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# **‘African solutions for African problems’ or a ‘liberal peace’: the African Union (AU) and Kenya**

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## List of acronyms

AACC	All Africa Conference of Churches
ACHPR	African Charter on Human and Peoples' Rights
AfDB	African Development Bank
AfriCOG	African Centre for Open Governance
ALC	African Leadership Centre
AMISOM	African Union Mission in Somalia
AP	Administration Police
APRM	African Peer Review Mechanism
APSA	African Peace and Security Architecture
ASBF	African Stand-By Force
AU	African Union
AUC	African Union Commission
AUCISS	African Union Commission of Inquiry on South Sudan
AUHIP	African Union High Level Implementation Panel
BBC	British Broadcasting Corporation
CAR	Central African Republic
CCP	Concerned Citizens for Peace
CCWU	Clerks and Commercial Workers Union
CEWS	Continental Early Warning System
CGD	Centre for Governance and Democracy
CIPEV	Commission of Inquiry into the Post-Elections Violence
CKRC	Constitution of Kenya Review Commission
CKW	Concerned Kenyan Writers
CoE	Committee of Experts
CORD	Coalition for the Restoration of Democracy
COTU	Central Organisation of Trade Unions
CPA	Comprehensive Peace Agreement
CPG	Citizens' Pathway Group
CSSDCA	Conference on Security, Stability, Development and Cooperation in Africa
DCG	Donor Coordination Group
DGDG	Democratic Governance Donor Group
DP	Democratic Party
DPA	Department of Political Affairs
DRC	Democratic Republic of the Congo
EAC	East African Community
EALA	East African Legislative Assembly
EATUC	East African Trade Union Congress
ECK	Electoral Commission of Kenya
ECOSOCC	Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
EJE	Extrajudicial execution
EMB	Electoral Management Body
EOM	Election observation mission

EU	European Union
FBO	Faith-based organisation
FCO	Foreign and Commonwealth Office
FKE	Federation of Kenya Employers
FORD	Forum for the Restoration of Democracy
G7	Group of Seven
GBSV	Gender-based and sexual violence
GDP	Gross domestic product
GJLOS	Governance, Justice, Law and Order Sector
GoK	Government of Kenya
GSU	General Service Unit
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ-Kenya	International Commission of Jurists-Kenya
IDP	Internally displaced person
IEBC	Independent Electoral and Boundaries Commission
IFI	International financial institution
IGAD	Intergovernmental Authority on Development
IGO	Intergovernmental organisation
IIECK	Interim Independent Electoral Commission (Kenya)
IMLU	Independent Medico-Legal Unit
IPPG	Inter-Parties Parliamentary Group
IREC	Independent Review Commission
IRI	International Republican Institute
KADU	Kenya African Democratic Union
KAM	Kenya Association of Manufacturers
KANU	Kenya African National Union
KAU	Kenya African Union
KAWC	Kenya African Workers Congress
KDF	Kenya Defence Force
KEPSA	Kenya Private Sector Alliance
KFRTU	Kenya Federation of Registered Trade Unions
KICC	Kenyatta International Conference Centre
KJAS	Kenya Joint Assistance Strategy
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
KPTJ	Kenyans for Peace with Truth and Justice
KPU	Kenya People's Union
KTN	Kenya Television Network
LDP	Liberal Democratic Party
Limid-P	Like-Minded Partners Political Group
LRA	Lord's Resistance Army
MAPROBU	African Prevention and Protection Mission in Burundi
MMPR	Mixed member proportional representation
MOA	Media Owners Association
MoU	Memorandum of understanding

MP	Member of Parliament
NAK	National Alliance of Kenya
NARC	National Rainbow Coalition
NATO	North Atlantic Treaty Organization
NCA	National Convention Assembly
NCC	National Constitutional Conference
NCCCK	National Council of Churches of Kenya
NCIC	National Cohesion and Integration Commission
NDP	National Democratic Party
NEPAD	New Partnership for African Development
NGO	Non-governmental organisation
NMG	Nation Media Group
NPI	Nairobi Peace Initiative
OAU	Organisation of African Unity
OCS	Officer Commanding Station
ODA	Overseas development assistance
ODM	Orange Democratic Movement
OSF	Open Society Foundation
OSIEA	Open Society Initiative for Eastern Africa
OTP	Office of the Prosecutor
PAP	Pan-African Parliament
PNU	Party of National Unity
PRC	Permanent Representatives' Committee
PSC	Parliamentary Select Committee
PSC	Peace and Security Council
PSD	Peace and Security Division
R2P	Responsibility to protect
REC	Regional Economic Community
RO	Returning Officer
RPF	Rwandan Patriotic Front
SADC	Southern African Development Community
SID	Society for International Development
SIDA	Swedish International Development Agency
SPLM	Sudan People's Liberation Movement
TAWU	Transport and Allied Workers Union
TFG	Transitional Federal Government of Somalia
TJRC	Truth, Justice and Reconciliation Commission
ToR	Terms of reference
UAF-Africa	Urgent Action Fund-Africa
UDHR	Universal Declaration of Human Rights
UNAMID	African Union-United Nations Mission in Darfur
UNDP	United Nations Development Programme
UNIFEM	United Nations Development Fund for Women (now UN Women)
UoN	University of Nairobi
ZANU	Zimbabwe African National Union

## **1. Introduction**

### **1.1 The research questions**

In 2001, the Constitutive Act of the African Union (AU) came into effect, marking the demise of the former continental intergovernmental organisation, the Organisation of African Unity (OAU). The AU was meant to signal a new start for Africa. Apartheid had ended in South Africa with its first democratic elections of 1994—realising a key aim of the former OAU. Many former one-party dictatorships had fallen across Africa during the 1990s, bringing into political power a new crop of African leaderships whose relationships with one another had helped the entry of the Rwandan Patriotic Front (RPF) into Rwanda to end the genocide, also in 1994.

Given these new African leaderships, the Constitutive Act could and did set out stronger normative standards on democracy, human rights and the rule of law for Africa as a whole. These included new limitations on state sovereignty and an end to non-intervention on the commission of international crimes (crimes against humanity, genocide and war crimes).

The first few years of the new millennium, therefore, saw numerous legislative, policy and institutional advances by and within the AU. Its human rights architecture evolved with the creation of the African Court of Justice and Human Rights to complement the African Commission on Human and Peoples' Rights. Its peace and security architecture also evolved, driven by the Peace and Security Council (PSC) and its Panel of the Wise, decisions from which are, in theory, implemented through relevant regional economic communities (RECs). Economically, continental integration remained the goal, to be realised through the fast-tracking of the full monetary integration of each of the RECs. And Africa's relationship with the rest of the world was intended to be on the basis of the exchange envisioned in the New Partnership for African Development (NEPAD)—with Africa addressing its own governance challenges through the African Peer

Review Mechanism (APRM) in return for more substantial external investments in African development.

But the import and meaning of these advances at the continental level within AU member states has varied. The effects are perhaps most easily assessed in countries on the verge of, in or emerging from conflict—and in which international crimes are being committed. For it is in such countries that the AU's professed new will and true capacities to generate 'African solutions for African problems' can be seen.

Kenya has always had an uncertain attitude to these advances. While Kenya has traditionally played the role of an anchor state for east Africa and the Horn, it has been sceptical of ideological commitments to pan-Africanism and pragmatic in its dealings with the continent as well as the rest of the world. It did not therefore, as it arguably could have, join the five or so African countries leading the changes within the AU or driving the NEPAD.

However, with respect to conflict resolution, Kenya has always played a leading role within the REC of the Intergovernmental Authority on Development (IGAD)—responsible for responses to conflicts in the Horn such as those in Somalia and the (former) Sudan—now South Sudan and Sudan. This role is equally pragmatic, however, given Kenya's borders with these countries and its hosting, until recently, of the bulk of the Somali and South Sudanese refugee communities generated by these conflicts. Similarly, given the expansion of Kenyan professionals and the Kenyan private sector into east Africa and the rest of the Horn, it has become fully engaged in developments within the REC of the East African Community (EAC)—whose integration process has reached the stage of customs union.

More recently, however, Kenya's attitude to the AU has changed. In 2008, the violence that followed the 2007 General Elections left over 1,000 people dead and half a million internally

displaced. The AU's response was uncharacteristically efficient and swift. Against the wishes of the political party that had controversially claimed the Kenyan presidency, the AU intervened through the appointment of a Panel of Eminent African Personalities headed by former United Nations (UN) Secretary-General Kofi Annan to mediate a political settlement to end the violence. Equally uncharacteristically, the rest of the international community placed its full weight behind the Panel—providing not just financial and technical support for its deliberations but also the requisite 'carrots and sticks' to ensure that political parties first sat down at the negotiating table and then reached a political settlement in the form of power-sharing.

Domestic pressure and substantive contributions from Kenyan civil society and the private sector eventually ensured a comprehensive set of mediation agreements. These exceeded the political settlement of power-sharing between the two political parties, also addressing the electoral failure and the subsequent violence as well as long-standing demands for constitutional, electoral, security sector and judicial reforms. The Kenya National Dialogue and Reconciliation (KNDR) thus stands today as one of the AU's success stories—for reaching a political settlement that ended the violence as well as for covering, through its Road Map, agenda and agreements, not only the trigger for the violence that ensued from the electoral conflict but also its proximate and more structural causes.

But the KNDR also marked the beginning of a new engagement by the Government of Kenya (GoK) with the AU. The GoK was taken aback by the continent's response to what it had tried to portray as a manageable electoral hiccup, and determined to avoid a similar situation in future. It has since sought to restore and more actively play its role as eastern Africa's anchor state. It has involved itself in the effort against piracy along the Somali coast and in the internationally backed African counter-terrorism and peacekeeping effort within Somalia. The latter began in its

surprise military offensive in Somalia against the jihadist *al Shabaab*—an offensive later endorsed by the AU with the Kenyan Defence Force (KDF) joining the AU Mission in Somalia (AMISOM). It has also sought to use the AU to challenge the cases of the International Criminal Court (ICC) against the current President and Vice-President concerning the violence resulting from the electoral conflict of 2007-8. And while implementation of the mediation agreements proceeded from 2008 to 13, it became clear that neither the proximate nor structural causes were being addressed in the manner intended, becoming pro forma and technical rather than political.

Taking the AU's intervention through mediation in Kenya's 2007-8 electoral conflict as a case study, *the key or primary research questions have to do, therefore, with determining the conditions under which supranational institutions intervene in member states, thereby limiting sovereignty, in order to realise their normative commitments, critically examining the nature and consequences of such interventions. Additional research questions here have to do with determining what provides leverage in respect of such interventions.*

It could be argued that the questionable presidential results of 2007-8 amounted to an unconstitutional change of government—prohibited by the AU's Constitutive Act. In addition, the Constitutive Act enabled AU intervention in Kenya given that the violence resulting from the electoral conflict was ultimately deemed to amount to crimes against humanity. In practice, however, it is unlikely that AU concerns about democratisation or even the responsibility to protect (R2P) were the primary motivations behind the AU's intervention through mediation given the economic consequences of the violence on transit trade and AU member states within the hinterland such as Rwanda and Uganda. In any case, the AU itself had little capacity to intervene through mediation in Kenya's electoral conflict of 2007-8, as well as little material leverage to ensure that parties to the electoral conflict both submitted to the intervention through mediation in

the first place and then reached a political settlement in the form of power-sharing. Thus Kenya could have ignored the AU's intervention through mediation but chose not to.

Why then did the AU intervene through mediation? And what made Kenya comply? Was it the international backing of the AU's Panel? Partially. But key long-standing bilateral partners also had little material leverage over Kenya. Before the 2007 General Elections, Kenya had registered a seven per cent economic growth rate—ensuring the financing of 95 per cent of its recurrent budget and 50 per cent of its development budget through Kenyan taxpayers alone. Overseas development assistance (ODA) could be done without in a pinch. Further, key new bilateral partners to whom Kenya had turned for infrastructural investment, such as China, tend to retain more traditional notions of state sovereignty and treat matters of democracy, human rights and rule of law as being solely internal.

While 'carrots' could have been offered by the rest of the international community, what was left as leverage therefore to key older bilateral partners seems to have been the 'sticks' of individual, personalised and targeted sanctions—together with the risk of Kenya's credit ratings falling as a result of the symbolic stopping of some ODA payments. This was combined with domestic pressure from Kenyan civil society and, more importantly (to the GoK), the Kenyan private sector. Economic growth and its assumed enabling of 'trickle-down' had arguably placed the GoK in a position of relative autonomy from the region and the rest of the international community, while needing to manage domestic demands. Threats to continued economic growth may therefore have been viewed as critical. Thus, *the hypothesis is that it was the combination of regional with international and domestic pressures that ensured the 'success' of the AU's intervention through mediation.* This is particularly so given that the KNDR found a political settlement in the form of power-sharing that nominally satisfied demands all round for political

power—and that, importantly, wasn't unusual as it was not the first but the third 'elite pact' in Kenya's political transition and process of democratic consolidation.

That said, it has been clear since 2008 that the GoK intends to ensure such coalescing of domestic, regional and international pressures cannot occur again in the same way. Hence the new alacrity with which Kenya is now engaging with the AU. Given the nature and purposes of that engagement, *the secondary set of research questions has to do with critically examining the meaning of 'African solutions for African problems', as well as the intended and unintended impacts of the same.* In addition, domestically, the political settlement in the form of power-sharing lauded as a 'success' was actually the third in a series of 'elite pacts' in Kenya—and thus ultimately gave rise to the same contradictions and dilemmas of the two previous 'elite pacts'. *The hypothesis here is that, consonant with predictions of the 'liberal peace', the political settlement in the form of power-sharing itself, in the medium-to-long term, contributed to undermining implementation of the KNDR agreements with respect to addressing proximate and structural causes of the violence—undermining democratic consolidation and mitigating against accountability.*

## 1.2 The significance of the research questions

The AU's intervention through mediation in Kenya's 2007-8 electoral conflict is taken as a case study for several reasons. First, the number of electoral conflicts within Africa is rising yet the AU's intervention through mediation in Kenya's 2007-8 electoral conflict was one of its first. The case thus illustrates not only the AU's right to intervene and the challenges thereof—such as sovereignty and capacity—but also considers the questions of how, by whom, to what intended ends and with what intended and unintended consequences.

Second, by demonstrating both why the AU intervened and why the intervention was deemed a ‘success’, the case study will contribute to understanding both the conditions under which an intervention does occur and factors contributing to its ‘success’. These include here a productive relationship between the AU and the UN with respect to preventive diplomacy and the alignment of regional with international and domestic actors and interests.

Third, the case study will contribute to critically assessing measures of ‘success’—including here the contradictions and dilemmas posed by political settlements that amount to ‘elite pacting’, ultimately to the detriment of the ability of even a comprehensive set of mediation agreements to address the medium- and longer-term proximate and structural causes of electoral conflict, democratisation and accountability. This is in line with predictions of the ‘liberal peace’.

### 1.3 The structure of the thesis

This introductory chapter spells out the research questions, their significance and how the thesis is structured to address them. Chapter Two explains the research methodologies used: the case study; the literature review; semi-structured elite interviews; and archival materials and research. It also highlights the limitations of the research methodology—both those inherent to the chosen research methodologies chosen and those experienced during fieldwork—and how the researcher tried to address them.

Chapter Three is a background or contextual chapter. It situates the political settlement reached as a result of the AU’s intervention in Kenya’s electoral conflict of 2007-8 in the context of previous political settlements reached in Kenya’s history of democratisation. It does so first to explain why the General Elections of 2007 triggered an electoral conflict and to highlight the more fundamental proximate and structural causes of that electoral conflict. Second (and more

importantly), Chapter Three highlights the problems inherent in previous political settlements in Kenya to lay the ground for a later assessment of the extent to which the KNDR did (or did not) definitively address these problems. Thus, focused on the political transition of 2002, Chapter Three reviews the factors enabling that transition as well as factors that ultimately mitigated against its ability to be truly transformative. Again, this is to enable the later assessment of the KNDR's intention and impact.

Chapter Four focuses on the case study—the AU's intervention in Kenya's electoral conflict of 2007-8. The research findings are used to explore the trigger to the conflict as well as its proximate and structural causes. They are also used to explain how the intervention was agreed to as well as the content of the intervention. The roles played by different actors, internal and external, are detailed in relation to both realising the intervention and informing its substantive content. Particular attention is paid, internally, to the roles of non-political actors and, externally, to the AU. Finally, the outcomes and impact of the intervention are detailed, in both the short and the medium-to-long term, highlighting what enabled those impacts and what gives rise to caution about their being termed a 'success'.

Chapter Five is another background or contextual chapter. It focuses on the transition of the OAU to the AU as well as the political, economic and institutional imperatives for and expectations of that transition. It spells out the normative and institutional differences between the OAU and the AU, preparatory to assessing the effectiveness of the new AU. This assessment is done by using the research findings on the implications for (electoral) conflict resolution arising from the AU's intervention in Kenya's electoral conflict of 2007-8.

Chapter Six goes on to explore and problematise the notion of 'African solutions for African problems'. Using the research findings, it shows the different ways in which the AU's

intervention in Kenya's electoral conflict of 2007-8 is understood as being an 'African solution' (or not). It explains factors that led, in practice, to a decision by the AU to intervene as well as what makes a member state agree to such an intervention. It outlines the objectives, model and advantages of such interventions and surfaces determinants of an intervention's 'success', or otherwise, as well as measures of such 'success'. It also explores the evolving relationship between the AU and the UN concerning conflict resolution in Africa.

Chapter Seven presents the conclusions of this thesis, referencing back to the original research questions and their hypotheses. It summarises the conditions under which supranational institutions decide to intervene and what provides leverage for such interventions. The two key conclusions here are the importance of a domestic base to legitimise and give real meaning to an external intervention and the importance of domestic and international actors for regional actors' interventions to occur and to 'succeed'. Chapter Seven also, however, critically analyses the nature and medium-to-long-term consequences of such interventions, noting that political settlements inevitably mitigate against addressing—in full—the proximate and structural causes of conflict and accountability. It therefore challenges the notion of any 'African solutions' predicated on political settlements. The thesis ends with a bibliography and the list of respondents for the research.

## **2. Methodology**

### 2.1 Introduction

Using the case study of the AU's intervention in Kenya's electoral crisis of 2007-8, the key or primary research questions this thesis seeks to answer are to determine:

- the conditions under which supranational institutions intervene in member states;
- the nature of such interventions;
- what provides leverage for such interventions;
- the measures of such interventions' 'success' or 'failure';
- the determinants of 'success' or 'failure';
- the short-, medium- and long-term consequences, intended and unintended, of such interventions;
- how those consequences correspond to the measures of 'success' or 'failure'.

The thesis then extrapolates from the case study to critically examine the AU's model for addressing (electoral) conflict as well as the meaning of its 'African solutions for African problems'.

### 2.2 The case study

Case studies can be selected: on the basis of variance with respect to an independent or dependent variable; randomly; to fit a given theory; or with respect to representivity. The AU's intervention through mediation in Kenya's 2007-8 electoral conflict is selected here to illustrate an AU intervention through mediation in an electoral conflict. While it proved difficult to establish a counterfactual, the hypotheses associated with the research questions are tested against other case studies referenced (although not in the same depth) to make generalisations through both semi-

structured elite interviews and archival materials/research. These situate the case study within a(n incomplete) range of possible case studies including those where the AU has intervened in an electoral conflict and not been deemed ‘successful’ (testing here the variables enabling success).

That said, it is not the intention of this thesis to be either fully comparative or quantitative—the latter in the sense of being able to definitively infer from the case study findings applicable to the entire field of possible case studies. The purpose of the above interrogation is to be merely indicative of the fact that alternative hypotheses could and do exist for both:

- what enabled the AU’s intervention in Kenya to be deemed ‘successful’ in the immediate or short term (or what ‘x’, independent or explanatory factors enabling ‘success’, best correlates with ‘y’, the dependent or response ‘success’); and
- what explains the intended and unintended consequences of that intervention through mediation in the medium-to-long term (what ‘x’, factors complicating implementation, best correlates with ‘y’, non-implementation).

### 2.3 The literature review

The literature addressed relates to: (Kenyan) democratisation and political transition; (African) regional integration; delegation, state sovereignty and intervention under regional governance systems and their growing place in and in relation to global governance systems; the ‘liberal peace’ and electoral conflict resolution.

As concerns the case study, literature on democratisation in Kenya is focused largely on political transition, the political instrumentalisation of ethnicity during electoral periods and the consequences of this for conflict. While some literature has developed in relation to the role of the

AU in the 2007-8 crisis, there is a lack with respect to how the same addressed (or rather, did not address) historical continuities that have always hindered structural reform.

In addition, the literature on political transition has not yet sufficiently engaged with the intended and unintended consequences of conflict resolution on the process of democratic consolidation and accountability. While there has been some critique of the negative impacts of the KNDR on Kenya's democratic consolidation process and accountability, that has not yet been placed within the critical literature about the 'liberal peace'.

As concerns the notion of 'African solutions for African problems', earlier literature on the OAU focused on realist, liberal institutionalist and structuralist challenges to African regional integration. However, current literature on the AU is underdeveloped and largely liberal-institutionalist, focused more on whether or not the AU will be able to address the economic and institutional rationales for its transition. There is a lack of realist and, in particular, structuralist analyses which re-focus on whether the AU will be able to address the political rationale for the transition, including its normative shift from state to human security and how best to realise that through its ability to intervene. There is also a lack of critical analyses of the AU's peace and security architecture which problematise its notion of, approach to and models for 'African solutions for African problems'.

Finally, the liberal-institutionalist literature on delegation is largely focused on the European regional integration project (or the federation of the United States). Analysis of the African integration project provides different or new insights into the theory's applicability and relevance outside Europe—as well as different or new insights into, in particular, the AU's institutional arrangements.

## 2.4 Semi-structured elite interviews

Semi-structured elite interviews were carried out for this thesis with representatives of the following groups.

- The AU (in Addis Ababa, Ethiopia):
  - relevant political and professional staff during the period and at present;
  - the lead mediator of the Panel of Eminent African Personalities.
- The RECs (in Nairobi, Kenya):
  - mediators in other conflict situations.
- Kenyan domestic actors (in Nairobi, Kenya):
  - parties to the electoral conflict (members of the negotiating teams for both sides);
  - relevant public ‘insiders’ (professional staff of Vision 2030);
  - relevant civil society actors (engaged academics; the two key civil society umbrellas at the time; the women’s umbrella);
  - relevant private-sector actors.
- The UN and the development, defence and diplomatic community (in Addis Ababa, Ethiopia and Nairobi, Kenya).

A list of interviews is included at the end of this thesis.

As the elite interviews were semi-structured, sets of guiding questions rather than formal and strict questionnaires were used, and these differed for each category of respondent. For external actors (related to the AU, the RECs and the UN), interviews covered the AU’s intervention in Kenya’s 2007-8 electoral conflict (its impetus, the respondent’s engagement or involvement, their interests, their assessment of the short-, medium- and long-term consequences and analysis or interpretation thereof). For domestic actors, in addition to the above, questions also covered the

links between the AU's intervention in Kenya's 2007-8 electoral conflict with Kenya's democratisation process (analysis or interpretation of Kenya's political transition of 2002, its achievement and failures and continuities through implementation of the KNDR agreements).

The interview notes were typed by the researcher while speaking to the respondents. Quotations from the interview notes used in the text are therefore close to verbatim, but not entirely verbatim (accounting for the clipped nature of some of the quotations).

## 2.5 Archival materials and research

The Panel of Eminent African Personalities, when winding down at the end of 2013, following the first General Elections under the new Constitution of Kenya, compiled and donated almost all its materials to the Kenya National Archives in Nairobi. In addition, the researcher already had a fairly comprehensive collection of press statements, position papers and articles and non-academic reports generated by domestic and external actors from 2008. These grey materials were reviewed to extract data relating to the interests and demands of all categories of actors at the time to determine their reflection (or not) in the KNDR agreements. Data was also reviewed for any predictions made at the time with respect to intended and unintended consequences weighed against whether or not those predictions came to pass.

## 2.6 Methodological limitations

Access to some of the elite respondents presented some difficulties, even though the researcher had been involved in the mediation process as a key civil society actor and thus had a political and professional relationship with most of the intended informants, enabling her access. For example, Dr Salim Ahmed Salim, the former Secretary-General of the Organisation of African Unity (OAU)

had granted an interview but the researcher was unable to go to Tanzania to conduct it at the time when he was available. Similarly, Raila Odinga, Principal of one of the parties and Prime Minister under the Grand Coalition Government, had granted an interview but his schedule made it difficult to meet, despite repeated scheduling attempts. Negotiators from the other party remained hostile and unresponsive throughout—although the researcher did finally manage to interview one of their negotiators who subsequently became Minister for Justice under the Grand Coalition Government. Finally, all heads of Northern/Western diplomatic missions who played critical roles at the time had since been deployed elsewhere. While the Dutch Ambassador at the time had also granted an interview, her movements made it difficult to schedule the same.

The quality of data collected through elite interviews can be affected by memory and recall problems, the dominance of ‘official’ narratives over time, and problems of subjectivity and representivity. These problems were (somewhat) mitigated by the fact that, in the main, the guiding questions concerned a landmark event for all categories of actors at the time. All data collected was cross-referenced and triangulated with respect to questions of fact. However, the purpose of this thesis is to determine different subjective opinions and understandings of the same landmark event—including over time. In addition, the data collected from the semi-structured elite interviews was also assessed against contemporary grey materials generated by most of the categories of actors, and included in the researcher’s personal archive.

### **3. Kenya's political transition of 2002: background to the General Elections of 2007**

This chapter is a background or contextual chapter. It situates the political settlement reached as a result of the AU's intervention in Kenya's electoral conflict of 2007-8 in the context of previous political settlements reached in Kenya's history of democratisation. It does so, first, to explain why the General Elections of 2007 triggered an electoral conflict and to surface the more fundamental proximate and structural causes of that electoral conflict. Second (and more importantly), this chapter highlights the problems inherent to previous political settlements in Kenya to lay the ground for a later assessment of the extent to which the KNDR did (or did not) definitively address these problems. Focusing on the political transition of 2002, this chapter reviews the factors that enabled that transition as well as those that ultimately mitigated against its ability to be truly transformative. Again, this is to enable the assessment below in this thesis of the KNDR's intention and ability to transcend the latter set of factors.

#### 3.1 Concepts and theory

A political transition refers to the interval between one political system and another. In a transition, old political elites can be newly legitimised or new ones can take power.<sup>1</sup> Thus, any transition is unique, its process can be non-linear and both its process and its outcomes can be uncertain.<sup>2</sup> Agency matters in the sense that ruling political parties' internal dynamics and political actors' strategic choices can affect both the process and outcomes of a given transition.<sup>3</sup> But structure and institutions matter too. Structural and institutional constraints as well as international conjuncture

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<sup>1</sup> Brown, Stephen (2004) 'Theorising Kenya's Protracted Transition to Democracy', *Journal of Contemporary African Studies* 22:3 September 2004, p 325.

<sup>2</sup> O'Donnell and Schmitter, cited in Brown (2004), p 325.

<sup>3</sup> Brown (2004), p 331.

can set the stage for a transition.<sup>4</sup> Conversely, the exercise of agency, more often than not, only temporarily suspends structural constraints,<sup>5</sup> such as economic conditions and international conjuncture.<sup>6</sup>

In Africa's neo-patrimonial political systems, factors influencing transitions include divisions within ruling political parties—as well as between ruling and opposition political parties—based on who is inside and outside patronage networks as well as the combination of domestic and international pressure.<sup>7</sup> African transitions since the 1990s have thus been more about authoritarian breakdown than democratic consolidation, whether the latter is considered in minimalist terms—as the conduct of 'free and fair' elections—or in broader terms.<sup>8</sup> That said, the process and outcomes of political transitions and democratic consolidation have not been entirely separate either.<sup>9</sup>

### 3.2 Background to and context for the political transition of 2002

Until 2002, Kenya was considered to be 'one of Africa's most notorious cases of stalled democratic transition'.<sup>10</sup> Amendments to its independence Constitution of 1963 had limited freedoms, replaced devolution with centralisation, created *de jure* one-party rule under the ruling Kenya African National Union (KANU) and weakened the parliamentary system by concentrating powers in the presidency. With no separation of powers, checks and balances or accountability, this had led to personalised rule and patronage, prevented the establishment of a meritocracy within the

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<sup>4</sup> Brown (2004), p 339.

<sup>5</sup> Guilhot and Schmitter, cited in Brown (2004), p 339.

<sup>6</sup> Brown (2004), p 339.

<sup>7</sup> Brown (2004), p 325.

<sup>8</sup> Brown (2004), p 326.

<sup>9</sup> Brown (2004), p 328.

<sup>10</sup> Ndegwa, Stephen N (2003) 'Kenya: third time lucky?' *Journal of Democracy* 14:3 July 2003, p 145.

civil service and heightened systemic discrimination along ethnic lines that dated back to the colonial era.<sup>11</sup>

In 1991, however, then President Daniel arap Moi ceded to domestic pressure and repealed Section 2A of the Constitution, ending *de jure* one-party rule and enabling the return of political pluralism.<sup>12</sup> A further constitutional amendment set a limit of two five-year terms for the presidency.<sup>13</sup>

But opposition political parties lost the General Elections of 1992 and 1997—both of which resulted in presidential wins for Moi and parliamentary majorities for KANU.<sup>14</sup> Given the distribution of the presidential and parliamentary vote (with the presidential candidates of opposition political parties accruing, collectively, more votes than Moi), this was attributed in part to lack of unity among opposition political parties. However, the constitutional, legal and political context was still incompatible with competitive politics, all characterised by a lack of access, equity and transparency.<sup>15</sup> Of specific concern were laws dating back to the colonial era, when they were used to contain and repress anti-colonial political activity. These laws limited the freedoms of expression (the Public Order Act and provisions on sedition in the Penal Code) and association (the Preservation of Public Security, the Chiefs' Authority and the Societies Acts).<sup>16</sup> They enabled security to be invoked to inhibit political activity (emergency regulations as well as the Outlying and Special Districts, Administration Police and Vagrancy Acts). And they

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<sup>11</sup> Cottrell, Jill and Ghai, Yash Pal (2007) 'Constitution-Making and Democratisation in Kenya (2000-2005)', *Democratisation* 14:1, p 3.

<sup>12</sup> Brown (2004), pp 326-7.

<sup>13</sup> Brown (2004), p 329.

<sup>14</sup> Brown (2004), p 327.

<sup>15</sup> Ndegwa, Stephen N (1998) 'The Incomplete Transition: the constitutional and electoral context in Kenya', *Africa Today* 45:2 April-June 1988, p 193.

<sup>16</sup> Ndegwa (1998), pp 198-202.

specifically spoke to elections and political financing (the National Assembly and Presidential Elections, Electoral Offenses and Public Collections Acts).<sup>17</sup>

In addition, gerrymandering and Moi/KANU's control of the electoral management body as well as the public broadcaster continued to ensure an uneven playing field, tilted in favour of Moi and KANU. Politically instigated, so-called 'ethnic cleansing', particularly at the Coast and in the Rift Valley—Moi's backyard and KANU's stronghold—occurred as voter registration began prior to the General Elections of both 1992 and 1997 in an attempt to create ethnically and assumed politically homogenous voting blocs.<sup>18</sup> Voter intimidation and ballot-box stuffing was widespread.<sup>19</sup> Thus, resistance from Moi/KANU—together with external support of the status quo in 1992 and 1997 by external endorsement of sub-standard elections—mitigated against a win by opposition political parties.<sup>20</sup>

That said, opposition political parties had broken from civil society and negotiated with Moi/KANU what became known as the Inter-Parties Parliamentary Group (IPPG) reforms before the General Elections of 1997—despite the fact that KANU controlled the House and could shape even the IPPG reforms in its favour.<sup>21</sup> The IPPG reforms included omnibus legislation amending or repealing of some of the legislation mentioned above and resulting in the Constitution of Kenya Amendment Act and the Constitution of Kenya Review Commission (CKRC) Act.<sup>22</sup>

Coming too late to make a difference to the 1997 electoral process and outcomes, however, the IPPG reforms were thus also not comprehensive and undermined public momentum for

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<sup>17</sup> Ndegwa (1998), p 197.

<sup>18</sup> Ajulu, Rok (1995) 'The Left and the Question of Democratic Transition in Kenya: a reply to Mwakenya', *Review of African Political Economy* 22:64 June 1995, p 232; Brown (2004), p 327.

<sup>19</sup> Brown (2004), p 327.

<sup>20</sup> Brown (2004), p 338.

<sup>21</sup> Ndegwa (1998), p 202.

<sup>22</sup> Ndegwa (1998), p 203.

comprehensive constitutional reforms. They did not affect presidential powers, including on appointments under the CKRC Act, 1997.

In reaction, civil society, under the leadership of the Ufungamano Initiative, had set up the People's Commission of Kenya.<sup>23</sup> Professor Yash Pal Ghai, appointed by the President as Chair of the CKRC, had accepted that appointment on condition that the two initiatives be merged. Through his mediation, they eventually were, under the Constitution of Kenya Review Act, 2000 (amended in 2001) with representation from both on the CKRC.<sup>24</sup>

The CKRC had been tasked to seek views from the public on comprehensive constitutional reforms and prepare a draft Constitution for consideration by a representative National Constitutional Conference (NCC) of 629 members in total—all of parliament, district and political party representatives and members of civil society. The draft negotiated by the NCC was then to be enacted by parliament, led by the Parliamentary Select Committee (PSC) on the Constitution.<sup>25</sup>

The CKRC proceeded to collect public views by opening up a process of public submissions, convening constitutional hearings in each of the 210 constituencies and establishing a coordinator and library in each of the 74 districts. It received over 37,000 submissions, in addition to reports from the 201 constituency hearings.<sup>26</sup> Instructively, the response of political parties was insufficient, with their submissions being 'late... poorly conceived and thin in terms of ideas'.<sup>27</sup> The response of the women's movement, in contrast, was coordinated and united, seeking to secure gains regarding political representation and land rights.<sup>28</sup>

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<sup>23</sup> Cottrell and Ghai (2007), p 5.

<sup>24</sup> Cottrell and Ghai (2007), p 5.

<sup>25</sup> Cottrell and Ghai (2007), p 6.

<sup>26</sup> Cottrell and Ghai (2007), p 9.

<sup>27</sup> Cottrell and Ghai (2007), p 10.

<sup>28</sup> Cottrell and Ghai (2007), p 11.

As Kenya headed to the General Elections of 2002, the CKRC had begun the convening of the NCC. The results were a presidential win for Mwai Kibaki of the National Rainbow Coalition (NARC) and a parliamentary majority for NARC as well. The stalling was deemed over as political transition had finally occurred, significant in that the incumbent President had retired, respecting the presidential term limits secured in 1991. A political party which had governed Kenya for over four decades was out of power and opposition political parties had gone into the General Election united under NARC.<sup>29</sup>

### 3.3 Factors enabling the political transition of 2002

#### 3.3.1 Agency

Domestic and international pressure was consistent in 2002. The public had benefited from civic education conducted as part of the CKRC's mandate<sup>30</sup> and the political participation its process engendered. Civil society had brokered initial discussions on opposition political party unity and come out publicly in support of the NARC. The security services had made clear their preferences regarding Moi's need to respect the presidential term limits and retire,<sup>31</sup> as had bilateral and multilateral organisations, including the international financial institutions (IFIs).<sup>32</sup> However, the strategic decisions of individuals and political parties mattered,<sup>33</sup> with three factors being of particular significance: the handling of succession within KANU; the achievement of opposition unity; and KANU's diminished ability to instigate political violence.

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<sup>29</sup> Murunga, Godwin R and Nasong'o, Shadrack W (2006) 'Bent on Self-Destruction: the Kibaki regime in Kenya', *Journal of Contemporary African Studies* 24:1, p 2.

