

# KENYA'S UNFINISHED AGENDAS

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Kenya is a critically important East African country at a crossroads. In the coming years, it will either chart a way through to democratic reform and state building, or it will join the ranks of the so-called collapsed or failed states. Much hinges on which way Kenya moves: the fate of 37 million Kenyans hangs in the balance. In the best-case scenario, Kenya moves toward greater prosperity and freedom and becomes a genuine force for transformation in Africa in the 21st century. With the largest and most dynamic economy in the region, key infrastructure and institutions of higher education, a vibrant press and civil society, political space and abundant human capital, creativity and entrepreneurship, it has many resources with which to achieve this future.

Yet in 2007 and 2008, in the aftermath of Kenya's contested election, the world glimpsed another terrifying future, in which Kenya could succumb to violence, illicit accumulation of public wealth and political fragmentation, the elements that have led to civil wars in neighboring Somalia, Ethiopia, Uganda and Sudan. From December 2007 to January 2008, brutal killings by the police, massacres, refugee flight from the country, massive regional economic dislocation and blatant electoral manipulation and deceit suggested Kenya was a razor's edge away from such an outcome.<sup>1</sup> Indeed, violence was only stopped through the concerted effort of civil society groups and global diplomacy, which culminated in Kenya's National Dialogue and Reconciliation process and the current power-sharing agreement, or National Accord.<sup>2</sup>

Kenya's future now depends on its ability to navigate the great contradictions of the National Accord, which are symptomatic of the deep structural problems of Kenyan state and society. To curb the violence in the short-term and create space for negotiation, the power-sharing agreement, like others of its kind, entrenches the key culprits of violence and corruption in very high levels of government. Indeed, the Accord has worked by using the lure of joint access to state resources

to bring opponents into an agreement. This short-term diplomatic purchase of time also creates conditions, if not incentives, for future conflict.<sup>3</sup> These same resources can and will be used—through corruption—for the next round of conflict in the election scheduled for 2012. Finally, since both parties include people guilty of corruption and violence, the grand coalition creates a common interest in perpetuating impunity and opposing the forces of accountability and transformation.

We cannot blame the recent diplomatic efforts for these difficult dilemmas; they were unavoidable. If the Accord was to stop the violence, it had to involve the key culprits. In the short-term, the Accord created some key opportunities by

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providing a brief time period for a cooling down of emotions and a broader, more measured public reflection on the country's problems. It has also put critical structural issues, including land reform, unemployment, poverty and constitutional change back on the table. Further, it created a focused set of targets to rally Kenya's civil society, media and parliament, as well as rousing global diplomatic, solidarity and aid efforts. The challenge will be to fully utilize the limited time available and take advantage of the new opportunities for change.

Can Kenya's transformative forces regroup, swell in numbers and prevail over entrenched politicians and the deep conservative interests they represent? Can they prevail over deep divisions and fractures created by violence and corruption, not only in the last election, but over the last decades as well? Finally, can international intervention play a positive, supportive role in this struggle for reform? With Kenya at what

appears to be a tipping point, this article aims to answer these key questions. As violently contested elections turn into power-sharing agreements in other places, most recently in Zimbabwe, this paper speaks to an important debate about whether such agreements bode poorly for democracy on the African continent.<sup>4</sup>

This paper begins with a brief overview of what led to the recent violent crisis in Kenya and shows that it is understandable within the context of Kenya's problematic past. Next, it focuses on the National Accord's four agenda items and how they play into forces for or against change. This analysis suggests that more violent struggle is likely in the next election unless key moves toward structural reform—including making inroads against impunity, working toward a more transparent electoral process and intensifying peace-building interventions at a local

level—have some degree of success before 2012. Finally, the paper concludes with broader reflections on the National Accord process, Kenya's democratic future and the way forward.

### **THE NATIONAL POST-ELECTION CRISIS**

In Kenya's election on 27 December 2007, people by and large voted peacefully and with great enthusiasm, especially young Kenyans, many of whom were voting for the first time. Early reports talked about unprecedented, orderly voting lines. Most Kenyans showed a strong faith in the electoral process, legal procedure and the ideal of democracy. One reason for this faith was that only five years before, through a peaceful, cathartic election, Kenya successfully ended the repressive rule of President Daniel arap Moi and the Kenya African National Union (KANU)—the party that had dominated the state and ruled Kenya with a bloody fist since independence.<sup>5</sup> In that historic election, Mwai Kibaki became the new president.

While expanded political space over the ensuing years gave birth to some minor but encouraging reforms in Kenya, the Kibaki government failed to make serious inroads in restructuring Kenya's highly inequitable economy and the deeply flawed colonial constitution that enabled it.<sup>6</sup> One reason for this is that Kenya's transition to democracy was not a definitive defeat of KANU, but rather a negotiated one, with the new government protecting Moi and recycling KANU's elites—including Kibaki himself—into the coalition. This dynamic put fundamental constraints on how much change could occur. Indeed, very soon after the new government took office in 2003, it disappointed Kenyans with a string of corruption scandals and a failure to move on constitutional change; truth, justice and reconciliation for past crimes; and assistance for the victims of the Moi period, including 350,000 displaced persons.<sup>7</sup>

