

## Donor responses to the 2008 Kenyan crisis: Finally getting it right?

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This contribution analyses Western governments' responses to the 2008 Kenyan crisis. It argues that while donors' reactions to the crisis were a vast improvement over their responses to previous elections and eruptions of political violence, they failed to learn some important lessons from the past and take a more proactive role in preventing violence, notably because they disregarded key governance problems that made violence easily imaginable, if not utterly predictable. Moreover, by focusing on ending the violence as quickly as possible, donors placed greater priority on peace than on justice or democracy, a trade-off that undoubtedly saved many lives but compromises the political reform agenda and carries significant future risks for Kenya and other countries.

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Many Kenyans and outside observers have long been critical of Western aid donors' role in Kenyan politics, faulting them among other things for prolonging authoritarian rule under President Daniel arap Moi and for their weak response to large-scale political violence in the 1990s. Though at the rhetorical level donors have consistently supported democracy and non-violence, their actions have been at best sporadic, focusing on the lead-up to general elections, and unsustainable. At times they have appeared timid and half-hearted, as well as naïve if not downright cynical. Economic and security interests often overshadowed donors' commitment to democracy and good governance (Brown 2007).

In the crisis that followed Kenya's 27 December 2007 general elections, however, donors appeared to have learned some lessons from the past. As a whole, they no longer support the status quo by – if reluctantly – endorsing unfair election results and by calling on election losers to fight their battles in the courts. In early 2008, donors placed much more pressure on the incumbent president, Mwai Kibaki, than they had after any other heavily contested election, to recognise the tainted nature of the official results. They also supported the losing party's claims that the results should not be recognised, which they had never done before in Kenya. Donors worked in close coordination to help winners and losers reach a compromise, in the form of a power-sharing agreement, which de-escalated tensions and largely restored social order. Some observers believe that the power-sharing agreement 'would not have been possible without this united stand by the international community' (Harneit-Sievers and Peters 2008, 133). One human rights lawyer and long-time activist praised donors' new role: 'For the first time, they were real allies'.<sup>1</sup> Did donors finally get it right?

This contribution analyses donors' short- and medium-term responses to the 2008 Kenyan crisis. It uses the term *donor* as convenient shorthand for Western governments and their missions in Kenya, including both diplomatic and aid representatives.<sup>2</sup> It asks what donors' roles were, how they differed from those they had played in the past, and how their actions relate to broader Kenyan political struggles, beyond the immediacy of the post-election crisis in early 2008. It argues that while donors' reactions to the crisis were a vast improvement over their responses to previous elections and eruptions of political violence, they failed to learn some important lessons from the past and to take a more proactive role in preventing violence, notably because they disregarded key governance problems that made violence easily imaginable, if not utterly predictable. Moreover, by focusing on ending the violence as quickly as possible, donors placed greater priority on peace than on justice or democracy, a trade-off that undoubtedly saved many lives but compromises the political reform agenda and carries significant future risks for Kenya and other countries.

The structure of this analysis is essentially chronological. It begins with a brief overview of the roles donors played in previous elections and instances of electoral violence. It then examines their roles and responses during the 2007 electoral campaign, on election day and during the vote-counting process and announcement of results. Next, it analyses donor involvement in the subsequent crisis and its resolution through international mediation. It subsequently examines donor involvement in the post-crisis period. Finally, it analyses trade-offs inherent in the political settlement and alternative scenarios, before concluding with an assessment of the continuities, changes and remaining challenges, as well as the relevance for other conflict-prone democratising countries.

### **Donors and previous electoral violence**

One of the gravest misunderstandings of the 2008 crisis is the assumption that large-scale political violence was unprecedented in Kenya. In fact, high ranking state and party officials from KANU (Kenyan Africa National Union, which ruled from independence in 1963 to 2002) sponsored political attacks around the 1992 elections and, to a lesser extent, those of 1997, commonly albeit somewhat misleadingly known as ‘ethnic clashes’. The total number of people killed in the 1990s exceeded 1,000 and some 500,000 more were forced to leave their homes, many of whom remain displaced today. These figures closely match the numbers of people killed and displaced in the violence during January-February 2008. The latter attracted much more international attention than the ‘clashes’ in the 1990s, not only because they occurred over a much shorter period of time, but also because the violence affected the Nairobi area, taking place under the noses of the national and international media and Western government officials, and seemed to threaten Kenya’s viability as a country.<sup>3</sup>

Donor responses to political violence in the 1990s were woefully inadequate. Although donor officials were well aware that senior officials had orchestrated attacks on presumed opposition supporters in KANU-dominated areas, they never acknowledged this publicly. Only in private did donors exercise ‘quiet diplomacy’, refusing to condemn openly the sitting government and continuing to channel relief funds through the same government that was allowing the attacks to continue, often even sponsoring them. This assistance continued until government abuses became impossible to ignore, and even then donors would not hold the government to account because of other foreign policy priorities and disincentives (see Brown 2003 for more in-depth analysis).