<sup>30</sup> Brown (2004), p 328.

<sup>31</sup> From conversation with Sally Kosgei, then head of the civil service, during the first review conference of the Kenya National Dialogue and Reconciliation (KNDR) in Geneva, Switzerland, referring to the convening of a farewell party for former President Daniel arap Moi by the heads of the Kenya Defence Forces and other security services and the messaging conveyed by the same.

<sup>32</sup> Cottrell and Ghai (2007), p 4.

<sup>33</sup> Ndegwa (2003), p 147.

*The handling of succession within KANU*<sup>34</sup>

Political party formation in Kenya has historically reflected two tendencies. First, restrictions dating back to the colonial era limited political activity to what were then ethnically homogenous areas. Second, formation was around political party leaders who offer financial (as well as intellectual) patronage, with a founding core linked by personal ties—family, clan, ethnic and otherwise—using ethnicity as a basis for the political party's reach.<sup>35</sup>

This results in 'unbounded politics'—that is in political parties and their alignments being easily formed and equally easily abandoned on the basis of whether those political parties and alignments advance the interests of the leadership and the founding core, as well as those of the ethnic communities they ostensibly serve.<sup>36</sup> Critical factors in the capturing and retention of power are thus the electoral (numerical) weight of the ethnic community involved as well as the ability of the political party's leadership and founding core to craft alliances and coalitions.<sup>37</sup> This has been apparent since *de jure* one-party rule came to an end in 1991.

Going into the 2002 General Elections, given domestic and international pressure to respect presidential term limits, Moi's strategy was to retain the chairmanship of KANU as well the loyalty of those within KANU with presidential ambitions, while expanding KANU's political support base.<sup>38</sup> He had tried to woo the Gikuyu back into KANU by nominating Uhuru Kenyatta, the son of Kenya's first President, Jomo Kenyatta, into parliament despite his having lost the parliamentary election in 1997 and then appointed him into the Cabinet as Minister for Local Government. He

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<sup>34</sup> Ndegwa (2003), p 150; Steeves, Jeffrey (2006) 'Presidential Succession in Kenya: the transition from Moi to Kibaki,' *Commonwealth and Comparative Politics* 44:2, pp 211-233.

<sup>35</sup> Ndegwa, Stephen N (1997) 'Citizenship and Ethnicity: an examination of two transition moments in Kenyan politics', *The American Political Science Review* 91:3 September 1997, p 604.

<sup>36</sup> Steeves, cited in Steeves (2006), p 215.

<sup>37</sup> Steeves (2006), p 215.

<sup>38</sup> Steeves (2006), p 216.

then turned to the Luo.<sup>39</sup> Raila Odinga's National Democratic Party (NDP) was absorbed into KANU in three stages: an initial stage of 'cooperation;' a second stage of 'partnership' in August 2001;<sup>40</sup> and a third and final stage of 'merger' in March 2002.<sup>41</sup>

Kenyatta had neither credibility, given his previous loss at the polls, nor experience. Yet, Moi unilaterally selected Kenyatta as his successor, without a political-party process. Personally, Moi may have believed Kenyatta was guidable—and that, given his family, he would share Moi's concerns regarding protection from prosecution and wealth protection.<sup>42</sup> Politically, as the Gikuyu are the majority ethnic group, he may have believed that Kenyatta's presidential bid would effectively divide the Gikuyu vote between Kenyatta and Kibaki.<sup>43</sup> However, he both over-estimated Kenyatta's appeal and under-estimated the alienation he created within KANU itself.<sup>44</sup>

Odinga united all potential presidential candidates within KANU under the Rainbow Alliance.<sup>45</sup> When it became clear that Moi would hold his ground on Kenyatta as his designated successor, the Rainbow Alliance left KANU to form the Liberal Democratic Party (LDP),<sup>46</sup> ultimately enabling a decisive re-configuration of political party alliances and coalitions.<sup>47</sup> Odinga's 'strategic moves... brought the KANU regime to an end. Indeed, Odinga is the mirror image of the unbounded politics leader'.<sup>48</sup> For KANU had changed from a 'deeply divided party to an eviscerated one. Moi's key ethnic coalition... designed to sweep KANU back into power had collapsed.'<sup>49</sup>

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<sup>39</sup> Ndegwa (2003), p 150.

<sup>40</sup> Steeves (2006), p 215.

<sup>41</sup> Steeves (2006), p 217.

<sup>42</sup> Brown (2004), p 330.

<sup>43</sup> Brown (2004), p 332.

<sup>44</sup> Brown (2004), p 331.

<sup>45</sup> Steeves (2006), p 219.

<sup>46</sup> Brown (2004), p 331; Ndegwa (2003), p 150.

<sup>47</sup> Brown (2004), p 336.

<sup>48</sup> Steeves (2006), p 229.

<sup>49</sup> Steeves (2006), p 220.

*The achievement of opposition unity*

Given Moi/KANU control over the electoral process, the lack of opposition unity may have been overstated as cause for its 1992 and 1997 defeat.<sup>50</sup> However, in 2002, the winning presidential candidate had a larger share of the presidential vote than in 1992 and 1997 and Kibaki's share was above that of all opposition presidential challengers in 1992 and 1997. In this sense, '2002 was a victory ten years delayed'.<sup>51</sup>

Civil society had laid the ground for opposition unity in 1992 and 1997 and it finally brokered and mediated the same in 2002.<sup>52</sup> There had been some learning within opposition political parties from 1992 and 1997.<sup>53</sup> In addition, there was external encouragement of the same—but the challenge of agreeing on a single presidential candidate remained.<sup>54</sup> However, the September 2002 KANU-NDP merger finally provoked a response—the National Alliance of Kenya (NAK) was formed, settling for Kibaki as its presidential candidate on agreement that he would assume office for only one five-year term.<sup>55</sup> In October 2002, following the exodus of the Rainbow Alliance from KANU and the formation of the LDP, the LDP merged with NAK under the NARC, again settling for Kibaki as the presidential candidate on agreement that he would assume office for only one five-year term. In addition, a Memorandum of Understanding (MoU) was drawn up between LDP and NAK promising, within the context of the comprehensive constitutional reforms process, to create the position of Prime Minister for Odinga and share

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<sup>50</sup> Brown (2004), p 331.

<sup>51</sup> Ndegwa (2003), p 148.

<sup>52</sup> Ndegwa (2003), p 152.

<sup>53</sup> Ndegwa (2003), p 152; Steeves (2006), p 218.

<sup>54</sup> Brown (2004), p 331.

<sup>55</sup> Brown (2004), p 331; Ndegwa (2003), p 151.

Cabinet positions between LDP and NAK.<sup>56</sup> And NARC's constituent political parties all agreed to field only one NARC candidate in each constituency.<sup>57</sup>

The NARC rolled out its campaign with a message presenting Kenyatta as continuity from Moi—'Uhuru na Moi'—and itself as change.<sup>58</sup> Civil society and the media provided an enabling environment for the public's reception of the message.<sup>59</sup> In the end, Kibaki achieved—given the proxy votes for him from the ethnic communities represented within the NARC's 'Pentagon' of political party leadership—62.2 per cent of the presidential vote over Kenyatta's 31.3 per cent.<sup>60</sup>

#### *KANU's diminished ability to instigate political violence*

Relative to the General Elections of 1992 and 1997, the General Elections of 2002 saw much less politically instigated violence and at lower levels. The extent to which political violence would have decisively and negatively affected NARC's estimated two-to-one lead over KANU in opinion polls may have been minimal.<sup>61</sup> At a mass/public level, it may be that the elections were 'de-tribalised' given that the Gikuyu vote was split and, overall, ethnic/political divisions were less clear.<sup>62</sup> More tellingly, however, the LDP included former KANU 'hardliners' who were allegedly most responsible for previous political violence.<sup>63</sup> Thus, their exodus into the NARC effectively ended KANU's monopoly over organised political violence,<sup>64</sup> especially as the security services had already discreetly made their preferences known and were unlikely to intervene at the behest

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<sup>56</sup> Brown (2004), p 332.

<sup>57</sup> Ndegwa (2003), p 149.

<sup>58</sup> Steeves (2006), p 221.

<sup>59</sup> Steeves (2006), p 223.

<sup>60</sup> Murunga and Nasong'o (2006), p 17.

<sup>61</sup> Brown (2004), p 332.

<sup>62</sup> Brown (2004), p 333; Steeves (2006), p 225.

<sup>63</sup> Brown (2004), p 332.

<sup>64</sup> Brown (2004), p 336.

of Moi/KANU.<sup>65</sup> In addition, it may be that a Kibaki presidency was not, ultimately, deemed threatening to the KANU ‘hardliners’ who remained within KANU.<sup>66</sup> In the end, both Kenyatta and Moi accepted the election results.<sup>67</sup>

### 3.3.2 *Structure and institutions*

Moi/KANU’s neo-patrimonialism may have been somewhat reduced by structural changes introduced by the IFIs under structural adjustment from the 1980s onwards. But additional structural changes arose from the incremental democratisation conceded to by Moi/KANU from the 1990s on. Notable here were the institutional constraints of presidential term limits, the invocation of the same by opposition political parties, civil society and external actors and Moi’s decision, eventually, to abide by them.<sup>68</sup> In addition, the institutional re-structuring anticipated under the process of comprehensive constitutional reforms and their perceived direction—particularly the inclusion in the CKRC’s draft Constitution of the position of Prime Minister—was important in helping NARC agree to support Kibaki as its presidential candidate.<sup>69</sup> Finally, the assertion by the Electoral Management Body (EMB) of its enhanced independence under the IPPG reforms and the change in electoral law requiring counting at each polling station helped guarantee the integrity of the vote.<sup>70</sup>

## 3.4 From the political transition to the lack of democratic consolidation

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<sup>65</sup> Brown (2004), p 333.

<sup>66</sup> Throup, cited in Brown (2004), p 333.

<sup>67</sup> Brown (2004), p 333.

<sup>68</sup> Brown (2004), p 328; Ndegwa (2003), p 153.

<sup>69</sup> Ndegwa (2003), p 154.

<sup>70</sup> Ndegwa (2003), p 154; Steeves (2006), p 223.

Agency, structure and institutions all account for the political transition. The NARC came into power accompanied by ‘enthusiastic euphoria... captured in the chants ‘*Yote yawezekana bila Moi*’ (everything is possible without Moi)’.<sup>71</sup> Public expectations were of a break with authoritarian, kleptocratic and personal rule, ushering in a new consensus-based politics.<sup>72</sup>

Cautionary notes were, however, sounded as to the NARC’s potential longevity, given the presence within it of ex-KANU politicians expected to be at odds with the NARC’s purported agenda.<sup>73</sup> For the NARC’s agenda to move from ‘transition’ to ‘transformation’,<sup>74</sup> the NARC would need to keep its eyes on the prize and maintain its cohesiveness, despite the trade-offs required within it, particularly on questions of accountability.<sup>75</sup> The House would need to perform and civil society to remain both critical and engaged.<sup>76</sup> Given the difficulties of meeting these requirements, the cautious predicted that the transformative agenda would stall and ethnicity would re-emerge as leverage both within and outside the NARC.<sup>77</sup>

These predictions did, in the end, come to pass. The ‘enthusiastic euphoria’ was ‘replaced by disappointment and despair over the performance of the new regime which, within a short period of two years, had lost both national popularity and goodwill’.<sup>78</sup> Although civil society’s leadership had been depleted as it was initially co-opted into the NARC,<sup>79</sup> the NARC failed at inclusive politics, including within the coalition that had brought it to power, failed to conclude the constitutional reform process and allowed new ‘grand corruption’ to occur within its ranks.<sup>80</sup>

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<sup>71</sup> Murunga and Nasong’o (2006), p 1.

<sup>72</sup> Murunga and Nasong’o (2006), p 2.

<sup>73</sup> Brown (2004), p 334.

<sup>74</sup> Kalu, Kelechi cited in Ndegwa (2003), p 156.

<sup>75</sup> Ndegwa (2003), pp 156-7.

<sup>76</sup> Ndegwa (2003), p 158.

<sup>77</sup> Ndegwa (2003), p 156.

<sup>78</sup> Murunga and Nasong’o (2006), pp 1-2.

<sup>79</sup> Brown (2004), p 335.

<sup>80</sup> Murunga and Nasong’o (2006), p 5.

The prediction that the negotiated compromises made to form the NARC and agree on Kibaki as its presidential candidate were ‘Machiavellian’ and made in bad faith for the short term, postponing difficult decisions and confrontations, was soon borne out.<sup>81</sup> The MoU agreed upon between NARC’s constituent political parties, the LDP—which had broken away from KANU under Odinga’s leadership—and Kibaki’s NAK, specified creating the position of Prime Minister for Odinga, reducing presidential powers and sharing Cabinet positions. All this was disrespected from almost the moment that Kibaki was sworn into office.<sup>82</sup> The political exclusion of the LDP was increasingly understood as being grounded in ethnicity,<sup>83</sup> given the emergence and ascendancy of what became known as the ‘Mount Kenya mafia’ within NAK.<sup>84</sup> By July 2004, Odinga’s responsibilities had been trimmed, LDP Ministers demoted and new Ministers appointed from the political opposition of the Forum for the Restoration of Democracy (FORD)–People and—incredibly—KANU.<sup>85</sup> It had also become clear that, contrary to the initial NARC agreements and despite internal opposition, Kibaki intended to stand for a second presidential term.<sup>86</sup>

The NAK’s about-turn once in office was also evident within the constitutional reform process. The CKRC had convened the National Constitutional Conference (NCC) to negotiate the draft Constitution, with the intention of Parliament then enacting it, led by the PSC on the Constitution.<sup>87</sup> But the NCC became anarchic, Ministers boycotted it and the NAK side of NARC walked out—again over the proposals to create the position of Prime Minister and reduce

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<sup>81</sup> Brown (2004), p 337.

<sup>82</sup> Brown (2004), p 334; Steeves, (2006), p 229.

<sup>83</sup> Brown (2004), p 334.

<sup>84</sup> Brown (2004), p 334; Steeves (2006), p 230.

<sup>85</sup> Brown (2004), p 334; Steeves (2006), p 230.

<sup>86</sup> Brown (2004), p 333.

<sup>87</sup> Cottrell and Ghai (2007), p 6.

presidential powers.<sup>88</sup> In June 2004, the NAK put forward a Bill to amend the Constitution of Kenya Review Act to enable Parliament to amend the draft Constitution with a 65 per cent majority—effectively seeking to enable Parliament rather than the more participatory and representative NCC to assume control over negotiating and finalising the draft Constitution. The Bill passed but was not assented to by Kibaki on the basis that it was unconstitutional. In December 2004, a revised Bill was put forward allowing for amendments to the draft Constitution by simple majority. It was passed and assented to, further to which a ‘consensus’ draft Constitution was approved in one sitting. That draft Constitution was published by Amos Wako, then Attorney General, and became known as the ‘Wako’ draft. It was put to referendum in November 21, 2005 and rejected.<sup>89</sup>

The referendum, understood as being ‘a popular vote of confidence in the government... [was] also a heavily ethnic vote, with only Kibaki’s own ethnic group, the Kikuyu, voting in favour’.<sup>90</sup> The goings-on within the NARC, the NAK’s disrespect of the LDP, its disregard of civil liberties, corruption and disrespect of rule of law<sup>91</sup> lay behind the public’s rejection of the ‘Wako’ draft. As did the NAK’s failure to account for previous political violence<sup>92</sup> and ensure truth, justice and reconciliation about the same<sup>93</sup> in a manner that provided recognition and restitution for survivors and victims.<sup>94</sup>

Going into the 2007 General Elections then, Kenya was still deemed only a procedural democracy.<sup>95</sup> Given the failure to usher in the long-awaited new Constitution, structural

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<sup>88</sup> Cottrell and Ghai (2007), p 12.

<sup>89</sup> Cottrell and Ghai (2007), p 16.

<sup>90</sup> Cottrell and Ghai (2007), p 16.

<sup>91</sup> Brown (2004), p 337.

<sup>92</sup> Brown (2004), p 334.

<sup>93</sup> Brown (2004), p 334.

<sup>94</sup> Brown (2004), p 335.

<sup>95</sup> Brown (2004), p 336.

transformation of the state, the economy and society had not occurred to the extent anticipated.<sup>96</sup> And the NARC itself, by failing in its transformative agenda, had been deemed as ‘bent on self-destruction’.<sup>97</sup>

### 3.5 Factors behind the NARC’s failure to realise its transformative potential

#### 3.5.1 Agency

*The composition of the actors, their alliances and coalitions*

*The immediate: the nature of NARC itself*

One explanation for NARC’s disintegration focuses on its leadership—and particularly that of Kibaki as its presidential candidate and then President and leader of the NAK.<sup>98</sup> Contrary to views that lauded Kibaki as being a consensus-builder of integrity and an economist able to build and lead a professional and political team,<sup>99</sup> this explanation notes the importance of seeing Kibaki and the rest of NAK’s leadership in historical perspective. Kibaki did not leave KANU until relatively late in the game and, given his fence-sitting, what he stood for was unclear.<sup>100</sup> In addition, the team he built around him—through appointments to the Cabinet, the civil service and parastatals<sup>101</sup>—was, in effect, ‘recycled KANU’.<sup>102</sup> Some of those who became known as the ‘Mount Kenya mafia’ were past retirement age and their political and civil service experience dated back to the first Kenyatta and Moi regimes. Mostly Gikuyu and representing the class of capital and property, they were invested in continuity and maintaining the status quo—sharing the

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<sup>96</sup> Ndegwa, cited in Brown (2004), p 336.

<sup>97</sup> Murunga and Nasong’o (2006), p 23.

<sup>98</sup> Murunga and Nasong’o (2006), p 2.

<sup>99</sup> Murunga and Nasong’o (2006), p 3.

<sup>100</sup> Murunga and Nasong’o (2006), p 6.

<sup>101</sup> Murunga and Nasong’o (2006), p 7.

<sup>102</sup> Ajulu, Rok, cited in Murunga and Nasong’o (2006), p 4.

spoils of power, not transforming it.<sup>103</sup> In this sense, the NAK could engender only a ‘revival of tribalism and patrimonialism and a continuation of many of the discredited practices characteristic of the Kenyatta and Moi eras’.<sup>104</sup> Political tribalism<sup>105</sup> remained intact, with the only changes being: first, the shift from the Kalenjin elite back to the Gikuyu elite, now referred to as the ‘Mount Kenya mafia’<sup>106</sup>; and, second, a new competition for spoils between the children of old money (old money being almost exclusively Gikuyu).<sup>107</sup>

The NAK was not alone in its continuities from the Kenyatta and Moi regimes. The LDP too included Moi/KANU hardliners—‘KANU in Diaspora’ who had stayed with Moi until the fallout provoked by his appointment of the first Kenyatta’s son as his successor.<sup>108</sup> In this sense, the LDP and NAK merger was a ‘Faustian bargain’.<sup>109</sup>

These continuities from the Kenyatta and Moi regimes within both the LDP and the NAK would have made it difficult for newer politicians in the NARC who moved from civil society into the NARC and were supposed to represent generational change and achieve transformative change as the ‘New Young Turks’.<sup>110</sup> But the ‘New Young Turks’ also failed to perform as anticipated given the ‘contradictory nature of civil society and the complex interpenetration of civil and political societies’.<sup>111</sup> Some ostensibly civil society members had, in fact, represented individual, family or sectarian interests,<sup>112</sup> viewing civil society as an avenue to politics and uniting solely in opposition to Moi/KANU.<sup>113</sup> Thus the ‘New Young Turks’ were not homogenous. They also did

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<sup>103</sup> Ajulu, Rok cited in Murunga and Nasong’o (2006), p 4.

<sup>104</sup> Murunga and Nasong’o (2006), p 8.

<sup>105</sup> Murunga and Nasong’o (2006), p 10.

<sup>106</sup> Murunga and Nasong’o (2006), p 7.

<sup>107</sup> Murunga and Nasong’o (2006), p 9.

<sup>108</sup> Murunga and Nasong’o (2006), p 8.

<sup>109</sup> Brown (2004), p 332.

<sup>110</sup> Barkan, Joel cited in Murunga and Nasong’o (2006), p 4.

<sup>111</sup> Murunga and Nasong’o (2006), p 16.

<sup>112</sup> Murunga and Nasong’o (2006), pp 12-13.

<sup>113</sup> Mutunga, Willy cited in Murunga and Nasong’o (2006), p 13.

not necessarily share and were not necessarily committed to a transformative agenda, as quickly became evident in the expediency with which they reversed previously stated positions, for example, on the content and process of constitutional reform, their own entanglement in new ‘grand corruption’ and nepotism,<sup>114</sup> justified as their right to reward<sup>115</sup> and contributing to NARC’s internal disputes and the re-constitution of NARC into ‘ethnic enclaves’.<sup>116</sup>

*The long-view: civil society and political interaction and interpenetration from the colonial period on*

A supplementary explanation not for NARC’s disintegration but for its inability to stay the course with respect to achieving the transformative agenda, however, focuses on civil society and its political interaction and interpenetration from the colonial period on. This explanation posits that the impetus for transformation has always come from a small group within civil society—termed with both some accuracy and some inaccuracy the ‘left’ or the ‘progressives’. The ‘progressive left’—identified loosely with Marxism and socialism but using the tenets of liberal democracy to advance a social democratic agenda—exists largely outside political parties. However, being numerically small and organisationally weak, it has never been able to mass-mobilise and organise autonomously from political parties,<sup>117</sup> ‘perhaps because politicians are more willing to introduce and exploit ethnic issues’.<sup>118</sup>

The sole exception was during the period from the late 1930s to the early 1950s. Organised labour, drawing on leadership from veterans of World War II, did then mass-mobilise and organise

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<sup>114</sup> Murunga and Nasong’o (2006), p 14.

<sup>115</sup> Murunga and Nasong’o (2006), pp 14-15.

<sup>116</sup> Murunga and Nasong’o (2006), p 6.

<sup>117</sup> Ajulu (1995), p 231.

<sup>118</sup> Cottrell and Ghai (2007), p 22.

among the urban semi-proletariat and petty traders, with support from the rural landless and smallholders. This group successfully held the 1947 general strike in Mombasa and proceeded in 1951 to capture the leadership of the Nairobi branch of the Kenya African Union (KAU) through the Clerks and Commercial Workers Union (CCWU) and the Transport and Allied Workers Union (TAWU).

The response by the colonial government effectively ended the ability of the ‘progressive left’ to mass-mobilise and organise. It detained the leaders of the 1947 general strike in Mombasa, banned the ‘radical’ East African Trade Union Congress (EATUC) in 1950, formed the moderate Kenya Federation of Registered Trade Unions (KFRTU) instead and then declared a state of emergency in 1952, leading to more detentions and arrests.

Thus, KANU emerged in the early 1960s as an alliance of class forces but with leadership from the emerging indigenous bourgeoisie—the class of capital and property referred to above. Following independence in 1963, what remained of the ‘progressive left’ was evicted from the backbenches of Parliament and retreated first to labour under the Kenya African Workers Congress (KAWC) and then to the political party of the Kenya People’s Union (KPU). In 1969, however, the Kenyatta regime banned the KPU.

The ‘progressive left’ re-emerged in the late 1970s and early 1980s among the ‘radical’ University of Nairobi (UoN) academics and students associated with the remnants of the former political opposition of the KPU, many in exile. However, the 1982 coup d’état and the state response to it forced another retreat.<sup>119</sup> The ‘progressive left’ emerged again only in the late 1980s, this time as the intellectuals and human rights workers—civil society—associated with the constitutional-change movement.<sup>120</sup> From 1991 onwards, the ‘progressive left’ made common

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<sup>119</sup> Ajulu (1995), pp 230-1.

<sup>120</sup> Cottrell and Ghai (2007), p 3.

cause with professional (legal) associations, the few independent trade unions that remained, religious organisations and—finally—opposition political parties.<sup>121</sup> In the 1990s, the opposition political parties represented the class of capital and property, with the Gikuyu bourgeoisie divided between the Democratic Party (DP), which had been aligned to both the Kenyatta and Moi regimes, and FORD-Asili, which was not aligned to the Moi regime. The Luo bourgeoisie, together with the ‘progressive left’, represented by the so-called ‘Young Turks’, were in FORD.<sup>122</sup>

That said, civil society and opposition political parties had different motives. As mentioned above, like the political opposition, some of civil society (apart from the ‘progressive left’) was ethnically motivated and shared the desire of the opposition political parties merely to (re-)capture power and not transform it.

Thus, ‘the unanimity that seems to characterise the reform groups and to bring them together around a common agenda was deceptive’.<sup>123</sup> This began to be clear from 1997, as the political opposition chose to negotiate the IPPG reforms with the incumbent Moi regime. For this regime and the opposition in fact shared a conception of leadership and state-society relations<sup>124</sup>—a conception distinct from that of the ‘progressive left’ within civil society.<sup>125</sup> This distinction became stark when the NARC took power with respect to the constitutional reform process.

Civil society, with popular support, had been prominent in pushing for comprehensive constitutional reforms. However, as soon as the official reform process began, the vested interests of the politicians mitigated against its desired outcomes, especially with respect to curtailing presidential powers.<sup>126</sup> In summary, ‘although the impetus for reform came from civil society...

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<sup>121</sup> Cottrell and Ghai (2007), p 4.

<sup>122</sup> Ajulu (1995), p 233.

<sup>123</sup> Cottrell and Ghai (2007), pp 3-4.

<sup>124</sup> Ndegwa (1998), p 209.

<sup>125</sup> Ndegwa (1998), p 194.

<sup>126</sup> Cottrell and Ghai (2007), p 1.

and had a major influence on the goals and design of the review, the process was eventually taken over by political parties (who had both common and divergent interests—but reform for the sake of a better constitution was not among them)'.<sup>127</sup>

*The actors' strategic choices*

Arising from the above, it is clear that an explanation of the NARC's disintegration and failure to achieve its transformative agenda that rests solely on strategic choices of the political actors within the NARC is insufficient. It is true that it was cobbled together in reaction to KANU and that its focus was on winning the 2002 General Elections within a short time-frame. It is also true that this may have hindered discussion of the contradictions and tensions within it, including those arising from the inclusion of ex-KANU politicians.<sup>128</sup> However, in one sense, most of NARC's members were ex-KANU, necessarily reducing discussions to 'elite pacting' and horse-trading on an ethnic and regional basis.<sup>129</sup>

However, a more comprehensive explanation is grounded in the historical relationship between civil society and its political interactions and interpenetration. In the early 1990s, the 'progressive left' had considered whether it should participate in the democratisation process, while calling for defiance of the Moi regime by all means necessary and the convening of a National Convention.<sup>130</sup> In response, it was noted that the only alternative to participation was observation,<sup>131</sup> and that, given the history of the 'progressive left' in Kenya, it should focus on the content of democratisation,<sup>132</sup> building momentum for democratic attainment and consolidation

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<sup>127</sup> Cottrell and Ghai (2007), p 4.

<sup>128</sup> Murunga and Nasong'o (2006), p 12.

<sup>129</sup> Ajulu (1995), p 233.

<sup>130</sup> Mwakenya cited in Ajulu (1995), p 229.

<sup>131</sup> Ajulu (1995), p 229.

<sup>132</sup> Ajulu (1995), p 232.

and building both civil society and the political opposition to create the conditions within which the social democratic agenda of the ‘progressive left’ could be realised.<sup>133</sup>

In 1992, the ‘progressive left’ failed to engage with the call of former KPU leader, Oginga Odinga, for a National Convention under FORD as it was then still largely underground.<sup>134</sup> By 1997, however, it was clear that civil society, now above-ground, had largely achieved the above through its work on democratisation through the content, process and support for comprehensive constitutional reforms.<sup>135</sup> It convened no fewer than three National Convention Assemblies (NCAs) on comprehensive constitutional change, in April, August and October 1997,<sup>136</sup> together with mass mobilisation and organisation in the form of civic education, demonstrations and strikes nation-wide, enabled by its engagement with religious organisations and the political opposition and responded to increasingly violently by the Moi regime.

Yet, the experiences of both 1997 and 2002 showed the difficulties inherent to civil society’s strategic choice to engage with the political opposition. In 1997, the political opposition effectively ceded democratisation to civil society by opting for electoral competition with KANU under the IPPG reforms<sup>137</sup>—the first ‘elite pact’.<sup>138</sup> The difference in understanding of the IPPG reforms by civil society and the political opposition was instructive. Civil society saw the IPPG reforms as ‘facilitative’, while the political opposition saw them as ‘minimal’.<sup>139</sup> Civil society saw them as a means to a ‘maximising’ end, while the political opposition saw them as a ‘satisfying’ end in and of themselves.<sup>140</sup>

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<sup>133</sup> Ajulu (1995), p 235.

<sup>134</sup> Ajulu (1995), p 232.

<sup>135</sup> Cottrell and Ghai (2007), p 1.

<sup>136</sup> Ndegwa (1998), pp 195-6.

<sup>137</sup> Ndegwa (1998), p 194.

<sup>138</sup> Ndegwa (1998), p 196.

<sup>139</sup> Ndegwa (1998), p 196.

<sup>140</sup> Ndegwa (1998), p 209.

Civil society's perspective was borne out by the political opposition's failure to capture power through the 1997 General Elections and new engagement re-started, again focused on the need for comprehensive constitutional reform under the CKRC process. There was initial consensus between political and civil society organisations on both the required method (participatory) and desired outcomes (a democratic culture).<sup>141</sup> The CKRC process began in November 2000 and was initially intended to end in two years. The second 'elite pact'—that resulting in the NARC's formation—intervened. The NARC did win the 2002 General Elections but, although it had promised conclusion of the comprehensive constitutional reform process within 100 days, it too began to stall for the reasons outlined above. The NCC did not reconvene until the end of April 2003 and had to adjourn whenever Parliament met. It was bogged down by numerous procedural disputes and court actions, including one preventing submission of its report and draft Constitution to the Attorney General. The NCC was also hindered by its own members and delegates enjoying the 'gravy train' of allowances and salaries that a drawn-out process enabled.<sup>142</sup> Finally, the NAK managed to draw the process away from the NCC and back to Parliament. With that, 'the initiative had passed from the people to the politicians'.<sup>143</sup> In November 2005, as outlined above, the 'Wako' draft was rejected at referendum.<sup>144</sup>

Thus, while the strategic choices of politicians within the NARC explain NARC's own disintegration, a more compelling explanation for NARC's failure to achieve its transformative agenda rests in the difficulties inherent in civil society's strategic choice to engage with political actors. Civil society faces the dilemma posed by its need to engage versus its capacity to manage the consequences of 'elite pacting' that inevitably excludes civil society and its concerns.

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<sup>141</sup> Cottrell and Ghai (2007), p 1.

<sup>142</sup> Cottrell and Ghai (2007), pp 14-16.

<sup>143</sup> Cottrell and Ghai (2007), p 16.

<sup>144</sup> Cottrell and Ghai (2007), p 1.

### 3.5.2 *Structure and institutions*

#### *The players determining the playing field and rules of the game*

Another explanation of the NARC's failure to achieve its transformative agenda has to do with politicians' self-interest<sup>145</sup> and the lack of structural and institutional constraints on the same. From 1990 to 2002, Moi and KANU had no interest in electoral-system reform beyond the short term. As its long-term considerations were premised on ethnic voting,<sup>146</sup> gerrymandering remained a key Moi/KANU strategy, with little attention paid to how the electoral system itself could be re-structured to cater for the legitimate fears of majoritarianism that also partially underlay gerrymandering.<sup>147</sup> Moi and KANU also had no interest in a comprehensive constitutional reform process that would focus on 'truth and justice' with respect to past 'grand corruption' and gross and systemic human rights violations.<sup>148</sup> They wanted to retain power as well as ensure continued impunity and thus determined to resist and sabotage all pressures—domestic and external—for comprehensive constitutional reforms.<sup>149</sup> Their strategy included state-sponsored violence for the purposes of gerrymandering, effectively disrupting popular momentum and pressures for the same through the IPPG, and appointing to the CKRC 'non-entities' without constitutional knowledge and keen to service politicians.<sup>150</sup>

The NARC then came to power on the basis of an agreement for Kibaki to lead given the NAK's MoU with the LDP on the positions of Prime Minister and Deputy Prime Minister, given the on-going constitutional reform process.<sup>151</sup> But, once in power, Kibaki and the NAK also proved

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<sup>145</sup> Murunga and Nasong'o (2006), p 2.

<sup>146</sup> Ndegwa (1998), p 206.

<sup>147</sup> Ndegwa (1998), p 207.

<sup>148</sup> Cottrell and Ghai (2007), pp 12-13.

<sup>149</sup> Cottrell and Ghai (2007), p 4.

<sup>150</sup> Cottrell and Ghai (2007), p 14.

<sup>151</sup> Murunga and Nasong'o (2006), p 16.

to have no interest in fundamental state re-structuring either under the MoU with the LDP or through the Constitution.<sup>152</sup> The MoU was disrespected<sup>153</sup> and Kibaki showed no further enthusiasm for curbing presidential powers, diminishing the provincial administration or preventing and dealing with new ‘grand corruption’.<sup>154</sup> Perhaps to satisfy popular expectations, Kibaki commenced legal, policy and institutional reforms in the absence of over-arching comprehensive constitutional reforms—most notably with respect to the NARC’s ‘radical surgery’ of the Judiciary and its upgrading of the independent regulatory authorities responsible for both corruption and human rights.<sup>155</sup> The Judiciary did not want further investigations of itself and thus allowed the use of court actions to stall the comprehensive constitutional reform process under the CKRC, including through obtaining an interim injunction preventing discussion of the Judiciary.<sup>156</sup> Within the NCC, when not motivated by ethnic considerations—along LDP and NAK lines—parliamentarians found it ‘difficult to hold any sort of party line... concerned only with their personal advantage’.<sup>157</sup> They did not support provisions in the draft Constitution on popular recall, restrictions on their terms of office, not being able to be Ministers or provisions for a second chamber of the House.

In short, the momentum to realise structural and institutional change was inhibited by the fact that those with the remit to realise it were able to inhibit it—politicians’ personal and political interests inevitably prevailed over the public interest.<sup>158</sup> Constitution-making is political, with high stakes for politicians as it affects their gateway to power and ability to retain it.

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<sup>152</sup> Murunga and Nasong’o (2006), p 12; Steeves (2006), p 230.

<sup>153</sup> Murunga and Nasong’o (2006), p 10.

<sup>154</sup> Cottrell and Ghai (2007), p 13; Murunga and Nasong’o (2006), p 17.

<sup>155</sup> Cottrell and Ghai (2007), p 13.

<sup>156</sup> Cottrell and Ghai (2007), p 18.

<sup>157</sup> Cottrell and Ghai (2007), p 16.

<sup>158</sup> Cottrell and Ghai (2007), p 2.

*Competing notions of citizenship, political participation and land rights*

A more profound explanation of the NARC's inability to achieve its transformational agenda goes beyond politicians' self-interest and the lack of structural and institutional constraints on the same. This explanation has to do with what may legitimately lie behind politicians' perceived self-interest and focuses on why rational individuals respond to ethnic mobilisation. The argument is that citizenship is not single, relating to a single political community—it is multiple and can be both transnational and sub-national.<sup>159</sup>

In Kenya, politicians respond to different and competing forms of citizenship rooted in both their ethnic communities and the state. These two forms of citizenship inspire not just different loyalties but different forms of loyalties—and result in differing and competing perceptions of democratic and liberal institutions. Ethnic or republican citizenship, dating back to the colonial era and persisting in the postcolonial era, is not coherent or monolithic.<sup>160</sup> It is socially constructed and relates to the satisfaction of both non-material and material needs through the moral economy and ritual—real, invented and re-invented. State or liberal citizenship, however, is legally constructed and relates to democratic accountability through the practice of authority. With republican citizenship, participation is required and rights are acquired by fulfilling obligations—while liberal citizenship qualifies individuals to participate, with rights residing in individuals to be guaranteed.<sup>161</sup> Republican citizenship shapes politicians' preferences and makes the state an arena in which to fulfil obligations. Thus, 'the new state elite is essentially an ethnic elite; its sphere of authority extends to the territorial limits of the state, but its sphere of obligation is limited to the sub-national group able to extract obligation (prebends) from its sons and daughters'.<sup>162</sup> And, in

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<sup>159</sup> Ndegwa, Stephen N (1997), pp 599-600.