In the months leading up to the December 2007 election, opposition leader Raila Odinga of the Orange Democratic Movement (ODM), capitalized on the anger and disillusionment of many Kenyans. He campaigned on a reformist, populist, anti-corruption platform that promised radical change, including the devolution of power.<sup>8</sup> However, the unofficial ODM campaign strategy appeared to be in part an ethnic one. At rallies, ODM politicians often insinuated that Kibaki's ethnic community—the Kikuyu—were responsible for the corruption and exclusionary politics that characterized much of Kibaki's first administration. They also suggested that the Kikuyu were collectively responsible for historical injustices from the beginning of independence, when Jomo Kenyatta, a Kikuyu, became president. The idea of devolution of power to the provincial level—or *majimboism*—was interpreted as the right to evict Kikuyu from the Rift Valley, as was done in the 1990s under Moi.<sup>9</sup> The overarching idea was to unite all of Kenya's minority ethnic

communities against its largest ethnic community, the Kikuyu.

On the other side, the party of incumbent Mwai Kibaki, the Party of National Unity (PNU), officially attempted to campaign on Kibaki's achievements. However, like their ODM counterparts, many PNU politicians used hate speech in their rallies and reinforced the notion that Kikuyu should vote as a bloc and not let the state slip from what they claimed was their communal grasp.<sup>10</sup> They used derogatory language about uncircumcised men to refer to Raila Odinga, whose Luo ethnic group did not engage in the practice of circumcision. The impact of this rhetoric was later reflected in post-election violence by Kikuyu gangs, who killed innocent Luos by forcibly circumcising them and letting them bleed to death.<sup>11</sup> In sum, this form of campaigning from both sides helped foster the deep polarization that developed around the election and created an environment where violence was sanctioned by many in political authority.

On top of these ethnic mobilization strategies, both sides distorted the electoral process, which was extremely vulnerable to manipulation. Given that the incumbent had tremendous influence over the Electoral Commission of Kenya, the PNU had the upper hand in rigging the election results. To this day, it remains a controversial issue. Many PNU operatives insist that Kibaki won the election, while the ODM side points to the National Republic Institute's suppressed exit polls, the ODM majority in parliament and statistical analysis to argue the opposite.<sup>12</sup> The Commission of Inquiry suggested that the "integrity of the process and the credibility of the results were so gravely impaired by these manifold irregularities and defects that it is irrelevant whether or not there was actual rigging at the national tally center. The results are irretrievably polluted."<sup>13</sup>

Most of the violence broke out right after the Electoral Commission of Kenya first delayed announcing the presidential results for days, then declaring Mwai Kibaki the winner of the presidency on 30 December 2007.<sup>14</sup> At first, some of the violence appeared to emerge out of spontaneous angry demonstrations against the Kibaki government and its PNU supporters by people who accused them of stealing the election. Hundreds were killed in brutal police action, which involved the use of live ammunition on so-called demonstrators, including women and small children.<sup>15</sup> This was especially the case in the ODM strongholds in Kisumu and parts of the Nairobi slums. However, it was clear that even as the violence was escalating, some ODM politicians were organizing demonstrations to bargain for power and encouraging violent evictions of PNU voters from the Rift Valley—a kind of gerrymandering by displacement and a fulfillment of the *majimbo* promise.<sup>16</sup> It was also clear that in response, some of the PNU leadership funded and armed militias—including the notorious Mungiki—supposedly for protection of their supporters.<sup>17</sup> These militias also committed atrocities, including massacres of

presumed ODM supporters in the Rift Valley.<sup>18</sup> Many in the civil service, and particularly in the police, fragmented along political and ethnic lines, and local communities mobilized youth for protection or revenge. If the military had similarly engaged and fragmented, these civil war dynamics would have intensified.

While these complex dynamics played out, Kenya's highest leadership on both sides showed a callous disregard for the victims of their political struggle, including the numerous poor youth enticed into violence with payment or the opportunity to appropriate wealth.<sup>19</sup> In contrast, many regular citizens, along with the Kenya Red Cross, worked tirelessly to assist the displaced and wounded. It is worth noting that many parts of the country that had experienced serious violence in the past remained mostly calm, including many parts of Nairobi's multi-ethnic slums and the coast.

Within the United Nations, the region and the diplomatic community more generally, Kenya was considered too critically important to collapse. Efforts were hastily put together to push the two warring sides to sit down and negotiate. This resulted in the Kenya National Dialogue and Reconciliation process, which was led by members of the Panel of Eminent African Personalities, including former UN Secretary General Kofi Annan, former Tanzanian President Benjamin Mkapa and Dame Graça Machel-Mandela of Mozambique. Important donors took the unusual action of placing travel bans on key figures on both sides of the divide.<sup>20</sup>

## **KENYA'S NATIONAL DIALOGUE AND RECONCILIATION: UNFINISHED AGENDAS**

Out of the intense civil society-backed diplomatic pressures came Kenya's National Dialogue and Reconciliation process, which resulted in the National Accord and Reconciliation Act (Accord). The Accord included a four-point agenda for addressing the situation, including: (1) taking immediate steps to stop violence and restore fundamental rights and liberties; (2) taking immediate measures to address the massive humanitarian crisis of traumatized victims and the displaced and to promote reconciliation, healing and restoration; (3) developing a strategy to overcome the political crisis through readjusting constitutional and legal frameworks; and (4) addressing long-term issues, including land reform, constitutional reform, unemployment, poverty and inequality. This paper will briefly look at each of these agenda items and the politics around them.

