

The National Accord, Impunity and the Fragile Peace in Kenya

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Introduction

Kenya's presidential elections on December 27, 2007 ended in a photo-finish. Amidst a very tense atmosphere and after 24 hours of counting and tabulations *in camera*, the Electoral Commission declared on December 30 that incumbent president Mwai Kibaki was the victor. At the eleventh hour, Raila Odinga, his main rival, lost the significant lead he had held in most opinion polls during the campaign and in the partial returns during the counting process.¹ Odinga and supporters of his party, the Orange Democratic Movement (ODM), cried foul and refused to accept the results. Demonstrations quickly sprung up in ODM strongholds, especially in Nyanza province, home to Odinga and the majority of his fellow Luo.²

In the days that followed, ODM supporters in Nyanza and Rift Valley provinces, as well as in Nairobi, perpetrated attacks, sometimes deadly, on Kikuyu and members of other ethnic groups that generally supported Kibaki and his Party of National Unity (PNU). Members of the Kikuyu and allied ethnicities responded with similarly violent reprisals against Luo, Kalenjin and others assumed to support the ODM. The police, during this period, used lethal violence against peaceful demonstrators and are widely believed to have received shoot-to-kill orders from the highest level.³

The violence spread and caused at least 1,100 deaths, while displacing 500,000 or more Kenyans from their home, land and businesses. It ended two months after the elections, when Kibaki and Odinga signed a power-sharing agreement, known as the National Accord. More broadly, the National Dialogue and Reconciliation process set in motion the creation of a series of institutions and activities that would, it was hoped, document what had happened and prevent future

¹ David Throup, "The count", *Journal of Eastern African Studies*, vol. 2 (2008), pp. 290–304.

² The Kenyan government does not publish census data on ethnicity. However, common estimates for the main ethnic groups in Kenya are the Kikuyu (21-24%), Luhya and Luo (13-14% each), Kalenjin (11-13%), Kamba (11%), Kisii (6%) and Meru (5-6%). Electoral alliances between ethnic "power brokers" vary widely from election to election. In 2007, most Kikuyu, Kamba and Meru supported the incumbent Mwai Kibaki and his Party of National Unity. The main support for the main presidential challenger, Raila Odinga, and his Orange Democratic Movement came from the Kalenjin and Luo.

³ The International Criminal Court (discussed below) did not, however, confirm charges against the head of police Mohammed Hussein Ali for his alleged role in the post-election violence.

outbreaks of large-scale violence. These included a number of mechanisms that fall under the rubric of transitional justice, such as establishing a record on the institutional failures that occurred of the election process and appropriate measures to strengthen the Electoral Commission, determining the causes of the post-election violence and suggesting means prevent its recurrence, obtaining accountability for the crimes committed, and promoting reconciliation.

This was not Kenya's first experience with large-scale political violence. In fact, immediately before and after the 1992 and 1997 general elections, a similar total number of people were killed and displaced. Those "ethnic clashes" in the 1990s, as they are usually called, were mainly instances of state-induced violence against members of ethnic groups that generally supported multipartyism and challengers to the rule of authoritarian president Daniel arap Moi, but lived in zones dominated by Moi's party, the Kenya African National Union (KANU). The latter had ruled the country from independence in 1963 until Kibaki's election in 2002, after Moi retired. Despite systematic and credible documentation on which senior officials incited, organized and financed the violence in the 1990s, the government never charged any of them. Thus, prior to the 2007-08 election violence, a history of complete impunity prevailed.

Although I use the term "transitional justice" in order to highlight links between processes discussed in this study and in the others in this volume, as well as in the broader literature, Kenya is not a typical example. For one, the transition to a new political order is only partial, lacking the solid break with the past that has occurred in such places as Bosnia and Herzegovina or Sierra Leone, both discussed in this volume. The former single party that had ruled Kenya since independence is no longer in power, but many of its officials – some of whom played an important role in many gross human rights violations in the past – still sit in Parliament and Cabinet. For that reason, it would be more accurate to refer to "post-conflict" or "post-atrocity" justice than transitional justice. I also discuss peace and peacebuilding is a somewhat different way from most, since Kenya experienced only intermittent violent conflict and no civil war, unlike the other countries analyzed in this book. The agreement signed to end the violence is not a typical peace agreement, though it contains many common elements, such as provisions for temporary governance structures, including power sharing, and new institutions. As no formal military combatants were involved, there has however been no discussion of disarmament, demobilization and reintegration (DDR) in Kenya – though as I shall argue, the continued existence of armed militias poses a serious threat to future stability.

This chapter assesses the performance to date of the National Dialogue and Reconciliation mechanisms of 2008 and how well they can be expected to function in the near future. In particular, it examines the contributions of the National Dialogue and Reconciliation process to transitional justice and peacebuilding in the Kenyan context – and the relationship between justice and peace. Goals discussed include holding perpetrators accountable, attending to victims' needs and the restitution of the assets they lost, establishing a broadly accepted account of what had occurred and why, and preventing recurrence. It draws on fieldwork conducted in Nairobi in December 2008 and January 2010, during which time I interviewed officials from embassies, aid missions, international organizations, Kenyan civil society organizations and the

government. Important local initiatives across the country, such as district peace committees, and reconciliation at the interpersonal level, unfortunately lie beyond the scope of this study.⁴

I argue that though the agreements ended the widespread violence, it would be premature to assert that they re-established “positive peace”, i.e., based on good inter-group relations, rather than merely a “negative peace”, with a potentially fragile absence of generalized inter-group violence. While a few of the transitional justice mechanisms have attained some of their particular goals, the majority have not. As a result of the lacunae in transitional justice, perpetrators go unpunished (with the possible exception of a handful of individuals that the International Criminal Court will try) and victims’ needs are generally ignored (resulting in the general absence of victim-centred approaches to peacebuilding). Paradoxically, the lack of implementation and sometimes active sabotage of key initiatives included in crucial National Accord–related initiatives have helped keep the peace agreement in place. Powerful PNU and ODM political elites have joined forces to prevent, as best they can, measures that are not in their shared interest, notably accountability for the crimes committed – since several high-placed officials of both parties are alleged to be among those who bear the greatest responsibility for planning and financing the violence. The debates on the concrete trade-offs between or complementarity of transitional justice and peacebuilding apply with difficulty to Kenya: Several years after the Accord was signed, it has produced no justice and only a tenuous peace.