<sup>160</sup> Ndegwa (1997), pp 600-1.

<sup>161</sup> Ndegwa (1997), p 602.

<sup>162</sup> Ndegwa (1997), p 604.

majoritarian electoral systems, majority ethnic communities can vote as republicans but expect to benefit as liberals with more rights and responsibilities.<sup>163</sup>

This argument holds that Kenya's stalled transition was and is due to conflicts/contradictions between republican citizenship rooted in Kenya's ethnic political communities and liberal citizenship rooted in Kenya's national political community—evidenced in the conflicts/contradictions over structure and institutions dating back to the immediate pre-independence era between Kenya's majority and minority ethnic communities.

Independence in 1963 was preceded by three constitutional conferences held in London in 1960, 1962 and 1963 respectively.<sup>164</sup> The debates during these three conferences were, in effect, related to the ethnic nature of the political alliances and coalitions that participated in them, and revealed fundamental disagreements over democracy itself and appropriate democratic institutions for independent Kenya.<sup>165</sup>

KANU represented the majority ethnic communities of the Gikuyu and Luo. The Kenya African Democratic Union (KADU) represented the minority ethnic communities of the Coast, the Kalenjin, the Maa and the Somalis.

To assure itself of political participation and protection from majoritarian domination,<sup>166</sup> KADU's proposals focused on regionalism or '*majimboism*' (self-determination for minority groups), calling for a two-chamber Parliament and decentralisation in seven regions, each with its own Legislature and Executive.<sup>167</sup> KADU's proposals also focused on communal land rights for ethnic groups in these regions, under the regional governments.<sup>168</sup>

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<sup>163</sup> Ndegwa (1997), p 604.

<sup>164</sup> Ndegwa (1997), p 604.

<sup>165</sup> Ndegwa (1997), p 559.

<sup>166</sup> Yash Pal Ghai et al cited in Ndegwa (1997), p 607.

<sup>167</sup> Ndegwa (1997), p 605.

<sup>168</sup> Ndegwa (1997), p 608.

As the transfer of political allegiance to the national political community was not threatening for majority ethnic communities, allowing for the stance that ‘tribalism’ endangered the integrity of state, however, KANU’s proposals sought to reduce minority protections and regional powers, retaining a single civil service and police force and enabling constitutional changes without majority votes from two Houses but a two-thirds majority at referendum. Given that land scarcity was worse for majority ethnic communities where colonial appropriations had taken place, KANU’s proposals were for individual land rights for all, with only Native Reserve lands under the regional governments and Crown and Scheduled lands under the central government.<sup>169</sup>

Thus, the independence Constitution ‘validated ethnic citizenship in autonomous regional governments and strove for a national, liberal citizenship within central government institutions’.<sup>170</sup> However, post-independence, regionalism was undermined by KANU’s pressure for constitutional change. KADU dissolved into KANU and KANU ‘became a Kikuyu hegemony’ in 1964. Post-1964, all land fell under the central government. ‘[The initial] arrangement assured minority groups that their land would not be taken by the majority tribes, but it gave them little in the way of reclaiming or of limiting non-indigenous settlement on or commercialisation of their ancestral land, especially in the Rift Valley... The subsequent dominance of KANU enabled it to apportion land, disproportionately favouring its core groups, especially the Kikuyu. This conflict over land persisted in post-independence politics and [was] recurrent alongside ethnic violence that erupted during the transition to multiparty democracy in the 1990s.’<sup>171</sup>

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<sup>169</sup> Ndegwa (1997), pp 606-8.

<sup>170</sup> Ndegwa (1997), p 606.

<sup>171</sup> Ndegwa (1997), p 608.

Fast-forward to the 1990s and the so-called ‘second liberation’, and the same miscommunication and misunderstanding seems equally apparent between the incumbent KANU and the political opposition of the FORD—with a turning of the tables. In the 1990s, the FORD represented the old KANU in terms of its leadership, its middle-class/urban base and its ethnic mobilisation in the regions while KANU represented the old KADU with its rural base.<sup>172</sup>

Like the original KANU, the FORD and civil society called for liberal citizenship under a unitary state with majoritarian institutions,<sup>173</sup> with parliamentary nominations previously intended for ethnic balancing to go to professional associations and individual land rights for all.<sup>174</sup> Difference was to be masked, recognised only in associational terms, not ethnic terms.<sup>175</sup>

Like the original KANU, the new KANU presented the democratisation process and the constitutional change movement as being the Gikuyu and Luo majority ethnic communities fighting back, calling for an expert-led constitutional reform process rather than a participatory one that majority ethnic communities could control.<sup>176</sup> KANU also called for federalism or ‘*majimbo*’ again, referencing ethnic or republican notions of citizenship with respect to both political participation and ancestral, communal land rights and ‘zoning’ in the regions.<sup>177</sup>

In this sense then, ‘the debate between KANU and the liberal democracy coalition [was] not simply one between an anti-democratic incumbent regime and progressive democrats. It... involved fundamental differences regarding (1) the preeminent political community in a multi-ethnic state (national versus ethnic); (2) the political institutions appropriate to govern such a state and, therefore, the kind of constitutional reforms required to arrive at such institutions; and (3) the

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<sup>172</sup> Ndegwa (1997), p 609.

<sup>173</sup> Ndegwa (1997), p 609.

<sup>174</sup> Ndegwa (1997), pp 611-2.

<sup>175</sup> Ndegwa (1997), p 611.

<sup>176</sup> Ndegwa (1997), p 612.

<sup>177</sup> Ndegwa (1997), pp 609-11.

process of formulating constitutional reform.’<sup>178</sup> The politically instigated so-called ‘ethnic clashes’ before the 1992 and 1997 General Elections and following the 2007 General Elections were in part therefore ‘an extension of the discourse on citizenship and democracy in Kenya, with land once again an arena as well as the object of contest’.<sup>179</sup>

### 3.6 The quest for accountability continued

As Kenya prepared for the 2007 General Elections, therefore, it was clear that the political transition of 2002 had failed to lead to the democratic consolidation anticipated. Agency could be said to account largely for the political transition—the handling of succession within KANU, the achievement of opposition unity and KANU’s diminished ability to instigate political violence. But agency could also be said to account partially for the failure of democratic consolidation—the composition of the actors, their alliances and coalitions and the nature of NARC itself: ‘the original NARC was dead. It had died on the anvil of ethnic assertiveness by President Kibaki and the Mount Kenya mafia and the unwillingness of a fraction of the political class to countenance any loss of presidential and central government power... Now Kibaki and his associates face a unified opposition movement in the [Orange Democratic Movement] (ODM), whose leaders have indicated their intention to stand united in the 2007 elections to rid Kenya of yet another unresponsive regime.’<sup>180</sup>

However, agency mattered more from a historical perspective—given civil society’s political interaction and interpenetration from the colonial period on and the actors’ strategic choices as determined by the same. Similarly, structure and institutions partially enabled the

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<sup>178</sup> Ndegwa (1997), p 610.

<sup>179</sup> Ndegwa (1997), p 612.

<sup>180</sup> Savula cited in Steeves (2006), p 231.

political transition—not just the introduction and respect of presidential term limits but the context of the protracted movement towards comprehensive constitutional change. What proved decisive in confounding democratic consolidation—and yet remained unchanged as the 2007 General Elections loomed—was that the players continued to determine the playing field and rules of the game, in addition to the persistence of competing notions of citizenship, political participation and land rights.

#### **4. The AU mediation of the 2008 Kenya National Dialogue and Reconciliation**

This chapter focuses on the case study: the African Union's intervention in Kenya's electoral conflict of 2007-8. It explores the trigger as well as the proximate and structural causes of the electoral conflict, and explains the content of the intervention and how it was agreed. The roles played by different actors, internal and external, are detailed as concerns both ensuring the intervention happened and also informing its substantive content. Particular attention is paid to, internally, the roles of non-political actors and, externally, the AU. Finally, the outcomes and impact of the intervention are detailed, in both the short and medium-to-long terms, with the focus on surfacing both what enabled those impacts and what gives rise to caution about their being termed a 'success'.

##### 4.1 Concepts and theory

###### *4.1.1 Electoral conflict*

While 'elections alone do not a democracy make', elections are important in the context of Africa's democratisation. The right of citizens to stand as and elect their representatives as well as participate in public life through regular elections is enshrined not just in the Universal Declaration of Human Rights (UDHR) and related human rights treaties, but in the African Charter on Human and People's Rights (African Charter), all African Constitutions,<sup>181</sup> as well as in the new norms and standards for democratic governance in the Constitutive Act of the AU, the African Charter on Democracy, Elections and Governance, 2007<sup>182</sup> and the NEPAD's APRM.<sup>183</sup>

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<sup>181</sup> Fomunyoh, Chris (2009) 'Mediating Election-Related Conflict', Background Paper July 2009. Geneva: Centre for Humanitarian Dialogue (HD Centre), p 5.

<sup>182</sup> Murithi, Tim (undated) 'Post-Accord Kenya: between a fragile peace and a constitutional revival'. Addis Ababa: Inter-Africa Group (IAG), p 7.

<sup>183</sup> Fomunyoh (2009), p 14.

Yet key causes of conflict in Africa continue to be political contestation, inclusion (or exclusion), succession and transition—all of which come to a head during elections. Africa’s ‘weak political institutionalisation in relation to social mobilisation increases the chances of instability’.<sup>184</sup> Elections, being competitive, stress political institutions, calling into question the rights to the freedoms of association and expression, the professionalism and neutrality of the security services and the independence and impartiality of the Judiciary.<sup>185</sup>

Electoral conflict and ‘protest politics’ are especially likely to occur under first-past-the-post, winner-takes-all electoral systems when the electorate is divided, the elections are closely contested<sup>186</sup> and are perceived of as flawed or failed.<sup>187</sup> This is particularly so when past exclusionary political practices<sup>188</sup> have given rise to grievance over domination and the electorate’s readiness for mobilisation.<sup>189</sup> Both liberal and Marxist theories of the economic causes of conflict—relating to economic inequality and relative deprivation on the one hand and the social contradictions of capitalism on the other hand—are of relevance to electoral conflict in Africa in that they explain the presence within the electorate of ‘willing protestors’.<sup>190</sup> Thus political and economic causes of conflict interact to enable electoral violence.

In addition, while the advent or return of multipartyism and political pluralism in Africa can give positive political accommodation and expression to ethno-regional and religious

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<sup>184</sup> Aman, Kahled Mohammed (undated) ‘Mediation: a viable mechanism in Africa’s political crisis: a case study of Kenya’s post-election crisis 2008’, p 4.

<sup>185</sup> Fomunyoh (2009), p 6; Nkwachukwu, Orji (2013) ‘Making Democracy Safe: policies tackling electoral violence in Africa’, *South African Journal of International Affairs* 20:3, p 396.

<sup>186</sup> Aman (undated), p 2; Brown, Stephen (2011) ‘Lessons Learned and Forgotten: the international community and electoral conflict management in Kenya’ in Gillies, David (ed) (2011) *Elections in Dangerous Places: democracy and the paradoxes of peacebuilding*. Montreal: McGill-Queen’s University Press, p 7; Nkwachukwu (2013), p 396.

<sup>187</sup> Nkwachukwu (2013), p 393.

<sup>188</sup> Fomunyoh (2009), p 5.

<sup>189</sup> Aman (undated), p 3; Nkwachukwu (2013), pp 393-4.

<sup>190</sup> Nkwachukwu (2013), p 395.

identities,<sup>191</sup> ‘under a “prebendal” polity, individuals, groups and communities seek state power in order to control the country’s resources and benefit from them... In the context of stiff competition for power, candidates and parties employ... ethnic, regional and religious sentiments in order to... gain or maintain power. This has the tendency to transform political competition into sectarian struggles.’<sup>192</sup>

Electoral conflict discourages candidates and voters, undermines electoral outcomes and democratisation, reduces public confidence in elections as a means of the peaceful transfer of political power, damages societal relations and can be a precursor to civil war.<sup>193</sup> The paradox is that elections remain important in post-conflict situations to restore legitimacy through the transformation of parties to the conflict into political actors to ensure their use of ‘ballots rather than bullets’ in the struggle to capture or maintain political power.<sup>194</sup> This is sometimes used to justify the persistent impunity granted to instigators and perpetrators of past electoral conflicts. Yet the failure to arrest and prosecute the same, also given state incapacity or corruption, not only prevents redress for survivors and victims of electoral violence but also fails to prevent future electoral conflicts.<sup>195</sup>

Although electoral conflict is increasingly common in Africa, there has, to date, been more of a focus on determining its patterns, scope, causes and consequences than on how to manage or resolve it.<sup>196</sup> The critique is that measures increasingly taken to manage or resolve electoral conflict—such as enhancing regulation of political activities, instituting commissions of inquiry and mediation—continue to fail to address its political and economic causes.<sup>197</sup>

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<sup>191</sup> Brown (2011), p 1; Nkwachukwu (2013), p 393.

<sup>192</sup> Nkwachukwu (2013), p 395.

<sup>193</sup> Nkwachukwu (2013), pp 393-4.

<sup>194</sup> Fomunyoh (2009), pp 5-6.

<sup>195</sup> Nkwachukwu (2013), p 395.

<sup>196</sup> Nkwachukwu (2013), p 393.

<sup>197</sup> Nkwachukwu (2013), p 393.

#### 4.1.2 *Mediation as a form of electoral conflict resolution*

Conflict can be avoided by either preventing parties to a given conflict from disruptive conflict behaviour or addressing or removing the source(s) of disruptive conflict behaviour through settlement. Settlement can be reached in one of three ways. Negotiation involves direct discussion between the parties to the conflict to resolve their incompatible positions. Arbitration involves a third party hearing of and rendering a decision or judgement on the parties' incompatible positions—this is a judicial or legal process in which the parties agree in advance to abide by the arbiter's decision or judgement. Finally, mediation involves a third party's proactive intervention between the parties to catalyse their 'collaborative negotiation'—this is a political or extra-legal process of compromise and there is no agreement by the parties in advance to agree to the settlement. However, compromise through a third party is sometimes easier to accept as remedies are more face-saving and flexible.<sup>198</sup>

Electoral conflict is usually constitutionally and legally subject to arbitration. However, where arbitration is not accepted by a party to the electoral conflict, mediation can be used to achieve political settlements: 'rolling bargains between powerful actors and the dynamic renegotiation and compromise that characterises these bargains'.<sup>199</sup> Mediation aimed at achieving political settlements of electoral conflict needs to be inclusive to maintain legitimacy.<sup>200</sup> Participation beyond the parties to those indirectly affected by the electoral conflict is important,<sup>201</sup>

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<sup>198</sup> Aman (undated), pp 5-6.

<sup>199</sup> Kanyinga, Karuti and Walker, Sophie (2013) 'Building a Political Settlement: the international approach to Kenya's 2008 post-election crisis', *Stability: International Journal of Security and Development* 2(2):34, p 2.

<sup>200</sup> Kanyinga and Walker (2013), p 2.

<sup>201</sup> Klein, Roohia S (2012) 'The Role of Women in Mediation and Conflict Resolution: lessons for United Nations (UN) Security Council Resolution 1325'. *Washington and Lee Journal of Civil Rights and Social Justice* 18:2, pp 279-80.

including of women as mediators and negotiators as well as of civil society and other stakeholders.<sup>202</sup>

#### 4.2 International and regional norms enabling and concerning intervention through mediation as a form of electoral-conflict resolution

Under Chapter VII of the UN Charter, the UN is enabled, on resolution by the UN Security Council, to authorise or take coercive or military measures to maintain or restore international peace and security. To date, Chapter VII has not been invoked by way of UN Security Council resolutions with respect to electoral conflict in Africa.<sup>203</sup>

However, under Chapter VI, the UN also has a mandate for preventive diplomacy with respect to the peaceful settlement of disputes.<sup>204</sup> Preventive diplomacy lies between conflict-prevention and peacekeeping,<sup>205</sup> and can include the authorisation or taking of economic, political and military measures against any ‘threat or use of force’ that is neither in self-defence nor involving engagement by regional arrangements or agencies.

Article 52(2) of Chapter VIII further calls upon member states to ‘achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council’.<sup>206</sup> As no definition of regional arrangements or agencies is provided, practice to date has been flexible, with the UN Security Council recognising both treaty-based regional organisations as well as groups of member states in a given region acting

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<sup>202</sup> McGhie, Meredith Preston and Wamai, E Njoki (2011) ‘Beyond the Numbers: women’s participation in the Kenya National Dialogue and Reconciliation’, Geneva: Centre for Humanitarian Dialogue (HD Centre), p 7.

<sup>203</sup> Opiyo, J Ododa (2012) ‘The Challenges of Preventive Diplomacy: the United Nations (UN)’ post-Cold War experiences in Africa’, p 66.

<sup>204</sup> Opiyo (2012), p 61.

<sup>205</sup> Opiyo (2012), p 65.

<sup>206</sup> United Nations (UN) Charter, cited in Lindenmayer, Elisabeth and Kaye, Josie Lianna (2009) ‘A Choice for Peace? The story of forty-one days of mediation in Kenya’. New York: International Peace Institute (IPI), p iii.

collectively on specific issues of common concern such as mutual defence and security or economic and development cooperation.<sup>207</sup> Thus, the UN also has no formal division of labour or relationship with any regional organisation. However, in practice, there is increasing recognition that ‘regional organisations have a comparative advantage... within their regions’.<sup>208</sup> In addition, ‘regional action as a matter of decentralisation, delegation and cooperation with [UN] efforts... lighten[s] the burden of the [Security] Council but also contribute[s] to a deeper sense of participation, consensus and democratisation in international affairs.’<sup>209</sup>

The AU is the primary regional organisation in Africa. And Article 4(h) of the Constitutive Act of the AU provides for ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’.<sup>210</sup> Electoral conflict in Africa may not always meet this threshold for intervention. However, depending on the nature of the electoral conflict in question, this right of intervention can be interpreted proactively and preventively.

This is particularly so given that the AU’s right of intervention is considered to embody the emerging international norm on the R2P. R2P posits that, when a state is either unable or unwilling to protect its citizens from or is involved in international crimes (that is: crimes against humanity, genocide and war crimes),<sup>211</sup> the international community (including Africa) has a responsibility to prevent or react to the same and rebuild after the fact through diplomatic, economic, legal or military means. R2P is considered, therefore, either to undermine state

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<sup>207</sup> Opiyo (2012), p 70.

<sup>208</sup> Opiyo (2012), p 78.

<sup>209</sup> Opiyo (2012), p 71.

<sup>210</sup> The Constitutive Act of the African Union (AU), cited in Lindenmayer and Kaye (2009), p 7; McGhie and Wamai (2011), p 15; Weiss, Thomas G (2010) ‘Halting Atrocities in Kenya’, *Great Decisions 2010*, p 28.

<sup>211</sup> Weiss (2010), p 17.

sovereignty or to re-define it to make it dependent on a given state's ability and willingness to uphold human rights.<sup>212</sup>

In conducting 'preventive action' in Africa, currently the UN takes a 'four-pronged approach' involving developing regional stakeholder partnerships, building contact groups including with neighbouring member states to the member state of concern, working with the RECs that are the building blocks of the AU's peace and security architecture and investing in the same for prevention.<sup>213</sup>

#### 4.3 Kenya's 2007-8 electoral conflict

##### *4.3.1 The trigger: the announcement of the supposed presidential results and swearing-in*

The electoral framework and architecture can contribute to electoral conflict. Relevant provisions of the Constitution and electoral laws that define the electoral system and ensure the EMB<sup>214</sup> are independent of Executive (and other) control with respect to its administration and finances and the non-partisanship of its officials.<sup>215</sup>

Kenya has a majoritarian electoral system, under which political parties and alliances are formed along ethnic lines, political patronage is used to maintain loyalty and support from ethnic bases within the electorate, and ethnicity is mobilised politically.<sup>216</sup> Thus 'the principle fault lines in politics follow ethnic divisions' and the electoral conflict became 'a political crisis with ethnic manifestations because politics in Kenya is organised ethnically'.<sup>217</sup>

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<sup>212</sup> Weiss (2010), p 18.

<sup>213</sup> Opiyo (2012), pp 67-8.

<sup>214</sup> Fomunyoh (2009), pp 7 and 8.

<sup>215</sup> Nkwachukwu (2013), p 395.

<sup>216</sup> Kanyinga and Walker (2013), pp 12-3; McGhie and Wamai (2011), p 12; Murithi, Tim (undated) 'The Kenyan Post-Electoral Crisis and the Prospects for Stabilisation', Addis Ababa: Inter-Africa Group (IAG), p 3.

<sup>217</sup> Kiai, Maina (2008) 'The Political Crisis in Kenya: a call for justice and peaceful resolution', *Review of African Political Economy* 35:115, p 141.

In addition, contrary to the 1997 IPPG agreement on consultation between political parties on appointments to the EMB, the President had unilaterally appointed new Commissioners to the Electoral Commission of Kenya (ECK) just before the 2007 General Elections.<sup>218</sup> Further concerns were posed by an unprecedented administrative decision within the ECK to give Commissioners responsibilities for their own regions, the ECK's rejection of an offer to install an electronic results transmission system, and the use of casual staff provided by Commissioners instead of ECK staff in the national tallying centre.<sup>219</sup> The ECK lacked cohesion, was unable to resist political pressures and could not credibly manage the counting and tallying process and disputes about the same.<sup>220</sup> This was starkly emphasised by the ECK Chair's own admission that there were problems with the presidential returns.<sup>221</sup>

The political participation of candidates and the electorate can also contribute to electoral conflict. Conflict is less likely when candidates can stand and campaign freely and when the electorate can freely register to vote, cast their ballots freely and have their free vote respected by the counting and tallying process.<sup>222</sup>

Kenya has had persistent problems with the delineation of constituencies, distorting the principle of one-person-one-vote and weighting the vote differently in different parts of the country. The incumbent Party of National Unity (PNU) made use of public resources in campaigning, illegally and to the disadvantage of the ODM.<sup>223</sup> There was differential access by

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<sup>218</sup> Fomunyoh (2009), p 13; Kenya National Commission on Human Rights (KNCHR), cited in Kiai (2008), p 141; Murithi (undated), p 1.

<sup>219</sup> Kiai (2008), p 142.

<sup>220</sup> Fomunyoh (2009), pp 13 and 9; Khadiagala, Gilbert M (2009) 'Regionalism and Conflict Resolution: lessons from the Kenyan crisis', *Journal of Contemporary African Studies*, p 435.

<sup>221</sup> Khadiagala, p 436.

<sup>222</sup> Fomunyoh (2009), pp 9-10.

<sup>223</sup> Fomunyoh (2009), p 13.

candidates to different parts of the country because of informal ‘zoning’, maintained by pre-election messaging appealing to ethnicity and inciting ethnic fears and hostilities.<sup>224</sup>

Polling and the addressing of electoral grievances also contribute to electoral conflict. Civil conduct during polling, maintaining the non-coercive nature and secrecy of the balloting process is as important as the EMB’s public information management in the context of the electorate’s access to and use of new communication technologies, its timely announcement of results and the prompt adjudication of any electoral disputes.

Kenya’s 2007-8 electoral conflict was triggered by the announcement of the supposed presidential results and the hurried swearing-in of the PNU’s Kibaki as President on December 30, 2007 with a supposed lead of 232,000 votes.<sup>225</sup> In the lead-up to the 2007 General Elections, all opinion polls had shown the ODM’s Odinga in the lead. While polling day was relatively peaceful, the initial speed of the return of results soon slowed, with unexplained delays in returns from PNU strongholds. The announcement of partial results raised suspicions about possible tampering with the counting or tallying process, given the unsatisfactory conduct of the same and the lack of an independent verification process within the national tallying centre.<sup>226</sup> Odinga’s initial lead began to diminish during the counting and tallying, amidst disagreement in the national tallying centre between ODM and PNU party agents. Against the backdrop of the loss of parliamentary seats of half of the incumbent PNU’s Cabinet members and the gain of 99 parliamentary seats for ODM as opposed to 43 for PNU, Kibaki was oddly declared the winner with a 2.5 per cent margin.<sup>227</sup> Finally, adjudication of the electoral disputes through the judicial

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<sup>224</sup> Fomunyoh (2009), p 10.

<sup>225</sup> Aman (undated), p 7.

<sup>226</sup> Fomunyoh (2009), pp 11-3; Nkwachukwu (2013), p 395.

<sup>227</sup> Kanyinga (2013), pp 90-1; Khadiagala (2009), p 436; Lindenmayer and Kaye (2009), p 2; McGhie and Wamai (2011), p 13; Nkwachukwu (2013), p 398; Weiss (2010), p 20.

process post-facto was not accepted given the low political and public confidence in the independence of the Judiciary.<sup>228</sup> In short, public perceptions were that the integrity of the presidential results had not been maintained—and that there was no way to challenge the process through the courts: ‘Kibaki saved the country but he’s also the one that caused it all’.<sup>229</sup>

With the benefit of hindsight, although polling day was deemed to have proceeded smoothly, tensions had begun to mount even then. Some polling stations had not opened on time and people in constituencies deemed supportive of the ODM had not found their names on the voter register. Many of those people’s surnames begin with ‘O’, as many Luo surnames do—and ODM’s presidential candidate, Odinga, was a Luo. In short, ‘it was a perfect set-up for what happened thereafter’.<sup>230</sup>

Tensions mounted even higher during the counting and tallying that followed. ODM seemed set to win as Odinga was initially in the lead at the presidential level and the parliamentary outcomes for the PNU seemed to indicate its fall across the country:

Watching tallies, the ODM far ahead, slaughter of the PNU. All losing. The first results coming in, parliamentary results, telling a picture: that the pillars of the Kibaki administration are being taken away. ODM had a one million lead, clear this thing was gone.<sup>231</sup>

Suddenly, however, the counting, tallying and announcement of results slowed. The PNU remained confident:

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<sup>228</sup> Fomunyoh (2009), p 13; Nkwachukwu (2013), p 396.

<sup>229</sup> Interview with Linus Gitari, former Group Managing Editor, the Nation Media Group (NMG), Nairobi, February 16, 2015.

<sup>230</sup> Interview with Kwamchetsi Makokha, journalist and member of Kenyans for Peace with Truth and Justice (KPTJ), Nairobi, April 23, 2015.

<sup>231</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the Commission of Inquiry into the Post-Elections Violence (CIPEV) under the Grand Coalition Government, Nairobi, January 15, 2016.

Had seen how national tally going, Odinga leading. Somebody asked me: are we going to lose? Said we're not thieves, if they win, we'll handover. But confident that Mount Kenya votes hadn't yet come in.<sup>232</sup>

But that confidence was not common across the board:

Somewhere down the line, the fiddling starts, can feel this tension, no information is coming forward, then the results are announced late.<sup>233</sup>

There was this trouble with counting. Not demands for re-counts but that counting couldn't be completed in 24 hours and voting had ended within statutory times. Or, if completed, didn't know results.<sup>234</sup>

The pattern of results from that point changed, creating more disquiet:

The patterns of results didn't make sense. I screamed: 'they're stealing the election from ODM'. Other constituencies announced with PNU taking the lead in constituencies where one would not have expected PNU to take the lead. I could see ourselves getting into a crisis engineered by the state, violence as a result of disputed elections. Was clear the incumbent wasn't winning.<sup>235</sup>

Returning Officers (ROs), particularly from constituencies deemed supportive of PNU disappeared. Media correspondents and reporters also disappeared, ensuring there was no parallel announcement of results by the media:

Talking to [Joseph] Odindo, who was Group Managing Editor, because the Nation [Media Group], the media, didn't have the results. We'd always had our own tally. Odindo confessed his own reporters and correspondents went black on him, he couldn't find them when trying to trace results for certain areas. They only came up for air after the ECK had declared results. People had been influenced, operating against imperative to relay results, in competition with everybody else, undermining institutional and professional objectives. People got compromised. They infiltrated the media to the extent that not possible to determine what'd happened.<sup>236</sup>

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<sup>232</sup> Interview with Martha Karua, negotiator for the Party of National Unity (PNU), Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>233</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>234</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>235</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>236</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

An Administration Police (AP) officer went public about the AP's partisan role in the electoral process: 'Clear tense, the Administration Police being caught, the role of the state, supporting Kibaki.'<sup>237</sup> ODM and PNU representatives engaged in a review of results at the national tallying centre, while incidents of violence began to be reported, particularly in low-income areas of Nairobi and the north Rift Valley, both ODM-dominated provinces.

In Nairobi, the import of the incidents of violence began to sink in:

My sister used to live right in Kibera [a low-income area of Nairobi], dawns on me have a problem in our family, call her, she's whispering, they're surrounded by slums, have a high wall, there are people trying to scale the wall to come and attack them, they're lying under the beds.<sup>238</sup>

On the 29<sup>th</sup>, just before the announcement of the results, driving on Ngong road, was attacked by mob of people, had a small child in the car, don't think these were protesters, think opportunistic. Managed to get away.<sup>239</sup>

Was living adjacent to Kibera and things happening were a harbinger of trouble. The second or third day after the elections, driving out of my gate, found a young man who'd been forcibly circumcised,<sup>240</sup> tried to get him to hospital, when got him to hospital, [it] refused to attend to him until a deposit of funds had been made. Unfortunately, he died. So already a climate of violence even before the results. Almost like anticipating a certain outcome.

The person helping me with housework at the time also from Kibera and said one morning had no place to go as *Mungiki*<sup>241</sup> was taking over and there were retaliatory gangs. Told her to move in with her children.<sup>242</sup>

In Nyanza province, people had already begun to stream in from Rift Valley Province and the main highway through the country had been shut down there:

Roadblocks have appeared, people burning things. Realise can't leave Kisii [in Nyanza province] because there are roadblocks on the border with the Kipsigis in Kericho [in Rift Valley province]. Tea workers, a large number Kisiis, start trekking

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<sup>237</sup> Interview with Maina Kiai, former Chair, Kenya National Commission on Human Rights (KNCHR), Nairobi, February 4, 2016.

<sup>238</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>239</sup> Interview with George Wachira, member of Concerned Citizens for Peace (CCP), via Skype, April 28, 2015.

<sup>240</sup> Indicating targeting of Luo men, who do not traditionally circumcise.

<sup>241</sup> *Mungiki* is an organised criminal group, also known for acting as a political militia for Gikuyu politicians.

<sup>242</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

back, telling tales of how attacked. People coming back on foot, no public transport, had to leave in a hurry, no money. The composition of the town's changed, there are a huge number of people running away from Kakamega, Kilgoris. Kikuyu and Kisii are spread all over, every available space in town, in anguish. Unbelievable scene.<sup>243</sup>

In Rift Valley province itself, people were desperate:

My shop steward in Naivasha had called me in the morning, saying this place is bad, I might not be alive. Told him you'll be OK. That night the shop steward called me and said people are being massacred on my plot, they are almost in my room. Said what do you mean? While I'm on the phone, hear him saying don't kill my children, hear the wife crying, the boy crying. That was the end.<sup>244</sup>

Several civil society leaders and public officials, aware of the growing numbers of incidents of violence tried to intervene with Samuel Kivuitu, the ECK's Chair, to urge him to take his time to verify the results before moving to announce:

On 31<sup>st</sup> December Martha [Karua, PNU] called me and said let Kivuitu announce the elections results. Told her it's dangerous, let Raila be there, let Kalonzo [Musyoka] be there to verify and announce together. Told her the country's going to go on fire. Tried calling Kivuitu to say don't announce, the country's going to go on fire.<sup>245</sup>

Am on the phone with Kivuitu, he starts saying he can't find his Returning Officers. Said to him: 'don't announce'. Too messy to announce, explain need time to verify results, as long as process of re-tallying is transparent, we'll give you the time. Buy time. He says yeah, announces and the violence starts in a concerted way, protests, other things.<sup>246</sup>

Don't know if you ever saw Kivuitu's interview about people on the phone with him, Willy [Mutunga] and Chief [Maina Kiai]. Kivuitu was Willy's pupil master, Chief was head of the [Kenya] National [Human Rights] Commission (KNCHR). Message was that shouldn't proceed and announce results, causing more harm than good. As soon as clear even Kivuitu had capitulated, became a question of how soon does Kenya collapse.<sup>247</sup>

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<sup>243</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>244</sup> Interview with Francis Atwoli, Secretary-General, Central Organisation of Trade Unions (COTU), Nairobi, January 12, 2016.

<sup>245</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

<sup>246</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>247</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, Open Society Initiative for Eastern Africa (OSIEA), Nairobi, April 29, 2015.

The closure of the national tallying centre, the announcement of Kibaki as the winner and a late afternoon swearing-in immediately following took the incidents of violence to a new level: ‘Hell broke loose thereafter’.<sup>248</sup>

Was sitting at home, watching the results on [television] (TV). Then saw those guys march in, teargas the place [the national tallying centre], close it down, put Kivuitu in a car and this is not part of the script. These numbers popped up on the screen, didn’t make sense. Told my wife, let’s stock up, she said why. Said this place is about to blow up.<sup>249</sup>

The security services tried to respond to get those assumed to be PNU supporters at risk away from Rift Valley province:

Got to the Officer Commanding Station (OCS) and he’s giving me his assessment that people attacked in other places and felt Kisii safe. A large number of buses come, clearly the government’s been at work, all these buses that operate towards Central province, the idea is to get Kikuyus to Nairobi and Central province. Met long convoy of people being transported to Nairobi. At the head of the convoy is a police group with huge show of force, guns everywhere, police vehicles strategically between. Kisiis from Western province said would find their level as belong to Kisii. Eventually, another evacuation to Nairobi and joined convoy with family, brought to Bomet by the police and see police, where Narok started, turning around. That’s when hits me that the Masaai are not in this war as have been taken through Kipsigis country. That’s how I got to Nairobi.<sup>250</sup>

However, the security services soon realised they lacked the capacity to contain the spreading violence:

Called the Director of Operations, [David] Kimaiyo, in police headquarters. He was frank, told me we’re overwhelmed.<sup>251</sup>

The security services were also responding in a politically partisan way, with violence themselves, particularly in Rift Valley, Nairobi and Nyanza provinces:

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<sup>248</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015; Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>249</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>250</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>251</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

Even as having conversations around elections, a competing crisis around safety of life and limb. Remember reports from Moi Referral [Hospital in Eldoret] and Kisumu, people saying a public health crisis as too many bodies in the streets.<sup>252</sup>

Some were surprised at the turn the country had taken, having not anticipated ODM's refusal to turn to the courts for redress or the turn the protests had taken or the insufficient and unacceptable responses of the security services:

The institutional route normally available, ECK, had made its pronouncement and, once done, all ends there. Loser had decided not going to use institution available, the Judiciary. Two things hand in hand: what happened with elections, who was winner, but also what's unfolding right in front of you.<sup>253</sup>

Had a sense all not well. But expected to be intermittent, isolated, usual kind of thing. When [the] opposition said won't accept elections, became clear things were not going to be OK.<sup>254</sup>

ODM itself seemed unsure how to proceed:

We were trying to make sense of it. The first meetings with the party leadership around the 31st—or the 30th—when it became clear violence had broken out and the elections had been stolen.<sup>255</sup>

PNU, on the other hand, seemed to have anticipated some sort of post-announcement arrangement with ODM, and proceeded accordingly:

Walked into a room where *akina* Raila, the Pentagon [ODM's leadership], [Peter] Anyang [Nyong'o was] telling me we need to talk. Remember saying since when were results negotiated? Said let talks be after announcement.<sup>256</sup>

What it hadn't, however, anticipated was the violence:

President sworn in. He names a few ministers, including myself, 17 out of the 34. Stubbornly just named half. Somebody calls me to say people have been burnt in

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<sup>252</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>253</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>254</sup> Interview with Billy Kahora, Editor, *Kwani* and member of Concerned Kenyan Writers (CKW), Nairobi, February 12, 2015.