On 1 February 2008, the two main political leaders, Kibaki and Odinga, and their parties addressed the Accord's first agenda item by agreeing to take immediate action to stop the violence and to restore rights and liberties. As a consequence, violence declined rapidly and a semblance of normalcy returned, at least to Nairobi. This was a clear indication of the political nature of much, though

not all, of the violence and its role as part of a national bargaining process over power.<sup>21</sup>

It is important to point out that, because of the crisis and past patterns of violence, localized tensions not directly controlled by the national level persist at the time of publication, continuing to threaten national coherence and state institutions. Some of this tension and the localized violence it produces are linked to Kenya's failure to properly address the Accord's second agenda item: the humanitarian crisis and reconciliation—not only in this round of violence, but also in the past. The government, civil society and international agencies like the United Nations have yet to tackle this crisis and address the need for more thoughtful and intensively targeted interventions in fragmented and hostile communities. In part, this is because many of the culprits of violence and corruption, at all levels of government, are still in charge of this effort. These problems are now compounded by a related crisis: An estimated 10 million Kenyans face hunger, including many of the approximately 500,000 to 600,000 people displaced by the violence.<sup>22</sup>

When the violence subsided and the coalition government formed early in 2008, the government, primarily the Office of the President, assumed the tasks of providing humanitarian relief and reconstruction from international agencies and the Kenyan Red Cross, including the responsibility for the large numbers of internally displaced persons. This critical task was handed over to the small Special Programmes Ministry. The Ministry launched Operation Return Home, which used part of the security apparatus—the provincial administration—to encourage and at times force people out of camps into hostile communities. The result was the proliferation of less visible and accessible “transit camps” in fragmented and hostile communities. It is unsurprising that some of these camps have been subject to attacks and intimidation and that women and children have been particularly vulnerable to continued violence, including gender-based violence.<sup>23</sup> The more recent Kenya National Dialogue and Reconciliation Monitoring Report confirms this situation, noting that as little as 40 percent of the displaced have actually returned home.<sup>24</sup>

The Kenya Human Rights Commission report on Operation Return Home also noted that most of the displaced are “in deplorable conditions bordering on gross human rights violations; poor housing, lack of food, lack of safe water” and underscored the prevalence of “sexual and gender-based violence, lack of maternal healthcare...[and] exposure of children and pregnant mothers to extreme weather conditions.”<sup>25</sup> Many of the displaced ended up in Kenya's notorious slums, increasing the pressure on community organizations working with the urban poor. When displaced women showed up to protest such conditions in front of Kenya's parliament, they were tear-gassed. Sadly, a real danger exists that the displaced

and the deep problems of their violence-torn communities are once again falling off the national agenda.

The Accord's third agenda item required readjusting the constitutional and legal framework to resolve the political crisis stemming from the botched election. The result was a power-sharing agreement formalized in the National Accord and Reconciliation Act 2008. The Act created a prime ministerial post for ODM's Raila Odinga and two deputy prime ministerial posts, one selected by ODM and the other for the leader of ODM-Kenya, which was allied with PNU. The cabinet was expanded to include nine new ministries and enough posts to reward key players in all the parties in the coalition. This resulted in the largest and most fragmented, ill-coordinated, incoherent and expensive cabinet in Kenya's history.

Another key part of the third agenda item was a "forensic review" of the election in order to generate recommendations for electoral reform. To this end, the Independent Review Commission (IREC) was formed with South African judge Johann Christiaan Kriegler at its head. The IREC revealed serious flaws in the conduct of Kenya's elections. These flaws included a voter registry that comprised only 71 percent of Kenya's voters and 1.2 million deceased persons, as well as vote-buying, ballot-stuffing and intimidation of opponents—especially in party strongholds. Other problems included manipulation and incompetence on the Electoral Commission and a poor legal framework, from gerrymandered constituency boundaries to loopholes that allowed people to vote twice in some cases.<sup>26</sup> IREC offered a long list of recommended reforms, including an overhaul of the Electoral Commission and the voter registration system. Since then, parliament overwhelmingly passed and the president signed into law the Constitution of Kenya (Amendment) Bill 2008, instituting some basic reforms, including disbanding the Electoral Commission of Kenya and replacing it with an Interim Independent Electoral Commission.<sup>27</sup>

The fourth agenda item involves addressing the long-term issues, including legal and institutional reform; poverty, inequity and regional imbalances; unemployment, particularly among the youth; national cohesion and unity; land reform; and transparency and accountability. These deep problems emerge out of Kenya's troubled history as a settler colonial state with institutions that concentrated political authority—including control over key resources such as land—at the center. Repressive colonial-era laws and institutions have protected this authority from societal pressure and mobilization.

Successive post-colonial governments have built upon this institutional infrastructure to enforce accumulation of resources by the few. Corruption scandal after corruption scandal has graphically illustrated this over the years, including in recent months.<sup>28</sup> Politicians use this "eating" or "politics of the belly" to main-

tain political control through patronage and persuasion.<sup>29</sup> When this fails, politicians often resort to violence and repression. The result is a long list of problems, including massive inequity and exclusion with regard to economic opportunity and resources such as land; a system of economic and political rewards that depends on controlling territory and votes and on privatizing the state; politicized and hence ineffective institutions; a growing mass of traumatized victims of successive cycles of violence and dispossession; and a lack of accountability for high corruption, murder and crimes against humanity.