Given the scale of the electoral violence in the 1990s, national and international actors shared a concern that violence would recur around the 2002 elections. It did not, for two main reasons. First, the National Rainbow Alliance (NARC) opposition coalition had a two-to-one lead over the KANU incumbent and the strategic deployment of violence could not have overcome the decisiveness of that advantage. Second, the shifting, competing cross-ethnic alliances and the fact that the two main presidential contenders were both Kikuyu confounded any ethnic chauvinist strategy for fomenting violence. It remained clear at the time that large-scale violence could easily emerge again in the future under a new political configuration if useful to some powerful players (Brown 2004, 332–4). Further encouraged by the peaceful conduct of the 2005 constitutional referendum, donors and other actors rashly concluded that the ghost of political violence had been buried.<sup>4</sup>

### **Donors and the December 2007 elections**

With political violence prematurely consigned to the dustbins of Kenyan history, donors missed the signs of rising violence during the 2007 electoral campaign. In the few months that preceded the December elections, political violence claimed almost 600 lives, a majority resulting from the police’s extrajudicial execution of suspected members of Mungiki, a religious cult/protection racket/political militia, events to which ‘the international community proved remarkably apathetic’ (Cheeseman 2008, 170). It also ignored other signs of growing tensions, including hate speech by candidates and on local-language radio stations (listened to almost exclusively by members of specific ethnic groups, as opposed to those in lingua franca

Kiswahili or English, which attracted multiethnic audiences). Multiple opinion polls suggested that the presidential race was going to end in a photo finish and it was hardly a stretch of the imagination to assume that the losing side would probably respond violently in some areas, even if the elections were technically free and fair.

At a more basic level, donors continued to fail to address the underlying causes of electoral violence in the past, including ethnic tensions rooted in inequity – usually real but also perceived – in access to land, monetary resources and political power. In the five-year period since the previous elections, if not since the return to multipartyism in 1991, donors had rarely engaged the government of the day in a sustained serious manner on the governance problems that exacerbated political and ethno-regional tensions. The voters' rejection of the proposed new constitution in 2005 left Kenya with essentially the same constitution that had underpinned four decades of autocratic rule under President Moi and his predecessor Jomo Kenyatta. Fundamental issues of electoral fairness, including the unequal distribution of constituencies (Brown 2001, 726), were never addressed in the post-Moi era.

Also unchanged was the fundamentally neopatrimonial mode of governance that coexisted with a formally democratic system, including the reliance on massive corruption to direct ill-gotten gains to ethno-regional power brokers and the use of these resources to assemble the ethnic building blocks of support to form a government. The complete impunity for grand larceny and ethnic cleansing in the past only encouraged the strategic use of these tools in the struggle for political power in 2007–8.<sup>5</sup> As Cheeseman (2008, 181) notes, 'the lack of international criticism of Kibaki's failure to dismantle the authoritarian structure inherited from the one-party state is striking'.

An important sign that incumbent President Kibaki was not prepared to 'play fair' in 2007 was that, a few months before the poll, he unilaterally appointed 19 new commissioners of the 22 members of the Electoral Commission of Kenya (ECK). Though permitted by the letter of the law, this was contrary to a 1997 agreement between KANU and the opposition parties – for which Kibaki had pushed – to split the appointments proportionally amongst them. Donors failed to pursue this matter with any vigour, which later proved extremely detrimental to the credibility of the elections.<sup>6</sup> In many ways, the ECK was a disaster in slow motion, culminating in its breakdown during the vote count. Donors, including the United States, which had provided direct support, and others that channelled their assistance through the United Nations Development Programme (UNDP), were initially hesitant to disown the body in which they had invested so much.<sup>7</sup> In part to avoid any possibility of conflict, they emphasised during the campaign that the ECK would be the final arbiter of the results. This made it very hard for donors to disavow the ECK's announcement of Kibaki's victory, even if they almost unanimously had expected challenger Raila Odinga to be elected president. Though there was no immediate evidence that Odinga should have won, there were sufficient reasons to believe that the fraud had made the results unreliable.

The ECK did not allow donor officials to observe the final tally of the vote in Nairobi. Suspicion arose as Kibaki's numbers surged at the last minute. Several ambassadors, including those from Germany, Netherlands, US and UK, tried unsuccessfully to get the commission to hold off on announcing the results to permit a recount (Throup 2008, 296; also *New York Times*, 30 December 2007). The British High Commissioner, Adam Wood, was reported to have met twice with ECK Chairman Samuel Kivuitu to urge him to conduct an investigation before declaring a winner (*Guardian*, 31 December 2007). Odinga's Orange Democratic Movement (ODM) had actually requested a meeting with the Western ambassadors to discuss suspending the announcement until the suspicious results in 40 constituencies were sorted out. Kivuitu was agreeable to the suggestion, as long as all parties agreed, but Kibaki's Party of National Unity (PNU) refused.<sup>8</sup>

After the announcement was made, international election monitors, notably the European Union's team, refused to endorse the result. The EU's chief observer, Alexander Graf Lambsdorff, stated that, because of irregularities, 'doubt remains as to the accuracy of the result of the presidential election as announced today' (*Guardian*, 31 December 2007). Other observer teams, including from the Commonwealth, the US-based International Republican Institute and the East African Community, also refused to endorse the results (ICG 2008, 6). As violence erupted across Kenya, the day after Kibaki was hastily sworn in for a second term, the ECK Chairman admitted that he did not actually know who the

rightful winner of the presidential contest was, but had ceded to pressure to declare a victor. Still, PNU officials denied that there had been any serious fraud and donors were unable to get access to Kibaki (*Guardian*, 1 January 2008). Donors soon agreed that outside involvement and pressure would be key to resolving the crisis.

### **Donors and the crisis**

Despite being caught rather unawares, donors responded to the crisis with coordination and follow up that was better than ever before. Even so, it took almost two months for the PNU and ODM to reach an agreement, as the government dragged its heels, expecting donors to cave in, as they had done in Kenya and elsewhere in the past, in an overarching concern for stability.<sup>9</sup> Though Kibaki himself may have been more amenable to a compromise, hardliners in his party, including Cabinet ministers Martha Karua, John Michuki and George Saitoti, initially refused to accept any mediation – in their view, the PNU had legitimately won the elections. At first, ODM officials were disinclined to negotiate with what they considered to be an illegitimate government and relinquish Odinga's claim to the presidency. Donor pressure was key to bringing both sides together at the bargaining table and reaching an agreement brokered by the African Union (AU) mediation team's chief negotiator, former UN Secretary General Kofi Annan.<sup>10</sup> Collectively, donors forced PNU and ODM officials to meet and accept the AU-led mediation process, using targeted sanctions (mainly travel bans on senior government and opposition figures) and threats of lower aid flows.