<sup>255</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the Committee of Experts (CoE) under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>256</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

Kiambaa church. Rushed to State House, discussed plan to put things down but never followed.<sup>257</sup>

For academics and civil society, however, PNU had acted on faulty intelligence, analysis or scenario-planning:

Talking to Gikuyu establishment-type people, was struck by fact that surprised them, they did not expect those consequences at all. While obvious to me that that would precipitate violence, didn't know what magnitude or character, but absolutely certain wouldn't go down quietly. Amazed by how many average, middle-class people didn't understand their country and its political character. They did not see such a rupture from a small thing like an election: I mean, it's only Raila. We steal an election from Raila, we'll have rioting in Kibera and Kisumu. That was their intelligence. Didn't see Rift Valley coming, rapid regionalisation and even internationalisation. That whole escalation.<sup>258</sup>

In effect, the supposed outcome of the presidential elections had served as a trigger for the violence. Not because the presidential race had been tightly contested but because of the handling of the final stages of the process, which placed into question the supposed outcome:

Kibaki sworn in, the country shut down. The reason go to elections is [to] get leaders that come into power. That wasn't [the] case, no way of telling one person had won over the other.<sup>259</sup>

Would understand why. A heavily contested election, the outcome didn't seem fair, the process was definitely flawed and whenever process flawed, obviously people disgruntled, so process is as important as outcome.<sup>260</sup>

Four distinct patterns of violence emerged: protests in areas dominated by ODM that took different forms depending on the area, and which quickly became more organised than spontaneous; responses to those protests by the security services; responses to those protests by

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<sup>257</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>258</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>259</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>260</sup> Interview with Florence Mpaayei, former Executive Director, Nairobi Peace Initiative (NPI) and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

armed groups or militia linked to or supportive of PNU; and, finally, gender-based and sexual violence (GBSV) that cut across all the other forms of violence.

#### *4.3.2 The proximate and structural causes: the failed political transition of 2002*

The political transition of 2002 had, over time, revealed anti-democratic and neo-patrimonial continuities in executive, parliamentary and judicial behaviour. Early civil society co-option into the NARC had also hindered structural reform.<sup>261</sup> Thus, by the time of the 2007 General Elections, Kenya's political institutions remained weak, marred by corruption and impunity, ensuring continued ethnic, gender<sup>262</sup> and regional inequalities and marginalisation as well as continued political mobilisation of the same.<sup>263</sup> 'ethnic and regional inequalities infiltrated not only Kenyan politics but also the society more broadly.'<sup>264</sup>

Thus, while the violence that ensued from the electoral conflict was initially directed at the ruling political party, expressing dissatisfaction with the electoral process,<sup>265</sup> it drew on and was fanned by historical economic and political grievances. These included prejudice and stereotyping on ethnic grounds and the political exclusion of the Luo and other ethnicities in favour of the Gikuyu. These also included persistent 'indigenous' land claims dating back to the colonial seizure of land in Central and Rift Valley provinces, the displacement of those from Central to the Rift Valley and the postcolonial seizure of land in the Rift Valley for distribution to the Gikuyu for political patronage purposes at the expense of Kalenjin and Masai land claims.<sup>266</sup>

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<sup>261</sup> Kanyinga and Walker (2013), p 4; Khadiagala (2009), p 435; Kiai (2008), p 141; Lindenmayer and Kaye (2009), p 3; McGhie and Wamai (2011), p 12.

<sup>262</sup> McGhie and Wamai (2011), p 11.

<sup>263</sup> Kanyinga and Walker (2013), p 4; Khadiagala (2009), p 435; Lindenmayer and Kaye (2009), p 3; McGhie and Wamai (2011), p 12; Weiss (2010), p 19.

<sup>264</sup> Kanyinga and Walker, p 5.

<sup>265</sup> Kiai (2008), p 142; Lindenmayer and Kaye (2009), p 3; Nkwachukwu (2013), p 401.

<sup>266</sup> Lindenmayer and Kaye (2009), p 4; Nkwachukwu (2013), pp 398-9.

The state's monopoly on violence was already tenuous<sup>267</sup> given impunity for previous violence associated with electoral conflict in both 1992 and 1997.<sup>268</sup> The instigators of past violence associated with electoral conflict were still active politically, and armed groups and militia remained at their disposal.<sup>269</sup> Thus the violence associated with the electoral conflict of 2007-8 easily and quickly transformed from spontaneous to organised violence, with the use of armed groups and militia by both parties as well as politically partisan violence by the security services, with GBSV cutting across all three.<sup>270</sup>

Ultimately, while the process and supposed outcomes of the presidential election in particular were a trigger for the patterns of violence that ensued, it was clear that the process and outcomes were so important because of historical and long-standing grievances, including systemic discrimination on ethnic grounds:

We are ethnically polarised with deep-seated animosities and historical grievances that could boil over into genocidal conflagration.<sup>271</sup>

Systemic discrimination on ethnic grounds was understood as intersecting with that based on gender:

We were cognisant this wasn't something that had happened overnight, there were long-standing grievances. We weren't going to have a conversation that pretended that discrimination, the instrumentalisation of ethnicity, didn't exist. It was the only time the women's movement in this country has acknowledged the intersectionality of different forms of discrimination. Normally we talk about gender-based discrimination as if it just happens alone.<sup>272</sup>

Systemic discrimination on ethnic grounds played out in terms of political representation and thus one grievance had to do with political exclusion, especially of leading Luo politicians:

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<sup>267</sup> Kanyinga and Walker (2013), p 5.

<sup>268</sup> Khadiagala (2009), p 435; Weiss (2010), p 20.

<sup>269</sup> Brown (2011), p 7; Kanyinga and Walker (2013), p 5; Kiai (2008), p 141.

<sup>270</sup> Lindenmayer and Kaye (2009), pp 3-4.

<sup>271</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>272</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

The sense that systems and structures were not inclusive, certain groups would never ascend to leadership, not everyone can participate in deciding destiny of the country, an exclusive club. Our government, our economics, our political structures. Where people feel excluded, where people feel as citizens can never contribute.<sup>273</sup>

This grievance can be traced back not only to the failed political transition of 2002 and the disregard of the MoU between Kibaki and Raila under the NARC but also even further to the immediate post-independence period:

Had great hopes for the country. But we started mucking about with it, systematically, starting with the Memorandum of Understanding (MoU), not honouring it. We started messing around post-2002, in another coalition where Raila came in. We had the opportunity to make him Vice-President. If they'd done that, we could've avoided 2007. We would've had smoother elections, maybe could've postponed it to 2013.<sup>274</sup>

The feeling among the Luo of being marginalised. Not just Raila, he symbolised this marginalisation. Goes back to 1966, when the father was ousted from his position as Vice-President of the party and diluted [the then ruling political party KANU] cleverly. How they weakened him and then he left. When he left, unfortunately, we entered into tribal politics. [The then President] Kenyatta ailing, aggravated by the assassination of [another leading Luo politician, Tom] Mboya. I don't know who advised the President to start oathing the Kikuyus. That was a disaster, isolated the Kikuyus. They couldn't trust the Luos. Luos marginalised. [President] Moi took over that problem, never resolved. Then the coup, whether Raila involved or not. That atmosphere, that's never resolved, is affecting the functioning of this nation.<sup>275</sup>

Systemic discrimination on ethnic grounds also played out in terms of access to and control over resources, particularly land. In addition, therefore, was grievance relating to equally historical and long-standing dispossession of land, this time dating back to the colonial period and: 'Bitterness within the Kalenjin on issues of land.'<sup>276</sup>

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<sup>273</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>274</sup> Interview with Linus Gitari, former Group Managing Editor, the NMG, Nairobi, February 16, 2015.

<sup>275</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the Truth, Justice and Reconciliation Commission (TJRC) under the Grand Coalition Government, Nairobi, week of April 27, 2015.

<sup>276</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

Finally explaining the violence and how it spread so fast was the question of institutional failure. The ECK had failed; ODM refused to use the electoral-dispute mechanism of the Judiciary to address that failure as the judiciary too was deemed politically partisan, as were the security services and the civil service:

Therein lies the multiple crises the country had to deal with. Peeled away veneer of stability and no institutions left. Couldn't trust the ECK, the security services, the civil service was partisan. Just hope that the military hadn't walked into argument. But no pro-people institution standing.<sup>277</sup>

Continued control of the provincial administration by the Executive further to the political transition of 2002 was also deemed responsible:

In 2005, during the [constitutional] referendum, was in Eldoret. People came to me to say Chiefs are pushing us to vote no. Gikuyus who wanted to vote yes. Called Mirugi [Kariuki], said: 'you guys are crazy'. These chiefs, three years after Moi had left, hadn't been replaced. Maintained same structures that had organised violence.<sup>278</sup>

#### 4.4 Intervention through mediation in Kenya's 2007-8 electoral conflict

The AU's response to both the elections and the unfolding post-election violence was uncharacteristic in both its speed and its circumvention of the design of its peace and security architecture under which intervention would normally be through the relevant REC (the EAC) or IGAD.

The explanations for this swift and direct intervention—against the preferences of its principal, the PNU which had assumed the presidency—are many. First is the question of the normative allowances of the Constitutive Act of the AU, which was explicitly intended to move from 'non-interference' to 'non-indifference', and allow for 'African solutions for African

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<sup>277</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>278</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

problems’. Kenya provided an: ‘Opportunity for the AU to resolve an African problem through an African-driven process’,<sup>279</sup> particularly in this:

Era of transitional justice, coming in and salvaging places with a formula. The AU also having ‘African solutions for African problems’ rhetoric.<sup>280</sup>

Under the OAU, we had this old doctrine of non-interference in the internal affairs of member states. It was a terrible doctrine, which reinforced a narrow doctrine of sovereignty which shielded abuses. The new doctrine when the OAU transformed to the AU, the Constitutive Act replaced the OAU Charter, was non-indifference to human rights abuses. Quite a radical change, a sea change. That sea change explains a whole lot of things, the AU becoming more assertive in the face of sovereignty.<sup>281</sup>

Those normative allowances were themselves rooted in experience of the potentially extreme consequences of non-interference. The post-election violence: ‘Looked like the beginnings of a genocide’<sup>282</sup> and:

They’d also had experience of the past and knew what’d happened in Rwanda. No surprise, people had Rwanda and Burundi on their minds and wanted to do everything they could. Four former Heads of State came in[to Kenya] before [South African Archbishop Desmond] Tutu and came in as real concern.<sup>283</sup>

The second reason for the rapid AU intervention was because Kenya had just undergone the AU’s governance ‘audit’, the APRM. The final APRM report, discussed at the level of heads of state and government, warned of the fragility caused by what, in the end, triggered and underlay the post-elections violence. In that sense, Kenya was already on the AU’s radar:

The APRM had happened the year before, led by Graca [Machel]. 2007 comes a year after Kenya had undertaken the APRM, it was a pioneer APRM country. The APRM report had already highlighted the issue of ethnic tension in Kenya that becomes more explosive around elections.<sup>284</sup>

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<sup>279</sup> Interview with James Orendo, negotiator for the Orange Democratic Movement (ODM), Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>280</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>281</sup> Interview with Dr Khabele Matlosa, Head, Department of Political Affairs (DPA), African Union (AU), Nairobi, May 7, 2016.

<sup>282</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>283</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, Kenya National Dialogue and Reconciliation (KNDR), by telephone, May 6, 2016.

<sup>284</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

Third was the question of leadership—in terms of both being concerned about upholding the normative commitments of the Constitutive Act of the AU and having the confidence of both political parties to the electoral dispute. The latter explains why the AU rather than the EAC took the lead in the intervention. There were:

... sub-regional dynamics. For example, [Yoweri] Museveni shows not everybody on board with same approach. Didn't bring in sub-regional leaders, sense of partisanship.<sup>285</sup>

The attempt by Museveni to slyly attempt to mediate in the name of the EAC was rejected, immediately. Not seen to be an independent arbiter. His relationships with different actors, serious indictment of his credibility. The AU came in as had that distance. It could get traction.<sup>286</sup>

As for the former:

Leadership is crucial. The leadership in charge then, an assertive leadership. [Ghanaian President John] Kufour [then AU Chair] wanted to make sure the AU acts proactively, because Ghana's also a model for democracy on our continent.<sup>287</sup>

President Kufour put his strength and credibility... having come from a country which had those difficulties, overrode those problems and became a democracy, his person contributed significantly.<sup>288</sup>

Give credit for moving quickly. Remember when Kufour came in, was not even sure that Kibaki would receive him. [PNU's Minister for Foreign Affairs Moses] Wetangula was asked why Kufour was there and his answer was I don't know, maybe he's coming to have tea with the President.<sup>289</sup>

Kufour came in quickly and elicited attention internally.<sup>290</sup>

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<sup>285</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>286</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>287</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

<sup>288</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>289</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>290</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

Fourth, however, were the more strategic considerations at play when the AU is weighing up intervention, namely the strategic importance of a country and the implications of its deterioration into conflict not just internally but for the region:<sup>291</sup>

The AU likes these islands of stability. Many factors appeal about Kenya, things function. So when things went wild, [it] took the right step.<sup>292</sup>

Kenya is a very important state for Africa and the AU. Everybody anxious to ensure Kenya didn't deteriorate further.<sup>293</sup>

The particular country and its role in the region are also crucial. The regional position of Kenya should not be taken for granted, it's a hub of this region. The perspective, correctly, was that if we let Kenya burn, literally, the entire region may burn.<sup>294</sup>

Kenya regarded as a key pillar in terms of geopolitics and therefore watching situation collapse would have been unpalatable next to Somali and Sudan. Would have been a challenge for the rest of the region and the international community.<sup>295</sup>

If collapses, East Africa collapses. Kenya's regional position. It's cliché when people keep saying Kenya is not Zimbabwe. But that did play out a bit.<sup>296</sup>

That Zimbabwe was on the AU's plate at the same time, although being addressed through the REC of the Southern African Development Community (SADC), provided an additional imperative for the AU's intervention to work in Kenya given:

The criticism of the institution being a toothless bulldog, a club of Heads of State that support each other, especially as that was the same time Zimbabwe was on the table and there was already a barrage of criticism [about] the AU. So wanted to send a strong message.<sup>297</sup>

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<sup>291</sup> Interview with James Orendo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>292</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>293</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>294</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

<sup>295</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>296</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>297</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

Other strategic considerations had to do with the internal dynamics of the situation, namely that the incumbent PNU's position was evidently tenuous given the manner in which Kibaki had re-claimed the presidency despite ODM commanding a parliamentary majority. In this sense, the:

Reasons for interventions by region and the rest of international community to be found within Kenya itself. Kenya divided, right in the middle, meant that a willingness to invite and entertain that kind of intervention. If, for example, had a situation that yes, a dispute, but no internal pressure for resolution and one party asymmetrically stronger than the other, the AU would've hesitated to be involved as would have been listening to the government. But stalemate and power tending towards the opposition created opportunity for the AU and international community to play a role. This wouldn't have happened if PNU in a stronger position, would've resisted more powerfully international intervention.<sup>298</sup>

An additional strategic consideration was that there were appeals for regional and international intervention not just from the political opposition, but also from Kenyan civil society and the Kenyan private sector. In short, it was clear there were significant domestic constituencies in support of regional and international intervention:

Civil society invited international involvement and ODM also amenable to international mediation. One thing always on table was international mediation, which spoke to the fact that there was institutional failure. So the conversation at the AU became the level of involvement. Had civil society, the opposition, saying want a lot of involvement and those with state power saying wanted as little as possible. The violence weakened those who had state power, didn't have control over the country so had to accept engagement.<sup>299</sup>

The final strategic consideration was the sense that an intervention both needed to and would work, given Kenya's recent political past. There are:

Many regional and international bodies in Kenya. Sense that Kenya on the move. Internal and external created momentum for democratisation. Had been possible to make positive changes and have an outcome. Not a Democratic Republic of the Congo (DRC), Somalia, Liberia.<sup>300</sup>

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<sup>298</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>299</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>300</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

Fifth, the AU itself was aware that if it didn't provide an 'African solution' to the particular problem of Kenya, the rest of the international community would:

The AU was also under pressure. The Americans had said it won't let Kenya go the Rwanda way. Also the EU.<sup>301</sup>

In this telling of the story, either the 'African solution' was an international solution in an African guise or there was a convergence of regional and international interests in resolving Kenya:

Look behind the AU, at who was speaking. You'll see it was a leadership that would listen to Western voices and Western voices clear what going on untenable. Don't think the AU did this as concerned Africans. The AU coming in was a convenient accident. In most other contexts, the AU supports the status quo.

Think the AU was a convenient proxy. The AU could play ball where your big superpowers, where your big bilaterals in Kenya, didn't want to be seen supporting either side. Realised early that coming out in support of Kibaki would backfire on them and, in that sense, immobilised.<sup>302</sup>

#### *4.4.1 Achieving agreement to the mediation of Kenya's 2007-8 electoral conflict*

The first question concerned whether there would be an intervention in the form of mediation at all. The ODM did not accept the announcement of the supposed presidential results and Kibaki's swearing-in. It raised the discrepancies between polling-station, constituency and national-level tallying figures to demonstrate an alleged addition of up to 300,000 votes to the PNU tally. Claiming rigging,<sup>303</sup> it demanded a re-count. It refused to consider arbitration under the Judiciary, which it considered as being under PNU control, and called instead for protests.<sup>304</sup> It also refused to consider negotiation with the PNU unless Kibaki resigned.<sup>305</sup> Finally, the ODM condemned the violence being committed by the security services in their bid to contain protests in ODM

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<sup>301</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

<sup>302</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>303</sup> Lindenmayer and Kaye (2009), p 4.

<sup>304</sup> Nkwachukwu (2013), p 398.

<sup>305</sup> Aman (undated), pp 7-8.

strongholds.<sup>306</sup> As arbitration and negotiation were thus ruled out, mediation remained the only option. The ODM's pre-condition for mediation was Kibaki's resignation and its initial preferences were for either a re-run of the presidential elections or the formation of a joint transitional government with a reform agenda, including on land.<sup>307</sup>

The PNU did not dispute the tallying discrepancies but claimed they worked in Odinga's favour. It demanded that the ODM submit to arbitration through the Judiciary to settle its electoral concerns and accused the ODM of instigating 'ethnic cleansing' through its calls to protests.<sup>308</sup> It posited that it would agree to mediation only if the ODM accepted the supposed legitimacy of Kibaki's presidency and if the ODM entered into mediation with no pre-conditions.<sup>309</sup> Meanwhile, however, it proceeded to create a government of national unity with the third presidential candidate in the race and began arrangements to host the Summit of Heads of State and Government of the IGAD.<sup>310</sup>

To the region and the rest of the international community, there was no question that the supposed presidential results were questionable. The EAC's East African Legislative Assembly (EALA), which had observed the elections, did not endorse the electoral process or supposed presidential result. The American and EU Ambassadors had requested that the ECK hold off the announcement of the supposed presidential results, pending verification. The ECK had agreed as long as both the ODM and the PNU agreed to the same but the PNU had refused.<sup>311</sup> Thus, the Election Observation Missions (EOMs) of the Commonwealth and the EU did not endorse the electoral process or the supposed presidential results, on the grounds that the counting and tallying

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<sup>306</sup> Kanyinga (2013), pp 97-8; Lindenmayer and Kaye (2009), p 11.

<sup>307</sup> Lindenmayer and Kaye (2009), p 8.

<sup>308</sup> Aman (undated), p 7; Lindenmayer and Kaye (2009), p 5 and 11.

<sup>309</sup> Lindenmayer and Kaye (2009), p 8.

<sup>310</sup> Lindenmayer and Kaye (2009), p 6 and 12.

<sup>311</sup> Brown, Stephen (2009) 'Donor Responses to the 2008 Kenyan Crisis: finally getting it right?' *Journal of Contemporary African Studies* 27:3, p 392.

process was not credible.<sup>312</sup> Meanwhile, a confidential memorandum from the World Bank's Country Director claiming that the UN had endorsed the electoral process and supposed outcome was leaked, to denials by the UN.<sup>313</sup>

Following the announcement of the supposed presidential results and the swearing-in, however, the US initially prevaricated. Amid allegations that it had suppressed an exit poll commissioned by the International Republican Institute (IRI) that gave Odinga an eight per cent lead, it furthered congratulations to Kibaki and called on the ODM to respect the supposed outcome. However, it eventually aligned itself with the region and the rest of the international community which refused to support the status quo by either endorsing the electoral process or calling for the ODM to seek remedies through adjudication by the Judiciary.<sup>314</sup>

To the region and the rest of the international community, there was no question either that the violence ensuing from the electoral conflict was untenable. Kenya has always played the role of regional 'hegemon', being relatively unaffected by Cold War conflicts and thus able to provide leadership for the resolution of the same in east Africa, the Horn and the Great Lakes.<sup>315</sup> In addition, the economic consequences of the disruption of infrastructure and trade links caused by the violence resulting from the electoral conflict were experienced almost immediately by Kenya's neighbours, reliant on its port,<sup>316</sup> in terms of shortages of fuel and other imports.<sup>317</sup> Regional leaders spoke out immediately, attributing the violence to Kenya's electoral system and political polarisation along ethnic lines and going so far as to call for military deployment or intervention

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<sup>312</sup> Aman (undated), p 7.

<sup>313</sup> Brown (2009), pp 393-4.

<sup>314</sup> Aman (undated), p 8; Brown (2009), p 389.

<sup>315</sup> Khadiagala (2009), p 433.

<sup>316</sup> Khadiagala (2009), p 432.

<sup>317</sup> Kanyinga and Walker (2013), p 2; Khadiagala (2009), p 437; Kiai (2008), p 141; Murithi, Tim (undated) 'The Kenyan Post-Electoral Crisis and the Prospects for Stabilisation', Addis Ababa: Inter-Africa Group (IAG), p 7.

if necessary.<sup>318</sup> It has been argued, therefore, that ‘Kenya in 2007-2008 illustrates the logic of R2P’s “proximate prevention”. It was less compelling in terms of death levels and forced displacement but compelling enough by conjuring up fear of another Rwanda while early international action still appealed feasible.’<sup>319</sup>

A steady stream of senior Africans thus made its way to Nairobi, urging the PNU to agree to negotiation if not mediation with the ODM. These included Archbishop and Nobel Laureate Desmond Tutu, a delegation from the Forum of Retired African Presidents (the former Presidents of Botswana, Mozambique, Tanzania and Zambia were on this delegation), the AU’s Peace and Security Commissioner together with the Ghanaian Ambassador to the AU and, finally, John Kufour, Ghanaian President and then AU Chair.<sup>320</sup>

Meanwhile, as the mediation effort initially backed by the rest of the international community through the World Bank failed, given the leaking of its Country Director’s memorandum, the rest of the international community aligned behind support for African intervention in the form of mediation, publicly demonstrated through public statements and private pressure, particularly on the PNU.<sup>321</sup> The United Kingdom (UK) was the first to call publicly for a political settlement in the form of power-sharing.<sup>322</sup> That call was followed by a joint statement by the UK Foreign Secretary and US Secretary of State, a visit by the US Assistant Secretary of State for Africa and visits by the EU Commissioner for Development and Humanitarian Aid.<sup>323</sup>

Thus, although domestic actors were unable to broker the mediation themselves, being viewed as politically partisan, the failed domestic mediation efforts opened the door for regional

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<sup>318</sup> Yoweri Museveni and Paul Kagame, cited in Khadiagala (2009), p 431.

<sup>319</sup> Weiss (2010), p 19.

<sup>320</sup> Aman (undated), p 8; Khadiagala (2009), p 436 and 438; Lindenmayer and Kaye (2009), p 4-5; McGhie and Wamai (2011), p 15; Weiss (2010), p 21.

<sup>321</sup> Brown (2009), p 395-6.

<sup>322</sup> Brown (2009), p 394.

<sup>323</sup> Brown (2009), p 394; Khadiagala (2009), p 437-8; Lindenmayer and Kaye (2009), p 5; Weiss (2010), p 21.

and international intervention by way of mediation.<sup>324</sup> The PNU in particular was unwilling to accept mediation by regional and international actors,<sup>325</sup> given its assumed incumbency and Kenya's pride in its regional 'exceptionalism'<sup>326</sup> but 'coerced consent eventually worked'.<sup>327</sup> During his visit, Kufour got both the PNU and the ODM to agree<sup>328</sup> to accept intervention in the form of an AU-mandated Panel of Eminent African Personalities. The Panel was to be led by Kofi Annan, former UN Secretary-General and to include Benjamin Mkapa, former Tanzanian President and Graca Machel, former Mozambican and South African first lady,<sup>329</sup> who had also led the APRM process in Kenya.<sup>330</sup> The ODM and the PNU were each to delegate four negotiators, one of whom was to be a woman, together with an adviser to the mediation.<sup>331</sup> Initial disagreement over the name of the process—with the ODM referring to it as an 'international mediation effort' and the PNU as a 'national dialogue'—was dispensed with as Annan ruled for it to be named the Kenya National Dialogue and Reconciliation (KNDR).<sup>332</sup>

The ODM was initially resistant to the mediation, its position being that it had rightfully won the elections:

It was not easy to access the ODM people. The most stubborn person was Martin Shikuku who said: 'how do you go and negotiate with a thief, someone you've seen with a cow passing your gate and you go and negotiate?' But Raila and [Musalia] Mudavadi saw sense and said if a joint meeting was convened, they would go. Suggested the same to [the then Attorney-General] Wako, that Raila was willing for negotiations... Immediately Kibaki's team contacted Kufour. Raila said as long as [the mediator's] not from Kenya. Raila was willing, knew these talks might bring

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<sup>324</sup> Fomunyoh (2009), p 13.

<sup>325</sup> Fomunyoh (2009), p 14.

<sup>326</sup> Khadiagala (2009), p 436.

<sup>327</sup> Weiss (2010), p 29.

<sup>328</sup> Khadiagala (2009), p 438; Lindenmayer and Kaye (2009), p 6.

<sup>329</sup> Aman (undated), pp 1 and 8; Fomunyoh (2009), p 15; Kanyinga and Walker (2013), p 2; Khadiagala (2009), p 432; Lindenmayer and Kaye (2009), p 1; McGhie and Wamai (2011), p 15; Weiss (2010), p 21.

<sup>330</sup> Kanyinga and Walker (2013), p 7.

<sup>331</sup> McGhie and Wamai (2011), p 18.

<sup>332</sup> Lindenmayer and Kaye (2009), p 11; Weiss (2010), p 22.

sanity for government, thinking of a government of national unity. Had had the coalition [under NARC].<sup>333</sup>

In addition, as PNU had assumed the reins of the state, ODM felt that mediation was the best way to have some of its claims recognised:

One strategy is to make a bigger issue, to internationalise and, when internationalise, more likely to gain more of what want.<sup>334</sup>

Once ODM had agreed in principle to mediation, the question became what would make PNU capitulate to it. In the end, many reasons informed its decision. The first appears to have to do with agency—Kibaki’s personal decision for reasons of both legacy and his own standing in the region as well as internationally:

Don’t know why the PNU capitulated after being so recalcitrant. Maybe Kibaki himself relented, which is story that [the lead mediator] Annan tells. Or Kibaki made a leadership decision.<sup>335</sup>

Kibaki wasn’t taking phone calls, the pressure was bearing on him that he’d go down badly in history and he didn’t want to be remembered like Moi.<sup>336</sup>

The Kibaki regime, unlike the Uhuru regime, cared about its image outside. He was concerned about his own image.<sup>337</sup>

Kibaki did not want to be the bad guy of the block. Kibaki acting a statesperson. When look at the character of some individuals, a way in which Kibaki did not want to be portrayed as someone who was a hardliner, a radical. That’s not his nature, he’s more aloof, more laissez-faire, he wanted to portray himself as a statesperson.<sup>338</sup>

The advice to him of the then head of the civil service, Ambassador Francis Muthaura, may have played a role in Kibaki’s ultimate decision, particularly when, like Raila, he was not opposed

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<sup>333</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

<sup>334</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>335</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>336</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>337</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>338</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women’s Consortium, Nairobi, February 26, 2015.

to the person suggested as lead mediator: ‘Muthaura played a key role because he was a diplomat before’.<sup>339</sup>

As long as the person being suggested was someone he did not feel had leanings towards ODM, remember they’d rejected Cyril Ramaphosa of South Africa on that basis.<sup>340</sup>

Even the South Africans [tried] to bring in [Archbishop] Desmond Tutu, Ramaphosa. The South African government had a do-good posture. It was rejected outright.<sup>341</sup>

Beyond the concern for Kibaki’s personal standing in the region and internationally was concern also for Kenya’s standing in the region, especially given its historical leadership in mediations in other situations:

If the AU’s sending a team, and we’re in the AU, have taken leadership in the IGAD processes in Sudan, Somalia, we could not afford ourselves to not go the way of mediation. Kenya has been key in terms of peacekeeping missions, in Sierra Leone, Angola. Kenya’s been key across the continent. On basis of that record, no option but to accept a mediation process by the AU... Because that’s what’s in the Constitutive Act, the APRM, the UN. We’ve signed up to, whenever there’s a crisis, mediation as the route to solve the crisis. That came into play, having signed up to these statutes and our record. Our standing within the continent required us to heed the voices calling for mediation.<sup>342</sup>

If we had the AU around us, it might try before we call for the international community. Have worked with the AU, seen it trying to intervene in West Africa, before we start crying for the others.<sup>343</sup>

The PNU also felt the pressure domestically on political grounds. The speed and spread of the post-elections violence had taken it by surprise. It was also affecting a key PNU political constituency, primarily the Gikuyu in the Rift Valley province, as the number of those internally displaced kept rising and there was fear of a mutation from political to class discontent. It was

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<sup>339</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

<sup>340</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women’s Consortium, Nairobi, February 26, 2015.

<sup>341</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>342</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women’s Consortium, Nairobi, February 26, 2015.

<sup>343</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

evident that the security services, despite being heavy-handed, could not contain the discontent. In effect, while the PNU had assumed the presidency for itself, it had lost control of the country:

It wasn't AU, it was Kenyans that came together and saved Kenya because we were sliding into a war of have and have-nots, not a war of politics anymore. That had been recognised early. All of us agreed the [Gikuyu militia allied to the PNU,] *Mungiki* was going to be unleashed and wouldn't be under anybody's control. Other communities would release their own gangs. It was a dangerous thing.<sup>344</sup>

Agreed to share power as, in own discussions with the President and Raila, said over a thousand have died, how many do you want to see killed? That was weighing on the President. When as situation reaches the thousand mark, that's really tragic.<sup>345</sup>

The violence in the Rift Valley. A core constituency for the Kikuyu elite, politically. The general sentiment was that Kenya was sinking into an abyss. I don't think they had ever contemplated that.<sup>346</sup>

The killings. The turning point for Mwai Kibaki was when he went to Eldoret and people took off from him. Many people had been killed, his own Gikuyus shouted him down and, as he watched, one more hut got *choma*-ed [burnt] in the distance, with all the *jeshis* [militia] he had arranged. It was a personal decision. Because the people around him, they are die-hards, they aren't people to negotiate. Kibaki had to deliver a deal as his people were digging in.<sup>347</sup>

There was violence around the country and they'd lost the power to put an end to that violence. They'd lost control of the country.<sup>348</sup>

Kibaki was also under pressure. Calls were coming in from the Rift Valley, people crying. This is what made Uhuru Kenyatta come in. Couldn't pass via Kikuyu, Limuru, to go to western Kenya. The problem in the Rift Valley, the police overwhelmed, that's what made Kibaki concede.<sup>349</sup>

And Kofi Annan went to see the President. The language he spoke: 'Mr President, which country are you ruling? There is no Kenya, it's all burnt down.' He didn't know that places were burning. Was being told that, in three days, this thing would be over. Which wasn't true.<sup>350</sup>

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<sup>344</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>345</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>346</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>347</sup> Interview with Linus Gitari, former Group Managing Editor, the NMG, Nairobi, February 16, 2015.

<sup>348</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>349</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

<sup>350</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

In addition, PNU felt the pressure domestically on economic grounds. Protests in ODM-controlled areas had also taken the form of economic sabotage, including blockage of the highway through the Rift Valley and uprooting of the railway, both interrupting transit trade. A key PNU economic constituency, the private sector, was being negatively affected. The PNU had prided itself on the economic recovery made under NARC following the political transition of 2002 and the private sector had access to the PNU and the presidency to express its concerns:

Our leaders are personal and personalised and take decisions based on the same. They couldn't transact business; that pressure may have been brought to bear. One of the dynamics of Kenya that's different, the middle class is bigger. Domestic pressure in terms of their own interests counts. Didn't calculate on the basis of the poor, they think the poor can be contained and managed. Found they weren't managing and the violence wasn't ending. Was going to hurt them. They hadn't planned economically for the crisis. Thought the worst that would happen would be that Luos would stand up in Kisumu and some towns. That's why the Gikuyu response was hastily put together.<sup>351</sup>

Much as some of the Kibaki elite wanted to go on with the war, hurting their business interests, reporting KES2 billion [losses] a day. Much as posturing [that was] under control, things out of control and they knew it. Within the security elite, a feeling of: 'oh goodness'. They weren't able to shut it down. Saw that without accepting something mediated, they would've been overhauled by Raila.<sup>352</sup>

Brought home to this political elite the fragility of the country. All their wealth is here. Hadn't known they were sitting on a tinderbox. Joe Wanjohi [a Gikuyu businessman close to Kibaki] got intelligence that the next phase [was] to burn their buildings. The Kikuyu business elite initiated the parallel mediation under Colin Bruce [then head of the World Bank in Kenya] as they realised the threat to their economic interests. Not how you want to get people to the table, to surround their properties with jerry cans, but comes to that if they don't hear any other language.

They had no idea that stealing an election would have economic consequences. They were war-mongering and then they get surprised. Economic shock, pure self-interest. Business went to see Kibaki and put pressure on him to compromise.<sup>353</sup>

The Kibaki regime was surrounded by people who'd invested in this country, the Kibaki elite, the owners of capital. Chris Kirubi [another Gikuyu businessman], Joe

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<sup>351</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>352</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>353</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

Wanjohi, himself, unlike the Moi regime where capital was outside. The interests of capital swayed him to talk.<sup>354</sup>

I don't think they would've survived for more than three months with a blockade on Kenya. None of us would. I always wondered what would've happened if we'd continued. What was fascinating was the shilling didn't depreciate, people taking out money, in dollars, but money coming in from Diaspora intense as well, so evened out.<sup>355</sup>

As the PNU's post-elections scenario planning, such as it was, fell apart, no alternative plan emerged:

Had done activities at community, national level, having candidates sign up to forms saying would accept outcomes. So that turned violent a surprise to us, hadn't put anything in place to steer process in event of violence.<sup>356</sup>

The lack of leadership on this front, together with both the incapacity of and mounting tensions within the PNU and between the security services meant that mediation came to be seen as the lesser evil in terms of a way out. Karua, who'd been sworn in as PNU's Minister for Justice argues that:

Can't say that PNU didn't want talks. Remember that at KICC [the national tallying centre, the Kenyatta International Conference Centre] what refused was discussing outcome before declaration of results. Results never negotiated. If disputed, can take to court or talk. That was my view, not a government position. Once talks agreed upon, the resistance was not about talks.<sup>357</sup>

But, she admits:

We were supposed to be in charge. We seemed to be in a paralysis. At wits end. Everybody was feeling helpless amongst us as Ministers, Kibaki not leading, felt we were being negligent about people's lives by not being decisive.<sup>358</sup>

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<sup>354</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>355</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>356</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>357</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>358</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

On [January 1, 2008], a few of us had gone to see President to support him in what needed to be done as needed a response that wouldn't add to the violence. I wanted the President to appear on national television asking people to be calm, ordering security agencies to do their duties as already reports being idle while on duty. Should have cautioned all security personnel would be personally liable from anything in their areas. Remember telling them we can be accused of criminal negligence but couldn't command security forces. Didn't know the Minister of Internal Security and the Police Commissioner were not on talking terms. Information coming to the Minister might not reach the Commissioner and vice versa. They fell out. That explains the lack of response.