Addressing these problems (encompassed in the Accord's fourth agenda item) requires sustained and determined efforts at transformation, and a danger exists that this agenda will slip through the cracks as the focus shifts to the next election in the year 2012. One item that cannot easily be removed from the agenda, however, is the issue of impunity. As part of the National Accord, a Commission of Inquiry into Post-Election Violence—known as the Waki Commission, after its chair, Justice Philip Waki—was given the mandate to examine what led to violence and determine where responsibility lay and provide recommendations on how to proceed. Even though the Commission had limited resources and time, it provided a long, detailed and graphic report about the varied forms and dynamics of violence in different parts of the country.<sup>30</sup> It also delivered a famous envelope to Kofi Annan containing the names of key culprits, including sitting cabinet ministers.

Kenya has had two other Commissions of Inquiry to investigate similar forms of violence in the past, and these commissions also named culprits, including cabinet ministers.<sup>31</sup> However, in a vivid demonstration of Kenya's culture of impunity, the recommendations from these reports were never fully implemented, and leading culprits were not held accountable for the harm they caused, despite the thousands killed and hundreds of thousands displaced in the 1990s. In light of this past experience, the Waki Commission recommended the formation of a special tribunal with international participation to try suspects in the post-election violence. In a move to generate pressure for action, the Waki Commission put a deadline on the formation of the tribunal after which it recommended that Kofi Annan pass on the suspects' names to the International Criminal Court for prosecution. For perhaps the first time in Kenya's long history of serious crimes, the culprits—including powerful, sitting cabinet ministers in both parties—felt some vulnerability.

At first there were attempts to downplay the Commission's recommendations, but a groundswell of public support for action and international attention made it difficult to bury the report, as had been done in the past. Once this sunk in, the next option—the creation of a national tribunal that could be controlled or manipulated—became viable. Both the prime minister and the president scrambled to



rally forces to draft and pass seriously flawed legislation establishing the recommended special tribunal Act before the deadline.<sup>32</sup> This took place in the context of public anger over corruption scandals and hunger. As a result, parliament failed to pass the Act. The reason appeared to be out of anger towards the president, who had reinstated a cabinet minister censured by parliament for his role in a major corruption scandal. However, some feared that the legislation had too many problems that would allow for manipulation, and poll results suggested a majority of the public supported the option of sending perpetrators to The Hague.<sup>33</sup>

## **THE POLITICS OF CHANGE?**

Despite the difficulties in implementing the National Accord, especially agenda items two and four, the Kenya National Dialogue and Reconciliation process and agenda have provided a brief time period for a broader public reflection and action, as well as for international intervention in support of putting Kenya on a better path. The Accord created a focused set of targets to rally Kenya's civil society, media and parliament, and established a legitimate basis for international intervention and oversight that most Kenyans welcome—a sad testimony to their lack of faith in the current coalition government and in the strength of local institutions to withstand the corrosive forces of impunity and corruption.

What are the forces and processes that support reform in Kenya? To begin, it is important to recognize Kenya's political achievements over its recent political history and how these successes provide the building blocks for change. While layers of colonial penetration, post-colonial continuities in repression and donor dependency have accreted over Kenya's history to produce a political culture of timidity and fear, many Kenyans over the last two decades have increasingly challenged this to re-build local agency and action. To use the words of the writer Binyavanga Wainaina, Kenyans are becoming the "agents of their own sovereignty."<sup>34</sup> Even during the dark times of the Cold War, many Kenyans spoke out courageously and organized against the repressive state and the strategies of accumulation and division cultivated by Kenya's political class. Many paid with their lives, but in doing so, became enduring symbols of resistance and alternative politics.<sup>35</sup>

When the wave of democratization linked to the thawing of the Cold War hit the world in the late 1980s and 1990s, Kenyans seized the opportunity to agitate for the reinstatement of multiparty competition as well as more fundamental change. Common folk and civil society activists risked their lives to exert pressure through mass rallies. Along with donor pressure, this created the impetus for restoring multiparty politics in 1991, as well as some incremental reforms in the most oppressive colonial laws and the creation of new institutions like the Kenya National Commission on Human Rights. The cost in lives for these changes was

ultimately high, as KANU mobilized violence and fraud to “win” elections in the 1990s and protect ill-gotten gains in land and other public resources.

Increased political competition and freedom also allowed for a reinvigorated parliament. Even though parliamentarians voted for massive pay increases for themselves and granted MPs exemption from paying taxes, and though parliament failed to stem the corruption scandals or push for accountability for past crimes, it was no longer a rubber stamp for the ruling party. Debates followed, and even if it was for selfish reasons, MPs attacked each other and, in the process, often revealed to Kenyans the ugly internal workings of the state. Citizens in turn showed their anger at their MPs by voting out many incumbents—even ministers—in large numbers. This served in many cases to enforce a greater sense of accountability, at least at the constituency level, and explains popular enthusiasm for voting in the last election.