The remainder of this chapter is organized as follows: First, I examine the concrete measures agreed to in the National Dialogue and Reconciliation process and the direct institutional outcomes, namely the appointment of several commissions and the adoption of a new constitution. Second, I analyze the indirect institutional outcomes, with a focus on the efforts to set up a special hybrid tribunal and the involvement of the International Criminal Court. Third, I examine key National Accord issues that remain insufficiently addressed or left off the agenda. The conclusion attempts to tease out the complex relationship between transitional justice and peacebuilding in Kenya and what lessons it might suggest for other countries.

Kenya’s Peace Agreement: The Kenya National Dialogue and Reconciliation Process

The international community responded rapidly to the post-election crisis in Kenya. The African Union appointed a Panel of Eminent African Personalities to mediate talks between the PNU and ODM, headed by former UN Secretary-General Kofi Annan and strongly supported by Western aid donors.⁵ Early in the process, the two sides agreed on a four-point agenda: 1) ending the

⁴ For analysis of local peacebuilding in one Kenyan community, see Jacqueline M. Klopp, Patrick Githinji and Keffa Karuoya, “Internal Displacement and Local Peacebuilding in Kenya: Challenges and Innovations”, Special Report 251 (Washington, DC: United States Institute of Peace, September 2010).

⁵ For more on the talks and international contributions, see Stephen Brown, “Donor Responses to the 2008 Kenyan Crisis: Finally Getting it Right?”, *Journal of Contemporary African Studies*, vol. 27 (2009), pp. 389-406; Monica Kathina Juma, “African mediation of the Kenyan post-2007 election crisis”, *Journal of Contemporary African Studies* vol. 27 (2009), pp. 407-430; and Gilbert M. Khadiagala, “Regionalism and conflict resolution: Lessons from the Kenyan crisis”, *Journal of Contemporary African Studies*, vol. 27 (2009), pp. 431-444.

violence and restoring fundamental rights and liberties; 2) addressing the humanitarian crisis, as well as promoting reconciliation, healing and restoration; 3) overcoming the political crisis; and 4) working on with long-term issues and solutions.⁶ The National Dialogue and Reconciliation process, as it became known, produced a series of joint ODM and PNU statements and agreements between February and May 2008. The foremost of these was the National Accord and Reconciliation Act, signed by Kibaki and Odinga on February 28, 2008, which instituted a power-sharing coalition government and basically ended the ongoing violence – thus resolving agenda items 1 and 3. The various agreements led to a number of other concrete measures, with both direct and indirect results, but also some significant gaps, all examined below.

Direct Institutional Outcomes

The agreements led directly to the creation of number of commissions and other institutional reforms, including constitutional and electoral.

1. Commission of Inquiry into the Post-Election Violence

One of the most important commissions that the National Dialogue created was the Commission of Inquiry into the Post-Election Violence (CIPEV), also known as the Waki Commission, named after its chair, Kenyan Justice Philip Waki.⁷ In June 2008, the chair and the other two CIPEV Commissioners, a human rights lawyer from the Democratic Republic of Congo and a senior police official from New Zealand, were sworn in. The appointment of international members was designed to enhance the commission's impartiality and legitimacy.

The Waki Report is an invaluable account of the violent acts that took place across the country in the two months that followed the December 2007 elections. Released in October 2008, it documents a broad range of atrocities and determined that the three sets of actors – ODM supporters, PNU supporters, as well as the police – shared responsibility for about one third of the deaths each.⁸ The data from the report not only helped establish a credible account of the nature of the violence, it also provided powerful evidence against self-serving and divisive

⁶ Kenyan National Dialogue and Reconciliation, “Annotated Agenda and Timetable”, February 1, 2008.

⁷ The commission's mandate, according to an agreement signed on March 4, 2008 by the PNU and ODM negotiating teams, was “(i) to investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 Presidential Election, (ii) investigate the actions or omissions of State security agencies during the course of the violence, and make recommendation [sic] as necessary, and (iii) to recommend measures of a legal, political or administrative nature, as appropriate, including measures with regard to bringing to justice those persons responsible for criminal acts” (p. 2).

⁸ Waki Commission, *Report of the Commission of Inquiry into Post-Election Violence*, Nairobi (October 2008).

claims that one “side” was responsible for the majority of the violence or that the majority of victims were from one particular ethnic group.

A key recommendation of the Waki Commission was the creation of a Special Tribunal for Kenya, a hybrid national/international tribunal discussed below, that would prosecute one hundred or perhaps several hundred suspected perpetrators. To help ensure that the coalition government followed up on its promise to implement the recommendation, the commission gave it 105 days from the report’s publication date to create the tribunal. To avoid the report being ignored, a common fate of such documents in Kenya, the commissioners included a “Trojan horse” that vastly improved the odds of implementation.⁹ Justice Waki sent Kofi Annan a sealed envelope that contained a list of names of people whom the commission believed to bear the greatest responsibility for organizing and financing the violence, accompanied by multiple boxes of evidence. Were the coalition government to fail to set up a credible tribunal by the deadline, January 30, 2009, Kofi Annan was to forward the documents to the prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, and request that he seek to open an investigation.¹⁰ The results of this initiative are discussed below, under the rubric of indirect outcomes.

