depends on more than eradicating a culture of impunity and reforming state institutions by paving the way for confronting problems of poverty, unemployment and land distribution is an

important first step in addressing holistically the root causes of political violence in Kenya. However, influential stakeholders in Kenya may have personal interest in some of the reforms not taking place. For example it has been noted that draft land reform legislation is being lobbied against by large landowners and certain members of cabinet.[155] For the reforms to foster substantial change it is obviously not enough that they are included in a broader process that aims to prevent political violence and conflict on paper. Both politicians and civil society must continuously push for their actual implementation and ensure that other pending questions of transitional justice do not lead to the neglect of these important structural changes. The commitment announced by the parties to the Kenyan National Dialogue and Reconciliation to a reform agenda that includes altering socioeconomic causes of conflict is vital but should be translated into concrete and far-reaching initiatives and action. Again, structural changes in society are not an overnight-undertaking. Patience and long-term commitment is required from all involved stakeholders.

A window of opportunity has been created where legacies of political violence in Kenya can be countered

## CONCLUSION

With the adoption of a broad reform agenda by the parties to the Kenyan National Dialogue and Reconciliation following the most recent election violence, a window of opportunity has been created where legacies of political violence in Kenya can be countered. This commitment to confront past injustices and bring about substantial change is imperative. After all, without leaders' acknowledgement that certain features in society such as impunity, the set-up of state institutions, and socioeconomic factors have allowed for political violence, profound change is unlikely to occur. Yet, the process of dealing with political violence in Kenya seems threatened by a lack of sincere commitment among vital stakeholders.

Despite the existence of a civil society in Kenya that reminds the political leadership of its pledges for reform and scrutinises action taken – and the international community following closely the developments – there are risks that important parts of the reform process will end up neglected. To avoid these risks materialising, political leaders must take responsibility, even if in the short-term it might seem easier to move on without addressing what is needed: 'deep', structural changes that can strengthen the rule of law, and at the same time address socioeconomic issues such as poverty, inequality, and land distribution. Civil society must be allowed, and willing, to participate and engage substantially in the further shaping and implementation of the process. If not, risks are not only that the undertakings will lack legitimacy but also that it becomes oblique, superficial, and unsuccessful in reaching the objective of preventing political violence. Although the present debate about preventing political violence in Kenya tends to take its starting point in addressing the recent election violence, it is clear that by undertaking the reforms envisaged, many of the causes of political violence could be confronted effectively.

## NOTES

1 The interviews were carried out confidentially and the identity of those organisations consulted will remain on file with the author only.

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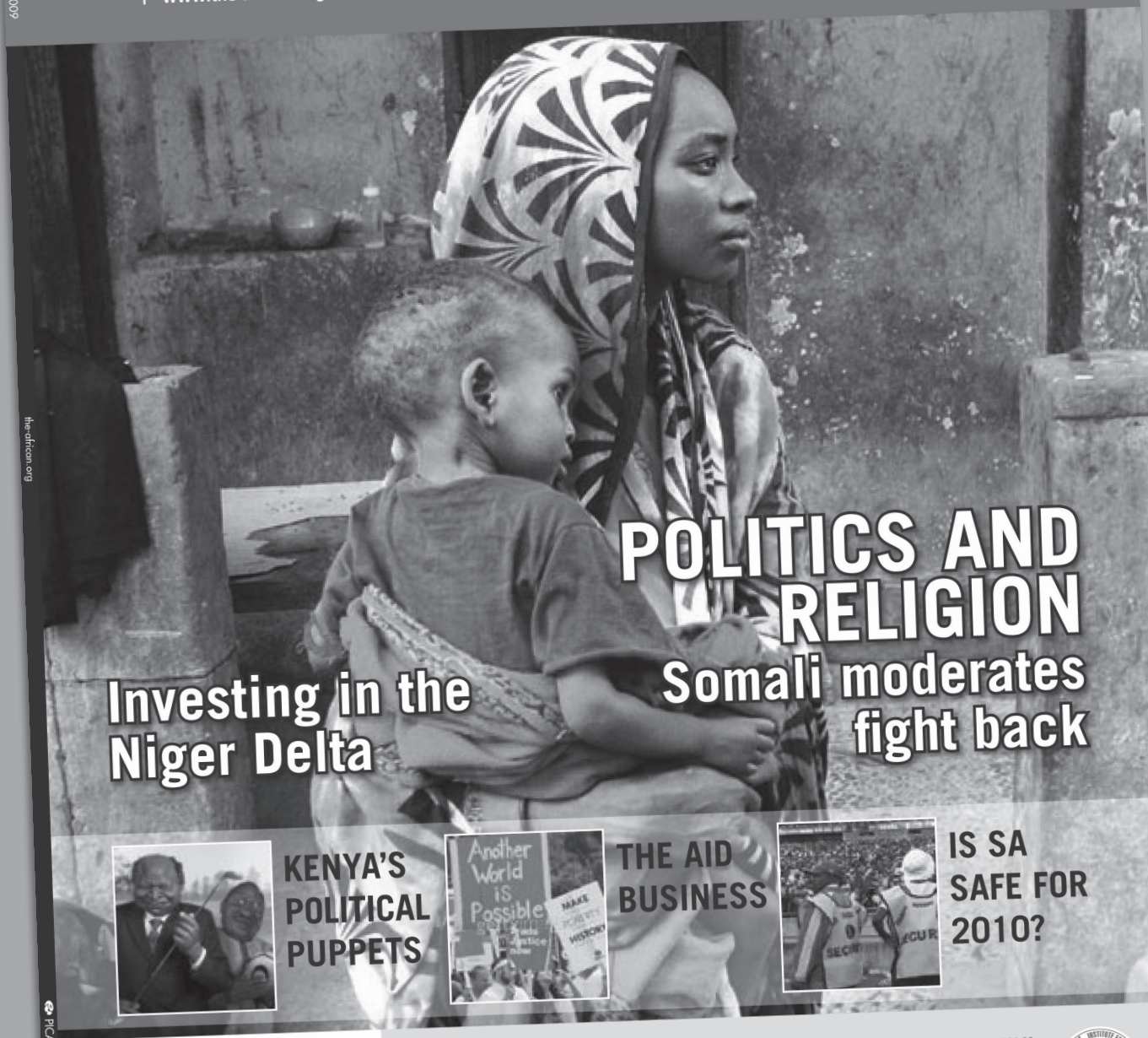
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## ABOUT THE PAPER

Following the 2007 elections, Kenya suffered political violence. More than 1 000 Kenyans lost their lives and many were displaced. While often portrayed as standing in contrast to an otherwise politically stable country, the fact remains that large-scale political violence has occurred on several other occasions. This paper looks into the legacies of political violence in Kenya, and points to some of its main causes. By drawing on transitional justice discourses, the paper discusses the action taken by the parties to the Kenya National Dialogue and Reconciliation and other stakeholders. In analysing these measures, it is argued that for Kenya to prevent the recurrence of political violence, priority must be given to profoundly reforming institutions and ensuring that accountability measures are set up.

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Thomas Obel Hansen is a PhD researcher with Aarhus University Law School. His research focuses on the field of transitional justice, and is based on fieldwork in Rwanda. He has conducted research stays with African civil society organisations, including a stay with ISS' Nairobi office in February-June 2009. He has published and lectured on human rights, transitional justice, and international criminal law.

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