Still, some important distinctions can be made in the various donors' reactions, especially their approaches in the first week or two after the elections. Below, I examine in greater detail the role of the most influential actors, namely the United States, the European Union and some of its member states, especially the United Kingdom.

#### ***Initial divergence: The US and the rest***

Before the vote, donors were divided in their preferences. Kibaki had lost a lot of donor support during his first term, notably over issues of corruption (Murunga and Nasong'o 2006, 19; Wrong 2009). Some, such as France, were generally supportive of Odinga, while others preferred the status quo of a second Kibaki term to the uncertainty of a new president.<sup>11</sup>

The only donor to recognise formally Kibaki's victory was the United States, Kenya's largest aid donor. On 30 December 2007, the day the ECK announced the results and Kibaki was sworn in, a US Department of State spokesman in Washington congratulated Kibaki for his election and 'call[ed] on the people of Kenya to accept the results of the election and to move forward with the democratic process,' adding that 'the electoral commission in Kenya and the commissioner there would be the ultimate authority, and we would look to them to investigate any claims of fraud or mismanagement' (AFP 2007). US officials later dismissed that statement as an error, stating that it was a committed by a relatively low-level official on weekend duty and not an accurate representation of the official US position—an explanation received with widespread scepticism.

That it was one person's mistake is rendered less credible by the US government's release, the next day, of an official statement that, 'Those alleging vote tampering may pursue legal remedies and should be able, consistent with respect for freedom of speech, to make their case publicly.' It also called upon 'the judiciary to play its role expeditiously' (US Government 2007). In a small but significant shift, this suggested that Kibaki was the legitimate president unless the courts – not the electoral commission – found otherwise. The ODM unsurprisingly refused to take the judicial route, given the courts' record of a lack of independence (see Cussac 2008a, also available as Cussac 2008b). The US's image as pro-Kibaki was strengthened by allegations that it had quashed the release of an exit poll, conducted by the International Republican Institute (IRI) and funded by the US Agency for International Development (USAID), that gave Odinga a decisive 8% lead.<sup>12</sup>

Two days later, the US position seemed to have shifted decisively to a focus on re-establishing peace without reference to validity of electoral results. A joint statement by US Secretary of State Condoleezza Rice and UK Foreign Secretary David Miliband on 2 January called for an end to violence and for political compromise (US Department of State 2008a).<sup>13</sup> The following day, at a press briefing, a State Department spokesman went to great lengths to avoid answering whether the US recognised Kibaki's victory as legitimate (US Department of State 2008b). From then on, the US sought to pressure Kibaki and Odinga to arrive at compromise, widely understood to involve some form of power sharing where Kibaki would remain president and Odinga would be appointed to the newly created post of prime minister.

The only other donor official to endorse Kibaki's victory was the World Bank representative in Kenya, Colin Bruce, who wrote in a confidential internal memo to headquarters in Washington that the UN had endorsed Kibaki's victory, a position which the UN denied taking. In the memo, which was leaked to the press, Bruce alleges that 'the considered view of the UN is that the Electoral Commission of Kenya announcement of a Kibaki win is correct' (*Financial Times*, 10 January 2008).

All other donors were much more cautious in their pronouncements, expressing concern about the irregularities but avoiding any mention of what free-and-fair results would have been. Even though most donor officials believed that Odinga should have won, not one said so publicly. None called for Kibaki to step down. A few staff members in the Scandinavian and Canadian diplomatic missions advocated reviewing the records and conducting a statistical analysis, after which they might recommend a rerun, but their position was not adopted by their respective embassies.<sup>14</sup> Donors felt they could play a more effective role in ending the violence if they remained 'neutral'.<sup>15</sup>

### ***Convergence: power sharing and African Union mediation***

The United Kingdom – Kenya's former colonizer and currently its second-largest donor – was the first to advocate power sharing. British Prime Minister Gordon Brown, for instance, telephoned both Kibaki and Odinga on 31 December to ask them to negotiate a coalition government (*Guardian*, 1 January 2008), but neither side was yet willing to renounce its claim to unilateral victory. The British Foreign Secretary began explicitly calling for the 'sharing of political power' on 5 January (UK in Kenya 2008a). On 7 January, he stated that 'Kenya's immediate and medium term future requires the sharing of power' (*Guardian*, 8 January 2008).

The US government dispatched assistant secretary of state for African affairs Jendayi Frazer on 3 January for a quick trip, meeting separately with Kibaki and Odinga, to try to expedite discussions and the mediation efforts of African Union Chairman John Kufuor of Ghana, whose involvement the Kenyan government initially rejected. Frazer allegedly toed a pro-Kibaki line, seeking to end the conflict and forget about the contested election results. This displeased Odinga and made no headway.<sup>16</sup> She returned to Nairobi a week later, after Kibaki – feeling secure in his bargaining position – named half a cabinet, giving close allies within the PNU most of the important positions, to the outrage of Western diplomats who had helped convince Odinga to renounce mass action because meaningful negotiations on power sharing were underway (*Guardian*, 9 January 2008).<sup>17</sup> After that, Frazer referred to power sharing as 'an essential element to a viable short-term solution for Kenya' (US Government 2008a), de facto aligning the US with the UK's emphasis on reaching an agreement acceptable to both parties. With donors reaching a joint position on the need for dialogue and compromise, Kibaki was under increased pressure to agree at least to let Kufuor try to mediate. By then, donors fully supported the African Union taking the lead in the search for a peaceful solution.