2. Truth, Justice and Reconciliation Commission

The idea of a truth commission was resurrected during the National Dialogue and Reconciliation process. The Kibaki government had in fact previously considered setting up a truth commission after it first came to power in January 2003. Soon after, it appointed a task force on the issue, but then ignored its recommendations for setting up a truth commission.¹¹ Though the actual reason is unknown, a plausible explanation is that the Kibaki government was in fact a loose and last-minute alliance of parties and powerful individuals (National Rainbow Coalition, NARC) that had joined together shortly before the December 2002 general elections to defeat KANU, the incumbent party, and its presidential candidate, Uhuru Kenyatta. NARC included in its ranks number of high-level former KANU politicians who themselves are widely believed to be deeply involved in many of the abuses during the rule of Daniel arap Moi (1978-2002), including massive corruption schemes and the organization and financing of widespread state-induced violence against opposition supporters in the 1990s, mentioned above. The Kibaki government relied on those individuals and their followers to govern and therefore had a strong incentive

⁹ The expression was used by Mugambi Kiai, Open Society Institute, interviewed by Stephen Brown and Chandra Lekha Sriram, Nairobi, Kenya, January 15, 2010. The best example of a similar report being ignored in the past is the report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, known as the Akiwumi Commission, presented to President Daniel arap Moi in 1999, but released publicly only in 2002. It contained serious allegations against many high-level government and ruling party officials, but the government undertook no investigations or prosecutions.

¹⁰ Waki Commission, *Report of the Commission of Inquiry*, p. 473.

¹¹ Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, “Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission” (Nairobi: Government Printer, 2003).

against investigating and prosecuting the main perpetrators – that is an important reason one cannot say Kenya has had a meaningful break with the past.

Within a week of signing the National Accord, PNU and ODM representatives reached an agreement that spelled out the parameters, principles and composition of a Truth, Justice and Reconciliation Commission (TJRC) and committed the parties to create the commission expeditiously.¹² After a series of delays, the commission did not begin hearings until April 2011. The delays can be attributed mainly to coalition government’s foot-dragging, including the withholding of financial support, as well as the controversial appointment of Bethuel Kiplagat as commission chairperson, whom many Kenyans – and a few reports of previous commissions of inquiry – associate with the abuses committed under Moi’s rule, including some that the TJRC would be investigating. As a result, the TJRC will be hard pressed to finalize its report before the next elections, due to be held by March 2013 – thereby increasing the likelihood of its politicization during the electoral campaign, potentially fomenting more violence.

The TJRC’s internal divisions and slow pace are not the only factors hampering the commission’s work. The TJRC Act gave the commission an extremely broad mandate: to investigate human and economic rights abuses in Kenya between independence in December 1963 and the signing of the National Accord in February 2008. Among other reservations to the legislation, Kenyan and international human rights organizations criticized the insufficient independence granted to the commission and the government’s central role in determining whether to prosecute or grant an amnesty. Many also believed that the provisions for witness protection and reparations were insufficient or left too vague.¹³

Though in theory a truth commission can promote reconciliation by allowing individuals to tell their stories, establishing an accurate historical account of abuses, restoring dignity to victims, and providing symbolic recognition and material reparations, Kenya’s TJRC faces many challenges before it is able to achieve any of those outcomes. Making public the crimes of high-profile perpetrators and then granting them amnesties could make victims feel revictimized and even increase tensions.¹⁴ The airing of an official “truth”, especially when highly contested, does not *ipso facto* lead to reconciliation – it can in fact exacerbate local tensions and put witnesses at risk, as the experience of local *gacaca* courts in Rwanda demonstrates.¹⁵ Given that the government has withheld payments of the TJRC’s budget, it will probably be even more reluctant to provide victims with compensations. Foreign aid donors are highly unlikely to underwrite payments to individuals.¹⁶

¹² Kenyan National Dialogue and Reconciliation, “Truth, Justice and Reconciliation Commission”, March 4, 2008.

¹³ See discussion in Stephen Brown, “Kenya”, in Lavinia Stan and Nadya Nedelsky (eds.), *Encyclopedia of Transitional Justice* (Cambridge University Press, 2012).

¹⁴ European ambassador, interviewed by Stephen Brown, Nairobi, Kenya, December 2008.

¹⁵ Jennie E. Burnet, “The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda”, *Genocide Studies and Prevention*, vol. 3 (2008), pp. 173-193; Max Rettig, “Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?”, *African Studies Review*, vol. 51 (2008), pp. 25-50.

¹⁶ Western official, interviewed by Stephen Brown and Chandra Lekha Sriram, Nairobi, Kenya, January 2010.