To the public, there was total absence of government in the middle of all this chaos and the situation only began to stabilise when talks commenced and the opposition at the encouragement of Kofi Annan had gone to their areas to cool the situation. That suggestion of talks did save the country because the situation was degenerating by the minute. Remember one horror being shown on television in Naivasha, houses being burnt, arrows, police not arresting, something from hell.<sup>359</sup>

The PNU thus capitulated because it had no plan B of its own. And, once it had agreed to mediation, the mediation developed its own dynamic and logic:

A mediation process was going to uphold ODM which PNU hated but, on other hand, would uphold PNU as would give them a semblance of control over the country. They'd run out of ideas about how to manage the country going forward. One hope was that, out of mediation, would come ideas on continuing in power and buying time. Agreeing to mediation threatens you but less bad than violence including on a support-base that is the object of the violence. Buying time in hope that, if agreed to mediation, things would clarify with them still in power.<sup>360</sup>

The odds were stacked against them. Their claim to have won the election was tenuous. Once process started, had own dynamic, once a foot in the door, difficult to resist. Not sure PNU had much choice except to accept reality.<sup>361</sup>

Part of accepting reality had to do with the PNU placing its own interests on the table, given that ODM was engaging with the AU and also seeing the AU's intervention as preferable to intervention by anybody else:

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<sup>359</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>360</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>361</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

The AU had been rejected by Kibaki's people for a while but the message got through that wouldn't get recognised. Then Raila is seen to be talking to some of these people. A moment they'd have been loath to allow to happen. Imagine if front page was Raila meeting with all these international names? A complication.<sup>362</sup>

Kufour saw President and suggested that can't let the country go down, we need to talk to the other side. Although the President declared winner, the other side held half the country. In that situation, where the [opposition] had a slight majority in parliament, nothing will ever go on here. We need to talk. Kibaki convinced. Kufour said important to agree who'll facilitate, suggested his countryman, [former Tanzanian President] Mkapa, Graca [Machel] and said would check with the other side. No formal AU resolution but Chair. As respectable head of AU, we accepted it and the opposition also accepted it.<sup>363</sup>

Kibaki happier with an African process than a non-African process. Because there was a rumour, which had some legitimacy, that the West was with the opposition. The opposition and civil society were seen as amenable to the West. So that intervention came from the AU was critical in the sense that Kibaki would find it easier to talk to his colleagues, President Kufour and ultimately [Tanzanian President Jakaya] Kikwete.<sup>364</sup>

You've got to choose. Intervention by the AU or by the EU and [the] US. Seemed more benign to deal with the AU. [Given] the flip-flopping of the US, the US had lost the moral high ground so couldn't be the face of that mediation. The EU had been accused by Kibaki of favouring Raila. The AU all too aware of their governance flaws, would be more tolerant of deficiencies. Also a misreading by PNU and those in power of the shape that mediation would take.<sup>365</sup>

That said, once the mediation had begun, the PNU recovered enough to pursue its interests—and the retention of power—vigorously, including through assuming some financial responsibility for the mediation:

We were worried the situation would be internationalised in the sense that they literally take over, almost become part of you and lead everything. I was advised by a senior UN official here, a lady, whatever happened, the negotiations must remain a GoK process, must take ownership.

When Kibaki appointed me negotiator, the first thing I did was say we have to acknowledge there's a government, even if disputed and that the talks are a

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<sup>362</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>363</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>364</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>365</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

government thing and it's the government that will implement and that government takes financial responsibility. Anybody wishing to support brings to basket under the UNDP [UN Development Programme] with no strings attached. Therefore, although much money paid by friends into the basket, we paid for Serena [Hotel, where the bulk of the negotiations took place] and we took responsibility.<sup>366</sup>

The PNU's pursuit of these interests and the retention of power also played out in contests over language, the nature of the political settlement and, once the political settlement was reached, the division of ministerial portfolios between ODM and PNU:

One of the stand-offs a simple matter of terminology. ODM talking about mediation and PNU would say no, these people coming for a cup of tea and then moved on to dialogue. When you say mediation, a particular approach with a particular structure whereas dialogue can be free-flowing engagement without particular agenda. So the minute ODM talking about mediation, PNU resisted as had implications: that had to recognise a problem; that problem needed a solution; that solution involved mediation. Then, who are the mediators, then a simple step to say can't have anyone in Kenya as an acceptable mediators, have to think about others. What looked like simple matters of wording reason [...] the process called the Kenya National Dialogue and Reconciliation because word mediation remained largely unacceptable to PNU even though eventually accepted process itself.<sup>367</sup>

We [PNU] wanted Kibaki to have total control. Wanted to accommodate them [ODM] but on our terms. They wanted to be in government as a right. They won the day. But want best for your side, to cede as little ground as possible. If we'd had our way, they'd have come in as Ministers under Kibaki and Kibaki would decide. The outcome was a coalition government not a government of national unity. And ours went further as entrenched in the Constitution. We also didn't want to entrench it in the Constitution.<sup>368</sup>

The government realised that this is between self-preservation of the political elite and preservation of the nation. It had those two choices. If I go for self-preservation of the elite, then I may not achieve preservation of the nation. They were aware that that would also have serious ramifications for the region. The thing that softened them was the carrot of the government of national unity. They recognised that they could try to have their cake and eat it at the same time. Let's aim for partial self-preservation while at same time we preserve unity of the country.<sup>369</sup>

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<sup>366</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>367</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>368</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>369</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

There wasn't any other option. If the situation had deteriorated further, would've been on their watch, they would've been responsible. They were in charge of security and protection and probably felt that, even with power-sharing, given powers of incumbency, could still have influence and power and survive. If didn't share power, how would they have defended themselves or what would they have had in terms of political influence?<sup>370</sup>

What incentive was there for PNU? Even as agreed to mediate, [PNU] took all key ministries.<sup>371</sup>

Ultimately, the political settlement was both face- and image-saving because PNU got enough out of it:

Kibaki not forced to climb down. A sweetener there, we will survive this. Lost some, but not the big prize, which we were fighting for. And much as pissed them off, when push came to shove, will still run government.<sup>372</sup>

Domestic calculations and pressure aside, the region also exerted pressure. Neighbouring countries experienced immediate effects on their economies with transit trade from the Kenyan port to Uganda and Rwanda effectively stopped:

The implications of our crisis on the region [meant] the leaders in the region had a major interest in Kenya being stable in terms of their economies. These actors had a stake in peace in Kenya.<sup>373</sup>

Given the 'Sabre-rattling from Museveni and [Rwandan President Paul] Kagame because of the blockage',<sup>374</sup> Rwanda and maybe Uganda played a role in pushing the AU to resolve this given the movement of their goods;<sup>375</sup> 'Don't forget that Museveni had been here, Kagame was talking to him, so there was pressure to talk.'<sup>376</sup>

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<sup>370</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>371</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>372</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>373</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>374</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>375</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>376</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

The region as a whole also exerted pressure, including at the highest possible level through a delegation from the Forum of Retired African Presidents:

There was [former Zambian President Kenneth] Kaunda, Graca, [former Mozambican President Joachim] Chissano, [former Botswanan President Festus] Mogaye, Mkapa. These African Presidents who'd left power and were walking freely, Kaunda telling stories about life after power, waking up and finding no drivers and no chaperones. That did begin to change the siege mentality. Presidents do leave power.<sup>377</sup>

There were former heads of state in town, some had difficulty getting appointments with Kibaki but in end felt couldn't be resisting or appear to be refusing to talk as situation getting out of hand. By the time Kufour came in, had decided would try mediation. But [was] not sure would lead anywhere.<sup>378</sup>

The region stayed engaged through the mediation, including at the very last stage, when agreement had to be reached on the political settlement: 'Heads were knocked together, was it Kikwete with Kibaki?'<sup>379</sup>

Kofi Annan was compelled to call [then Tanzanian President] Kikwete on how the Office of Prime Minister works. Kikwete said: 'I also have a Prime Minister and do you hear him?' [Thus there was] domestic pressure from the owners of capital and external pressure from the region and the international community.<sup>380</sup>

The rest of the international community also maintained high-level engagement—including threats of financing cuts and targeted sanctions—to ensure the mediation happened and, following, throughout the mediation: 'International pressure sufficiently mounting'.<sup>381</sup> This too explains the consent of the PNU to the mediation and, ultimately, to the political settlement:

They keep shouting about [only receiving] two per cent [of the budget from] aid, but get recurrent and development expenditure and a big issue.<sup>382</sup>

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<sup>377</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>378</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>379</sup> Interview with Gladwell Otieno, Executive Director, African Centre for Open Governance (AfriCOG), Nairobi, February 26, 2015.

<sup>380</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>381</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>382</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

The international community was catching up with them as individuals. The need for pressure individually. The Americans published names of people they wouldn't give visas to, a big story, that donors would use that as a carrot or a stick.<sup>383</sup>

The personal sanctions made a difference, the threat they'd go for families as well as all of them had children in the West, money. A big incentive.<sup>384</sup>

Pressure from the international community and threats, they were throwing tantrums. Remember some announcing would deny visas to perceived hardliners of the Kibaki side. Whenever there's a hard stand, they never blame the principal, but the agents. We [PNU] were being blamed, threatened with denial of visas which thought silly as not everybody dying to go out there. Asked whether the position of heaven had changed.<sup>385</sup>

The international community, led by America through the Ambassador, also were calling. Kibaki received calls from Washington.<sup>386</sup>

There was the [former US President George] Bush trip, [US Secretary of State] Condi Rice flew in. The last bit of pressure that was decisive had to do with the visit by Condi Rice.<sup>387</sup>

It is the Americans who made Kibaki talk. Not the AU. It's Condoleeza Rice.<sup>388</sup>

Can't just ignore superpowers. The [US] Secretary of State, when she came and said you either find an option or dot, dot, dot. This guy in Kenya Airways, part of Kibaki elite, [was] pissed off: how can a small girl come and talk to them like that?<sup>389</sup>

The international community was strong when had Condoleeza Rice come in. Both carrots and sticks used to help two sides come to an agreement. Not just about PNU and ODM, greater than one side wants power. We've got the UN here, international agencies, those things came to bear in terms of softening both sides.<sup>390</sup>

Overall, domestic, regional and international pressure all leveraged each other:

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<sup>383</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>384</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>385</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>386</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>387</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>388</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>389</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>390</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

There was a domestic voice proposing things, it wasn't an alien thing imposed on people, it was a situation where Kenyans were saying what should happen. The EU were a bit slow, were afraid of being viewed as people intervening but were able to point to domestic pressure. Above all, it was Kofi Annan, with his prestige. Was here for the AU. It was an African solution. Westerners could back it up without fear of being seen as interventionist, imperialist.<sup>391</sup>

The choice of the mediator helped to harness the three different sources of pressure by insisting on a single mediation and by calling for pressure to be brought to bear when necessary. The high standing of Kofi Annan ensured this. Negotiators from both sides also credited the lead mediator with his strategic guidance of the negotiations, including through pre-emptive announcements of his vision for the political settlement, moving all negotiators to a secret location to break an initial deadlock on the nature of the political settlement and, finally, resorting to negotiations between the two Principals only, locking the two negotiating teams out and bringing Kikwete in, as both then Chair of the AU and a peer with a similar constitutional arrangement:

Annan announced would be a grand coalition government. Our side [PNU] upset, I made statement he's pre-empting as haven't negotiated. That nearly broke the talks when Annan decided to sit with Raila and Kibaki without any of us.<sup>392</sup>

Just Raila and Kibaki in the room with Kofi, Mkapa and Kikwete, President Kikwete chairing as Chair of the AU. The discussion was do we constitutionalise the Accord. Kibaki felt no need to constitutionalise. Attorney-General [Wako] called to give advice. Raila said the Attorney-General serves the government of the day and he needs his own lawyers. That's why I [James Orengo, ODM negotiator] was called in. An argument between me and Wako on constitutionalising the Accord. Agreement that provisions had to be constitutionalised. Sent out with Wako to do final draft using Kofi's Secretariat. Did final draft and went back. Even after had read final document, Kibaki refused to have any discussion with his team and said everybody should go downstairs and prepare seats and table for signing ceremony. What Muthaura did was prepare seats. Without that, wasn't going to be an Accord. Said should sign every page, which they did. Signed the agreement and a celebration. The Accord signed and follow-up was how this unity could be shown,

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<sup>391</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>392</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

the two of them should go out to the country particularly to the Rift Valley to cool tempers down.<sup>393</sup>

#### 4.4.2 *The content of the mediation of Kenya's 2007-8 electoral conflict*

The KNDR began on January 22, 2008, three weeks into the violence occasioned by the electoral conflict,<sup>394</sup> in the awareness that its failure could precipitate descent into civil war and its success the opportunity for structural reform demanded by domestic actors for two decades.<sup>395</sup> It had two objectives: achieving a political settlement to end the violence; and catalysing structural reform.<sup>396</sup> These objectives were to be reached through negotiations on a Road Map with four agenda items: ending the violence and restoring human rights (proximate causes); addressing the humanitarian crisis; addressing the electoral conflict (the trigger); and addressing the long-term problems (structural causes).<sup>397</sup> The first two agenda items implicitly reflected R2P.<sup>398</sup>

By February 1, 2008, the KNDR had concluded agenda item one, agreeing to the demobilisation and disarmament of all armed groups and militia and investigations into the violence through a Commission of Inquiry into the Post-Elections Violence (CIPEV).<sup>399</sup> By February 4, 2008, the KNDR had also concluded agenda item two, agreeing to the restoration of suspended human rights and humanitarian assistance, including the re-settlement of all internally displaced persons (IDPs).<sup>400</sup>

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<sup>393</sup> Interview with James Orendo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>394</sup> Lindenmayer and Kaye (2009), p 1.

<sup>395</sup> Kanyinga and Walker (2013), p 15; Kiai (2008), p 140; Lindenmayer and Kaye (2009), p 1.

<sup>396</sup> McGhie and Wamai (2011), p 16.

<sup>397</sup> Kanyinga and Walker (2013), p 10; Khadiagala (2009), p 440; Lindenmayer and Kaye (2009), p 10; McGhie and Wamai (2011), p 16; Weiss (2010), p 22.

<sup>398</sup> Weiss (2010), pp 22-3.

<sup>399</sup> Khadiagala (2009), p 440; Lindenmayer and Kaye (2009), p 11.

<sup>400</sup> Khadiagala (2009), p 440; Lindenmayer and Kaye (2009), p 11.

Agenda item three had two components: addressing the past (the 2007 General Elections); and addressing the present and future (the political settlement in the form of power-sharing).<sup>401</sup> On the first component, it was eventually agreed that neither a re-count nor a re-tally of the supposed presidential results was possible given the compromise and destruction of some electoral records. Neither was it possible to hold a new presidential poll, given the disrepute of the ECK and the displacement that had occurred as a result of the violence.<sup>402</sup> Therefore, by February 11, 2008, the KNDR had agreed on investigations into the elections through an Independent Review Commission (IREC) with a mandate to recommend electoral reforms.<sup>403</sup> Although an IREC member has since claimed that it was clear that the IREC's task was not to determine who won, the wording of the agreement belies that clarity.<sup>404</sup> Regardless, the issue of who had won the presidential election was effectively parked. The KNDR thus deferred accusations and blame about both the elections and the violence to two Commissions of Inquiry, to be composed of both domestic and regional/international members to ensure independence and public confidence, with short timelines for completing their mandates and quick public reporting for transparency.<sup>405</sup>

As to the second component, negotiations on a political settlement involving power-sharing proved far more difficult and lengthy, taking about three-and-a-half weeks to conclude. The PNU was particularly (if unsurprisingly) intransigent on this component, claiming variously that power-sharing would end Kenya's multipartyism and political pluralism as it would decimate the political opposition, that it was unconstitutional and amounted to a 'civilian coup' and that it would fragment Executive power.<sup>406</sup> The ODM insisted, based on its previous experience with the failed

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<sup>401</sup> Lindenmayer and Kaye (2009), p 13; Weiss (2010), p 22.

<sup>402</sup> Nic Cheeseman, cited in Brown (2009), p 396; Fomunyoh (2009), p 16.

<sup>403</sup> Lindenmayer and Kaye (2009), p 14; Weiss (2010), p 22.

<sup>404</sup> Elklit, Jorgen (2011) 'The Role of International Organisations during Electoral Crises: the case of Kenya 2007-08', *Representation* 47:4, p 407.

<sup>405</sup> Kanyinga and Walker (2013), p 13.

<sup>406</sup> Lindenmayer and Kaye (2009), p 18; Weiss (2010), p 22.

MoU within the NARC post-2002, that any power-sharing would have to be entrenched within the Constitution.<sup>407</sup> The three-and-a-half weeks therefore saw much backtracking, brinkmanship, delaying tactics and prevarication, particularly from the PNU's negotiating team, dealt with by the Panel by announcing agreement on power-sharing during a parliamentary '*kamukunji*' [meeting], organising a retreat for the negotiating teams and, finally, suspending the negotiations for direct recourse to the Principals.<sup>408</sup> In a closed-door meeting with the two Principals, Annan and Mkapu, supported by Kikwete, Tanzanian President and new AU Chair, finally reached a political settlement in the form of a power-sharing agreement that established the position of Prime Minister for Odinga and a coalition government of the ODM and the PNU.<sup>409</sup> On February 28, 2008, the Agreement on Principles of Partnership of the Coalition Government was concluded,<sup>410</sup> together with the National Accord and Reconciliation Bill, 2008.<sup>411</sup> The political settlement was a compromise, in which neither the ODM nor the PNU got what they had originally wanted.<sup>412</sup>

By March 4, 2008, agenda item four had also been concluded, including agreements on establishing a Committee of Experts (CoE) to conclude the constitutional reform process and a Truth, Justice and Reconciliation Commission (TJRC) to address the sources of economic and political grievance as well as on the members of the CIPEV and the IREC. On May 23, 2008, agreement was reached on principles to guide implementation of the KNDR agreement and, finally, on July 30, 2008, an implementation matrix was concluded.<sup>413</sup>

As to why the mediation agenda included four key items:

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<sup>407</sup> Lindenmayer and Kaye (2009), p 16.

<sup>408</sup> Khadiagala (2009), p 440; Lindenmayer and Kaye (2009), p 14, 20; Weiss (2010), p 22.

<sup>409</sup> Aman (undated), pp 2 and 10; Kanyinga and Walker (2013), p 2; Lindenmayer and Kaye (2009), p 21; Weiss (2010), p 23.

<sup>410</sup> Lindenmayer and Kaye (2009), p 1.

<sup>411</sup> Aman (undated), p 1.

<sup>412</sup> Lindenmayer and Kaye (2009), p 22.

<sup>413</sup> Kanyinga and Walker (2013), p 11.

What we wanted, based on our experience in mediations we've done in various places, was first, stop the mayhem. Get people to share power because that was the immediate reason why we had the crisis. Then look at the root causes, that every time we have elections in this country we fight. Ours had a basis, a contested election.<sup>414</sup>

The most contentious item on the mediation agenda—and the most difficult to negotiate during the mediation itself—had to do with what had triggered the post-elections violence. The process and supposed outcome of the presidential elections was eventually addressed through an agreement to establish the IREC into the 2008 General Elections and, of course, the power-sharing agreement.

Prior to the arrival of the mediation team, however, Kenyan academic and civil society constituencies had already determined that, of all possible options to address the process and supposed outcome of the presidential elections, some sort of accommodation between PNU and ODM was likely to be necessary. A re-run was impossible given both the blow to public confidence in the ECK and the on-going violence around the country. A re-count was out given the apparent inability of the ECK to secure the ballot boxes and a fire where they had been stored. A re-tally was difficult given the number of altered or missing tallies from all polling stations and all constituency tallying centres. Kenyan academics began talk of a coalition government fairly early and the peace and security sector of civil society, including Kenyan mediators who'd been engaged elsewhere in the continent, was used to proffering power-sharing as an answer to political stand-offs of this nature. What was needed was to:

Establish what'd happened with the elections. Then, because incidents around the elections, tampering with ballot boxes, the warehouse where materials stored was torched, that option off the table. Could've done a re-count as problems were with counting and tallying. But that option interfered with. Because many people perceived the security services as partisan, couldn't even say secure the elections materials because who'd secure them?<sup>415</sup>

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<sup>414</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>415</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

Violence started spreading fast—the pattern common every time there were elections. The only thing that came to my mind was coalition governments in the context of disputed elections for purposes of preparing a constitutional framework. Called [political scientist] Michael Chege and asked him what usually happens and he said: ‘yes, this is recipe for a coalition government and there’s no way PNU can govern under any circumstances’. But it was a stolen election and he said there’s no way PNU would agree.

The crisis presented opportunity to have a shared government that could deliver. A shared government with limited mandate. Messed-up election, can’t do re-count, can’t go back to the polls, so take the pain, have an illegitimate, shared government for two years, transitional government, to institute legitimate leadership.<sup>416</sup>

We are about 50/50 [between ODM and PNU], close to half of the votes. Wanted something credible that will mean the anomaly has been addressed. Hence the ‘*mkate nusu*’ [half-loaf] slogan.<sup>417</sup>

The Kenya Scenarios Project [of the Society for International Development, SID] came over to CCP [Concerned Citizens for Peace], issued a Citizens Agenda for Peace. Ideas emerged as to way forward. Cannot re-count the ballot, cannot re-tally. And if were to re-run, would need a preparatory period, not possible, couldn’t call elections within next three months. Even if re-counted and decided ECK mispronounced, wasn’t going to be as easy as saying here’s the correct winner. So the suggestion was that needed a government of national unity. Didn’t call it a Grand Coalition Government. But said would be an interim government for two, three years that’d reform institutions. The surprise was when agreement signed and parties willing to go full five years.<sup>418</sup>

Made a memorandum on what workers wanted. Continued to appeal to leaders to strike a compromise. We were asking for a government of national unity. We didn’t have a coalition government in mind. Achieved it. Told Kibaki. He said not with [William] Ruto [a member of the ODM leadership]. Said bring all into government, you’re an elder. Raila said, when Prime Minister, it’s you who gave me this job.<sup>419</sup>

Remember [Anglican Archbishop Eliud] Wabukala bringing up Prime Minister.<sup>420</sup>

The current Bishop of the Anglican Church of Kenya said he called Kofi Annan and suggested [a] coalition government. There were many people talking to both sides, it was from individuals the shift began to happen.<sup>421</sup>

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<sup>416</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>417</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>418</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>419</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

<sup>420</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>421</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women’s Consortium, Nairobi, February 26, 2015.

While addressing the process and supposed outcomes of the presidential election was recognised as necessary, the priority agenda items were: one, ending the violence and disarming armed groups; and two, addressing the humanitarian crisis and restoring fundamental freedoms. This was recognised by negotiators from both ODM and PNU:

For us [ODM] what most important was political crisis and who goes to State House. Yet not most important in circumstances. Got reports from security agencies, the Red Cross, daily briefings from Kofi's own Secretariat about how many people had died, how many in hospital, what kind of wounds suffering, either shot or crude weapons, knifed, speared. Had a chilling effect on negotiators. All agreed had to stop the violence.

How to stop the violence and restore respect for fundamental rights and freedoms. That was immediate. Then how to deal with humanitarian crisis, the deaths, the displaced persons. Thirdly, how to deal with political crisis and long-term issues.<sup>422</sup>

The sequencing of the agenda items was deliberate on the part of the lead mediator as well as the urgent manner in which he approached agenda item one. The primary agreement arising here had to do with the establishment of the CIPEV and, later, the TJRC, recommendations about which had been pending since just after the political transition of 2002:

Created the CIPEV [which when constituted became known as the Waki Commission after the Judge, Philip Waki, who chaired it], in our parlance, the small TJRC, to deal with immediate problems and TJRC will deal with long term.<sup>423</sup>

Those agenda items concluded, the more difficult agenda item was on addressing the election. The lead mediator, having benefited from views of Kenyan academics and civil society prior to his arrival was also clear that some kind of accommodation needed to be found. The positions of the two negotiating teams were, however, initially intransigent:

What caused problems was dealing with the political crisis. The PNU delegation said ODM could should accept the role of being a loyal opposition. But preliminary

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<sup>422</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>423</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

reports from the electoral commission were that couldn't determine a winner and our [ODM's] view was that won the elections, Raila should become President and ODM should form government. These contending positions difficult to deal with. Other side said [we were] responsible for the violence because didn't accept the elections.<sup>424</sup>

Again, the manner in which the lead mediator handled the intransigence was deliberate, including taking the negotiating teams through each option proposed, bringing in comparative examples, trying to turn the political impasse into a legal problem capable of resolution and, when all else failed, reversion directly to the Principals.

Kofi's idea was to bring people to us [both negotiating teams] to have conversations on how problems like this could be resolved. Brought up sharing power. He came out strongly imploring us to be honest [about] whether Kenya could have a repeat election with violence that had taken place, integrity of electoral commission in question and incumbent in power that wouldn't like other result. So brought people who had ideas about sharing of power. Said even in more mature democracies, where elections results not conclusive and formation of government becomes difficult, coalitions are formed. PNU obviously adverse to discussions on that.<sup>425</sup>

Once the idea of a political settlement involving power-sharing was accepted in principle, the issue became the devil in the detail:

Then engaged in formation of government, portfolio balance. Against parliamentary strength, ODM had more members but agreed on 50/50. Kofi had told us if you have this kind of coalition where almost equal in numbers, important to look at key ministries outside the presidency, the deputy, Treasury, Internal Affairs, Foreign Affairs. Anybody who controlled those ministries would carry government. Raila had idea [of] a Permanent Secretary from ODM, Minister from PNU. But said important to take ministry in entirety so work can be done. Arrangement accepted was to mix and match every ministry.

He said: 'Can't the lawyers come up with solutions?' I was the only lawyer on the ODM side. On the other side, three lawyers, Martha, Wetangula, [Kilonzo] Mutula. Said let's have a chat about constitutional, legal questions that would arise having a Prime Minister. PNU didn't want two centres of power. [Said] if you have that arrangement, should be clear that Prime Minister responsible directly and accountable to the President and appointed and dismissed. Our position was that should have executive Prime Minister and Ministers from our end would be

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<sup>424</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>425</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

appointed by the Prime Minister. Total disagreement, a bitter exchange of words and Kofi was incensed with Martha. Called off meeting and said going to talk to Principals. Said talks should continue, leave power-sharing, start dealing with long-term issues, constitutional reforms, land, legal and institutional reforms. Had a document, what became the Accord, but everything contested and in brackets. Kofi not making progress. So went back to Raila and Kibaki.<sup>426</sup>

Ultimately, the primary agreements under agenda item three on addressing the elections had to do with establishing the IREC to examine all failures of the 2008 General Elections and the power-sharing agreement establishing what became known as the Grand Coalition Government: ‘The elections, if we went on finding fault, wouldn’t find answers so another Commission.’<sup>427</sup>

The trigger for the post-elections violence thus addressed, the mediation then moved on to the long-term and structural issues deemed to constitute the proximate and structural causes of the post-elections violence. For Kenyan academics and civil society, agenda item four on the long-term issues was the most critical and the impact of their engagement was evident:

The Accord gave an opening to allow more than political actors to be involved in the reform process, taken advantage of to the fullest, a second chance for Kenya which most countries never get.<sup>428</sup>

Political scientists think[ing] about using moment to do institution-building as social renewal. Unfinished business from failed constitutional review of 2005. What informed the content of the national accord? The dialogue team and people around the dialogue team on both sides. But in terms of agenda four, [constitutional lawyer] Wachira [Maina], [economist Dr] David [Ndi] and [political scientist Professor Karuti Kanyinga] were contracted to give meat to agenda four.<sup>429</sup>

The women’s movement also saw it as a chance to make progress on addressing the gender-specific impacts of the post-elections violence and advance women’s political representation in all the mechanisms arising from the Accord:

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<sup>426</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>427</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>428</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>429</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

Key issues women wanted to bring out: how the conflict affected women, how sexual violence to be dealt with, services for women. Reinforcing regional and international commitments to women's rights. Also representation of women in the negotiations, calling for the two parties to have women in the negotiation teams, mediation team to have services of a gender expert, so that all gender issues addressed.

The contributions from women's groups impacted on final outcome of the mediation. Indicators, the Commissions, the representation of women mainstreamed in all that. Provisions for women to be appointed. All proposals on addressing root causes were there. The setting up of the CIPEV and how it invested in [addressing] sexual violence. So women's participation had an impact, all the way to the Constitution.<sup>430</sup>

Negative and positive peace were pursued at the same time. Negative was to negotiate immediately an end to violence. But not just signing of the peace agreement. Attempt to ask question why, what led to this? Civil society saying bound to happen, the land issue, social injustice issues, have caught up with us and need to return to them. Can't talk about 'Africanness' without emphasising that difference relative to other cases.<sup>431</sup>

First was to stop the killings, stop the violence, protect the people and find a way of ending the conflict and bringing tensions down. That was the rationale behind the effort to get the two leaders to come out and shake hands and send the message that they were ready to talk. Gave time to move on to humanitarian assistance to those in desperate need. Then focused on the political settlement and long-term issues. A four-phased approach. From the beginning, all determined not only to stop violence but to ensure that Kenya, so important to the region of Africa, dealt with root causes and ensure that not repeated at the next elections.<sup>432</sup>

#### 4.5 The roles played by domestic, regional and international actors in the mediation of Kenya's 2007-8 electoral conflict

If PNU was initially shocked by the public response to the swearing-in of Kibaki and the unfolding violence, ODM was also shocked but also thinking of how to internationalise and publicise protests:

I was part of a group called the ODM intellectuals who were coming up with policy and looking at how, if ODM won, ODM would deliver on its promises. The group

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<sup>430</sup> Interview with Mary Wandia, member of the Women's Consortium, Nairobi, February 27, 2015.

<sup>431</sup> Interview with Professor Funmi Olonisakin, founding Executive Director, the African Leadership Centre (ALC), London, April 11, 2016.

<sup>432</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

was not re-convened post the elections but I had access to the Pentagon and would go in and out of [ODM's headquarters at] Orange House. So we were coalescing but not as an organised group.

We were trying to make sense of it. We responded by the first meetings with the party leadership when it became clear violence had broken out and the elections had been stolen. There were meetings at Orange House at senior level, Raila, the Pentagon, people running on party tickets who'd been elected. Discussions were mooted on conversations with international leadership and trying to get an intervention. At the same time, there were discussions about going to the streets and demonstrating. There was a group within ODM that wanted to install Raila at Uhuru Park. The other side got wind of that and cordoned off the park. We started the demonstrations moving from Orange House trying to get to Uhuru Park but had the special GSU [General Service Unit] or AP unit, the teenage mutant ninjas, stopping us. Raila never came and don't know if he intended to. That's when we found out Ruto was a coward, the old activist types like Anyang [Nyong'o] walked, but Ruto turned tail early.

As rank and file, I was not privy to those discussions [on when to talk to PNU]. Those discussions were in the inner circle.<sup>433</sup>

#### *4.5.1 Domestic civil society, including the women's movement and the private sector*

Civil society's role in democratisation was evident during Kenya's 2007-8 electoral conflict, despite the differences in understanding of the conflict and the approaches adopted by the two main civil society groupings that emerged at the time. These groupings have been defined as including, on the one hand, conservatives and moderates and, on the other hand, progressives and radicals.<sup>434</sup>

The conservatives and moderates saw peace as both a means and an end and thus effectively supported the status quo with respect to the elections, consonant with the PNU's position. The progressives and radicals saw truth and justice about both the elections and the violence as means to the end of peace and demanded accountability for the same, consonant with the ODM's position. The conservatives and moderates, including Christian organisations

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<sup>433</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>434</sup> Kanyinga, Karuti (2011) 'Stopping a Conflagration: the response of Kenyan civil society to the post-2007 election violence', *Politikon: South African Journal of Political Studies* 38:1, p 94.

uncomfortable with the ODM's campaign promises to Muslim organisations and on devolution, as well as 'conflict entrepreneurs' (senior diplomats and military officials involved in peace processes outside Kenya), grouped together under CCP.<sup>435</sup> Their engagement was through public prayers as well as lobbying the media around peace promotion and, more importantly, parties to the electoral conflict on mediation if not negotiation.

The progressives and radicals, including academics as well as governance, human rights and legal organisations, grouped together under Kenyans for Peace with Truth and Justice (KPTJ).<sup>436</sup> Their engagement was through elections- and then violence-monitoring to generate data and analysis on both the elections and the violence. For example, KPTJ audited the presidential results, revealing significant differences between tallies at the presidential as compared to parliamentary and local levels, and advocated for mediation.<sup>437</sup> The Women's Consultative Group's Women's Memorandum was ultimately in line with KPTJ's position,<sup>438</sup> as was the position of the Kenya Association of Manufacturers (KAM), Kenya's largest private-sector umbrella organisation.<sup>439</sup>

Civil society contributed to resolving Kenya's 2007-8 electoral conflict: 'CSOs [Civil society organisations] in Kenya have played what appear to be non-traditional and non-conventional roles'.<sup>440</sup> Civil society obviously assisted with the humanitarian response to the violence that ensued from the electoral conflict, liaising with humanitarian organisations and providing services to survivors and victims<sup>441</sup> as well as protection to elections and violence

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<sup>435</sup> Kanyinga (2011), p 96.

<sup>436</sup> Kanyinga (2011), p 96.

<sup>437</sup> Kanyinga (2011), p 100.

<sup>438</sup> McGhie and Wamai (2011), p 9; and Klein (2012), p 301.

<sup>439</sup> Kanyinga (2011), pp 96-7.

<sup>440</sup> Kanyinga (2011), p 86.

<sup>441</sup> McGhie and Wamai (2011), p 17; Murithi (undated), p 5; Wanyeki, L Muthoni (2008) 'Lessons from Kenya: women and the post-election violence', *Feminist Africa* 10, p 56.

monitors.<sup>442</sup> It also, particularly through the women's movement, initiated local-level reconciliation.<sup>443</sup>

But civil society was also the first to identify the patterns of violence: spontaneous violence in protest in ODM strongholds; ODM-organised violence in the Rift Valley aimed at perceived PNU supporters; counter-attacks by PNU in the South Rift Valley and Nairobi; and excessive use of force by the security services in ODM strongholds, all including GBSV.<sup>444</sup> It also identified the causes of the violence, with the announcement of the supposed presidential results and swearing-in providing the trigger.<sup>445</sup> Civil society challenged claims of the PNU and international media that the violence was atavistic and primordial: 'the violence [was] neither genocide nor ethnic cleansing', given that the state had not collapsed but was conducting selective and uneven policing aimed at preventing protest and not providing protection.<sup>446</sup> It identified possible solutions to the electoral conflict, discounting arbitration through the Judiciary given the new judicial appointments made unilaterally by Kibaki (three in the very week of the 2007 General Elections) and the lack of judicial independence. It moved soon from an initial call for a re-count or re-tally to one for a political settlement<sup>447</sup> through mediation.<sup>448</sup>

Civil society then brought pressure to bear on the two parties to agree to the mediation,<sup>449</sup> including through regional and international advocacy to highlight the electoral conflict and provide information on its causes<sup>450</sup> in key capitals, including the seats of the AU, EU and UN.<sup>451</sup>

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<sup>442</sup> Kanyinga (2011), p 101.