Western ambassadors had access to senior ODM officials and some PNU ministers, but Kibaki would not meet them. World Bank Country Director Bruce was able to shuttle discretely between Kibaki and Odinga to promote AU-led face-to-face talks, an approach especially favoured by the British. Bruce enjoyed direct access to Kibaki because of their personal relationship, thereby bypassing PNU hardliners.<sup>18</sup> This ended by 10 January, when the local media published Bruce's memo, mentioned above, and Odinga rejected his role as honest broker.

Under Kufuor's mediation, the two sides came to a verbal agreement that included a recount and, where necessary, a rerun. Kibaki, however, upon advice from hardliners from his party reneged on the agreement. Foreign Minister Moses Wetang'ula denied any PNU involvement in the draft (*Daily Nation*, 12 January 2008). Kibaki refused to sign the document and claimed Kufuor was only on a fact-finding mission and that no outside assistance was required. Odinga also questioned Kufuor's credibility as a mediator. Kufuor gave up in frustration and flew home on 10 January, having asked Kofi Annan to take over as chief mediator.<sup>19</sup> During this period, violence in the streets escalated and state security forces increasingly attacked demonstrators, often using deadly force.

Annan, delayed by an illness, arrived in Nairobi on 22 January. He had previously contacted American, European and African leaders to try to ensure that there would be, in his words, 'just one mediation process. Otherwise you have the protagonists trying to bottom shop, looking elsewhere if they don't like what you're offering. You get diplomatic tourism and that's no good' (Cohen 2008a). Kibaki initially resisted meeting with Annan, as he had earlier refused to meet with Nobel Peace Prize Laureate Desmond Tutu of South Africa, hoping to deal instead with a plan touted by his ally Yoweri Museveni, President of Uganda – one of only four African countries to recognise Kibaki's re-election (*Guardian*, 3 January 2008). The government objected to Annan's mediation. Justice minister Martha Karua accused Annan of being pro-Odinga and attempting to carry out a 'civilian coup' by transferring presidential executive power to an opposition prime minister (Cohen 2008b).

Annan's approach emphasised ending violence at all cost. Past events, including fraudulent results, were set aside, and the possibility of a recount, runoff or rerun discarded. By the time Annan took the lead in negotiations, the international community had come to see power sharing as the only viable strategy. The ODM wanted an internationally supervised recount, but that was not possible: the ballots and tallying forms had been tampered with or destroyed (Cheeseman 2008, 177). A rerun or runoff could have been organised but it was not clear when or by whom, as the ECK was thoroughly discredited. Donors were also concerned that new elections would lead to new violence and thus agreed that power sharing was the 'least bad solution possible at that time'.<sup>20</sup> The Annan Plan thus had rapidly become 'the only game in town'.<sup>21</sup> Western countries knew and trusted Annan from his many years at the United Nations. Donors strongly supported his mediation efforts, both in official pronouncements and behind-the-scenes pressure on the ODM and especially PNU officials, even if a few officials might have had reservations. The main differences among donors were more over how much to say publicly than whether to follow Annan's lead.<sup>22</sup>

Progress was very slow and moved only in fits and starts. The PNU negotiators were especially reluctant to cede any ground, emboldened by their position as a de facto government with no particularly reason to hurry – except of course the violence that continued apace and, at that stage, specifically targeted members of Kibaki's ethnic group, the Kikuyu. Pressure from donor capitals and local donor officials, inclusive of the threat of sanctions, helped move things forward at key moments. Donors were in daily contact with Annan and closely coordinated their pressure with him. The US embassy even sent their draft statements to Annan for approval (Cohen 2008b).

On numerous occasions in January and February, donors repeated individually and collectively, in public and in private, that it would not be 'business as usual' in the area of financial assistance until a political compromise had been reached.<sup>23</sup> The UK was the first donor to raise the possibility of aid being cut. In early January, Douglas Alexander, the Secretary for International Development, stated: 'In light of the political instability and violence, the UK will keep our aid programme in Kenya under ongoing review. It is vital that Kenya's political leaders enter a process of dialogue aimed at achieving a democratic solution to bring this crisis to an end' (*Guardian*, 4 January 2008). In mid-January, 14 donors, including the US, issued a joint warning that they were 'reviewing foreign aid in light of the crisis', raising the possibility of channelling a greater proportion through NGOs and the private sector (*Daily Nation*, 17 January 2008; *New York Times*, 17 January 2008). On 17 January, the European Parliament threatened to freeze budgetary aid (*East African*, 22 January 2008). As a whole, the EU could take collective measures only with difficulty, since the relevant article of the Cotonou Agreement would be

cumbersome to enact.<sup>24</sup> ODM officials and some Kenyan civil society organisations voiced their support for a suspension of aid (*Daily Nation*, 18 January and 21 January 2008).

Individual donors did not always speak with one voice and some officials were reluctant to invoke a reduction in foreign aid as a means of pressure. For instance, on 24 January, US Ambassador Michael Ranneberger was reported saying it would be 'counterproductive' and 'premature' to talk about cutting assistance (*New York Times*, 24 January 2008). On 30 January, however, the Australian Foreign Minister, Stephen Smith, invoked the spectre of aid cuts when he announced, 'We will also be keeping under review our development assistance program provided to Kenya' (Australia 2008). Donors soon stopped some payments, which had an effect on Kenya's credit rating, moving to a 'low-case scenario' as foreseen in the 2007 Kenya Joint Assistance Strategy, which contained scenarios for scaling up or down aid, depending on the quality of governance (HAC Kenya 2007, 37–9).