3. Other processes and promises

The National Accord commits the coalition government to carrying out a number of other activities, the two most prominent of which are constitutional reform and the review of the 2007 presidential elections. Constitutional reform had been high on the public agenda for at least two decades. It completely dominated the political scene in 2004-05, culminating in a rejection of the proposed draft in a plebiscite in 2005.¹⁷ The promulgation of a new constitution in August 2010, after 70% of Kenyan voters expressed their support in a referendum, is arguably the most important concrete achievement to date of the National Dialogue and Reconciliation process. The new constitution has the potential to catalyze widespread institutional reforms. The longer-term impact of the new constitution will depend heavily on the government's respect for constitutionalism and the rule of law, which in turn is subject to its political will.¹⁸ Worrisome in that respect was Kibaki's attempt to appoint a new Attorney-General, Chief Justice and Director of Public Prosecutions without consulting the prime minister, as the law requires. However, he eventually acquiesced to national and international pressure. A key undertaking will be the overhaul of the judiciary (widely perceived as very corrupt) and the police (responsible for extrajudicial killings with impunity, accord to a UN report), to which the government's commitment is tepid, at best.¹⁹

An important element of the National Accord was the commitment to determine what had gone wrong with the electoral process – thus establishing a definitive account of the spark that ignited the violence – and how to prevent recurrence. The ODM and PNU negotiation teams signed an agreement, on March 4, 2008, on the establishment of an Independent Review Committee, “mandated to investigate all aspects of the 2007 Presidential Election and make findings [sic] and recommendations to improve the electoral process”.²⁰ The commission's report, issued in September 2008, offered a comprehensive review of procedures and numerous technical recommendations. Among other things, it led to the disbandment of the Electoral Commission of Kenya and the appointment of an interim new one, as well as to electoral reforms, such as redrawing district boundaries. As for its investigations into alleged irregularities in the presidential elections, the commission did not identify any clear patterns of fraudulent practices that would suggest that the incumbent government had systematically acted to steal the elections. This passive endorsement of Kibaki's victory disappointed many Kenyans and outside observers,

¹⁷ For further information, see Beth Elise Whitaker and Jason Giersch, “Voting on a constitution: Implications for democracy in Kenya”, *Journal of Contemporary African Studies*, vol. 27 (2009), pp. 1-20.

¹⁸ See discussion in Stephen Brown, “Lessons Learned and Forgotten: The International Community and Electoral Conflict Management in Kenya”, in David Gillies (ed.), *Elections in Dangerous Places: Democracy and the Paradoxes of Peacebuilding* (Montreal: McGill-Queen's University Press, 2011), pp. 127-143; Susanne D. Mueller, “Dying to win: Elections, political violence, and institutional decay in Kenya”, *Journal of Contemporary African Studies*, vol. 29 (2011), pp. 99-117.

¹⁹ On the judiciary, see International Bar Association and International Legal Assistance Consortium, “Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya” (February 2010). On police impunity, see Philip Alston, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions”, UN Doc. A/HRC/11/2/Add.6, 26 May 2009.

²⁰ National Dialogue and Reconciliation, “Independent Review Committee”, March 4, 2008.

including foreign diplomats, who felt that the report did not go far enough when it attributed irregularities to incompetence rather than intent.²¹ Though Commission kick-started the reform of electoral procedures and institutions, it did not identify the legitimate winner of the 2007 presidential elections. The commission thus did not contribute to an indirect outcome of reconciliation based on a shared understanding of events. In fact, a finding in favour of either Kibaki or Odinga would likely have reignited conflict, rather than contribute to peacebuilding. The reform of electoral institutions that resulted from the commission will, however, improve the odds of future elections not only being free and fair, but also widely perceived to be so, reducing the odds of large-scale violence.

The National Dialogue and Reconciliation process also included commitments to a number of other longer-term issues, notably in a specific agreement signed by PNU and ODM representatives on March 23, 2008. The statement of principles listed a number of areas of reform that would contribute to sustainable peace over the longer term (agenda item 4), including constitutional and legal reform, land reform, poverty reduction, reduction of regional disparities, employment creation, especially for youth, and the creation of a National Ethnic and Race Relations Commission.²² Of these areas, the coalition government has made good on its commitment to constitutional reform and the appointment of an Ethnic and Race Relations Commission, and has slowly begun judicial reform, which can all be considered direct outcomes of the National Dialogue and Reconciliation process. The remaining issues, however, are tremendous undertakings, some of which – such as job creation and the reduction of poverty levels – have been on the government’s agenda since independence. Their presence in the statement of principles is unlikely in and of itself to lead to much progress, which is unfortunate from a peacebuilding perspective, because those seeking to recruit and mobilize individuals to carry out election-related violence often capitalize on underlying tensions and inequalities (whether perceived or real), as well as the ready availability of people (mainly young men) who could be easily mobilized.

Indirect Institutional Outcomes

The coalition government’s concrete measures described above set in motion a number of other mechanisms and activities that indirectly resulted from the National Dialogue and Reconciliation process. The two most important ones, from the point of view of peace and justice, involve accountability for the atrocities committed, to be obtained locally at a special tribunal or by the ICC in The Hague. Holding perpetrators accountable via retributive justice may be of succour to victims and, at least in theory, be restorative as well. However, convictions would not automatically provide victims with pressing material needs, such as restitution or compensation.

²¹ Two Western embassy officials and one Western ambassador, interviewed by Stephen Brown, Nairobi, Kenya, December 2008.

²² Kenya National Dialogue and Reconciliation, “Statement of Principles on Long-term issues and Solutions”, May 23, 2008.

1. Hybrid Tribunal

After the Waki Commission published its report, the coalition government announced that it accepted the findings and would implement all of its recommendations. The most prominent of these was the proposal to create a Special Tribunal for Kenya, mentioned above. Two of the tribunal's three judges and the special prosecutor were to be from other Commonwealth countries. Similar to the Waki Commission that proposed it, the Special Tribunal's international personnel would help guarantee its independence and fairness.