This space also allowed for a new people’s parliament—called *Bunge la Mwananchi*—to emerge. Until recently, this multi-ethnic forum and network of the poor met every day in Jeevanjee gardens in Nairobi. Over the past fifteen years, the group has raised critical issues, including the recent need for lower food prices and an end to impunity and corruption. The body has also argued and agitated for MPs to pay taxes.

*Bunge* is a product of the urban experience of a common oppressive life in the slums. As Kenya continues to urbanize rapidly, and the city becomes an even more intense site of interaction and cultural fusion as well as a theater of oppression for the poor, the possibility of class- and issue-based politics along the lines of *Bunge’s* network—which reaches into other parts of Kenya as well—is heightened. This is perhaps one reason *Bunge* and its members are the continuing targets of harassment and human rights violations.<sup>36</sup>

Many Kenyans, like those in *Bunge*, have fought and died to raise critical issues about the uneven distribution of resources, including land. Throughout the 1990s, Kenya witnessed vigorous battles over “land grabbing,” or illicit accumulation of public land.<sup>37</sup> Pressures around land issues were so strong that the government set up two commissions to deal with the issue. Both made scathing observations about Kenya’s illicit accumulation and politicization of land, as well as key recommendations for constitutional change around governance of land and land reform.<sup>38</sup> For over a decade the Kenya Land Alliance, a network of civil society organizations working with pastoralists, slum dwellers and the landless, advocated for change and raised the voices and interests of the excluded into the national dialogue. They also pushed Kenya closer to a new National Land Policy, addressing agenda item four of the National Accord.

Some of Kenya’s media organizations and their staff also played an important

role in creating change. While some journalists pandered to power and money, many of their courageous colleagues continued to report on corruption and violence and constitutional issues throughout the 1990s, prying open a space for a broader debate and challenging the culture of silence and fear. In other cases, media organizations helped keep a sense of nationhood and civic engagement alive. For example, in the 2000 drought, the *Daily Nation* newspaper raised millions of shillings across the country for drought victims. More recently the, KISS 100, Classic 105, East FM, Radio Jambo and Xfm radio stations collected 172 metric tons of food for Kenyans suffering from the current famine.<sup>39</sup> During the violence, the major newspapers splintered and took sides. Some ethnic-language radio stations circulated hatred, while others—like KISS FM, with host Caroline Mutoko—created a sense of sanity and civility throughout the ordeal, as did many of Kenya's artists and writers, who partnered with networks of civil society organizations like Kenyans for Truth, Justice and Peace.<sup>40</sup>

Broader forces are also at play in Kenya's shifting political dynamics. A generation has now come of age with Kenya's newly won political freedoms and norms. Former human rights activists have become parliamentarians, and while they, too, often disappoint on issues of corruption, they are far more open and vulnerable to lobbying from their former colleagues. A highly mobile and savvy young class of businesspeople, bankers and entrepreneurs has also emerged in Kenya and among its considerable diaspora. They are absorbing notions of corporate social responsibility and social entrepreneurship, starting local philanthropic activities and beginning to engage government—at least at a local level. Some are invigorating local political action through civic associations such as the Kenya Alliance of Residents Associations. Overall, indications suggest a more entrenched rights and accountability culture has emerged in Kenya over the last two decades, even though it remains fragile and highly uneven, with the poor continuing to suffer from arbitrary state power and exclusion.<sup>41</sup>

## **THE WAY FORWARD**

In sum, Kenya has been subject to two kinds of broad processes over the last few decades, as the country has opened to more political competition and space. The first set of negative processes involves a deepening “criminalization of the state.”<sup>42</sup> This was in part a response to the need to win elections and stay in power, often against popular forces. Enhanced corruption is both a way to find resources to stay in power and a reason to cling to power or to support a protective clique in power at all costs. These dynamics—including the rise of militias linked to powerful politicians—have led to a pattern of violent struggles when state power is contested, particularly during elections. The latest crisis has merely revealed how

far these processes have gone in corroding and ethnicizing state institutions and the civic identities upon which they are based.

However, we have also seen another set of processes at work to re-structure and democratize the state and society, with some tangible achievements. These processes, what South African urban theorist Edgar Pieterse would call “radical incrementalism,” bring change through “more discrete avenues; surreptitious, sometimes overt, and multiple small revolutions that at unanticipated and unexpected moments galvanize into deeper ruptures that accelerate tectonic shifts of the underlying logics of domination and what is considered possible.”<sup>43</sup> The problem is that these processes not only generate pressures that can promote change, but as we saw in the build-up to the last election, can get enmeshed, harnessed and subverted in a complex, reactive politics of violence and division.

The National Accord is but a pause in the usual workings of the complex forces of Kenyan politics. While it may create incentives for future violence and undermine democratic principles as critics claim, over recent decades a general focus on elections rather than local violence and structural issues—such as land, constitutional reform and impunity—has demonstrated that the brief electoral moment is generally a poor indicator of the depth of a country’s democracy. Further, critics of such agreements give few other options for ending the suffering and violence in places like Kenya and Zimbabwe. However, if the opportunity provided by the Accord to start addressing these issues in solidarity with civil society networks is lost, then the agreement is at best a short break on the road to more violence.