<sup>443</sup> McGhie and Wamai (2011), p 17.

<sup>444</sup> Kanyinga (2011), p 86; Wanyeki, L Muthoni, cited in Kanyinga (2011), pp 92-3; Kiai (2008), p 141; Wanyeki (2008), p 55.

<sup>445</sup> Kanyinga (2011), p 93.

<sup>446</sup> Kiai (2008), p 142.

<sup>447</sup> Kanyinga (2011), p 102.

<sup>448</sup> Kanyinga (2011), p 98.

<sup>449</sup> Kanyinga (2011), p 89.

<sup>450</sup> Kanyinga (2011), p 86.

<sup>451</sup> Kanyinga (2011), p 99.

It called for consistent regional and international pressure to get the two parties to the negotiating table and keep them there, condemning actions that delayed or subverted the mediation, especially by the PNU's hardliners.<sup>452</sup> Given the initial US response, civil society paid particular attention to the US in capital, calling for its leadership at the UN Security Council on Kenya, the release of the IRI exit poll, suspension of military assistance, re-channelling of development assistance through civil society, travel bans and asset freezing of hardliners on both sides as well as those implicated in violence through both armed groups and militia and the security services.<sup>453</sup> Finally, during the mediation, it called for truth and justice and for no impunity for either the elections or the violence through investigations into both, a political settlement through power-sharing in the form of a transitional government of both PNU and ODM for a short period to oversee constitutional, electoral, security service and judicial reform, prepare for devolution, establish a TRJC and conduct new elections.<sup>454</sup>

Civil society's impact was clear. The PNU's initial position was weakened and few states recognised Kibaki's presidency. KPTJ's demand for truth and justice about both the elections and the violence as a means to peace was reflected in US Congress and Senate resolutions pertinent to the Kenyan 2007-8 electoral conflict.<sup>455</sup> The data and analysis handed over to the Panel was used to leverage, when necessary, the positions of the PNU and ODM negotiating teams.<sup>456</sup> And civil society demands were reflected in both the Road Map and agenda items for the KNDR as well as in its final agreements,<sup>457</sup> including on the gendered impact of the violence that ensued from the electoral conflict and the long-term issues and solutions.<sup>458</sup>

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<sup>452</sup> Kanyinga (2011), p 86; Kiai (2008), p 140.

<sup>453</sup> Kiai (2008), p 143.

<sup>454</sup> Kanyinga (2011), p 99; Kiai (2008), p 143.

<sup>455</sup> Kanyinga (2011), pp 99-100.

<sup>456</sup> Kanyinga (2011), p 101.

<sup>457</sup> Kanyinga (2011), p 103.

<sup>458</sup> McGhie and Wamai (2011), pp 11 and 17.

In short, with the PNU initially bunkered down and ODM trying unsuccessfully to hold its public protests, leadership ended up being initially provided by Kenyan academics and civil society, as well as, later, the private sector, who provided data and analysis on what had happened and potential solutions to both Kenyan and external publics:

This was the alternative leadership, not something many people prepared for. Picking up that responsibility, as alternative leadership, what do you want to do? Articulate the crisis and begin to frame options out of it.<sup>459</sup>

Gatherings began immediately as everybody was:

Struggling like everybody else to understand what just [had] happened, from understanding [of] what'd happened, to seeing what was happening, the wanton destruction, the killings, the destruction of property.<sup>460</sup>

Kenyan academics soon merged with the governance, human rights and legal organisations to form what became known as KPTJ, whose distinguishing features were two-fold. First, 'breaking ranks' with its members' assumed political positions based solely on their ethnicity:

We talked about 'breaking ranks'. Said let's get a group of 'Mount Kenya' professionals [Mount Kenya being the PNU stronghold], go public about the government stealing the election, plunging the country into chaos. Said 'breaking ranks' to say we want justice for these elections. Was a popular idea, needed about 50 of us to say we've broken ranks.<sup>461</sup>

People in that room were the new Kenyan ethnic, the cross-ethnic. Because everybody had sunk into this identity crisis. But people who'd consistently viewed Kenya as a viable entity gathered in that room, began asking what to do. Skilful at avoiding perception that were one ethnic group because politics had been ethnicised. Ethnicity the cover but ideological and policy questions underlying that.<sup>462</sup>

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<sup>459</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>460</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>461</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>462</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

Second, the provision of data and analysis on the elections and the patterns of the post-election violence, together with demands for truth and justice and engagement with the region and the rest of the international community:

Became a question of how soon does Kenya collapse. A core part of civil society wouldn't take Kenya caving in while sitting there. First question was electoral violence. As became clear police carrying out shenanigans, ethnic violence in the Rift, question of peace and accountability became part of it. Within 48 hours, a huge group, about 40/50, press conferences, reaching out to the international community.<sup>463</sup>

This group had been forming, what ended up becoming KPTJ, meeting at the Kenya National Commission on Human Rights (KNCHR), talking about how to respond.<sup>464</sup>

Don't remember what made us go to the National Commission but we started gathering and working.<sup>465</sup>

Maina [Kiai] convened us at KNCHR.<sup>466</sup>

Continued to meet [as academics], another group meeting [at the] KNCHR, at some point, those groups merged and originated what is now KPTJ. That went on, got off to various initiatives, got structured.<sup>467</sup>

Formed our own group, KPTJ. Clear, informed and informative, institutions talking together, as opposed to the Serena [Hotel] group [of writers and peace and security organisations] which was individuals trying to have the status quo, the peace, calm agenda. Side-lined it.<sup>468</sup>

We were trying to put together the story of what'd happened with the elections with the help of Koki Muli [then Executive Director of the Centre for Governance and Democracy, CGD, which had been key to the domestic elections observation umbrella]. We released a statement, collated what we were hearing, no peace without truth and justice. Took Koki's statement, she took us through what'd happened, began to inform what we were saying, were putting together the pieces.<sup>469</sup>

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<sup>463</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>464</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>465</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>466</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>467</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>468</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>469</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

The one thing everybody agreed about, including PNU sympathisers, was that needed to establish what'd happened with the elections.

That people had been killed began to settle [in] when [the Independent Medical-Legal Unit] (IMLU) began to document how many people had been killed and how had they been killed. Other people in the room were doing survival support. There were three competing narratives of victimhood. Narrative about displacement, being sent off from one's land and losing property. Also the story of injury. The invisible story was the story of the deaths.<sup>470</sup>

Writers and Kenyan mediators who worked with peace and security organisations were, in parallel, forming what became known as CCP whose distinguishing feature was seeking to end the violence by encouraging dialogue between ODM and PNU, well in advance of the AU intervention:

[Writer] Binyavanga [Wainaina] and I had been working on *Kwani* 5, [a] creative take on the elections. Building up by talking to people, commissioning work, workshops, people going into the field. People calling, saying can't stay on in the field, heard there were going to be problems.

Apart from these calls, other conversations with writers, creatives, other friends, using all contacts to find out what was going on. Remember stopping being an editor, stopping being a writer [and] starting being a citizen. People who straddled civil society and writing were going [to the Serena Hotel]. The Serena meetings concentrated on two areas. Everybody would give a small testimony, what they knew, what they'd heard, what other people were doing. Then what do we do. Nucleus of idea for [Concerned Kenyan Writers] (CKW). How to get beyond time, space-specific Serena meetings. Writers' group so people could share all these things.

Binyavanga, Ory [Okolloh, Ushaidi founder], myself, [journalist] Parselelo [Kantai]. Daudi Were [IT specialist] as group was going to be online but also had an activist background.<sup>471</sup>

Started calling. [Ambassador] Bethuel [Kiplagat, mediator for the Somali peace talks], Florence [Mpaayei, Executive Director of Nairobi Peace Initiative, NPI]. This didn't look good, situation falling apart.<sup>472</sup>

Kiplagat calls me [General Lazaro Sumbeiywo, mediator for the South Sudan peace talks], I call [General] Daniel Opande, he's got IDPs on his farm, Kiplagat calls George [Wachira of NPI. Dekha [Ibrahim] came in, she was the most useful person on our team. She was Muslim and she was a woman so we made her our Convenor. Gave us the leeway not to be seen. Our people put tags on us, I was being rung by

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<sup>470</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>471</sup> Interview with Billy Kahora, Editor, *Kwani* and member of CKW, Nairobi, February 12, 2015.

<sup>472</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

people from my community saying: ‘Get out of that place or we’ll burn your place’. I said: ‘Why don’t you burn it, why are you informing me?’ Became acceptable, Daniel a Luo, myself a Kalenjin, just a group of Kenyans and the flavour of Dekha, from North-Eastern province, married at the coast.<sup>473</sup>

Grew group tending towards a movement, CCP. Quickly forming, being surprised how many people available to lend themselves to idea that needed to secure the peace for things to happen.<sup>474</sup>

Discussed solution, came to conclusion only way forward was a government of national unity.<sup>475</sup>

While there were women in leadership in both KPTJ and CCP, what became known as the Women’s Consortium came together later than the rest of civil society and at the initiation of Machel, a member of the Panel. Relative to the rest of civil society, it also spent more time members were affiliated to political parties. A benefit of this, however, was that the Consortium could reach out to both sides. But because of when it came together it responded more to the mediation agenda already on the table:

The response was based on a request from Graca Machel to convene women so that they speak with one voice. The challenge was women were polarised by tribe and political party. Having been here before for the APRM, she’d noticed that. Graca didn’t want to receive different petitions from women’s groups, she wanted one voice.<sup>476</sup>

This had come out of Graca saying to [Mary] Wandia she wanted to know what women were thinking. When Graca came, Wandia reached out to us across party and professional lines. Asked to come as women from the women’s movement but also ODM, as feminists able to influence ODM. We were given space to present views just as women.<sup>477</sup>

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<sup>473</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>474</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women’s Consortium, Nairobi, February 26, 2015.

<sup>475</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

<sup>476</sup> Interview with Mary Wandia, member of the Women’s Consortium, Nairobi, February 27, 2015.

<sup>477</sup> Interview with Atsango Chesoni, lawyer and member of the Women’s Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

Call[ed] women together to reflect on crisis and contributions to a solution. Asked if I could convene women's meetings to understand what was going on and add a voice. Convene[d] women's forum and my role was to facilitate.<sup>478</sup>

Had to ensure had women from key ethnic groups, political parties and sectors. Especially women from key political parties, ODM and PNU. The Urgent Action Fund (UAF) was already supporting the response to violence against women, women working on reconciliation. Also reached out to the UN Development Fund for Women (UNIFEM).<sup>479</sup>

We need[ed] to 'spit' to take advantage of the space Graca had opened up. We talked about that legacy of exclusion within the women's movement.<sup>480</sup>

Provided space for women to acknowledge that, prior to the elections, they weren't united, that was why it was difficult to provide joint response. Requested space for candid conversation on what kept them divided to overcome that and work together. We later came to call [that meeting] a 'spitting' session.

Because people had different feelings and explanations on what was wrong, what was happening and how it'd impacted on them. Women from North-Eastern, saying not part of the problem. Women from Nyanza were bitter as felt their people had been targeted and didn't feel people speaking out and supporting them. Women from Kisii feeling had never had any issue with any ethnic group but, neighbouring the Luo, had also suffered. Acknowledged had been polarised by tribe and political party which had made it impossible for them to offer alternative voice prior to the elections. A challenge to be overcome. A space to come together as women of Kenya.<sup>481</sup>

Not just wearing identity as women, wearing many identities, ethnic groups, professions, political affiliations, religious identities. Needed to vent as difficult to shape memorandum without individuals looking at it from their political affiliation lens or an ethnic lens.<sup>482</sup>

An agreement we'd nominate 11 women who'd collect and put forward women's concerns to the Eminent Persons.<sup>483</sup>

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<sup>478</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>479</sup> Interview with Mary Wandia, member of the Women's Consortium, Nairobi, February 27, 2015.

<sup>480</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>481</sup> Interview with Mary Wandia, member of the Women's Consortium, Nairobi, February 27, 2015.

<sup>482</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>483</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

The private sector too took longer than civil society to forge a response, partly because a generational tension within it had to be overcome. The older generation had benefited more from state patronage and was more ready to accept PNU's incumbency as long as the violence ceased. The younger generation, not being as reliant on the state, felt freer to push a policy-oriented response:

Was in Nairobi when results were coming in. Raila leading. Landed in Mombasa, drove to Watamu, something had changed. Don't remember if it was [the burning of] Kiambaa church [in the Rift Valley], began hearing incidents at the Coast, Gikuyus in Diani starting to get into trouble. Called Patrick Oboth, Chair, [Federation of Kenya Employers, FKE]. I was Vice-Chair and discussion was that business community needed to make statement. Steve Smith [Chief Executive Officer], Eveready, Chair of KEPSA [Kenya Private Sector Alliance]. Vimal [Shah], Chair of KAM. Things getting worse, kept hearing about areas where people turning on Gikuyus. Organised a meeting at Holiday Inn, called friends from different communities, had a joke: 'Are you about killing me now?' KEPSA, KAM, decided to have one meeting. Before rivalry. In face of this crisis, business community came together and agreed on KEPSA as voice, channelled everything through them.<sup>484</sup>

The first priority was getting data, analysis and proposed solutions out to domestic and other publics. The media, well aware from the start of the deteriorating situation, made decisions to both open up to alternative leadership and also help convene the same:

You call your journalist, he tells you he's on top of a building and people are coming for him, so send a helicopter. From page one to last page, nothing other than bloodshed. Do we continue reporting bloodshed or do something else?

Let's engage. Alternative news. The editorial: 'Save our Country' was driven by the Editors. Although the Media Owners Association (MOA) discussed it, was thought out and executed by the Editors. We had a common headline [across all media outlets].<sup>485</sup>

The data and analysis concerned, first, the process and supposed outcome of the presidential election. KPTJ staged a protest to file a complaint at the Kilimani police station, held press conferences to release public statements and deployed its members to various talk shows on

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<sup>484</sup> Interview with Mugo Kibati, former Vice-Chair, Federation of Kenya Employers (FKE), Nairobi, April 29, 2015.

<sup>485</sup> Interview with Linus Gitari, former Group Managing Editor, the NMG, Nairobi, February 16, 2015.

Kenyan and other television stations to ensure Kenyan and other publics could begin to understand what had happened and possible solutions:

Through public statements, buying space in the papers. We were also writing, op-ed pieces, and buying space'.<sup>486</sup>

I forgot our first demonstration when walked from the [Kenya National Human Rights] Commission to the [Kilimani] police station. A little thing but had impact. Forgetting meetings where people stood up, one by one, Shailja [Patel, poet] asked everybody to stand up and say why they were there.<sup>487</sup>

Decided needed to do some media interventions. Called Julie Gichuru [a television talk show host with the Nation Media Group, NMG], she agreed, went on and did say persuaded the election had been stolen and that that was a recipe for chaos. As soon as I left, got calls by people who weren't amused.<sup>488</sup>

Was one of the talking heads on [television].<sup>489</sup>

A journalist called, asked whether I had an idea of what could be done. I said a coalition government. I went to Citizen or KTN [Kenya Television Network] and was calling it power-sharing. Said the purpose is to have a framework in which a new election can be held. This was the most difficult part: passing the message on the election through the media. The media became the most important disseminator of the message.<sup>490</sup>

CCP was also deploying its members to various television talk shows to urge a cessation of violence and dialogue between ODM and PNU, while KPTJ shared data and analysis of the specific patterns of violence:

Agreed important to go to the media, in particular TV and radio stations. People's reactions to TV powerful, needed to use to call for peace, say not to kill one another and destroy property, allow for dialogue and maintain calm.<sup>491</sup>

First move was to talk to Kenyans through the media, to say if we allow the country to disintegrate, there'll be consequences. Need to hold politicians accountable, but not be willing to die for them.<sup>492</sup>

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<sup>486</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>487</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>488</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>489</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>490</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>491</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>492</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

Publicising the idea of liv[ing] together in peace. Making statements in the media. Sumbeiywo and myself [Kiplagat] went to Kass FM to speak in Kalenjin: when you shed blood, the land is contaminated, when you kill, you're also affected. Prayed, spoke, had a night vigil.<sup>493</sup>

Then Kofi Annan came and we'd released a full-page statement in the dailies. No interest in becoming a pariah state. Analysis of the violence. Negotiations not for political parties alone, shouldn't be reduced to share the cake.<sup>494</sup>

At the same time, writers affiliated with CKW, itself affiliated with CCP, began to target the international media, incensed with the simplistic understanding of the post-elections violence that they had adopted (reducing the same to supposedly historical 'tribal' conflict):

At some point, the Western correspondents' narrative started. One word being bandied about was genocide. Immediately, this *Kwani* crowd, 'How to write about Africa', [crowd, reacted with] alarm. That's when CKW seemed to get purpose. Everybody encouraged to write what they knew, thought, what other people were doing and send this material to counter the meta-narrative about this crisis. Everybody [was] asked to give contacts and resources, to send material to the West, so could get out there.<sup>495</sup>

A writer formed a committee [that] wrote articles about the situation in Kenya, got about 45 articles published internationally.<sup>496</sup>

Despite the differences in focus of the two main civil society umbrellas that emerged, KPTJ and CCP, there was quite a lot of cross-over. Both had contacts across the different umbrellas, utilised to come to a common understanding of what needed to happen well before the AU intervention, namely some form of accommodation.

Critical constituencies were engaged, including faith-based organisations (FBOs) and the private sector:

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<sup>493</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

<sup>494</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>495</sup> Interview with Billy Kahora, Editor, *Kwani* and member of CKW, Nairobi, February 12, 2015.

<sup>496</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

Also convened within the International Commission of Jurists (ICJ), a meeting of members to think through as legal problem. Prepared document giving options for resolving Kenya's problems. A caretaker government with participation of both PNU and ODM. A caretaker government without either to organise elections. Power-sharing, first time mouthed or articulated. Looked outlandish at the time. But one of the possible solutions.<sup>497</sup>

People started reaching out to other groups, including religious groups. Nobody had good ways to pass the message to PNU. Also difficult to pass the message to the private sector as all it was [initially] interested in was stopping the violence. It was not concerned about justice for the elections. The coalition government idea found traction as easier than justice for the elections.<sup>498</sup>

Meetings with various constituencies, talking to business, talking to the religious people.<sup>499</sup>

Started doing outreach. Did speak to business. The one that left biggest impression was [with] the [Anglican] Bishops. The room was full of these Bishops in all their regalia and long hats. Became clear they were ethnically polarised. [But] Remember Wabukala talking about compromise and bringing Raila in as Prime Minister.<sup>500</sup>

At the same time, critical constituencies on the ground, particularly in areas affected by the post-election violence, were also engaged, including with providing practical (financial) support to enable organising and community-level responses and facilitating community-level advocacy:

With regard to places where already people were being killed, displaced, like in the north Rift, had a network that cut across the country, in Eldoret, in Mombasa, began to reach out to them. In Eldoret, reached out, started to help mobilise networks of peace, asked what needed, even airtime. How to conduct burials, how to reach people in the camps, get medical help for women, sanitary pads, food, so that stay in camp would be dignified.

In Kibera, had worked with youth so began to also mobilise them through Peacenet, [the] Peace and Development Network. They had monitors on the ground and were able to see how violence affecting people. And the religious leaders, Christian and Muslim, from networks we'd begun working with from 2001 to address conflict evolving at grassroots level. That was the first reaction, who was our network, how could they respond and call for calm as volatile and people

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<sup>497</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>498</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>499</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>500</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

divided along ethnic lines. If people not happy with elections, how to address that credibly.<sup>501</sup>

Met Bishop [Jackson] Kosgei, leader in Rift Valley. Told him he had responsibility as a clergyman, as a Christian leader, to deal with what's happened. Blood has been shed, the land is contaminated. He listened, two days later, called a meeting of Kalenjin leaders. He asked me to address them, to tell them what I'd told him. Spoke frankly, asked me a few questions. After some days, he called me and gave me a statement that that group had done, stealing votes not right, killing is not right, agreed to establish a committee to deal with peace and reconciliation. Challenged him again, said would like him to get hold of pastors from Kalenjin to take initiative to meet with pastors from Gikuyuland. He took the idea and organised a delegation of pastors, seven or eight, from Kalenjin and approached Kikuyu pastors, they met. What he told me is that the pastors, after praying, the Kalenjin apologised, said sorry for what'd happened, that broke the ice, with time they mellowed and began talking. Said continue and get the message down in Rift Valley, they took it up with people like [Major-General John] Seii, Chair of the Elders. This went on for more than a year. Culminated in a joint committee of Kikuyu and Kalenjin in Eldoret.

Had a request of pastors from Kalenjin who wanted to meet with the American Ambassador. Called him, he agreed, arranged a room, left. They had a two-, three-hour meeting, mine was to facilitate.<sup>502</sup>

Once all the civil society umbrellas were on board, they tried to engage both ODM and PNU. Given its data and analysis of the elections, KPTJ found it easy to reach ODM. However, they weren't on the same page as concerned the violence. And even CCP had difficulty reaching PNU although the Central Organisation of Trade Unions (COTU) obtained an audience with the person in the presidency. Members of the Women's Consortium, however, being more political-party-affiliated, had access to both, although not all were transparent about how they utilised this access:

Met the Pentagon, Ruto was there, Charity [Ngilu] in her sneakers coming from some march, Raila falling asleep, Anyang [Nyong'o]. Orengo. They were wanting to form [a] Movement for the Restoration of Democracy. We laid forth our analysis, the pattern of the violence, said they'd have to stop the violence in the Rift [Valley]

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<sup>501</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>502</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

and Ruto was scary. His eyes just flashed. Inconclusive. We weren't going to work with them as long as engaging in violence but kept the door open.<sup>503</sup>

People were reaching out to people at different times. Got upset with [ODM] re: their lack of energy, focus, strategy. Some of us were interested in doing it on our own, an independent approach.<sup>504</sup>

Never made direct contact with party that had claimed to win the election, the President. Made direct contact with the ODM, including meeting with Raila Odinga and his lieutenants. ODM dismissive, didn't think right to sit down and talk and understandable in terms of strategy. With regards to the PNU, we were talking to people other than the Principal himself. Carrying messaging across two sides, tried to reach out to Principals.<sup>505</sup>

The only person from the PNU who talked to us was [PNU's Minister of Finance Amos] Kimunya. The rest kept themselves off.<sup>506</sup>

We played a pivotal role. It is us that made them tone down the arguments, the fight, the confrontation, between Kibaki's team and Raila's team. On 18<sup>th</sup> January, we had the first meeting with the President and Raila. The President was hostile. He didn't want to hear about [ODM], particularly Ruto. We had to appeal to him that Kenya's bigger [than them], our children and grandchildren must live here, he must accept dialogue. Impressed upon him to be in touch with the AU. It was us who proposed Kufour. Muthaura supported us.<sup>507</sup>

Directly in touch with our party leadership. Also had meetings as women affiliated with ODM. The PNU women were not as honest about their party affiliations. Nobody declared.<sup>508</sup>

Still having back channels, especially to political parties. Information going back to political parties. Goes to show how the women's movement held hostage by ethnic and political interests.<sup>509</sup>

The private sector also had easier access to PNU, after an initial shock at the manner in which it was handling the fall-out from Kibaki's swearing-in:

[Minister for Roads and Public Works, John] Michuki banned live feeds, transmissions. I was livid, thought it the wrong decision. Called [his son,] Fred

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<sup>503</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>504</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>505</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>506</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>507</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

<sup>508</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>509</sup> Interview with Mary Wandia, member of the Women's Consortium, Nairobi, February 27, 2015.

Michuki, then my banker, asked: ‘What are we doing, are we in a state of national emergency if you’re interfering with press freedom?’ He went off on me: ‘You guys not with the programme, we’re going to crush these guys.’ Realised oops, things more serious than I thought. Called my friends, my peers and asked if you’re talking to these *wazees* [old men], they’re crazy, they’re no longer rational.

Tried to get meeting with Kibaki. Tried to get meeting with Raila, Raila’s view was that KEPSA just Kikuyu, Indian. Then invited by Muthaura, trying to organise business community to go see Kibaki, but [with] [established Gikuyu businessmen], mostly Kibaki friends, none a member of KEPSA, wealthy, have disdain for organised lobbying. Mistake they made was going under guise of KEPSA. Wrote to State House Controller, with list of names of Board members of KEPSA. On morning, they were at State House, we jumped ahead of them. Which was good. Two slipped in so Kibaki saw faces he knew.<sup>510</sup>

Given all the above, both civil society and the private sector laid the ground for the eventual AU intervention and the mediation process. The media had the idea from the start that mediation was necessary and proactively supported the convening of Kenyan mediators that eventually grew to become the CCP. The Kenyan mediators, while consciously constituting CCP so as to reflect a multi-ethnic umbrella quickly saw the need to go outside Kenya and reached out to their contacts across Africa:

Why not get Kenya, a provider of people to reconcile others, [in] Somalia, Kiplagat, [in the] Sudan, Sumbeiywo, [in] Mozambique, Opande. Why don’t we gather them? Put them in Serena [Hotel] where they went on to convert themselves to Concerned Citizens for Peace. The advantage was that we had alternative voices, they were an also an oasis of hope. They tried to bring in [Archbishop] Tutu.<sup>511</sup>

Contacted Bethuel Kiplagat, General Opande, Dekha Ibrahim, important to have a Kenyan face, important to have a face from North Eastern and a woman. Had General Lazaro Sumbeiywo, his experience with mediation processes in the Sudan. Would bring in soberness. Also Kalenjin and would help balance who was sending out peace message. These individuals appropriate to appeal to the high level, able to reach out to Kibaki, Raila, the five in the ODM, were credible, were people who’d brought honour to the country.

Launched the day after the eruption of the violence, speedy, started contacting people, made call to South Africa looking for Archbishop Tutu. Models seen in other places, how to get people out of dangerous moments, create possibility for alternatives.

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<sup>510</sup> Interview with Mugo Kibati, former Vice-Chair, FKE, Nairobi, April 29, 2015.

<sup>511</sup> Interview with Linus Gitari, former Group Managing Editor, the NMG, Nairobi, February 16, 2015.

See who we can reach out to, even outside Kenya, engaged with General Opande and Bethuel Kiplagat, talked to the All Africa Conference of Churches (AACC) to talk to Desmond Tutu to see if could come and talk to Kibaki and Raila. Increasingly, began to see need for analysis of what was going on and need for options.<sup>512</sup>

[I, Ambassador Kiplagat] Was working with the APRM, an Eminent Person. Went to Nigeria, had a breakfast appointment with [former Nigerian President Olusegun] Obasanjo, said what's happening in Kenya not good. Said he's been trying to call Raila. Called Nairobi and instructed somebody to contact Raila and tell him that Obasanjo has to speak to him today. An hour or so later, message came back confirming he would. The next day, he came running, so happy, said Raila's coming tomorrow. Briefed him, said: 'Sir, don't allow Raila to go back the same day, he needs to rest, he's under tremendous pressure, show him your chickens, let him walk on the farm, let him sleep.'

Then the idea came up for the AU to send Kufour to intervene. Wasn't sure Kufour the right person. A President, wouldn't have time. When choice made for Kofi Annan, endorsed it. Former Heads of State came. Kofi, the four ex-Heads of State.<sup>513</sup>

The reaching out across the continent by CCP was supplemented by regional advocacy by

KPTJ. KPTJ sent a delegation to the January AU Summit of African Heads of States:

The AU was involved from the beginning. Kibaki knew an important site and invested in projecting an image of calm: 'This is a small tiff.' Civil society began to say this is also an important site to engage. Had a mediation crisis, because didn't have anybody who could talk to both sides. Had PNU and ODM talking at each other and nobody of sufficient stature to sit them down. Kenyan crisis occurred within five years of APRM taking off. Kenya had just completed this process in 2005. Civil society had taken part and created linkages with influential voices within that process, gave them an entry point.<sup>514</sup>

The internationalisation, the international advocacy. We went to Addis [Ababa]. The AU. The ODM delegation [was there] but they were out of their depth, traumatised and emotive. We ended up making their case. We did effective advocacy in Addis [Ababa] and that changed things. We came in, they [the PNU] were there, they saw us and did a double-take. We were the last people they wanted there.

Those advocacy forays had impact, being there, solidarity with African civil society, those things were beginning to push PNU to the status of a pariah regime

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<sup>512</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>513</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

<sup>514</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

and [for] these people who were more of a business elite, those were fairly costly things, both for prestige and their pockets. For [the AU], to meet ordinary citizens who could articulate issues, that strengthened them as otherwise would've just been listening to the two sides. Given the bad blood and [that] my friends in ODM were incoherent, some cool heads around helped.<sup>515</sup>

We also went to the AU [Summit]. We went to the AU again in February. Since not allowed into the Summit, went around talking to various delegations. Some were like: 'This is just your usual disputed elections.' Others, like Senegal, [were] supportive. Managed to put the KPTJ analysis on the agenda. That persuaded people and began to draft a statement for the PSC. Described what had happened, said it was a civilian coup, described the violence, how the GSU had moved in, how Kibaki sworn-in surreptitiously or hastily. By the time Kibaki came to the AU, he found a not very friendly reception. They went as far as they could in terms of indicating to him he had to go back and sort out his problems.<sup>516</sup>

KPTJ also carried out international advocacy, through the Western diplomatic community in Nairobi, in key Western capitals, in Brussels with the EU and in New York with the UN:

Meetings with international partners. Then we started reaching out internationally. I was invited to London by the all-Africa parliamentary group and the Royal African Society and used that to convey our message. Started developing a written position. I went to London, Brussels, met people at the EU, international NGOs [non-governmental organisations] in Brussels, various delegations of the EU. Then I went to Oxford. An MP [member of parliament] spoke on the floor of parliament and mentioned me and the KPTJ proposal. Talked to the media, went to the BBC [British Broadcasting Corporation], talked to the *Guardian*, went to the FCO [Foreign and Commonwealth Office], those cold fish. Then you and Maina went off [to Washington DC and New York], wrote your [*New York Times*] op-ed.<sup>517</sup>

Once the idea of an AU intervention had gained traction, in the form of a mediation between ODM and PNU, civil society also engaged the Forum of Retired African Heads of State and the AU Panel of Eminent African Personalities. The aim was to ensure that the mediation process would result in truth about and justice in respect of both the elections and the violence.

And to continue to provide domestic backing to the idea of a political settlement:

As part of KPTJ, went to see the Elders, Maina [Kiai]. Making suggestions. Remember meetings we'd have, the fact that scared, that harm just around the

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<sup>515</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>516</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>517</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

corner. All the ups and downs and the pre-mediation discussions in various places. Then the mediation itself.<sup>518</sup>

The significant event was the first meeting with the mediators. There was Kaunda, Graca, Chissano, Mogaye, Mkapa.<sup>519</sup>

Met with Kofi Annan's mission, met with the retired Presidents, Mkapa, Kaunda, Festus Mogaye. Kaunda mentioned that [KPTJ's was the] first gender-balanced delegation he'd met.<sup>520</sup>

When Kofi arrived, met with him. Decided to let Dekha be the face, a lady, the youngest amongst us, the Kikuyu/Kalenjin factor. Met with Kofi a number of times, gave them the brief a number of times, made suggestions, had lunch with Mkapa [and the former Heads of State].<sup>521</sup>

CCP had five individuals in the forefront and male-dominated, not hearing women's voices. Yes, had women in negotiating team and Graca in the mediation but didn't feel had Kenyan women contributing.<sup>522</sup>

Despite the fact that women were at the negotiating table, we were concerned women's concerns wouldn't come through. We wanted a peaceful resolution to the violence, to be sure that whatever came out of the negotiations would ensure that women's rights would be respected. We did insist that whenever the Eminent Persons went around the country, they should hear the voices of women, not just the privileged male elite. We were able to say that all those instruments in the National Accord needed to include women.<sup>523</sup>

Focus on how to engage with the mediation team. Appointed a working group to consult with the wider group and come up with a statement to be presented to the mediation team. Ten or 12 people. Cautious to ensure women affiliated to ODM were represented, PNU, other groups based on their professional contributions. The team started working on the statement and then decided to organise a meeting where they invited women from Rwanda to share experiences on conflict, post-conflict. The women managed to hear from women from other post-conflict settings on best way to engage.<sup>524</sup>

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<sup>518</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>519</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>520</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>521</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

<sup>522</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>523</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>524</sup> Interview with Mary Wandia, member of the Women's Consortium, Nairobi, February 27, 2015.

Once the mediation agreements were concluded, both CCP and KPTJ continued with more long-term initiatives. KPTJ focused more on monitoring implementation of the mediation agreements, particularly those intended to obtain truth about and justice for both the elections and the violence. CCP focused more on continued peace and reconciliation at the community level in areas affected by the post-elections violence:

2013, a meeting in Naivasha. Initiated by the pastors. About 80 people, Kalenjin, Kikuyu leaders, businesspeople, politicians, discussing peace, that must live together. That Gikuyus there belong to Rift Valley, jokingly accusing them, had reached position where could speak. Invited Ruto who came and addressed the meeting, said must live together. Uhuru came, spoke in the same vein, that need to work together, live together. Before the elections.

Then the elections in March [2013]. The AACC, the Secretary-General, told me they have a request from Rift Valley through the National Council of Churches of Kenya (NCCCK), that the group working for peace and reconciliation would like to send a delegation to Rwanda.<sup>525</sup>

#### *4.5.2 The AU's RECs under its peace and security architecture*

Under the AU's peace and security architecture, the relevant RECs are intended to be the first port of call and the first responder in situations of conflict, including electoral conflict. This was not, however, the case in Kenya's 2007-8 electoral conflict, in which the AU intervened directly through mediation by the Panel. Were the EAC and IGAD 'marginalised' by the AU despite the division of labour and subsidiarity that pertains between the AU and the RECs on conflict-resolution?<sup>526</sup> Or were the RECs just 'tested' and found wanting?<sup>527</sup>

Although the EAC's EALA's EOM did not endorse Kenya's 2007 General Elections, no use was made of IGAD's early warning system<sup>528</sup> and statements of concern by the two RECs'

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<sup>525</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

<sup>526</sup> Khadiagala (2009), pp 431-2.

<sup>527</sup> Khadiagala (2009), p 431.

<sup>528</sup> Khadiagala (2009), p 441.

most senior political leaderships did not translate into either of the RECs taking charge of the intervention through mediation. The question is ‘Why?’ It has been posited that cultural and historical differences among the EAC and IGAD member states persist, with all also being illustrative of low levels of democratisation given the continuities from the pre-multiparty into the political pluralist era. In addition, the EAC and the IGAD are both weak institutionally, the former particularly as concerns peace and security, and thus have yet to demonstrate similar levels of influence as their southern and western counterparts with respect to conflict resolution. This lack of capacity and influence was evident in Kenya’s electoral conflicts of 1992 and 1997—and became starkly so in 2008.<sup>529</sup>

In addition, Uganda’s President Museveni was one of only four African Heads of State and Government who initially endorsed Kibaki’s supposed electoral victory. This undermined his attempts, in his capacity as then EAC Chair, to intervene through mediation—particularly as he then deployed the Ugandan military near Kenya’s western border.<sup>530</sup> His attempt at a parallel intervention through mediation ended with his presence at the launch of the KNDR, effectively ceding ground to the AU.<sup>531</sup> That said, it was Tanzanian President Kikwete, who had just succeeded Kufour as AU Chair, whom the Panel invited into the final negotiations directly between the two Principals—in his capacity as both AU Chair and a peer with an executive in which power was shared between the President and the Prime Minister.<sup>532</sup>

Thus, although the AU can rightfully take credit for the intervention through mediation in Kenya’s 2007-8 electoral conflict, it has to be noted that that intervention through mediation was not, strictly speaking, according to the design of the AU’s peace and security architecture and the

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<sup>529</sup> Khadiagala (2009), p 434.