Despite three versions of legislation being drafted, the coalition government never actually created the hybrid tribunal. Many MPs opposed the first bill for differing and even opposing reasons. Some were concerned that the legislation contained loopholes that would make it ineffective in the struggle against impunity. A presidential pardon, for instance, could prevent a convicted perpetrator from serving his sentence. Those MPs preferred justice in The Hague, since the accused would be unlikely to unduly influence the ICC process, as they feared would be the case in a Kenya-based tribunal, despite the proposed safeguards of international staff.²³ Other MPs opposed the legislation because they feared that the hybrid tribunal *would* be effective and might pursue them or their allies, while the ICC seemed like a distant threat that could be dealt with later. Still others voted against the legislation because they felt the government had not consulted widely enough or allowed sufficient time to debate the bill.²⁴

Despite promises to reintroduce improved legislation to establish a hybrid tribunal, the government never did. When Kofi Annan tired of the Kenyan government's recalcitrance and prevarications in July 2009, he forwarded the Waki envelope and evidence to Moreno-Ocampo. In response to the government's inaction, a backbench MP introduced a private member's bill on the establishment of a special tribunal. A sufficient number of MPs boycotted its reading in Parliament to prevent it from ever achieving the required quorum for debate.²⁵ Despite Parliament's and Cabinet's overwhelming expressions of support in public, they privately ensured that the Special Tribunal for Kenya would never be created – keeping in place the tradition of complete impunity for massive crimes.

Still, the public debates on accountability issues, the ultimately unsuccessful struggle to establish a special tribunal and the evident hypocrisy of elected officials all combined to constitute unparalleled civic education among Kenyans of all walks of life on domestic and international accountability mechanisms and create a sustained demand for accountability.²⁶ They also promoted trust in and calls for the ICC to pursue those bearing the greatest responsibility for the post-election violence.

²³ Even if the judges were impartial, many feared that perpetrators would be able to tamper with evidence, silence or threaten witnesses or otherwise prevent a guilty verdict.

²⁴ Godfrey M. Musila, "Options for transitional justice in Kenya: autonomy and the challenge of external prescriptions", *International Journal of Transitional Justice*, vol. 3 (2009), p. 452.

²⁵ A more detailed account of the various attempts to create a hybrid tribunal is available in Stephen Brown with Chandra Lekha Sriram, "The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya", *African Affairs*, vol. 111 (2012), pp. 244–60.

²⁶ Mugambi Kiai, Programme Officer, Open Society Initiative for East Africa, interviewed by Stephen Brown and Chandra Lekha Sriram, Nairobi, Kenya, 15 January 2010.

2. International Criminal Court

The ICC’s *raison d’être* is to pursue grave transgressions of international criminal law in instances where the national government is unable or unwilling to pursue credible local trials, as is the case in Kenya. However, the Kenyan government and the ICC have been dancing an intricate *pas de deux*. Were it not for the Waki envelope and the spectre of ICC involvement, it is highly unlikely the Kenyan government would have embraced the recommendation of establishing a Special Tribunal for Kenya, including the introduction of legislation to do so. In fact, many Kenyan politicians’ support for the hybrid tribunal mirrored the likelihood of ICC involvement. The higher the probability of ICC action, the more strongly some prominent politicians voiced support for the tribunal – in order to forestall ICC involvement. When the ICC “threat” seemed more distant, the special tribunal seemed less urgent.²⁷

ICC Prosecutor Moreno-Ocampo obtained permission from the pre-trial chamber to open an investigation into the situation in Kenya in March 2010. At his request, the chamber issued summonses to appear to six high-level Kenyan officials. The three suspects in the first case were associated with the ODM (Cabinet ministers William Ruto and Henry Kosgey, as well as radio executive Joshua arap Sang, accused of fanning ethnic hatred). In the second case, all three suspects were linked to the PNU (Uhuru Kenyatta, deputy prime minister and minister of finance; Francis Muthaura, head of the civil service and secretary to cabinet; and former head of the police Hussein Ali, subsequently demoted to the position of Postmaster General). The ODM-PNU symmetry is generally understood to be the prosecutor’s attempt to attempt to “balance” the accusations in order to show no bias, thus avoiding being accused of a witch-hunt and ensuring a high level of legitimacy for the ICC judicial process, as well decreasing the potential for further upheaval. Nevertheless, some Kalenjin politicians have tried to make political capital out of the fact that Moreno-Ocampo’s three ODM-associated suspects are all ethnic Kalenjin from the Rift Valley, whereas no Luo was accused.

The ICC prosecutor’s public naming of the suspects quickly set in motion a number of efforts to avoid them going to trial in The Hague, mostly conducted while publicly insisting on the government’s complete support for and cooperation with the ICC. Three strategies soon emerged, some concurrently. The first involved the resurrection of the plan to set up of a local tribunal (though purely national, not hybrid) that would be able to try the ICC suspects, among others, and thus obviate the need for ICC involvement. This strategy was unlikely to make a difference to the ICC judges, as once the investigations were authorized, the chamber would not normally reverse course. Even if it were possible for the ICC to accept a local tribunal as a substitute for its own proceedings, the tribunal would have to try the same six suspects for the same crimes, and the process would have to be credible, which is a highly improbable scenario. Local trials would depend on the prior reform of the Kenyan judiciary and police – no small or quick task. Credible proceedings would be unlikely, since the politicians’ goal in setting up a local tribunal appears to be evading accountability, not just bringing the process to Kenyan soil.

²⁷ See Brown with Sriram, “The Big Fish Won’t Fry Themselves”.