At the end of January, as violence continued unabated, Mark Malloch Brown, UK Minister for Africa, visited Nairobi and lent support to the Annan process. Formal negotiations between ODM and PNU representatives finally got under way on 29 January. Frazer also returned to Kenya and, as the violence appeared increasingly orchestrated rather than spontaneous, referred to 'ethnic cleansing', though the state department refused to endorse her use of the term (*Washington Post*, 31 January 2008). She also raised the possibility of cutting aid (*Guardian*, 31 January 2008). UN Secretary General Ban Ki-moon visited Nairobi to express support for Annan. French Foreign Minister Bernard Kouchner recommended that the UN Security Council consider the situation in Kenya (France au Kenya 2008).

In early February, the US embassy notified 13 Kenyan politicians and businessman that the US government was reviewing their visa status, in light of their alleged support or incitement of violence (US Department of State 2008c). A pan-European travel ban would have been more difficult to put in place and, furthermore, some Southern European countries were opposed to it.<sup>25</sup> Individual European countries, however, were free to do so. The British and Swiss announced measures similar to the American ones, and the UK raised the possibility of 'smart sanctions' that would freeze assets held abroad by those who sabotaged the mediation process (*Guardian*, 18 February), while the Canadians reiterated the standing possibility of not being permitted to enter Canada.

Senior officials from donor countries travelled to Kenya at key times to show support for Annan's efforts and help move the mediation process forward. On 18 February, not long after a second opposition MP was killed, Secretary of State Condoleezza Rice visited Nairobi to assist in breaking the deadlock in the Annan-led talks. Echoing an earlier statement by US President George W. Bush on the US's wish for a power-sharing deal (*Guardian*, 16 February 2008), she announced that 'the political leaders from all persuasions, all sides, need to come to an agreement. They need to have a power-sharing arrangement which will allow the governance of Kenya to go forward' (US Department of State 2008d). A week later, Rice raised the possibility of further punitive steps in an attempt to break the deadlock.<sup>26</sup> During this period, European Commissioner for Development and Humanitarian Aid, Louis Michel, twice visited Kenya in support of the AU-led process. Reportedly, British pressure was particularly influential with Kibaki, notably when Annan was about to give up in late February, amid rumours of militias rearming.<sup>27</sup> In a final attempt, Annan circumvented the government negotiating team's intransigence by presenting a draft directly to Kibaki and Odinga, without their mediation teams. On 28 February, the PNU and ODM finally signed the National Accord, which provided for power sharing. Donors moved back to the 'base scenario' for foreign aid, even if nothing concrete had been achieved yet.<sup>28</sup>

The agreement decisively ended the violence, but did not actually spell out the distribution of Cabinet positions, requiring a new round of negotiations. When the subsequent talks were once again deadlocked, donors applied pressure anew. For instance, on 7 April, Rice spoke by telephone in turn to Kibaki and Odinga, urging them to come to an agreement. The next day she warned, 'Should the accord not be implemented, however, the United States will form its own judgments regarding responsibility for lack of implementation of the accord, and act accordingly' (US Government 2008b). Donors also encouraged private sector pressure.<sup>29</sup> Annan returned to Nairobi to move negotiations forward. On 17 April, six weeks after signing the National Accord, the two parties finally formed a 'Government of National Unity'.

In sum, despite being wholly unprepared for widespread electoral violence and having some disagreement in the first few days over the best strategy to follow, donors soon coordinated their actions to an unprecedented degree amongst themselves, as well as with the African Union's mediation team. They also sustained the unexpectedly strong pressure for two months, until the power-sharing agreement was signed and then for another six weeks until the coalition government was actually formed. This unprecedented level of strategic cooperation contrasted quite strongly with their reluctance throughout the 1990s to maintain a united front and constant pressure on the Moi regime and other authoritarian rulers elsewhere in Africa (Brown 2001). The focus on stopping the violence as quickly as possible by brokering a power-sharing arrangement required leaving unresolved or even unaddressed many crucial basic issues.

### **After the crisis ends, the real work begins**

The National Accord ended the killing, but did not solve any of Kenya's other serious problems. At the cabinet swearing-in ceremony Annan announced: 'Don't believe that now that we have a government, all is resolved and we can relax. There is lots of hard work ahead: constitutional reform, land reform, a programme that will create employment for the youth' (*Financial Times*, 17 April 2008). The government of national unity, however, quickly proved disappointing. The PNU and ODM agreed on a bloated cabinet, with 40 ministers, to be split evenly between them, supplemented by 50 assistant ministers. Thus, more than 90 out of 222 members of parliament or over 40% would participate in the executive (Kiai 2008a, 164). When the power-sharing cabinet was appointed, donors objected to its size but lacked the political will to make it a real issue; they wanted the government to get to work.<sup>30</sup> According to the Danish ambassador, 'The international community felt power sharing could possibly address the underlying issues'.<sup>31</sup>

In its first year in power, however, the coalition government has done little or nothing to address other pressing issues, including the deficient governance that underpinned the violence in the first place. To the contrary, power sharing has institutionalized a division of the spoils by the two parties, without a functioning opposition in parliament to try to hold the government accountable, including dealing with large-scale corruption. Irrespective of their current party affiliation and alliances, members of the Kenyan political class share many common interests. Constitutional review once again appears to be on hold and the government has not yet taken concrete action on land and police reform or disarming private militias, among other pressing issues. When donors do get involved in these issues, they tend to deal with symptoms rather than overtly political causes. For instance, in recent years, donors have provided important assistance in the justice, law and order sector, focusing on technical aspects, such as service delivery, work plans and efficiency. As one observer wryly noted, 'Making the police more efficient means they beat people better, in nice uniforms and with new truncheons'.<sup>32</sup>

Nonetheless, in accordance with the post-crisis agreements, the government appointed two commissions: one to look into the conduct of the elections (the Kriegler Commission) and one on the post-election violence (the Waki Commission). One observer stated that Kriegler did what the embassies told him to do: 'Don't rock the boat. Focus on the future.'<sup>33</sup> But some donors consider that the report was not critical enough, as it failed to substantiate a deliberate pattern of fraud.<sup>34</sup> It did nonetheless result in the disbandment of the ECK, though it is not yet clear when its successor will be operational.