<sup>530</sup> Khadiagala (2009), p 437.

<sup>531</sup> Khadiagala (2009), p 439; Lindenmayer and Kaye (2009), p 5.

<sup>532</sup> Kanyinga and Walker (2013), p 11.

intended division of labour between the AU and the RECs. Whether there has been policy learning since by the EAC and IGAD is questionable. ‘For the most part, East Africa treats the Kenyan events as if they never happened’.<sup>533</sup>

#### 4.5.3 *The rest of the international community*

The rest of the international community—defence, development and diplomatic—has been blamed for failing to recognise and respond to what became the trigger for Kenya’s electoral conflict as well as its proximate and structural causes. Not only did it tend to focus only on the lead-up to General Elections in Kenya, but it failed to proactively address the violence that preceded and accompanied the General Elections of both 1992 and 1997. Due to competing foreign policy aims, it opted instead for ‘quiet diplomacy’, while channelling humanitarian assistance through the very state that had sponsored that violence, thus contributing to the lengthy and ultimately failed political transition of 2002 and undermining democratic consolidation.<sup>534</sup>

Continued economic and military assistance from the UK and US in particular stands accused of enabling the stalling of political transition and democratic consolidation—culminating in Kenya’s electoral conflict of 2007-8.<sup>535</sup> ‘Decades of turning a blind eye to corruption, impunity and mismanagement by Kenya’s governments has contributed to this crisis’.<sup>536</sup>

Prior to the violence that ensued from electoral conflict, the international community lacked a ‘thick’ understanding of Kenya’s political context<sup>537</sup>—in part due to the regular rotation of defence, diplomatic and development staff and the resulting lack of memory about 1992 and

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<sup>533</sup> Khadiagala (2009), p 443.

<sup>534</sup> Brown (2009), pp 389-91.

<sup>535</sup> Khadiagala (2009), p 435.

<sup>536</sup> Brown (2009), p 389; Human Rights Watch (HRW), cited in Weiss (2010), p 29.

<sup>537</sup> Kanyinga and Walker (2013), p 1.

1997.<sup>538</sup> It thus misread the absence of violence during the General Elections of 2002 and the constitutional referendum of 2005, ignored warning signs and failed to proactively prevent violence from ensuing from the 2007-8 electoral conflict.<sup>539</sup>

The data and analysis that would enable a ‘thick’ understanding of Kenya’s political context were available. Conflict and governance and conflict analyses had been commissioned and were available, including those in the APRM’s 2006 report and the Kenya Joint Assistance Strategy (KJAS). The APRM’s 2006 report had cautioned as to the levels of political polarisation along ethnic lines while the KJAS had included a low case scenario in which the international community would not conduct business as usual. However the KJAS’s low case scenario had been downplayed to ensure GoK agreement and none of these analyses were systematically shared and used in actual programming.<sup>540</sup>

Other warning signs included the unilateral presidential appointments to the ECK just prior to the 2007 General Elections, on-going extrajudicial executions (EJEs) by the security services in their operations against armed groups and militia and the hate speech along ethnic and gender lines during the political campaigns. Structurally, continued neo-patrimonialism (including corruption and impunity) in the context of the stalled constitutional reform process and levels of inequality on ethnic, gender and regional grounds were further warning signs.<sup>541</sup>

Yet the international community proceeded to finance a joint election support programme to the tune of USD12 million.<sup>542</sup> That said, its response to the violence that ensued from the 2007-8 electoral conflict was an improvement on the past. It pressured the PNU to acknowledge the

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<sup>538</sup> Brown (2011), p 7; Kanyinga and Walker (2013), p 7.

<sup>539</sup> Brown (2009), p 391; Kanyinga and Walker (2013), p 1.

<sup>540</sup> Kanyinga and Walker (2013), pp 6-7.

<sup>541</sup> Brown (2009), pp 391-2.

<sup>542</sup> Elklit (2011), p 405.

contested presidential results and submit to mediation, it acknowledged the need for the mediation to be African-led and coordinated well to assist the mediation, in tandem with the low case scenario foreseen by the KJAS.<sup>543</sup>

The normal divide between the development and diplomatic fronts was overcome through the Like-Minded Partners Political Group (Limid-P), usually including political counsellors but, in the lead-up to and during the KNDR, meeting at the level of Ambassadors and High Commissioners to formally collaborate and ensure an appropriate division of labour. Coordination of decisions on development assistance occurred through the Donor Coordination Group (DCG) behind the KJAS and its Democratic Governance Donor Group (DGDG). In the lead-up to and during the KNDR, it met weekly to exchange information and also regularly met with the Panel and domestic stakeholders. A multi-donor trust fund was established to support the KNDR through the UN Development Programme (UNDP), enabling quick disbursements for the KNDR's financial and human resource needs.<sup>544</sup> Both the Limid-P and the DCG's DGDG consulted regularly with Kenyan civil society, particularly KPTJ, and the private sector. 'The international community was very supportive of the strong, outspoken and respected Kenyan activists who also carried considerable public support'.<sup>545</sup>

To get the ODM and the PNU to agree to a political settlement through power-sharing, the international community utilised, in consultation with the Panel and domestic stakeholders, a combination of 'carrots and sticks' which included public statements, visits and targeted sanctions. As the KNDR proceeded, Kenya was visited by the US Secretary of State and the UN Secretary-General.<sup>546</sup> Some bilaterals suspended on-going development assistance, replacing it with

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<sup>543</sup> Aman (undated), p 2; Brown (2009), p 389; Kanyinga and Walker (2013), p 8; Weiss (2010), p 17.

<sup>544</sup> Kanyinga and Walker (2013), pp 9-10.

<sup>545</sup> Kanyinga and Walker (2013), p 14.

<sup>546</sup> Aman (undated), p 10; Khadiagala (2009), p 440; Lindenmayer and Kaye (2009), p 10 and 17; Weiss (2010), p 23.

humanitarian assistance and financing for the KNDR. While the amounts suspended were not that significant, the suspension was a significant signal.<sup>547</sup> The UK was the first to threaten cuts in development assistance, stop some payments and thus affect Kenya's credit rating.<sup>548</sup> The US was the first to threaten use of targeted sanctions for those either implicated in the violence that ensued from the electoral conflict or those impeding progress within the KNDR and proceeded to announce some travel/visa bans and asset freezes.<sup>549</sup> Accordingly, 'the international development and diplomatic communities collectively commanded substantive influence of the nature and trajectory of Kenya's evolving political settlement'.<sup>550</sup>

After the KNDR, the DCG's DGDG created new sub-groups to follow implementation of the mediation agreements, including one on elections to support the IREC, one on conflict to liaise with the CIPEV and one on civil society to continue to liaise with and support civil society.<sup>551</sup> It also provided financing for implementation of the mediation agreements. The US, for example, offered KES1.75 billion for reconstruction and KES2 billion for implementation. However, as the urgency of electoral conflict resolution faded away and the scale of commitments made under the KNDR became clear, the DCG's DGDG reached a decision to prioritise implementation with respect to critical reforms. By 2010, the year in which the new Constitution of 2010 was finally passed through referendum, the international community had reduced the political pressure it had brought to bear on the PNU and the ODM, now in the Grand Coalition Government together.<sup>552</sup>

The international community's unity of purpose, coordination within itself and cooperation with the Panel and domestic stakeholders has been assessed as being a good example of mediation

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<sup>547</sup> Kanyinga and Walker (2013), p 8.

<sup>548</sup> Brown (2009), p 396.

<sup>549</sup> Brown (2009), pp 393 and 397; Kanyinga and Walker (2013), p 11; Khadiagala (2009), p 442.

<sup>550</sup> Kanyinga and Walker (2013), p 1.

<sup>551</sup> Kanyinga and Walker (2013), p 9.

<sup>552</sup> Kanyinga and Walker (2013), p 14.

for electoral conflict resolution.<sup>553</sup> That said, in the more medium- to long-term, it arguably again began to prioritise peace over justice, with negative impacts on democratic consolidation.<sup>554</sup> With respect to the trigger, it focused on the technical (symptoms) rather than political (causes) of the IREC's reform recommendations. This is also the case with the proximate causes in respect of the CIPEV's recommendations for the demobilisation and disarmament of armed groups and militia, security sector reform and accountability. As for the structural causes, although the Constitution of Kenya, 2010 is now in place, land reform is not the focus of attention that it should be.<sup>555</sup> The final assessment is that, with some in the international community remaining or reverting to being risk-averse,<sup>556</sup> the international community focused on state-building for two years following the KNDR but then shifted from the political to the technical.<sup>557</sup> It has justified this shift from political to economic, security and foreign policy imperatives given what it terms its decreased leverage, the limitations of political conditionalities and the fact that they have only indirect or symbolic impacts.<sup>558</sup>

Philanthropies active in Kenya on human rights and justice issues responded to the unfolding situation immediately. The Open Society Initiative for East Africa (OSIEA), as part of the broader Open Society Foundation (OSF) network, made an early decision to support KPTJ with additional funding to enable its response as well as by using its African and global advocacy teams to facilitate high-level access for KPTJ within the region and elsewhere:

This group morphed into KPTJ. Unparalleled, unprecedented, daily report backs to OSF's New York office to let them know where stood. Emergency situation, needed facility this civil society group could use to respond to situation. A grant given through [the African Centre for Open Governance] (AfriCOG), an OSIEA

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<sup>553</sup> Brown (2009), p 401; Kanyinga and Walker (2013), p 1.

<sup>554</sup> Brown (2009), pp 400-1.

<sup>555</sup> Brown (2009), p 399.

<sup>556</sup> Kanyinga and Walker (2013), p 12.

<sup>557</sup> Kanyinga and Walker (2013), p 15.

<sup>558</sup> Brown, cited in Brown (2009), p 399.

grantee, to make sure energy around electoral justice, truth, accountability for crimes against humanity, where we located our programmatic and ideological sympathies. First attempt to inform negotiated intervention was when heard Kofi Annan would lead it. Sent as much information as possible to prepare him. Effort to prepare Graca too, Mkapu not so much. Not sure we had trust in [Annan's] ability to wade into Kenya and not get pushed and bullied up and down. So informally talking to Annan's team, which morphed into grant to South Consulting to do its assessments about how well or how badly implementation was going.

A step ahead of most donors. Because have been in civil society. Bilaterals looking at bilateral aspects and letting diplomats, political officers speak, rather than thinking about Kenya for Kenyans.<sup>559</sup>

With the exception, initially, of the US, the Western diplomatic community also responded decisively to both the elections and the violence. This followed heavy investments after the 2002 political transition, ultimately with disappointing results:

By the time we were going for the elections, [NARC's former ethics advisor, John] Githongo had written his letter [about grand corruption in the NARC government], the raid on the Standard newspapers by the men in black [Armenian mercenaries believed to be acting on behalf of NARC]... the Brits, the Canadians [had] pulled out of GJLOS [Governance, Justice, Law and Order Sector the sector-wide reform programme], left SIDA [the Swedish International Development Agency] there, not the place to be for reforms. We had a donor community that was divided.<sup>560</sup>

In that sense, the elections were the straw that broke the camel's back. And, of course, the violence created as much concern in the Western diplomatic community as it had in the African diplomatic community and the AU, for the same reasons:

The EU [election observation] monitors said: 'Hey, there's a problem'. Clear no credibility. No way could come up with a souped-up report. Then the violence. Wasn't just that Nairobi shut down. They'd been watching Raila strongholds, not enough intelligence on Ruto strongholds and what Rift Valley means to Kenya, food security, the highway.<sup>561</sup>

A lot of straws were broken, this was the last straw. The fact that at KICC [the national tallying centre], there was a clear stalemate, the way the announcement was made, the blackout of the media, the police going in, the way Kibaki was sworn-in. A deluge that knocks down the door. Our own people telling them there's a big problem, the situation wouldn't lend itself to acceptance of Kibaki. Became what to do, how to engage and not be accused not just of bias but of imperialism.

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<sup>559</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

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<sup>561</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

These were not governments Kenya happy to listen to. The spin around regime change would come into play. So when the AU option on the table, the best option.<sup>562</sup>

‘The Americans were not on board initially.’<sup>563</sup> But the initial pro-Kibaki bias of the US Ambassador and the Assistant Secretary of State for Africa slowly changed, in part due to the international advocacy conducted by KPTJ and fairly strong positions/resolutions taken by both Congress and Senate which reflected KPTJ positions, in part due to skilful diplomacy by the lead mediator and in part due to analysis from the American Africanist policy community, which had links to Kenyan academics:

Former Secretary of State, Rice, the American academics who study Kenya, the Stanford ones, she had an open channel to them. A number did urge her to be more nuanced. That might have played a role. She did reach out to people she could trust who also knew Kenya, people like [Professor Joel] Barkan.<sup>564</sup>

The UN had had forewarnings from the Department of Political Affairs (DPA): ‘DPA had written three memos saying there’d be violence’. But within Kenya, the UNDP, which, like SIDA, had yet to disengage from its support to NARC and, like the US, believed a Kibaki win was better for Kenya, despite housing the basket for electoral support, initially also didn’t respond:

UNDP played a nasty role. In Kenya and elsewhere. In most countries, takes the lead, but can’t seem to be bigger than the government, cannot extricate itself from linkages to government, just not useful. One institution that needs transformation. Will lead to more crises.<sup>565</sup>

In the end, however:

The international community stood as a major ally. Initially thought they were conservative but many were buying in. Think they thought ODM represented reform wing of society and PNU conservative element of society.<sup>566</sup>

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<sup>562</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>563</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>564</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>565</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>566</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

What the international community was able to offer were ‘carrots’ and ‘sticks’ in support of the mediation process to ensure, first, that PNU came to the table and, second, that PNU capitulated to power-sharing. It also provided financial and technical support (mediation expertise and comparative experiences) to the Secretariat of the AU Panel of Eminent African personalities when required:

These players came in from AU and UN, coming with experience in this field because they wanted us to make progress and any progress was better than no progress. A guided-missile kind of negotiation, discussing openly how to achieve objectives of the mediation.

Other international players, the UN, countries like the US, the UK, Germany and, to a lesser extent, France. Sending representatives at the highest level was good. In sense that could talk to one another in presence of people not intimidated by authority of the state. When had meeting with Condoleeza Rice, clear that what telling us was telling other side, using direct not diplomatic language. Had sessions with UN Secretary-General. Talking to us as two sides whose stature wasn’t different, looking at us equally.<sup>567</sup>

This was primarily due to the confidence of the Western diplomatic community in the lead mediator and his handling or management of their urge to assist.

#### 4.6 The outcomes and impact of the mediation of Kenya’s 2007-8 electoral conflict

##### 4.6.1 *What outcomes, what impact?*

Although there is no counterfactual, the AU-mandated, domestically demanded and internationally backed intervention, in reaching a political settlement, arguably prevented further escalation of the violence that had ensued from the electoral conflict and worse impacts.<sup>568</sup> The most critical of the KNDR agreements were implemented over time, addressing to varying degrees the trigger as well

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<sup>567</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>568</sup> Lindenmayer and Kaye (2009), p 1.

as the proximate and structural causes of the violence that arose from the electoral conflict. However, implementation was both insufficient and slow.<sup>569</sup>

As concerns the trigger, despite entry into the Grand Coalition Government, the ODM and the PNU continued to contest the details and meaning of the political settlement. Despite the existence of the position of Prime Minister, the presidency remained centralised and the state continued to be in control of the PNU.<sup>570</sup> In September 2008, the IREC's report was released, finding the 2007 General Elections had been too flawed to determine who had won but recommending reform of the EMB.<sup>571</sup> New electoral legislation was passed, including on the registration of national (rather than ethnic or regional) political parties, and the ECK was disbanded and ultimately replaced, following interim arrangements, with the Interim Independent Electoral Commission (IIEC). Critically, however, constitutional negotiations failed to result in the transformation of Kenya's majoritarian electoral system into a mixed member proportional representation (MMPR) electoral system. It has been argued, therefore, that mediation, commissions of inquiry and enhanced regulation of political parties are insufficient to address the political mobilisation of ethnicity.<sup>572</sup>

As concerns the proximate causes, in October 2009, the CIPEV's report was released, finding the causes of the violence that followed the electoral conflict included the concentration of powers in the presidency (and thus that presidential contests remain high-stakes) and grievances over land.<sup>573</sup> Contrary to the IREC, it engaged the questions of the political mobilisation of ethnicity and accountability by recommending the establishment of a Special Tribunal to try those

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<sup>569</sup> Brown (2009), p 398; Kofi Annan Foundation (KAF), cited in Weiss (2010), p 24.

<sup>570</sup> Kanyinga and Walker (2013), p 12; Nkwachukwu (2013), p 401.

<sup>571</sup> Kanyinga and Walker (2013), p 13; Weiss (2010), p 24.

<sup>572</sup> Nkwachukwu (2013), p 401 and 403; Weiss (2010), p 29.

<sup>573</sup> Weiss (2010), p 24.

it had implicated in the violence that ensued from the electoral conflict, failing which the ICC should assume responsibility for criminal proceedings against the same.<sup>574</sup>

Finally, as concerns the structural causes, agreements under agenda item four had covered structural reform and statebuilding.<sup>575</sup> The Constitution of Kenya Amendment and Review Act, 2008<sup>576</sup> was passed, ultimately ushering in the new Constitution of Kenya, 2010.<sup>577</sup> The Constitution of Kenya, 2010 reduced the powers of the presidency, restored separation of powers and checks and balances and also provided for devolution. Other means of addressing economic and political grievance were to be handled by the institution of the TJRC, together with the Ethnic and Race Relations Act and Commission.<sup>578</sup> The TJRC was, however, dogged by controversy from its inception—due to the appointment to its Chair of a senior diplomat implicated in previous public reports as being present at a massacre in the north of the country and being a beneficiary of previous illegal and irregular allocations of public land. It only released its report in 2013 amidst further controversy as to apparently Executive-ordered changes to its final report—having to do with the current President’s family benefiting from previous illegal and irregular allocations of land.

Thus the short-term outcomes of the KNDR agreements are mixed and their medium- to long-term impact is unclear.<sup>579</sup> Further to the 2013 General Elections—the first under the new Constitution of Kenya, 2010 and devolution—it is true that violence did not follow the electoral conflict that occurred, again having to do with voter registration, counting and tallying as well as the supposed presidential results. Electoral reforms proved insufficient, as did judicial reforms—

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<sup>574</sup> Kanyinga and Walker (2013), p 13.

<sup>575</sup> Aman (undated), p 10; Kanyinga and Walker (2013), p 1.

<sup>576</sup> Weiss (2010), p 24.

<sup>577</sup> Kanyinga and Walker (2013), p 2.

<sup>578</sup> Aman (undated), p 11.

<sup>579</sup> Nkwachukwu (2013), p 404.

the ODM, alongside civil society, placed the 2013 electoral conflict before Kenya's new Supreme Court to an unsatisfactory response. The lack of violence has been attributed to the peace education now incorporated into the educational curricula<sup>580</sup> and an early warning and response system, the 'Uwiano Platform'. But, it is more likely that violence was checked by the engagement of the ICC, restrictions on freedom of assembly and expression as well as media self-censorship, the deployment of the security services across the country and voluntary internal displacement in advance of the poll.<sup>581</sup>

The violence that ensued from Kenya's 2007-8 electoral conflict was at the cost of the myth of Kenyan exceptionalism—its supposed stability given its middle class, civil society and media—and undermined its role as a regional broker with respect to peace and security, most notably in Somalia and South Sudan.<sup>582</sup> But the lack of violence from Kenya's 2013 electoral conflict also came at a cost, to Kenya's prospects of democratic consolidation. There has been no accountability and policy learning, with focus in the main shifting back to stability rather than democracy and justice in the interests of long-term peace.<sup>583</sup>

What Kenyan civil society and the Kenyan private sector provided was alternative leadership and voices and, in advance of the AU intervention, information—data, analysis and ways out—helping to shape public opinion domestically and internationally in favour of the mediation process and a political settlement:

What I did was to give a sense of what's going on. People were starved of information, except in own neighbourhoods. As comprehensive a picture as possible of what going on across the country. An unfolding humanitarian problem that needed to be responded to. [An] appeal for calm, peace, however aggrieved

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<sup>580</sup> Aman (undated), p 11.

<sup>581</sup> Nkwachukwu (2013), p 399.

<sup>582</sup> Khadiagala (2009), p 434; Murithi, Tim (undated) 'Post-Accord Kenya: between a fragile peace and a constitutional revival'. Addis Ababa: IAG, p 6.

<sup>583</sup> Brown (2011), p 9; Nkwachukwu (2013), p 404.

people are, no reason to kill anybody else. [That the] elections results not accountable and hope a process to address problem developed.

Impact was to create a picture of the condition of the country, needed for a response based on correct information. Appeal for calm and for people not to take the law into own hands. Appeal for justice for people violated but also that people feel aggrieved about the elections get grievances addressed.<sup>584</sup>

Because of contacts, content started appearing. [An] op-ed in *The New York Times*, 'An Obituary for Kenya'. A couple of *New York Times* pieces, stuff in the *Guardian* and also connected with Embassies, who were also asking for material. Apart from sending out to Western media, local media.

People were publishing, a lot in *The [Daily] Nation*, the mainstream media. [Before], disregard for local media. Then, [in 2007/8], saw as very important.<sup>585</sup>

Civil society and the private sector, in this way, began to create a narrative about both the elections and the violence that transcended political party divisions (and the ethnic divisions assumed to underlie them). The result: 'Was to begin collating a national narrative that was not ethnic'.<sup>586</sup>

Came up with citizens' agenda for peace, beginning to look at repeat of elections, shared government. The bone of contention was the fact the presidential elections were disputed. Given that, what alternatives could we offer to both sides? Trying to explore solutions.<sup>587</sup>

Civil society's major strength was coherence and consistency in messaging. It kept the country focused on truth and justice. This is not to deny that the 'flower girls' [CCP] were not also consistent in their messaging. They weren't contradictory, reinforcing each other. Evidence-led advocacy. That must have swayed everybody, no matter whom you were, as didn't make an argument without evidence. Never visited any Embassy without a message to give that was well-researched. Any government, the same. The private sector was swayed by analysis KPTJ was doing, including evidence on the costs of the violence. The media focused on civil society. I have never seen such collaboration between media and civil society. We had access to the KTN [Kenya Television Network], [*The Daily] Nation*. A partnership between civil society and the media. Even though we talk about civil society being fragmented, that fragmentation did not show itself during the period. The people who'd taken sides were not as vocal as the people who hadn't.<sup>588</sup>

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<sup>584</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>585</sup> Interview with Billy Kahora, Editor, *Kwani* and member of CKW, Nairobi, February 12, 2015.

<sup>586</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>587</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>588</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

Frankly, up to the point that Kufour came and decided that the former UN Secretary-General was going to mediate, those were the voices people were looking at, civil society. About peace and bringing back sanity. We [the Nation Media Group] spent money, we paid for everything, but didn't want anybody to know that we were paying. We gathered them together, with no discrimination. They held the fort, they managed to meet ODM, emissaries from the PNU side. After that, Annan took over. By then, the country was beginning to have semblance of normality. We never publicised it.

What we did more than anything else was support them. We opened our platforms to them. Annan did many opinion pieces as we were supporting the peace process deliberately. Kenyans have forgotten that, Annan is now persona non grata in Kenya. But we were proud of it. Beyond what we showed on television, we gave them materials, they were able to review, buy what they wanted.<sup>589</sup>

I read a blog by a woman who chronicled the events. She says when she saw us on TV, she felt there were voices of reason and some sober people left... [Dr David] Ndi, [Professor] Karuti [Kanyinga, both in KPTJ], Julie [Gichuru, of the Nation Media Group]. [She] felt that things would be OK. If that was a widespread enough sentiment, citizens likely to identify with us, could've had an effect.<sup>590</sup>

For civil society, it gave us a realisation that we, citizens, have a reserve of power that probably didn't know we had. We were able to have voice and influence over what happened to the country, because our ideas affirmed by the mediation. It affirmed the voice of citizens. Its very creation is an affirmation that citizens had an extraordinary voice at the time.<sup>591</sup>

The result was a historical record of the period:

CKW ended up having the most alternative, creative and unrecorded conversations of that time. Biggest records of what alternative media and creatives thought about what was going on. *Kwani 5* got a lot of international academic interest, [who] wrongly thought [it was the] only font of creative memory as structured as a book.<sup>592</sup>

Another result was providing a domestic anchor and domestic legitimacy for the mediation, the region and the rest of the world:

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<sup>589</sup> Interview with Linus Gitari, former Group Managing Editor, the NMG, Nairobi, February 16, 2015.

<sup>590</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>591</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>592</sup> Interview with Billy Kahora, Editor, *Kwani* and member of CKW, Nairobi, February 12, 2015.

KPTJ among the first to call for international engagement as scale of what was happening looked like the beginnings of a genocide.<sup>593</sup>

Giving the mediators, the process, a sense [that] a participatory national process, giving legitimacy and moral force. Whether contributed to cessation of violence, don't know. But, intellectual contribution. The public was so polarised, people weren't listening to anybody not on their own side.<sup>594</sup>

By 'speaking truth to power', civil society and the private sector also helped soften the hardliners in both ODM and PNU, moving them away from their initial positions and, during the mediation, enabling the mediation's success:

Brought two opposing camps together in a violent environment and able to talk. Changed nature of politics and this was reflected in 2013. People disappointed but resorting to violence out. The ICC also helped [with deterrence in 2013].<sup>595</sup>

Must not send wrong message to President [during the private sector's first meeting with him]: 'Your Excellency, we recognise you're the duly sworn in President. However, 50 per cent of the country considers your election as illegitimate.' Wrote it down or nobody would have the guts. Felt his Ministers cheating and lying to him. Was livid with [them], they'd made comments that all that is going on has no impact on the growth of the economy: 'When 1,000 people already killed, no tourism, no agriculture. Even if you and Raila came together today, no way this economy is going to do more than two or three per cent this year and each day you waste is going into negative territory.'

Everyone candid, told him he needed to be Commander-in-Chief, secure the country, make sure people not being killed. A political problem and have to meet with Raila. Gave him the legacy thing, said [he's the] third President of Kenya, this never happened under the other two Presidents' watch. For one hour, never said anything. When he opened up, he was furious: 'That fellow, they're killing people, they're murderers, you're telling me to talk to murderers.' But after he'd vented, said he appreciated us coming. Told us he'd made efforts to see this guy [Odinga], had invited him to State House, religious leaders had mediated. Told Muthaura to get mediators to go to the other side. Said: 'Go and tell him I'm willing to meet with him outside State House.'

Spent about three hours with Kibaki: 'People sitting around this table represent the entire economy, forget the middle man (Finance Minister).' Kibaki got message. All thought that [the Ministers were] the hardliners. Walked out and said: 'We've just met the hardliner himself, there is no other hardliner.'

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<sup>593</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>594</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>595</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

When Raila heard we'd had this meeting, wanted to meet us. Met with Raila, the Pentagon, [he] kept talking about the business community as Kibaki supporters. Both of them had ridiculous demands, pre-requisites to meeting each other. Raila also opened up furiously: 'That man you're referring to as the President is nothing but a common thief. In 1992, in 1997, the IPPG, at least Moi honoured the IPPG, this guy just came and threw out IPPG.' Had a few valid points. But, we had to fetter ourselves to reality. Asked him if willing to split the baby into two to get own way. Raila said no.<sup>596</sup>

Finally, the data and evidence-based analysis provided by civil society and the private sector helped first frame and then fill out the content of the mediation agreement, ensuring it went beyond responding solely to the trigger of the post-elections violence and sought to address the proximate and structural causes of the same. That it did so was deliberate on the part of the lead mediator and the rest of the AU Panel of Eminent African Personalities:

We defined success in several ways. First, ensuring that the killings and displacement of people stopped. Working with the Red Cross and international actors able to get help to the needy and the internally displaced. Then, when we got to agree to a political settlement in the form of power-sharing, that was another benchmark. Then a focus on long-term goals, with the Kenyan people pushing for the new Constitution, which was adopted. The real test for us was to wait for the next election and when that went the way it did, we felt we had made a difference.<sup>597</sup>

In that sense, the mediation agreements had a life-span that lasted well beyond the political settlement and the Grand Coalition Government that they brought into being:

People do think about the peace accord. When refer to the Constitution, know came from the peace accord. And devolved government. It was a blueprint or a beginning. A reference point. We understand why have a National Cohesion and Integration Commission (NCIC). A Truth, Justice and Reconciliation Commission (TJRC) that's stalled but people are always asking, 'Where's the TJRC report?' Organisations working on reparations, make their reference the TRJC report and ultimately the national accord.<sup>598</sup>

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<sup>596</sup> Interview with Mugo Kibati, former Vice-Chair, FKE, Nairobi, April 29, 2015.

<sup>597</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>598</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

The first important impact of the mediation agreements was stopping the post-elections violence and beginning to address the needs of those that its different forms had displaced:<sup>599</sup> ‘We got back calm. Afraid to use the term peace. We got a ceasefire.’<sup>600</sup> ‘We succeeded in stopping the violence. We partly succeeded in tackling the humanitarian crisis.’<sup>601</sup>

In addition, the agreement to establish the CIPEV reflected the desire to end impunity for politically instigated violence and the excesses of the security services:

[The CIPEV or] Waki [Commission] made an effort to address accountability. Even the TJRC before it was scuttled and its report doctored by State House.<sup>602</sup>

The mediation averted civil war. Without the mediation, accountability for the violence wouldn’t have occurred. Attempts at accountability put in place and that search for accountability for the violence has been a reference point for demands for justice enabled as a result of the mediation. Also articulated an agenda for the long-term causes of violence: why were people so easily recruited for violence?<sup>603</sup>

The second important impact of the mediation agreements was acknowledgement that the presidential electoral process and supposed outcome was wrong: ‘[The] success of the mediation was an acknowledgement that the election was troubled’.<sup>604</sup>

KPTJ was injecting analysis and facts into the debate. Nobody else was doing that. That’s what made an impact.<sup>605</sup>

Event we did, at which presented the data analysis, which then took on a life of its own. It was that event that culminated in the list of Kikuyu traitors.<sup>606</sup>

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<sup>599</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015; Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>600</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>601</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>602</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>603</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>604</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>605</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>606</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

In addition, the agreement establishing the IREC set the stage for the accountability and disbandment of the ECK, an investigation into what had gone wrong and legal, policy and institutional reform of the electoral process:

A lot of people upset with Raila going into power-sharing but anger palliated by acknowledgement that elections hadn't gone as meant to and that needed a process of renewal, reform. Subsequently, the disbandment of the ECK, the legal awkwardness of it notwithstanding, did not take the expected partisan positions, both PNU and ODM had a general sigh of relief about shutting it down and beginning anew. Used as basis to create a new electoral framework.<sup>607</sup>

Reform of the electoral process, including the new complaints procedure about contested presidential results through the Supreme Court, arguably helped to ensure that an equally contested process and supposed outcome in 2013 did not serve as a trigger for post-elections violence:

We had the same thing in 2013. We had a repeat, right. [But] we waited for the court. I don't know whether we'll wait again. But at least tided us over that particular event. We are more ethnically polarised after 2013 than after 2007.<sup>608</sup>

A third important impact of the mediation agreements was the political settlement in the form of power-sharing that led to the establishment of the Grand Coalition Government: 'Everybody got a share of the pie.'<sup>609</sup>

The Citizens' Pathway Group (CPG) [of the private sector umbrella] got over shock, began doing research, had a session on narratives that communities have of each other and the country, that we have about government, said if we took PNU and ODM, how to get talking? Had a mock negotiation, came up with pie chart and became clear there must be power-sharing. Clear productive sector ministries must go to ODM as grievance is being left out of economy. Gikuyus insecure [so] security ministries to Kibaki. Called [political cartoonist at the Nation Media Group] Gado, he did a cartoon.<sup>610</sup>

The business community and NGOs, you came to camp at Serena [Hotel] as though telling us [PNU] was not enough. Pressuring, wanting normalcy restored. That pressure did work. The business community and NGOs did well. Had local

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<sup>607</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>608</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>609</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>610</sup> Interview with Mugo Kibati, former Vice-Chair, FKE, Nairobi, April 29, 2015.

ownership. Although we did feel as government that you treated us as criminals. Nobody wanted to see our point of view or believed we could have won the elections. Civil society, the business community, a majority of you were supporting the opposition, you'd taken sides, that's what we felt. Any calls for inclusion, for accommodation, in our ears sounded like support for the opposition. But now, with insight, know that helped to see if don't agree to a solution that restores normalcy, would've lost what support was there.

Through the chief negotiator, the Eminent Persons, the views from civil society, from Kenyans, informed us, our think-tank without knowing it. One way persuaded about coalition was that had hung parliament [so took] opportunity to finalise the Constitution, institute legal and institutional reforms, youth.<sup>611</sup>

Kofi Annan came. Called for meeting with KEPSA. Said I'll lead, said fax/email those documents to Serena [Hotel]. Our job was to help Kofi. Took the pie chart and its rationale, the narratives. Had a whole business agenda, how business, the economy affected. Will never forget Graca asking me if Kibaki and Raila know all this stuff. I told her: 'Madame, what I've read to you is out of research, these people have lived this, they know it better than me, don't make mistake and think fools or naïve.' [Annan] said one thing: 'power-sharing'. Kofi told us we need to go out there and talk about power-sharing, I can't say that, must be clear that's what Kenyans want. Called a press conference, said KEPSA's view is that there needs to be power-sharing. When we said that, people who used to think KEPSA good, hated it and vice versa. Ruto called and said: 'I can't believe you said what you said, are you for real?' Said: 'Not about you, about Kenya.'

Co-opted COTU [the Central Organisation of Trade Unions]. Sponsored two ads [as] my view was power-sharing has got to be the theme of the ad in the dailies. Second, a photo of Raila and Kibaki and Kenyans saying: 'Not about you, about Kenyans.' My proposal to have a big cross in red on Kibaki was vetoed.

Kofi Annan took over, met KEPSA, Kiplangat's group [CCP], you guys [KPTJ] skilfully drove us towards a settlement.<sup>612</sup>

A related but perhaps unintended impact of the mediation agreements was the lessening of 'grand corruption' during the tenure of the Grand Coalition government:

I can't recall during the Coalition Government a scandal of the scale of Anglo-Leasing [the major 'grand corruption' scandal of the NARC]. Because everyone watching each other, you do something, I scream. Not as common as today or during Kibaki 1. God saved us as one wing unable to steal as they would do in other circumstances.<sup>613</sup>

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<sup>611</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>612</sup> Interview with Mugo Kibati, former Vice-Chair, FKE, Nairobi, April 29, 2015.