The second strategy involved a Kenyan withdrawal from the ICC, preferably as part of a mass walkout of African countries dissatisfied with the ICC’s alleged anti-Africa bias. Immediately after Moreno-Ocampo named the six suspects in December 2010, the Kenyan parliament unanimously passed a (non-binding) motion to withdraw from the ICC. The initiative found an ally in Sudanese president al-Bashir and Kenyan officials won AU support for ignoring any forthcoming ICC summonses to appear or arrest warrants. However, Kenyan officials abruptly dropped the campaign for departure *en masse*, perhaps because they realized that their formal withdrawal would be effective only one year after official notification and that the ICC would retain jurisdiction over grave crimes committed on Kenyan soil while the country was still a member.

The third strategy was a concerted but ultimately unsuccessful effort to persuade members of the UN Security Council, especially the five permanent members who wield veto power, to pass a resolution instructing the ICC to suspend its involvement for one year, based on the argument that the current ICC process posed a risk to international peace and security. This is the only permissible reason to forestall, albeit temporarily, the ICC. Credible domestic trials alone are insufficient grounds for the Security Council to suspend proceedings.

Despite the Kenyan government’s multiple attempts to prevent ICC involvement, the ICC confirmed charges against four of the six accused (Kenyatta, Ruto, Muthaura and Sang) in January 2012. At best, the ICC could find four perpetrators guilty of crimes against humanity committed during the two-month period that followed Kenya’s 2007 general elections. This would constitute a remarkable break with the complete impunity of the past and be very important symbolically for victims. However, the lower-level perpetrators that victims identified as responsible for their personal plight would remain unaffected. Barring any credible Kenyan tribunal, the hundreds and perhaps thousands of other perpetrators will not be held accountable for their actions.²⁸ This scenario does not provide much hope for deterring future outbreaks of mass violence, for instance in conjunction with the general elections due to be held by March 2013. For one, future perpetrators would make sure to not leave a clear trail of evidence, which did not matter in the past. They might also ensure that they are not among the half-dozen of those most responsible for the violence, as the ICC is unlikely to prosecute more than a handful in any future case of election violence.

Some Kenyan government officials have, in fact, begun to recast the role of the ICC and international criminal justice as antithetical to peace and national reconciliation, as well as national sovereignty. To discredit international accountability mechanisms, a few officials have publicly suggested that Justice Waki committed treason when he handed over the evidence to a foreigner and that Kofi Annan, previously trumpeted as the saviour of Kenya for his role in the National Accord mediations, was actually a puppet of the West. Some uninformed outside observers have rather naïvely accepted the politicians’ self-serving framing of the ICC as a new threat to the country’s wellbeing, forgetting that the lack of accountability for previous serious crimes, including the killings and forced displacement associated with the 1992 and 1997

²⁸ Human Rights Watch identified only six convictions of low-level individuals, with three other local cases in progress as of December 2011, almost four years after the violence ended. Its report also noted a marked anti-ODM bias in the selection of cases. See Human Rights Watch, *“Turning pebbles”:* *Evading Accountability for Post-Election Violence in Kenya* (New York: Human Rights Watch, 2011), pp. 39-44.

elections, facilitated the 2007-08 post-election violence. For instance, a well intentioned December 2010 *Washington Post* editorial endorses continued impunity, warning of the risk that prosecution “will drag Kenya back toward civil war” and concluding that “Justice for human rights crimes is important; but Kenya’s continued peace and democratic process is of greater value than another endless prosecution in The Hague”.²⁹ ICC trials could indeed serve as a pretext for the accused and their allies to foment further violence in protest of the supposedly unfair charges and alleged unwarranted targeting of specific communities, especially if convictions fall disproportionately on one side. However, these are likely to be of short duration and remain localized.³⁰ Thus, accountability might pose a minor threat to the negative peace in the short term, but continued impunity poses a much bigger threat to negative peace in the medium and long term. Each bout of inter-ethnic violence renders more difficult the path to an eventual positive peace.

Opinion polls suggest that self-serving politicians failed to persuade ordinary Kenyans. A poll released in February 2011 found that over 60% of those polled opposed withdrawal from the ICC, a position supported by 36%.³¹ An April 2011 poll revealed that 61% of respondents felt those responsible for the violence should face ICC trials, while only 32% preferred a hybrid national/international tribunal (24%) or local courts (8%).³²

Unfinished Business

The Kenyan government has achieved a lot more on some agenda items than others. As mentioned above, the National Accord quickly put an end to the violence (item 1) and the political crisis (item 3). Results remain far more elusive, however, on addressing the humanitarian crisis and promoting reconciliation, healing and restoration (item 2) and working on with long-term issues and solutions (item 4).

With regards to item 2, the most important remnants of the humanitarian crisis are the internally displaced persons (IDPs), the main (surviving) victims of the post-election chaos. As mentioned above, the violence displaced more than 500,000 people. Though the political crisis was resolved in 2008, the following year 60% or more of IDPs were still unable to return home and most were living in deplorable conditions, while few received sufficient compensation or assistance for resettlement.³³ About 350,000 found refuge in one of more than 100 tented camps for IDPs, where they joined a similar number of people displaced by state-induced violence in the 1990s

²⁹ “Justice for Kenya”, *Washington Post*, p. A14, December 30, 2010.

³⁰ Several unattributable interviews conducted by Stephen Brown and Chandra Lekha Sriram in Nairobi, Kenya, January 2010.

³¹ *The Standard* (Nairobi), February 10, 2011.

³² Synovate, “Kenyans’ Perception towards the ICC Process”, April 6, 2011, available at <http://www.synovate.co.ke/spr/index.php/site/poll/kenyans_perception_towards_the_icc_process_6th_april_2011>, accessed July 10, 2011.