The Waki Report has generated considerable interest. It recommended setting up a Special Tribunal to prosecute high-level officials responsible for organising and carrying out the violence. Should the government fail to do so, it requests that Kofi Annan transmit to the International Criminal Court (ICC) a sealed envelope with the names of a dozen suspects for further investigation and possible indictment, widely believed to include both PNU and ODM MPs and cabinet ministers.

Donors have expressed strong support for the Waki and Kriegler Commission recommendations, including in public declarations and privately with Prime Minister Odinga and the Minister of Foreign Affairs, raising the possibility that aid could be reduced if the government fails to act.<sup>35</sup> Still, it is not clear



how the international community will monitor the implementation of the National Accord and how it will react to any deficiencies. So far, the government has already failed to respect the timelines set out in an agreement between the PNU and ODM.<sup>36</sup>

Despite some grumbings, donors are generally satisfied with Kenyan macroeconomic policies and political openness.<sup>37</sup> They have moved up from the 'low-case scenario' and are unlikely to cut aid again – even if they do occasionally express discontent publicly or take less radical steps, such as imposing further visa restrictions on senior government officials (for instance, see BBC News Online, 26 February 2009; *Daily Nation*, 1 and 19 March 2009). If the past is any guide, donors are unlikely to maintain intense political pressure over time, shifting instead to economic and security priorities once again (Brown 2007). Kenya is an important ally in the US-led 'war on terror', notably given that al-Qaida has committed attacks on Kenyan soil, including blowing up the US embassy in 1998, and for the country's proximity to Somalia (Brown 2003, 85; Wrong 2009, 277). It is also an important partner for myriad donor and international NGO activities in Kenya and neighbouring countries, including as the host of a large UN office and most recently in the fight against maritime piracy (*New York Times* 24 April 2009). Donors might not actually mind the 'imperial' powers of the presidency, as it makes for a strong interlocutor. For instance, they would prefer not to renegotiate access to military bases with parliament.<sup>38</sup>

Many donors also feel that, while they have provided an annual total of between \$767 million and \$1.3 billion in development assistance (net, 2005–2007), their leverage is not as strong as it used to be, especially since the Kenyan government increasingly enjoys access to other sources of funds, notably financial markets and China. They recognise the inherent limitations of political conditionality and believe that the 'damage' of any bilateral aid suspension would be in large part symbolic and indirect, hurting the government's reputation and standing among investors.<sup>39</sup>

### **Trade-offs and the road not taken**

When the Kenyan crisis erupted, donors needed to play multiple roles and had access to incomplete information; they had little time to ponder and debate how to react. They prioritized the re-establishment of order and stability, which involved abandoning the search for justice and an outcome that reflected the democratic will of the voters. Even if most donors believed that Odinga should have won, they did not possess any concrete proof. Moreover, it was at first only ODM supporters who were perpetrating violence, which made it harder for donors to express their support for Odinga. Donors thus refused to take sides, some would say they 'betrayed Odinga', in an overarching desire to ensure stability.<sup>40</sup>

Unlike the Kufuor draft agreement, the Annan Plan set aside the issue of the elections. Annan persuaded the parties to sign what one observer called a 'ceasefire document'.<sup>41</sup> It alleviated the urgent symptoms of the crisis, ending in particular the deadly violence, but was quite vague on how to address the actual causes. One could argue that this was but the first step in a lengthy and complex process. The Danish ambassador argued that power sharing gave Kenyans time to address other issues and was in fact the most democratic outcome available at the time: 'the alternative was civil war and ethnic cleansing'.<sup>42</sup> However, the extent to which these 'other issues' will be tackled remains to be seen.

The main critical juncture where donors could have decisively taken another path was on 30 December 2007. When the ECK announced the results, donors could have insisted on an immediate recount. If all donors had quickly rejected the results as non credible, a different outcome might have been possible – but riots had already started and donors wanted at all cost to avoid an escalation of violence.<sup>43</sup> In this, their strategy failed, as waves of violence swept the country for two months. Still, once the decision was made to set aside the matter of true electoral results, thereby implicitly recognising Kibaki's presidency if not its democratic legitimacy, it was no longer possible to declare an actual winner of the presidential elections.

An interim government and new elections were also a possibility, but neither the ODM nor the PNU favoured that scenario and donors did not insist, in part because the logistical challenges seemed impossibly complicated. Donors also could have supported the ODM's desire to have the power-sharing

agreement last less the full five-year term, but Condoleezza Rice insisted that it be in place until the next regularly scheduled general elections, arguably constituting an impediment to future reform (Rothmyer 2008).<sup>44</sup> Alternative scenarios were thus possible, even if their success was far from guaranteed.

## Conclusion

The violence that followed Kenya's 27 December 2007 general elections caught donors completely by surprise, despite being somewhat predictable or at least a clear possibility. They had failed to learn from the occurrences of similar, if less intense, electoral violence in the past and missed several warning signs – the relative peacefulness of the 2002 elections and the 2005 referendum having lulled them into premature complacency. Moreover, during the previous five years, they had failed to address in any serious manner the key problems in governance of Kibaki's post-authoritarian government that greatly contributed to the crisis, focusing instead on economic, diplomatic and strategic priorities. Donors also fatally overestimated the strength of Kenyan institutions, notably the Electoral Commission and its chairman. These gaps in donors' political analysis and their lack of proactive action to try to prevent the re-emergence of political violence hardly suggest that donors 'finally got it right' in a broader sense.