Most critically, Kenyans must seize the opportunities now available. The Accord has given Kenyans a chance to reflect and watch the combined leadership in office. As new corruption scandals over maize and oil emerge involving both PNU and ODM ministers, as former opponents shift positions and sides opportunistically and as few politicians show sympathy for the internally displaced, victims of violence and the 10 million facing hunger—or take any action to address their plight—some of the polarization between ODM and PNU supporters has dissipated. It has shifted into a collective anger and, among many, a search for a “third way” that is not associated with either PNU or ODM. The polarization must be replaced by strategic and cooperative action for reform.

The pause has also given civil society, the media, urban youth and some of the professional class a chance to critically examine their role in the recent violence. While it would be inaccurate to say that all the hostilities and divisions are healing, a great deal of questioning has occurred. Many of the politicians who advocated violence are losing support. Civil society groups and media organizations that were divided or partisan are trying to regain their sense of mission for a deeper change. Here, the commissions mandated by the Accord have played a

critical role by showing that neither electoral manipulation, nor the organization and encouragement of violence was confined to one side of the struggle, suggesting deeper systematic problems with Kenya's politics.


Can Kenya's transformative forces regroup, swell in numbers and prevail over entrenched politicians and the deep conservative interests they represent? Can Kenya's democratic gains be preserved, even in light of the inadvertent perverse incentives set up by the power-sharing agreement? The answer depends on Kenyan "third way" networks maximally and strategically using the opportunities opened up by this same Accord. If public pressures can be mobilized to make violence and corruption more politically expensive, then hope exists that the Accord can help launch Kenya forward. Recent public outrage, press coverage and the use of parliament to censure and remove corrupt ministers—from both the ODM and the PNU—are a step in the right direction. Increased public pressure and parliamentary backing for the implementation of the Waki Commission report breaks the country's historic silence and passivity on the issue of violence, putting a crack in impunity.

The only successful path for Kenya is one that challenges corrosive politics by supporting "third way" networks within the media, civil society, artistic community, parliament, business community and the diaspora. The problem is that this is a slow process and the next election is around the corner. It will thus be critical to build resiliency at every level against the violence that is likely to come. This can be done through shoring up cross-community associational life and economic exchange and creating local wealth that the next generation has deep interests in protecting. There are positive examples all across the country where this has occurred and where violence failed to take hold last election.

Greater and more sophisticated international intervention can support these ongoing Kenyan efforts at a local level. With the financial crisis, falling commodity prices, famine and drought, the temptation will be to take stopgap measures and give aid in a way that addresses only the symptoms of ongoing distress. There is also a danger of moving back into normal modes of dealing with the Kenyan situation, ignoring the need to keep up pressure for change, especially in the violence "hot spots." With limited resources, it is critical to simultaneously engage in development and humanitarian assistance and intelligently build up resilience to violence at a local level.

To do this, the United Nations and supporting donors must move away from a "top down peace-building culture."<sup>44</sup> This approach tends to ignore or distort and displace local peace-building and development networks.<sup>45</sup> The UN ought to evaluate why and how its violence prevention programs failed in the last election. In addition, more resources and attention are needed to address local peace-building

involving economic reconstruction that brings youths together in the creation of public services and businesses in which they have a stake. Dealing with the plight of the internally displaced and the communities in which they now live will be critical. This must include the pastoral communities of the North Rift, along with the country's problems of arms circulation and lack of economic opportunity.<sup>46</sup>

Kenya's impunity problem is now a transnational issue. However, it will ultimately need to be solved in Kenya through negotiation and the struggle for justice. The international community must carefully and cautiously consider the local implications of international action. At all costs, the international community must do what it can to help Kenyan "third way" networks to protect public space, act for change and find local solutions that reinforce bottom-up pressures. This means not giving up on the idea of a reformed local tribunal with international cooperation, as well as other means to cope with lower-level perpetrators. Regardless, any international action requires consultation and coordination with Kenyan reformists and must respect and support local peace-building efforts. 

## NOTES

<sup>1</sup> Jacqueline M. Klopp and Prisca Kamungi, "Violence and Elections: Will Kenya Collapse?" *World Policy Journal* 24 (Winter 2007/2008), 11-18; Daniel Branch and Nic Cheeseman, "Democratization, sequencing, and state failure in Africa: Lessons from Kenya," *African Affairs* 108/430 (January 2009), 1-26.

<sup>2</sup> The full text of the National Accord and Reconciliation Act and related documents are available at the Kenya National Dialogue and Reconciliation Web site, <http://www.dialoguekenya.org/>.

<sup>3</sup> Denis M. Tull and Andreas Mehler, "The Hidden Costs of Power-sharing: Reproducing Insurgent Violence in Africa," *African Affairs* 104/416 (July 2005), 375-398.

<sup>4</sup> Fred Oluoch, "Power Sharing Bad for Africa, says Kriegler," *East African*, 13 September 2008; Tull and Mehler.

<sup>5</sup> Angelique Haugerud, *The Culture of Politics in Modern Kenya* (Cambridge: Cambridge University Press, 1993); Jennifer Widner, *The Rise of a Party-state in Kenya: From "Harambee" to "Nyayo!"* (Berkeley: University of California Press, 1992).

<sup>6</sup> Makau Mutua, *Kenya's Quest for Democracy: Taming Leviathan* (Boulder, CO: Lynne Rienner Publishers, 2008).