³³ Jacqueline M. Klopp, “Kenya’s Unfinished Agendas”, *Journal of International Affairs*, vol. 62 (2009), p. 148. See also Prisca Kamungi and Jacqueline M. Klopp, “Failure to Protect: Lessons from Kenya’s IDP Network”, *Forced Migration Review*, vol. 28 (2007), pp. 52-53.

who had never been relocated. Despite the coalition government’s public commitment to resettle all IDPs by the end of 2010, at least 300,000 of the 2007-08 IDPs remained in camps in February 2011, three years after the crisis ended.³⁴

Item 2’s other objectives – reconciliation, healing and restoration – are also elusive and complex. Though most may not seem themselves that way, members of several communities are both perpetrators and victims, a fact that would immensely complicate any discussion of reparations or compensation, with a potential for renewed animosity. Likewise, what might bring about healing for one community, for instance the conviction of a high-level organizer of the violence against its members, could – if seen as unjust or imbalanced – fuel further resentment among the perpetrator’s ethnoregional group. Moreover, the restitution of property could provoke renewed antagonism, especially if its legal ownership is contested or perceived as unjust.³⁵

As explained earlier, the main institutional response in this area is the Truth, Justice and Reconciliation Commission, which only began to hold hearings in April 2011, after many delays and widespread criticism. Moreover, though they are at the core of peacebuilding and transitional justice efforts, the outcomes of healing and reconciliation are extremely difficult to measure.³⁶ Still, there appear to be few signs that inter-ethnic relations have substantially improved, especially at the local level, though more research is required to make a more definitive statement. Though a few new alliances have formed across the 2007 electoral divide, it is mainly limited to the elite level and the “coalition of the accused”, who share interests in evading accountability, yet sometimes still rally support via ethnic nationalist discourse.³⁷ Ethnic partisanry was clearly a major factor in responses to the ICC prosecutor’s charges against the “Ocampo Six”. Once ICC trials begin, arguments and revelations regarding crimes committed, as well as the identities of those most responsible, could also stoke tensions along ethnic lines, for instance if Kikuyu suspects portray Kikuyu-perpetrated violence as justified self-defence against prior Kalenjin attacks.

The coalition government has already dealt effectively with some of the components of agenda item 4 – longer-term issues. Its main achievement is the drafting, approval by plebiscite and promulgation of a new constitution. It has also initiated the reform of other institutions, notably the electoral ones, but very little has been done on reforming the judiciary, the police and the civil service. Likewise, there has been scant progress, if any, on the other item 4 issues: land reform; poverty, inequity and regional imbalances; unemployment, particularly among the youth; consolidation of national cohesion and unity; and transparency, accountability and impunity.

³⁴ Victoria Mwirichia and Jeniffer Katusya Barako Elema, “How Far is Home For Kenya’s Internally Displaced Persons?” (Nairobi: Institute for Security Studies), February 24, 2011, available at <http://www.issafrica.org/iss_today.php?ID=1238>, accessed April 17, 2011.

³⁵ On this and other challenges to peacebuilding posed by internal displacement, see Klopp et al., “Internal Displacement and Local Peacebuilding in Kenya”, pp. 3-4.

³⁶ See Colleen Duggan, “Editorial Note”, *International Journal of Transitional Justice*, vol. 4 (2010), pp. 315-328 (special issue on “Transitional Justice on Trial: Evaluating Its Impact”).

³⁷ For instance, former rivals Uhuru Kenyatta (PNU) and William Ruto (ODM) have joined forces to try to avoid being tried by the ICC. There are rumours that they might run on the same ticket during the 2013 elections. However, their alliance might be short lived: after ICC trials begin, they are likely to incriminate each other’s side, presenting themselves and their communities as victims.

Though constitutional and institutional reform may have positive effects in the future, in the short to medium term, it is unlikely to have an impact on justice or peacebuilding.

Off the Agenda

Peace agreements usually contain provisions on the demobilization, disarmament and reintegration (DDR) of armed groups. The National Dialogue and Reconciliation agenda, however, contained no mention of DDR. Though the armed groups in Kenya differ greatly from the parties that negotiate the end to civil wars – typically a country’s armed forces and one or more rebel groups – the issue remains extremely salient. Much of the violence around the 1992, 1997 and 2007 elections was perpetrated by organized militias (often known by the Kiswahili word *jeshi*). Some *jeshis* are beholden to a specific political figure, who funds them and has them do his bidding. Others are fundamentally “guns for hire”. The most famous irregular armed group is Mungiki, an officially banned, large, Kikuyu-based organization that is part religious cult, part criminal gang and part *jeshi*. During the 2008 post-election violence, PNU officials are alleged to have paid Mungiki to carry out brutal attacks on ODM supporters in Naivasha and Nakuru.³⁸ The failure of the National Accord to address what to do about the various militias is one of its biggest flaws. The coalition government’s lack of any serious attempts to disarm the *jeshis* is one of the greatest threats to peace in future elections. In fact, various communities have been arming themselves in anticipation of future attacks, notably in the Rift Valley, the main location of political violence since the 1990s. In a new arms race, they are purchasing sophisticated weapons, such as AK-47 machine guns, from illegal arms dealers.³⁹

The other major area of concern left out of the National Accord regards the protection of victims, in particular those who have served or could serve as witnesses for various official investigations. The Kenyan press and NGOs have already noted with alarm that a significant number of those who testified before the Waki Commission have been threatened, injured or even killed, possibly by members of *jeshis*. Some have already recanted their testimony. The ICC will protect and relocate any witnesses who testify in The Hague. However, those who spoke to ICC pre-trial investigators in Kenya will get no support. The coalition government, under pressure from NGOs and aid donors, strengthened its witness protection program in 2010, but critics claim it still cannot provide adequate protection. The insufficiencies of the program and the protection of witnesses more generally will be serious impediments if there are prosecutions held in Kenya. In a related concern, Deputy Prime Minister Uhuru Kenyatta, one of the “Ocampo Six” named in December 2010, remained on the Witness Protection Agency advisory board until he bowed to ICC pressure and resigned in March 2011 – and may have had access to witnesses’ confidential information.⁴⁰

³⁸ Waki Commission, *Report of the Commission of Inquiry*.