Nonetheless, once the US fell in line, donors reacted with unprecedented unity, coordination and co-operation, furthermore working closely with the African Union's mediation team to reach a power-sharing agreement that would end the violence. From this narrower conflict-resolution perspective, donors finally did 'get it right'. Though the National Accord clearly did end the large-scale violence, it took the two sides two months to reach an agreement – and then another six weeks to form a government. This was to a certain extent due to government stalling, fully expecting donors to condone the rigging and other *faits accomplis*, and get on with business, as they had done in Kenya and other countries in the past. In this way, the Kenyan crisis may serve as a positive example to other countries facing a similar crisis: Donors appear more serious than ever before in refusing to endorse fraudulent elections. This new behaviour, however, might only apply in cases where the losing side renders the country ungovernable.

Donors' commitment to democratic electoral outcomes is patently less clear. With the abandonment of Kufuor's draft agreement and Annan's focus on power sharing, there was no longer any question of determining who really won or holding new elections to produce a clear winner according to democratic principles. Instead, with the formation of a grand coalition, both sides got to win. In the end, it might be the Kenyan voters who wind up losing.

The National Accord was predicated on future action on fundamental, pressing problems in Kenya, including constitutional reform, land tenure, prosecutions and human security. How committed the government or the donors are to acting on these complex issues beyond the rhetorical level is not clear. Lack of progress on these issues during Kibaki's first term and the government of national unity's first year in office suggests that the Kenyan government has not turned over a new leaf – and donor commitment is compromised by other priorities. It also means that, unless significant and sustained efforts are soon undertaken, a new violent crisis could well emerge in conjunction with the 2012 elections, if not sooner.

The 2008 Kenyan crisis, alongside the concurrent case of Zimbabwe, produces a dangerous new precedent for other countries. An incumbent government or an opposition party unwilling to accept that it actually lost an election can foment enough violence to ensure that, with the blessing of the international community, it can retain or obtain a share of power, with no penalty for any abuses committed during the campaign period or for any fraudulent practices related to the tallying of votes. If this elite-pact model holds, the donors' overarching desire for stability will trump the basic tenets of democracy, whereby the electorate determines who will form the government through the ballot box following predetermined procedures. Thus, in 'finally getting it right' in Kenya, donors chose a path that might unwittingly hamper democracy and promote more violent conflict in the future, both in Kenya and elsewhere.

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## Notes

1. Interview with Willy Mutunga, Programme Officer, Human Rights and Social Justice, Ford Foundation, Nairobi, 10 December 2008.
2. This corresponds to the general usage of the term in Kenya. Here, I concentrate on bilateral donors, though on occasion also discuss multilateral donors and lenders, such as the United Nations and the World Bank. In 2006–07, the top five providers of official development assistance were the United States (\$304 million/year or 27% of total), the United Kingdom (\$133 million, 12 %), the European Commission (\$115 million, 10%), Japan (\$113 million, 10%) and World Bank/IDA (\$111 million, 10%) (OECD 1009).
3. On the various waves of political violence from 1991 to 2008, see *inter alia* Akiwumi Commission 1999; Anderson and Lochery, 2008; Human Rights Watch 1993; Kagwanja 1998; Maupeu 2008ab; and Mueller 2008.
4. Though they lost the referendum, the status quo was even more advantageous for Kibaki and the government, as it left intact the high concentration of power in the hands of the executive (Whitaker and Giersch 2009, 13).
5. The perpetrators operated with complete impunity. Many senior officials involved remained in the Moi/KANU government and the Kibaki/NARC government that succeeded it; some are prominent in the current PNU/ODM coalition government.
6. Interview with Bo Jensen, Danish ambassador, Nairobi, 8 December 2008. On other ECK warning signs, see Kiai (2008b, 142).
7. Some felt, in retrospect, that it had been serious mistake to channel electoral assistance funds through UNDP because of its close relationship with the government, rather than a more neutral organisation such as IFES, whose assistance with computerisation the government had refused (unattributable interview, Nairobi, December 2008; see also Kiai 2008a, 165; Kiai 2008b, 142). Others faulted UNDP for poor management of the domestic election observers (interview with François Grignon, Africa Program Director, International Crisis Group, Nairobi, 4 December 2008; interview with a Western embassy official, Nairobi, December 2008). UNDP’s close ties with the government gravely compromised its response to state-induced political violence in the early 1990s (Brown 2003; Human Rights Watch 1997).
8. Interview with a European embassy official, Nairobi, December 2008.
9. Interview with a European embassy official, Nairobi, December 2008. Western countries had countenanced in recent years a number of elections that failed to meet the standard of free and fair, including in Ethiopia, Nigeria and Uganda.
10. I do not wish to underestimate the central role of African mediation efforts (see Lindenmayer and Kaye, n.d.; Litscher 2008). My focus here, rather, is specifically on the role of Western donors. For that reason, I also pay insufficient attention to the role of Kenyan civil society, which warrants further study.
11. Interview with a European researcher, Nairobi, December 2008. In particular, some donors were worried that an ODM victory could lead to the mass expulsions from the Rift Valley of members of ‘non-indigenous’ ethnic groups – which occurred anyway when Odinga was not declared the winner.
12. US officials deny that the poll was not released for political reasons, invoking instead technical flaws in the data entry and calculations. IRI finally released the results, which gave Odinga a 6% lead, in August 2008, far too late to make a difference. After leaving the organization, the former head IRI official in Kenya told the *New York Times* (30 January 2009) that the US ambassador had favoured Kibaki throughout the campaign. See also the IRI website ([www.iri.org](http://www.iri.org)) and Rothmyer (2008).
13. The *New York Times* (2 January 2008) reported that the US government, among others, was ‘calling for a vote recount’, but no other indications of this could be found. In fact, much evidence exists to the contrary.
14. Interview with a Western embassy official, Nairobi, December 2008
15. Interview with Bo Jensen, Danish ambassador, Nairobi, 8 December 2008.