<sup>7</sup> For more on the corruption during this period, see: Micaela Wrong, *Its Our Turn to Eat: The Story of a Kenyan Whistleblower* (London: Fourth Estate, 2009); on the failure of constitutional change, see: Mutua (2008); on truth justice and reconciliation see: The Government of Kenya, "Task Force on Truth, Justice and Reconciliation" (Nairobi: Government Printers, 2003); Jacqueline M. Klopp, "Kenya's Internally Displaced: Managing Civil Conflict in Democratic Transitions," in *East Africa and the Horn: Confronting Challenges to Good Governance*, ed. Dorina Bekoe (Boulder, CO: Lynne Rienner Publishers, 2006), 59-80.

<sup>8</sup> Justin Willis, "What Has He Got Up His Sleeve? Advertising the Kenyan Presidential Candidates in 2007," *Journal of Eastern African Studies* 2, no. 2, (2008), 264-271; Dillon Mahoney, "Political Subjectivities in Kenya's 2007 Election: The Appeal of the Orange Democratic Movement in Mombasa," (paper delivered to the American Anthropological Meeting, San Francisco, 21-23 November 2008).

<sup>9</sup> David Anderson, "'Yours in Struggle for Majimbo.' Nationalism and the Party Politics of Decolonization in Kenya 1955-64," *Journal of Contemporary History* 40, no. 3 (2005), 547-564. For more

recent analysis of “majimboism” in campaigning and violence in the 1990s see: Jacqueline M. Klopp, “‘Ethnic Clashes’ and Winning Elections: The Case of Kenya’s Electoral Despotism,” *Canadian Journal of African Studies* 35, no. 2 (2001), 473-517.

<sup>10</sup> The Kenyan National Commission on Human Rights meticulously recorded and documented hate speech from both major parties among others. For a discussion of popular versions of this hate speech transmitted through cell phones and the role it played in the crisis, see: Michael Osborn, “Fuelling the Flames: Rumour and Politics in Kibera,” *Journal of Eastern African Studies* 2, no. 2 (July 2008), 315–327.

<sup>11</sup> Gavin Alistair McFadyen, David Majanja, Hon. Justice Philip Nyamu Waki, George Kegoro and Pascal K. Kambale, Commission of Inquiry into Post-Election Violence (CIPEV), *Report of the Commission of Inquiry into Post-Election Violence*, Nairobi, Kenya, 15 October 2008, 120-121, available at [www.dialoguekenya.org](http://www.dialoguekenya.org). It is also interesting that right after the election Odinga went on a campaign to increase circumcision among the Luo, ostensibly to help prevent HIV/AIDS.

<sup>12</sup> Mike McIntre and Jeffrey Gettleman, “A Chaotic Kenya Vote and a Secret U.S. Exit Poll,” *New York Times*, 30 January 2009; David Ndii, “Preliminary Findings from the 2007 Presidential Election Results Released from the Electoral Commission of Kenya” available at <http://www.scribd.com/doc/2223270/KPTJ-David-Ndii-Analysis>; Independent Review Commission (IREC), “Independent Review Commission Report on the General Elections held in Kenya on 27 December 2007,” (2008).

<sup>13</sup> IREC.

<sup>14</sup> In some “hot spots,” like Kuresoi and Mt. Elgon constituencies, violence started well before the actual election. Subsequent evidence suggests that, while violent local conflicts existed for some time without resolution (especially around land in Mt. Elgon), this became entangled in electoral calculations and was used by politicians in both cases to consolidate their support and kill or displace opponents.

<sup>15</sup> CIPEV, Chapter 4.

<sup>16</sup> Human Rights Watch, “Ballots to Bullets: Organized Political Violence and Kenya’s Crisis of Governance,” 16 March 2008; CIPEV, Chapter 3.

<sup>17</sup> David Anderson, “Vigilantes, violence and the politics of public order in Kenya,” *African Affairs*, 101 (2002), 531-555; Peter Kagwanja, “Facing Mount Kenya or Facing Mecca? The Mungiki, ethnic violence and the politics of the Moi succession in Kenya, 1987–2002,” *African Affairs* 102 (2003), 25-49; Mutuma Ruteere, *Dilemmas of Crime, Human Rights and Politics in Mungiki Violence in Kenya* (Nairobi: Kenya Human Rights Institute, 2008); One police informant claimed that wealthy PNU supporters paid a large sum each for AK-47s easily available in the North Rift. For an excellent explanation of this phenomenon, see: Kennedy Agade Mkutu, *Guns and Governance in the Rift Valley: Pastoralist Conflict and Small Arms* (Oxford: James Currey, 2008).

<sup>18</sup> Human Rights Watch; CIPEV, 113-128; Author interviews.

<sup>19</sup> Makumi Mwangiri, Olang Sana and Kenneth P. Njau, *Facts about Majeshi ya Wazee* (Nairobi: Friedrich Ebert Stiftung Foundation and Centre for Conflict Research, 2002). They note a shift in the increasing use of violence in Nairobi beginning in 1988: “The demand for political violence is high among the sponsors and the supply is overwhelming from the perpetrators’ side.”

<sup>20</sup> Shailja Patel, “How the Kenyan Left Pulled Kenya Back from the Brink: Internal Energy and External Fire,” *Pambazuka News*, 29 January 2009, 417.