³⁹ “Kenyans ‘rearming for 2012 poll’”, BBC News online, October 7, 2009, available at <<http://news.bbc.co.uk/2/hi/8293745.stm>>, accessed April 17, 2011.

⁴⁰ “Lack of a credible witness protection unit a major setback”, *The Standard* (Nairobi), April 9, 2011.

Conclusion – No justice, fragile peace

Ideally, transitional justice measures not only promote accountability and fight impunity in relation to past violence, they also act as an incentive for peace and deter future abuses. In Kenya, however, the coalition government formed in response to the post-election violence in 2007-08 had only an insincere commitment to transitional justice, especially to the matter of accountability for the gross abuses. In particular, it expected that the report of the Commission of Inquiry into the Post-Election Violence would merely gather dust. It was caught off guard by the Waki Report's leverage, using Kofi Annan and the secret envelope, but it still managed to scuttle the proposed hybrid tribunal to try suspected perpetrators of the violence. The government also established a Truth, Justice and Reconciliation – a staple of transitional justice mechanisms meant to contribute directly to peacebuilding – but gave it a feeble mandate and sabotaged its work sufficiently to remove any significant threat of negative repercussions on the political class. It has raised the prospect of a national tribunal, mainly in an attempt to forestall ICC trials, but has taken little action, including in the necessary concomitant major reform of the discredited judiciary and police – though the appointment of a well respected human rights scholar and former activist as Chief Justice of the Supreme Court may set in motion a positive process. Victims of past violence remain vulnerable, especially if they are able to provide testimony against perpetrators and the government does not provide sufficient witness protection. This will make prosecutions more difficult, at least in Kenya. Only the ICC in The Hague could escape its grasp, but its work will be slow and distant from Kenyans' everyday activities and, moreover, will not try more than four suspects.

The reason Kenyan transitional justice mechanisms will have such limited outcomes is relatively simple: There has not been a meaningful transition or break with the past, as a number of perpetrators remain in positions of power and there have been no high-level prosecutions for any of the crimes of the authoritarian past. The National Accord put in place a power-sharing coalition government in which prominent members of the political elite on both sides shared a common interest in avoiding accountability for the atrocities their members helped organize and finance. The lack of accountability has in fact helped keep the peace agreement going. It is the “politics of collusion” that bring together the various party leaders and ethno-regional political barons and has made it possible to manipulate important components of the Kenya Dialogue and Reconciliation process according to their own needs.⁴¹ The National Accord has nonetheless achieved more than a mere ceasefire. It has created significant momentum for constitutional reform and the strengthening of election-related institutions. Some judicial reform and other measures might follow. Even after several years, however, it has failed to compensate or relocate hundreds of thousands of victims of the 2007-08 violence, many of whom still languish in IDP camps. Two key issues were left off the National Dialogue and Reconciliation agenda – the disarmament of militias and the protection of witnesses – which will cause greater insecurity at the local level and facilitate future outbreaks of widespread, organized political violence, including in conjunction with the next general elections, to be held by March 2013.

⁴¹ Nic Cheeseman and Blessing-Miles Tendi, “Power-sharing in comparative perspective: the dynamics of ‘unity government’ in Kenya and Zimbabwe” *Journal of Modern African Studies*, vol. 48 (2010), pp. 203-229.

An analysis of Kenya's National Accord cannot test the hypothesis that transitional justice contributes to peace. It does, however, suggest that the lack of transitional justice, especially accountability for past atrocities, may temporarily keep the "negative" peace, but it might make future conflict more likely. Continued impunity compounds the shared understanding that violence is a useful political tool. Accountability mechanisms, on the other hand, may put some victims and witnesses at risk in the short term, but it also could facilitate a more positive peace in the future. It is unlikely, in practice, to meet victims' material needs and we still do not know enough to predict how it might affect reconciliation, healing and restoration.

For the time being, there is no real trade-off in Kenya between peace and justice, but rather a substantial lack of both. The National Accord has permitted negative peace to prevail, with few signs of positive peace. Tensions will mount again once the ICC trials begin and the 2012-13 campaign and general elections will no doubt exacerbate the situation, raising the risk of broader violence – especially as armed militias are allowed to continue to operate. Government promises of justice, premised on prior judicial and police reform, to be followed by credible trials of numerous perpetrators of the 2007-08 atrocities appear unrealistic, especially in the short to medium term, mainly due to lack of will. The only measure that can escape the government's control and shatter Kenya's record of complete impunity is to be found at the international level. The ICC might condemn and sentence some of those most responsible for Kenya's latest bout of large-scale, election-related violence, but even in the best case scenario it will apply only to a small number of individuals and is unlikely to deter in and of itself future violence.

Kenya also serves as a cautionary tale for other countries at risk of conflict, including with regards to: 1) the application of transitional justice mechanisms in situations where no significant transition has taken place; 2) the potential for anti-accountability alliances to sabotage domestic justice mechanisms, especially under power-sharing coalition governments; 3) the importance of DDR, even in agreements that end conflicts that are not really civil wars; and 4) the needs and vulnerability of victims and their central role as witnesses in achieving accountability.

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