16. Interview with François Grignon, Africa Program Director, International Crisis Group, Nairobi, 4 December 2008.
17. Some felt donors could have expressed greater support for Odinga's position, but they lack the will to be more forceful. Interview with a Western embassy official, Nairobi, December 2008.
18. Kibaki lived next door to and in fact owned the World Bank representative's residence (*Wall Street Journal*, 6 March 2008 ; Wrong 2009, 191, 260).
19. ICG (2008, 1, 22) and interview with François Grignon, Africa Program Director, International Crisis Group, Nairobi, 4 December 2008. See also *Guardian* (10 and 11 January 2008). The other two members of the AU's Panel of Eminent African Personalities were Benjamin Mkapa, former president of Tanzania and Graça Machel, former minister of education of Mozambique and First Lady of both Mozambique and South Africa.
20. Interview with a European ambassador, Nairobi, December 2008.
21. ICG (2008, 23). Some civil society organisations opposed power sharing, calling for new elections. Donors considered this impractical while the violence was ongoing. Interview with Willy Mutunga, Programme Officer, Human Rights and Social Justice, Ford Foundation, Nairobi, 10 December 2008. One could argue that once Odinga renounced his claim to the presidency and sought instead the position of prime minister, donors had no choice but to support power sharing. Others would argue that donors had played a key role in convincing Odinga to drop his claim of being the rightful president, which would never prove acceptable to the PNU.
22. Interview with Bo Jensen, Danish ambassador, Nairobi, 8 December 2008.
23. Interview with a European embassy official, Nairobi, December 2008; Embassy of Denmark (2008); European Union (2008); and *Financial Times* (18 February 2008).
24. Interview with a European embassy official, Nairobi, December 2008. Article 96 of the Cotonou Agreement between the EU and African, Caribbean and Pacific countries stipulates that co-operation may be suspended in cases of egregious violations of human rights, democratic principles or the rule of law, but only as a last resort, after other efforts to find a solution have failed.
25. Interview with a European ambassador, Nairobi, December 2008. Such a visa ban would apply to the borderless 'Schengen Area' of Europe, rather than to the European Union per se.
26. Rice stated, 'I am disappointed by the failure of leadership necessary to resolve all the remaining issues... I want to emphasise that the future of our relationship with both sides and their legitimacy hinges on their co-operation to achieve this political solution. In that regard, we are exploring a wide range of possible actions' (*Washington Post*, 27 February 2008).
27. Interview with a European researcher, Nairobi, December 2008.
28. Unattributable interview, Nairobi, December 2008; interview with a Western embassy official, Nairobi, December 2008.
29. Interview with Bo Jensen, Danish ambassador, Nairobi, 8 December 2008.
30. Unattributable interview, Nairobi, December 2008.
31. Interview with a Bo Jensen, Danish ambassador, Nairobi, 8 December 2008.
32. Interview with Mugambi Kiai, Programme Officer, Open Society Initiative for East Africa, Nairobi, 10 December 2008. See also Maina Kiai (2008a, 165-166).
33. Interview with François Grignon, Africa Program Director, International Crisis Group, Nairobi, 4 December 2008.
34. Interview with a European ambassador and a European embassy official, Nairobi, December 2008.
35. Interview with a European embassy official, Nairobi, December 2008; *Daily Nation*, 19 September 2008 and 17 November 2008.
36. 'Statement of Principles on Long-term issues and solutions', 23 May 2008. Internet, [www.dialoguekenya.org/docs/S\\_of\\_P\\_with\\_Matrix.pdf](http://www.dialoguekenya.org/docs/S_of_P_with_Matrix.pdf), last accessed 11 March 2009.
37. Interview with a European embassy official, Nairobi, December 2008.
38. Interview with Willy Mutunga, Programme Officer, Human Rights and Social Justice, Ford Foundation, Nairobi, 10 December 2008.
39. Interview with Bo Jensen, Danish ambassador, Nairobi, 8 December 2008. The aid figures are taken from OECD (2009), which also indicates that aid accounts for about 4% of Kenya's gross national income. According to Wrong (2009, 184) – although she does not cite her source – aid as a proportion of the government budget has declined dramatically from 45% in the early 1990s to about 5% today, due mainly to 'improved tax collection'. The size and nature of Chinese assistance to Kenya have not been made public.
40. Unattributable interview, Nairobi, December 2008. It is worth noting that PNU supporters were also armed and would likely have reacted violently to the declaration of an Odinga victory. A similar scenario would probably have played out, with the roles reversed. Donors should therefore have been more proactive before the elections

to avoid violence, rather than relying on the Electoral Commission's to lend legitimacy to the results, whatever they turned out to be.

41. Interview with Mugambi Kiai, Programme Officer, Open Society Initiative for East Africa, Nairobi, 10 December 2008.
42. Interview with Bo Jensen, Danish ambassador, Nairobi, 8 December 2008.
43. Interview with a Western embassy official, Nairobi, December 2008.
44. The lack of a sunset clause in the power-sharing agreement or even a stipulation of what happens if one side pulls out strengthens Kibaki and the PNU's hand, providing them with no incentive to accommodate the ODM. As Odinga and ODM officials grow increasingly dissatisfied with their share of power, they have limited options. Withdrawing from the collation would have the effect of voluntarily handing all power back to the PNU. The National Accord includes no mechanism to trigger fresh elections before 2012.

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