<sup>21</sup> Jacqueline M. Klopp and Elke Zuern, “The Politics of Violence in Democratization,” *Comparative Politics* 39, no. 127 (2007). Since some of the mobilized militia groups have political ties and are informal in nature, challenges exist to demobilization and the militias could be easily reactivated if needed. For a list of these groups and a helpful analysis see: “Kenya National Dialogue and Reconciliation Monitoring Report (KNDRMP),” 2009. Available at: <http://www.dialoguekenya.org>.

<sup>22</sup> The exact number of internally displaced people is not known. A recent report claims there were 663,921. See KNDRMP, 1. There are also large numbers of displaced people in the Northern Rift from violence not directly linked to the 2007 election as well as displaced from previous cycles of violence. See Prisca Kamungi and Jacqueline M. Klopp, “Failure to Protect: Lessons from Kenya’s IDP Network,” *Forced Migration Review* 28 (2007), 52-53.

<sup>23</sup> Ann Njogu, “Battered, Bruised, Broken, They Trudge On,” *Pambazuka News*, 29 January 2009, 417.

<sup>24</sup> KNDRMP.

<sup>25</sup> Kenya Human Rights Commission, "A Tale of Force, Threats and Lies: 'Operation Rudi Nyumbani' in Perspective," 28 October 2008, 27; Jacqueline M. Klopp and Nuur Mohamud Sheekh, "Can the Guiding Principles make a difference in Kenya?" *Forced Migration Review* (2008), 19-20.

<sup>26</sup> IREC.

<sup>27</sup> The new law also set up an Interim Independent Boundaries Review Commission to review constituency boundaries and an Interim Independent Constitutional Dispute Resolution Court to deal with future electoral disputes.

<sup>28</sup> Wrong.

<sup>29</sup> Francois Bayart, *The State in Africa: Politics of the Belly* (London: Longman 1993).

<sup>30</sup> CIPEV.

<sup>31</sup> Government of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western Kenya and Other Parts of Kenya* (Nairobi: Government Printers 1992); Government of Kenya, *Report of the Judicial Commission appointed to Inquire into Tribal Clashes in Kenya* (Nairobi: Government Printers, 1999).

<sup>32</sup> One key concern is the lack of protection for witnesses. It is also problematic that the clause that would require those implicated to step down from office was deleted. This would put many of the alleged perpetrators in powerful state positions with avenues to influence the tribunal.

<sup>33</sup> Ndung'u Wainaina and Haron Ndubi, "Get the planes ready for The Hague," *Pambazuka News*, 29 January 2009.

<sup>34</sup> "Binyavanga Wainaina on 'Civil Society,'" Sukuma Kenya, 9 February 2009, <http://sukumakenya.blogspot.com/2009/02/binyavanga-wainaina-on-civil-society.html>.

<sup>35</sup> Robert M. Press, *Peaceful Resistance: Advancing Human Rights and Democratic Freedoms* (Farnham: Ashgate, 2006); Jacqueline M. Klopp, "Remembering the Muoroto Uprising: Slum Demolitions, Land and Democratization in Kenya," *Journal of African Studies* 67, no. 3 (December 2008).

<sup>36</sup> This includes a string of recent arrests of Bunge members peacefully protesting corruption scandals. The treatment of Bunge raises questions about how well the first item on the National Accord's agenda (return of fundamental rights and freedoms) is being respected.

<sup>37</sup> Jacqueline M. Klopp, "Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya," *Africa Today* 47, no. 1 (January 2000), 7-26.

<sup>38</sup> Karuti Kanyinga, Odenda Lumumba and Kojo Sebastian Amanor, "The Struggle for Sustainable Land Management and Democratic Development in Kenya: A History of Greed and Grievances," in *Land and Sustainable Development in Africa*, ed. Kojo Sebastian Amanor and Sam Moyo (London and New York: Zed Books, 2008), 100-126.

<sup>39</sup> "Kenya: Radio stations feed 2m people," *Africa News*, 10 February 2009.

<sup>40</sup> For reflections on the violence by Kenyan writers, see: *After the Vote: 5 Dispatches from the Coalition of Concerned Kenyan Writers* (Nairobi: Kwani Trust, 2008).

<sup>41</sup> Human Rights House Network, *Human Rights in Kenya: The Post-Moi Era 2003-2007* (Nairobi: Claripress, 2007).

<sup>42</sup> Jean-François Bayart, Stephen Ellis and Béatrice Hibou, *The Criminalization of the State in Africa* (Oxford: James Currey, 1999); Branch and Cheeseman (2008); Klopp (2001).

<sup>43</sup> Edgar Pieterse, *City Futures* (Cape Town: UCT Press, 2008), 6.

<sup>44</sup> Severine Autessere, *Failing the Congo* (Cambridge University Press, forthcoming).

<sup>45</sup> Peter Mwangi Kagwanja, "Strengthening Local Relief Capacity in Kenya: Challenges and Prospects," in *Eroding Local Capacity: International Humanitarian Action in Africa*, ed. Monica Kathina Juma and Astri Suhrke (Uppsala, Sweden: Nordiska Afrikainstitutet, 2002).

<sup>46</sup> For helpful ideas on how to do this see, Mkutu (2008).