<sup>613</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

Another related impact of the mediation agreements was assured or guaranteed political representation of women in all the institutions and mechanisms arising:

How to address women's participation in politics and decision-making moving forward, in whatever structures would come out. Recommendations about that.<sup>614</sup>

Because we had been involved as women speaking on behalf of the party, in the postaccord processes, we had opportunities women who hadn't done that did. For instance, I was asked to serve on the [South African Justice Johann] Kriegler Commission [the IREC]. I turned it down because I'm not interested in electoral law. I said interested in the Constitution. Gave me insight into our political culture. Why as women we get left out of opportunities. Because not political in that sense, an old boys' way of doing things, people take a position not because concerned about the issue but opportunity for patronage, influence, not necessarily influence in the public interest.<sup>615</sup>

Of the long-term issues, the most important impact of the mediation agreements was conclusion of the almost two-decades-long struggle for constitutional reform to restore separation of powers as well as checks and balances:<sup>616</sup> 'Kenya made progress because of the violence. Would never have concluded the Constitution.'<sup>617</sup> 'It couldn't have been obtained if either was President [alone], nobody wanted to be contentious.'<sup>618</sup>

Ask if there would've been commitment to new Constitution? Was now a goalpost written in the law because the agreement became an act of parliament which was constitutionalised. These goalposts were important. To avoid them was difficult without a political cost. When something not there in the law or as recognised goalpost, people tend to view not an obligation but guideline that don't need to follow. If left to usual and normal politics, the Constitution would've been more difficult. Would never have been without the Accord.<sup>619</sup>

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<sup>614</sup> Interview with Mary Wandia, member of the Women's Consortium, Nairobi, February 27, 2015.

<sup>615</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>616</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015; Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>617</sup> Interview with Professor Funmi Olonisakin, founding Executive Director, the ALC, London, April 11, 2016.

<sup>618</sup> Interview with Linus Gitari, former Group Managing Editor, the NMG, Nairobi, February 16, 2015.

<sup>619</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

We got a progressive new Constitution. We were able to preserve the majority of what was positive in the earlier drafts. Separation of powers. The Bill of Rights except on abortion, same-sex marriage.<sup>620</sup>

Gave Kenya a chance to revive constitutional process, which had come to a standstill, address long-term injustice and create opportunity. Constitution of high quality that has assured checks and balances. The Constitution made fundamental structural changes, holds out hope.<sup>621</sup>

The long-standing demand for the introduction of proportionality into the electoral system to lessen the intensity of electoral competition for the presidency didn't, ultimately, make it through parliamentary negotiations on the draft Constitution. This meant that while the quota to guarantee women's political representation remained, the means to reach that quota was unresolved: 'There are areas that we need to think through more, like women's representation.'<sup>622</sup> But the new Constitution did, critically, devolve powers to the regions, helping lessen the intensity of electoral competition for the presidency:

We got a new Constitution, all these new mechanisms to check and balance Executive power. We got devolution, the Bill of Rights. We got these independent Commissions. A place where you're not just drunk, you're high: my goodness, we've hit the jackpot.<sup>623</sup>

Devolution has mitigated the potential political price. Distribution of power. Imagine this government was plundering as it's doing without anything going to the counties? The distribution of grievances so people don't feel as vulnerable to the national government, the state.<sup>624</sup>

Devolution is a major step forward. State House weakened. No longer sufficient to take State House. A whole lot of hotels and houses, like Monopoly. Devolved system is [a] check on central government. Weak, nascent, subject to same corruption networks and dirty politics. But, if strengthened, a push factor against centralised Executive power complete with impunity and abuses. Mediation is to thank for that.<sup>625</sup>

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<sup>620</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>621</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>622</sup> Interview with Linus Gitari, former Group Managing Editor, the NMG, Nairobi, February 16, 2015.

<sup>623</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>624</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>625</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

Even more fundamentally, the structural reform brought in by the new Constitution has also altered the manner of political contestation:

You can put a lot of things under the rubric of the Constitution. We have as retrogressive a government as Moi[’s]. The same people. We’re surviving them. They’re messing up the economy, squandering money, but you can see institutions working. Before [the] Constitution, most conflicts about individuals, now between Uhuru and Raila. But other contestations [are] about institutions fighting for power. Between judiciary and parliament. Parliament and the Senate. All against the Executive. I consider that progress. Wars on institutions are better than wars on tribes.<sup>626</sup>

Apart from concluding the Constitution, long-term issues were addressed by the mediation agreements, ensuring they had far more potential to address the proximate and structural causes of the post-elections violence than would otherwise have been the case. The mediation agreements had:

More focus on structural causes than many other mediation processes, especially processes intended to resolve electoral disputes. In Kenya, attempt to go beyond resolving electoral dispute and recognise other issues that needed to be resolved.<sup>627</sup>

They did not just address the immediate concern and took a historical perspective, into root causes. Because the conflict a symptom of deeper issues over the years.<sup>628</sup>

Agenda item four, covering long-term issues, thus addressed historical grievances about historical dispossession from land, past gross and systemic human rights violations, systemic discrimination on the basis of ethnicity in particular and national cohesion and integration:

The land question. Marginalisation. Mechanisms like the TJRC, mechanisms to address the violence.<sup>629</sup>

The mediation agreements were:

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<sup>626</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>627</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>628</sup> Interview with Mary Wandia, member of the Women’s Consortium, Nairobi, February 27, 2015.

<sup>629</sup> Interview with Mary Wandia, member of the Women’s Consortium, Nairobi, February 27, 2015.

More comprehensive than anybody would've imagined. Power-sharing everybody expected. But sought to address the long-term and stipulated constitutional reform, Agenda Four.<sup>630</sup>

In short, the mediation agreements: 'Provided an agenda for reform'.<sup>631</sup>

We did more reforms within a short period of time than we've ever done in postcolonial Kenya to address structural causes.<sup>632</sup>

Constitution review became possible and key legislation. National cohesion. TJRC. Everything passed except the [bill establishing a] local [special] tribunal [to try those suspected of criminal culpability for the post-elections violence, as recommended by the CIPEV] which was disrupted by self-interests on both sides, not one side.<sup>633</sup>

Exclusion, inequality, that's also an agenda that the mediation put on the table.<sup>634</sup>

Look at cabinet formed: based on an understanding of the need for ethnic equality. A Ministry of northern Kenya and other arid areas. The need to address marginalised areas. That consciousness emerged. We started talking about ethnicity in public. It used to be a silent discussion, in private. All of us started looking at it with our eyes open.<sup>635</sup>

An acknowledgement that needed to de-politicise the civil service. General appreciation power-sharing was going to neutralise the partisan poison in the public service.<sup>636</sup>

Different commitments and mechanisms arising, however, had different results. While:

Everybody knuckled down to take advantage, different efforts had different impacts. Hybrids. Local, international and of varying quality. But an amazing amount of work undertaken.<sup>637</sup>

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<sup>630</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>631</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>632</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>633</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>634</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>635</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>636</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>637</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

Other issues that came up [weren't] allowed to fester. Not implying they were resolved but they came to the fore and we had discussions on them and even that was healthy.<sup>638</sup>

#### 4.6.2 *What enabled those outcomes, that impact?*

Legitimacy for the intervention in Kenya's 2007-8 electoral conflict came from the fact that it was AU-mandated—to that extent, it constituted 'an African solution to an African problem'.<sup>639</sup> However, it was also demand-driven<sup>640</sup>—and by domestic actors beyond the ODM itself, including CCP<sup>641</sup> and KPTJ.<sup>642</sup> The opening for the KNDR was provided by domestic actors, who exerted domestic pressure, applied pressure on and influenced regional and international actors and whose engagement with the KNDR also influenced and shaped its Road Map, agenda and agreements. Civil society in particular provided the lead through evidence-based analysis, messaging and advocacy.<sup>643</sup> Ultimately:

external interests converged with civil society interests. International actors and civil society created and sustained a huge demand for peace and thereby compelled the two parties into mediation.<sup>644</sup>

The fact that there was a single mediation was important.<sup>645</sup> The Panel included knowledgeable and skilled mediators,<sup>646</sup> who committed to being present for the time it would take.<sup>647</sup> The Panel also commanded credibility, independence, stature and trust,<sup>648</sup> enabling it to exercise control over the structure, agenda and sequencing of the KNDR, including its division

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<sup>638</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>639</sup> Lindenmayer and Kaye (2009), p 6.

<sup>640</sup> Weiss (2010), p 28.

<sup>641</sup> Khadiagala (2009), p 436; Kumar (2011), p 392; Lindenmayer and Kaye (2009), p 1; Weiss (2010), p 28.

<sup>642</sup> Kanyinga (2011), p 103.

<sup>643</sup> Kanyinga (2011), pp 103-4; Murithi (undated), p 4.

<sup>644</sup> Kanyinga (2011) p 103; Murithi (undated), p 8.

<sup>645</sup> Khadiagala (2009), p 440; Lindenmayer and Kaye (2009), pp 1 and 6; Weiss (2010), p 21.

<sup>646</sup> Aman (undated), p 2.

<sup>647</sup> Opiyo (2012), p 75.

<sup>648</sup> Aman (undated), p 9; Lindenmayer and Kaye (2009), p 7.

into short- and long-term issues<sup>649</sup> as well as its procedures and problem-solving measures.<sup>650</sup> These problem-solving measures included its use of international ‘carrots and sticks’ for leverage,<sup>651</sup> its use of experts on the humanitarian situation, options for addressing the supposed electoral results, coalition governments and the legal basis for the same to ensure pragmatism over politics,<sup>652</sup> and direct recourse to the two Principals when the ODM and PNU negotiating teams were stuck.<sup>653</sup>

The Panel also leveraged the legitimacy afforded by its AU mandate and domestic demand. It cultivated ownership of the KNDR with the parties to the electoral conflict by engaging them in reality-testing, for example, on options to addressing the supposed electoral results.<sup>654</sup> It cultivated ownership of the KNDR beyond the parties to the electoral conflict through consultation with civil society and the private sector,<sup>655</sup> insisting that one each of the ODM’s and PNU’s four negotiators be a woman and proactively catalysing the formation of the Women’s Consultative Group to ensure inputs with a gender and women’s rights perspective.<sup>656</sup> Finally, it cultivated public ownership of the KNDR, while managing public perception, through addresses to and consultations with the media, including through the Kenya Editors Guild.<sup>657</sup> Beyond ownership, this all also ensured that the KNDR maintained access to ideas and resources from domestic actors and the public.<sup>658</sup>

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<sup>649</sup> Kanyinga and Walker (2013), p 11; Lindenmayer and Kaye (2009), p 1.

<sup>650</sup> Aman (undated), p 9.

<sup>651</sup> Lindenmayer and Kaye (2009), p 6; Weiss (2010), p 21.

<sup>652</sup> Kanyinga and Walker (2013), p 11; Lindenmayer and Kaye (2009), pp 1, 11, 13, 15 and 18; Weiss (2010), p 23.

<sup>653</sup> Brown (2009), p 397; Khadiagala (2009), p 440.

<sup>654</sup> Aman (undated), p 10; Lindenmayer and Kaye (2009), p 13.

<sup>655</sup> Khadiagala (2009), p 440; Lindenmayer and Kaye (2009), p 7; McGhie and Wamai (2011), p 15; Weiss (2010), p 22.

<sup>656</sup> McGhie and Wamai (2011), p 18 and 19.

<sup>657</sup> Aman (undated), p 9; Khadiagala (2009), p 440; Lindenmayer and Kaye (2009), p 1 and 7; Weiss (2010), p 22.

<sup>658</sup> Aman (undated), p 9.

The regional-international collaboration was also important.<sup>659</sup> ‘The AU was well-placed to act quickly and with the implicit support of the UN Charter.’<sup>660</sup> Explicit support was provided by the deployment of UN staff and experts to the KNDR. In summary, ‘it was the [AU] led by Kofi Annan that was at the forefront of the mediation effort, but the UN was present earlier on and actively working behind the scenes. The UN quickly deployed... the main support staff for the mediator... Few would contest that the prompt international mediation in Kenya helped prevent an even larger catastrophe.’<sup>661</sup>

That the impacts listed above were achieved was not guaranteed. That they were achieved was due to mutually reinforcing factors. The first of these factors was the involvement of the AU:

[The] involvement of the AU was critical in sense that, if internally initiated process, would have been too many roadblocks.<sup>662</sup>

The second factor was the AU’s choice of lead mediator: his perceived independence but also his stature and ability to leverage all internal and external stakeholders:

The mediator was an independent person who was not interested in who the victor was but a process to bring the country back to sanity. The level and authority of the intervention was important. Kofi had just been Secretary-General of the UN, was highly regarded and the AU had chosen somebody with those kind of credentials.<sup>663</sup>

The third factor was the mediation strategy adopted by the lead mediator and the Panel as a whole. Key elements of the strategy were: ensuring there was one mediation process; ensuring the participation of civil society and the private sector, even though they were not at the negotiating table; providing technical inputs to the negotiating teams to help de-politicise points of contention;

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<sup>659</sup> Edward Luck cited in Lindenmayer and Kaye (2009), p iii.

<sup>660</sup> Brown (2009), p 401; Kanyinga and Walker (2013), p 6; Lindenmayer and Kaye (2009), p 7; Weiss (2010), p 28.

<sup>661</sup> Kanyinga and Walker (2013), p 11; Opiyo (2012), p 74; Weiss (2010), p 22.

<sup>662</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>663</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

and agreeing to stay for the duration and monitoring implementation of the full set of mediation agreements for five years.

They [the Panel] spoke to people beyond the key Principals, gave space to youth groups, women's groups, religious leaders, private sector, listened to other opinions. That was important. They did help ensure women had space in the dialogue process and post-conflict arrangements.<sup>664</sup>

Kofi Annan has remarked on depth of civil society. We [KPTJ] engaged him many times and subsequently did some work around Agenda Four items, wrote some papers, intellectual work.<sup>665</sup>

When people managing by crisis, your ability to think is hampered. It came in handy the way Kofi Annan treated those suggestions. He would formulate them and propose to us [the ODM and PNU negotiating teams]. That's how the Agenda Four was suggested and we adopted.<sup>666</sup>

The first week, talking about how to stop the violence. Engaging the state to tell us why people are dying. Called the Police Commissioner. The head of internal security. The Red Cross was coming to us every morning, the strategy was to show the government this was something to resolve. Then the humanitarian crisis. Again, government agencies would be called.<sup>667</sup>

I [Annan] thought I would stay ten days and stayed for six weeks straight. My staff started calling me a prisoner of peace as the people were not capable of making a deal and I couldn't go. So stayed so could get to the logical conclusion and stayed engaged for five years. It was necessary.<sup>668</sup>

Fourth was domestic data, analysis and pressure before, during and following the mediation process into implementation of the mediation agreements: 'My view is that it wasn't AU, it was Kenyans.'<sup>669</sup>

Was coming a week or two earlier, but fell sick on my [Annan's] way to the airport, had to go to hospital and the doctors wanted to keep me there for two weeks. [While in hospital,] I was on the phone, speaking to everybody and reading to keep

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<sup>664</sup> Interview with Mary Wandia, member of the Women's Consortium, Nairobi, February 27, 2015.

<sup>665</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>666</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>667</sup> Interview with James Orenge, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>668</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>669</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

informed. That was my time to prepare, consult and reach out to other players, not only in Kenya but also in the international community. Some [information] came from the AU but not much. The UN had some, not much. Quite a lot, I had to gather with experts who'd worked on Kenya. And then, in Kenya, had wide outreach and was talking to lots of people, including yourself and others. The historical context was there but what was relevant was key elements needed to get a complete picture of what was needed. Of course, both sides put forward information to put them in a good light but needed to go behind that.

[Civil society and the private sector] made substantive contributions, you guys [KPTJ] came with written submissions and we factored them into our work. I remember the business community telling me they were glad we were making the effort because all of us have plan Bs and those plan Bs are not good for Kenya: to close down, cut back or relocate. Told me they represented 85 per cent of [gross domestic product] (GDP). I told them: 'That's power, that's influence, did you talk to government?'

Speed was of the essence and if had broadened table and brought all in [to the negotiations], it would've taken longer. But civil society and the business community had a right to be part of the process. I was not going to make deals behind their backs. It was their society and their agreement and they'd have to press for implementation. Which couldn't have been left to politicians alone. Participation added pressure on the politicians.<sup>670</sup>

Without the interventions from non-political actors within and without the country, getting on the table [for ODM] would've been extremely difficult. Before started formal meetings, separately being met by civil society and all manner of groups. Giving ideas. Having heard from civil society and internal groupings, once the negotiations started, difficult to open up. During those negotiations, there was little formal engagement with other actors. Final document was result of period prior to mediation, partly the mediation and partly when the Principals agreed.<sup>671</sup>

Where work that civil society did came in was after signing of the Accord. Not just implementation but various questions that were raised, constitutional, legal and institutional reforms. You all did a good job during the crisis. I [Annan] am very proud of the Kenyan people.<sup>672</sup>

#### 4.7 A cautionary note

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<sup>670</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>671</sup> Interview with James Orendo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>672</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

The KNDR lasted for 41 days, taking just under six weeks to de-escalate the electoral conflict and end the consequent violence, which is unusually fast.<sup>673</sup> The KNDR has therefore been celebrated for being ‘an African solution to an African problem’.<sup>674</sup> It is unique in that it was the AU’s first direct and swift intervention in an electoral conflict that sought a political settlement intended to address both immediate and longer-term aspects of that electoral conflict. But it became a single and successful intervention due to both domestic and international support. It was inclusive of and transparent with domestic actors and it commanded, unusually, undivided support from the rest of the international community.<sup>675</sup> It does provide, thus, a positive example of UN and AU cooperation under Chapter VIII on regional arrangements—legitimate and timely response by the AU with political support and capacity from the UN.<sup>676</sup>

While it has also been posited that this UN and AU cooperation was, in effect, a positive example of R2P,<sup>677</sup> questions have been asked as to whether R2P explicitly motivated the AU response and explained the alignment of domestic, regional and international interests and whether the KNDR is therefore a unique or replicable example.<sup>678</sup> As a related question, was the KNDR the success of the AU or the Panel? More specifically, would the rest of the international community have been so supportive of the KNDR had it not been led by Annan? If not, is the KNDR replicable?<sup>679</sup>

In addition, the question has also been asked as to whether a political settlement in the form of power-sharing is an appropriate solution for electoral conflicts.<sup>680</sup> Not only was the political

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<sup>673</sup> Aman (undated), p 2.

<sup>674</sup> Aman (undated), p 12; Lindenmayer and Kaye (2009), p 2; Nkwachukwu (2013), p 403.

<sup>675</sup> Nkwachukwu (2013), p 403.

<sup>676</sup> Edward Luck cited in Lindenmayer and Kaye (2009), p iii.

<sup>677</sup> Edward Luck cited in Lindenmayer and Kaye (2009), pp iii and 2.

<sup>678</sup> Khadiagala (2009), p 443.

<sup>679</sup> Khadiagala (2009), p 441.

<sup>680</sup> Brown (2009), p 401; Fomunyoh (2009), p 16.

settlement in the form of power-sharing derailed by ‘spoilers and in-house detractors’ throughout the course of the Grand Coalition Government,<sup>681</sup> it also diminished the political opposition (although the ODM often played that role from within the Executive and parliament).<sup>682</sup> More fundamentally, however, the trade-off of ‘negotiated democracy’ is that of peace over democracy and justice, which, in Kenya, compromised reform and continues to pose risks for the future.<sup>683</sup> The lack of accountability and continued impunity for both the elections and the violence of 2007-8 undermined rule of law and provided no disincentives for electoral manipulation or the use of violence as an electoral and political tool.<sup>684</sup>

In addition, while the Road Map, agenda and agreements were intended to address not just the trigger, but also the proximate and structural causes of the electoral conflict and the violence that ensued, over time it was felt that the implementation matrix was too ambitious and that prioritisation was needed. This is particularly so given the low buy-in from both sides of the Grand Coalition Government with respect to structural reform that would address ethnic, gender and regional inequalities, and the coalition’s equally poor appetite for accountability and an end to impunity.<sup>685</sup> The diminishing of regional and international interest over time contributed to this low buy-in and appetite.<sup>686</sup>

The agenda was good, the negotiated settlement was one of the best things to happen to this country and, for a moment, had great hopes for the country. But we started mucking about with it, systematically.<sup>687</sup>

What turned out to be a problem with the mediation agenda and agreements was, ironically, ultimately the flipside of what was vaunted as their success. A political settlement arrived at

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<sup>681</sup> Murithi (undated), p 7.

<sup>682</sup> Brown (2009), p 398.

<sup>683</sup> Brown (2009), p 389; Nkwachukwu (2013), p 403.

<sup>684</sup> Brown (2011), p 11.

<sup>685</sup> Kanyinga and Walker (2013), p 13.

<sup>686</sup> Khadiagala (2009), p 443.

<sup>687</sup> Interview with Linus Gitari, former Group Managing Editor, the NMG, Nairobi, February 16, 2015.

through negotiations between contesting political parties meant that all agreements and legislation, policies and institutions or mechanisms arising were not necessarily what was best for the country but what those contesting political parties could agree upon. The mediation was:

Reduced to a PNU/ODM issue whereas it was our elections that were stolen, reduced to a battle over spoils. We lost that battle early. Concerned about the approach to Commissions of Inquiries because of our experience with the same. Agenda four was broad enough. We would've had reservations about timelines, firmness, what was required of political parties.<sup>688</sup>

A first problem was that the criteria for selection of the AU Panel of Eminent African Personalities were implicit, rather than explicit. In addition, the AU didn't provide the mediation team with terms of reference (ToRs). While this provided the mediation team with flexibility, the ability to achieve what they did was not necessarily guaranteed:

There were gaps. The mediation team members not knowing why appointed. Graca said assumed because here for the APRM and as a woman. The mediation team had no terms of reference (ToRs). But were able to develop own framework.<sup>689</sup>

A second problem, albeit perhaps evident only with the benefit of experience and hindsight, was that civil society and the private sector had initially argued for a political settlement limited in terms of both mandate and time—as necessary only to implement the mediation agreements and move the country to new General Elections under a new constitutional order. In the end, however, the Grand Coalition Government remained in place for a full electoral cycle, not seeing its mandate as transitional. In addition, the mediation agreements were general and, in some areas, lacked the detail or specificity that could have forestalled the tug-of-war between ODM and PNU on the formation, size, cost and effectiveness of the Grand Coalition Government as well as obligations arising once it was in place. In effect, the agreements rewarded the incumbent in a manner

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<sup>688</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>689</sup> Interview with Mary Wandia, member of the Women's Consortium, Nairobi, February 27, 2015.

reminiscent of previous political settlements in Kenya, including the one that brought about the political ‘transition’ of 2002 under the NARC:

Power-sharing took us back to the NARC MoU, which is what the fight was about. Demonstrated the futility of Kibaki and his people subverting the NARC MoU. Could’ve given Raila half a loaf before. This is political myopia, insight about our Kikuyu political jingoism of 2003.<sup>690</sup>

It put a cap on things, [but] the abscess wasn’t drained and came back to haunt us. Everything reduced to politicians. The political settlement came too soon, reduced to the interests of the two competing parties and not everything in our politics that causes this violence.<sup>691</sup>

The National Accord was conservative, not radical. Giving the incumbent and the opposition a lifeline, a soft landing. No reason to think about elections again. Even ODM didn’t accept the idea of going to elections after two years. The Coalition Government lived for itself. Nobody was pushing for a public agenda. Made it difficult to give public goods. Were all looking for opportunities for themselves and to reproduce themselves.<sup>692</sup>

What was put in the political settlement was experimental, to ensure society didn’t sunder completely. ODM had symbolic power, with PNU retaining real power. Kibaki remained President even if pesky Prime Minister trying to make his life difficult. Was rewarded even though had dodgy electoral victory.<sup>693</sup>

An agreement in itself is not enough, there’d be need, if had to do it again, to go the extra mile, to spell out what we meant by portfolio balance. Whereas Raila meant to have relevance in day-to-day running of government, critical ministries, didn’t get. Would talk to him out of courtesy but do what they wanted or what Kibaki wanted. Affected government operations. An agreement is not good enough. The harder part is executing the spirit of the same. A repeat of 2002 when Kibaki said no longer the Summit which brought together people from the LDP and [the] NAK.<sup>694</sup>

Power-sharing meant right through the civil service. Kibaki was able to manipulate the civil service. [The Panel] thought Odinga had a strong enough personality to manoeuvre that. Forgot about people like Francis Muthaura. Once clear that 50/50 not 50/50 but 70/30, implementation skewed in favour of people who wanted to

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<sup>690</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>691</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>692</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>693</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>694</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

maintain a strong authoritarian presidency. Everything was a fight. Assumptions made in the agreement that could've been paid better attention to.<sup>695</sup>

A marriage of convenience, forced, not something PNU wanted. Unclear as to roles, tension between three, President, Vice-President and Prime Minister, affected functioning of state. Bloated administration. 42 ministers, expensive, unworkable. But a compromise. Only way to move forward.<sup>696</sup>

Grand Coalition Government dysfunctional. President and Prime Minister fighting each other rather than digging country out of the pit. A consequence of mediated agreement with adversaries, rather than when have outright winner [who] can take country in particular direction.<sup>697</sup>

We had this huge cabinet, had demonstrations about it, a full page thing in the paper saying your greed is obscene, shame on you. Kibaki had the upper hand. Reduced to a squabble between politicians and left out everybody else, left out the entire nation.<sup>698</sup>

Another unintended consequence of the political settlement was diminishing the opposition as well as the ability of civil society to leverage the same to achieve public policy objectives in line with the mediation agreements. In some ways, it was a reversion to the state of affairs under the KANU dictatorship:

With hindsight, we started [down] the road to finishing the opposition. Because had a coalition, we had no opposition for five years. The government was not put on its toes. There was no vigilance. We started seeing weakening of civil society in 2003 [when leading civil society personalities had gone into the NARC government] and, by 2007, religious organisations came out of the violence weaker than ever. Human rights organisations also came out weakened. Yes, had a platform within government, space was there. But didn't operate the way they did before as no opposition to support them the way they did in the past.<sup>699</sup>

Everybody into government and we became a one-party state.<sup>700</sup>

We've retreated to the one-party state. The regime or its alternatives look the same. They both use democratic language but when look at practice, at intention, just to get power and make most of it. Kenya removed itself from place where could say

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<sup>695</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>696</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

<sup>697</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>698</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>699</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>700</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

need to fix the system, no attempt to look hard at the question and see what real problem is. It elongated the life of this elite. We wanted that settlement, we gave [the elite] a new lease of life. They have re-settled. We're less able to sustain a challenge to the illegitimacy of this political elite. Because they've given a new shine to it. Have a recycled elite that's smarter. The operating system is KANU 101: everything has to go through the Executive, to please the Executive.

The thing about power is it can't be reserved for you, has to be fought for, civil society didn't gird its loins. When comes to getting into the mud of politics, there's no appetite. Kenya can't move forward in that democratic sense that's so required.<sup>701</sup>

What this led to was back-peddalling on the political commitment to constitution-making. On both, substance mattered more than form and the devil was in the detail. Important commitments to specifics in the constitutional review process as well as to accountability were sacrificed:

The script was clear in terms of working on a new constitutional dispensation. But people already in office, going through process now not attractive and enthusiasm low. In cabinet became difficult. People would reach out to the President when the draft [Constitution] became a problem and the Church was intervening with Kibaki and PNU. When came to the constitutional review process, not committed to any ideals on either side, bigger and larger objective that's not immediately translated into political capital. Constitutional debate was translated into a quest for power and what arrangements would suit each [part of the] political coalition.<sup>702</sup>

What got kicked to the wayside were many of the proposals intended to lessen the intensity of political contestation for the presidency such as shifting to a purely parliamentary system and introducing proportionality in the electoral system. Although devolution was finally agreed upon, it was not devolution as initially proposed:

On the Executive, we wanted a parliamentary system as ODM. For inclusivity, we thought a parliamentary system would take care of all interests. But the other side wanted a presidential system. The President would be the ultimate authority. The idea of having coalitions in parliament which could fall at any time was not attractive to PNU.<sup>703</sup>

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<sup>701</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>702</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>703</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

We need to re-think this presidential system. We knew it was the wrong thing but, because of path dependence, [we didn't] consider going parliamentary. Wouldn't have an executive presidency for tribes to fight for. Could change government without the nuclear option. Parliamentary systems more stable. The problem was, by time negotiating, ODM was pushing parliamentary and, whatever ODM pushing, PNU resisting, fighting for Kibaki. [The C]onstitution is an instrument to change society. With tribalism so entrenched, need to shock the system as just reproduces itself. It's the thing which makes us fight. So why not get rid of it? This presidency we fight for, insult other people, use language we can't believe, possible to have a ceremonial President who's a referee between this slag-fest.<sup>704</sup>

The Committee of Experts (CoE) decided the winner-take[s]-all is a bad system, given our divisions. We need coalitions depending on how many votes you win. That gives every ethnic community a stake and an obligation to check each other. Was more viable than one community being in charge. Devolution's helped. But need the national level as well. People like Kenyatta and Ruto so ingrained in a centralised government, will do anything to bring it back.<sup>705</sup>

My biggest regret is the electoral system. A MMPR system would've allowed us to introduce proportionality into the electoral system. That system [also] prevent[s] you from having bloating. [We were] very naïve, had a draft that left the size of parliament open-ended with an assumption that parliamentarians wouldn't go beyond 210. Didn't anticipate would do what they did with the size of the national assembly. They said was non-negotiable.<sup>706</sup>

We [ODM] wanted less counties. Even the eight [provinces]. Except that the Rift Valley was too big. Our maximum was 14 with the Rift Valley having additional counties and Eastern as well. [PNU] would not hear of it. They wanted even more than the 47 and how to create the 47 was becoming difficult as would find minorities [all across the country]: the Kuria in Nyanza. Nakuru an issue between the Kalenjin and the Kikuyu. The Kalenjin wanted to control Nakuru but could only do it if counties larger. Said: 'OK, if not workable, have eight regions and those regions would have counties, a three-tier system'.<sup>707</sup>

System of government is where there was some loss, devolution also. Because we ended up with devolution units that have affirmed ethnic boundaries.<sup>708</sup>

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<sup>704</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>705</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>706</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>707</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>708</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

Once the new constitutional dispensation came into being and devolved governments were voted in through the 2013 General Elections, more challenges emerged, including that of essentially having devolved the notion that the state is the source of largesse down to the counties:

We've entered into this era of devolution, there's been such teething problems. See MCAs [Members of County Assemblies], Governors, Senators not agreeing, translating former style of politics to the county level, where the first thing I think about is how, as a Governor, my building should look posh, what kind of car I should get, how I should travel. No sense that a civil servant coming to serve the people. Corruption transferred into those counties, priorities at the county level not clear. In terms of ownership, people participating in the budget process, that's lacking. [In] which county do you see a clear break, a demarcation between what was before and what's now? What's changed? Who's in charge? Where are those voices of change within the counties?<sup>709</sup>

In summary, there were ultimately problems with both the specifics of the Constitution and implementation of its provisions in line with the reasons for which those provisions were brought into being:

Need to contrast the Constitution and constitutionalism. You have the Constitution as a document but is it a way of life? Which is constitutionalism. We have a situation in Africa where we have constitutions without constitutionalism. Look at the way they're being changed left and right across the continent. We have term limits but a number of countries blatantly violate the letter and spirit of the Constitution, electorally manipulate the processes simply to maintain power. This is against the spirit of the African Charter on Democracy.<sup>710</sup>

Similar losses were registered with institutional reforms intended to be brought into being by the findings of the IREC on the electoral system, the CIPEV on the security sector and the Constitution on equality and non-discrimination, human rights in general, transitional justice to address historical grievances and the justice sector:

A measure of institutional reforms but corrupted to suit the two groups, not the country, with the next election in mind. Even the IEBC [Independent Electoral and Boundaries Commission]. That's how we, the political class, undermined the

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<sup>709</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>710</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

solution. That's the crisis we're fighting today. We keep infesting and re-infesting institutions. It's more of a political problem than the Constitution.<sup>711</sup>

Security sector deforms, not reforms. Non-professionalisation. What were supposed to be short-term gains—new Constitution, new policy and institutional arrangements—turned around to serve exactly same interests as before.<sup>712</sup>

Looking at institutional reform, window-dressing around the police. Have an independent IG [Inspector-General] of police but security beyond his ken.<sup>713</sup>

These guys were going to hold onto the police. At the CoE, one of the discussions was having one police service. We needed to do away with the administration police because of the role they'd played, clear in 2008 that we'd had some elite ethnic formation with the AP.

Police reform could've been continued through constitutional reform. I pushed for us to set up an Equality Commission separate from the KNCHR. If I'd had the slightest idea that parliament would use that to weaken the KNCHR and create weak institutions, wouldn't have. We did not anticipate how parliamentarians would manipulate the transition from the old to the new Constitution to weaken bodies they considered threatening. If we had preserved the provision on a body for historical injustices, might have had leeway to insist on a stronger TJRC. If I'd had a crystal ball, I wouldn't have removed, naïve.

Post the Constitution coming in, those against the Constitution precisely because could see its power, organised to undermine it. Have a Judiciary, for example, with a progressive CJ [Chief Justice] but the CJ never sits alone. The Supreme Court was stacked. By 2010, those against reform [were] not going to make mistake of allowing people not amenable to their interests be in these positions.<sup>714</sup>

We agreed to reform the Judiciary, you can see how it's going. We've also messed up judicial reforms. Comes into the selection panels. The result is that even the new people in the Judiciary corrupt. We, the political class, have ruined the atmosphere. Everything.<sup>715</sup>

Have gone back through legislation, the Chief Justice, the President must decide. If appointed by President, if a man, you've lost your manhood. If a woman, your womanhood. Now at the mercy of Head of State. Can be bullied around. The

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<sup>711</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>712</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>713</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015; Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>714</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>715</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

Constitution set up the Judiciary, the police, independent, without interference of the Executive. When the Executive starts interfering, using its majority in parliament, that's the beginning of problems. All those independent bodies no longer independent.<sup>716</sup>

Have Judiciary that's mixed in terms of its judgements.<sup>717</sup>

The consequence is that, only one election cycle away from the institutional reforms ushered in by the mediation agreements, public confidence in critical public institutions is again low:

Don't think people believe in reforms any more. I've seen opinion polls in 2014 and people's confidence in institutions is low. The triggers of violence are with us. They were about lack of faith in institutions, lack of trust. In terms of institutional reforms, we've lost it. During the Coalition Government, we'd talk about the most reforming institution. These days, which institution would we talk about? That's why corruption is taking place the way it is. Extortion rings in parliament are as big as ever, if not worse. Committees that used to be reformist aren't. Even if led by CORD [the Coalition for the Restoration of Democracy]. The voices that demand accountability have either become fewer or have decentralised.<sup>718</sup>

There was also back-peddalling on the political commitment to accountability as a result of the political settlement. This includes accountability not just for 'grand corruption' but also for electoral malfeasance and, critically and ultimately, the post-elections violence:

The fight against corruption and impunity was also an immediate and long-term solution. Both sides undermined that fight. We're more corrupt than we've ever been. Today's corruption makes Moi's corruption look like child's play. The corrupt of Moi's era used to hide. Today, they beat their chests, come out with a hammer to see who interrupting their holy mission. The right to corruption. Both sides had vested interests in corruption.<sup>719</sup>

The mediation process appeared to give solutions but those solutions were not durable, clawbacks, leads to questions about assumptions that went into settlement. Could something else have been done, shooting Kibaki for example, that gives us lessons that if you do this, the consequences are this? Nothing discouraged as a

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<sup>716</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

<sup>717</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>718</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>719</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

result of the mediation. Saw in 2013, a repeat, because the mediation didn't discourage the behaviour that led us to 2007.

That the grievances have never been addressed is what gives us 2013 where Kenyatta a continuation of Kibaki, emboldened enough to say can steal the Kenyan state and there'll be no consequences. The impotence of instruments available to ensure there are real consequences for people who steal political power. Emboldened the two suspects before the ICC when were two dark horses at that time. What will happen this time when more emboldened now? There's nothing they can't do now. So 2007 frames the enormity of the problem of 2017.<sup>720</sup>

The government is not accountable to society. It is accountable to itself. The culture of impunity. That is entrenched at all levels. Whether on violence, on corruption, a war that's been lost. Rule of law is also out the window. The moment [Kenyatta and Ruto, suspects before the ICC, were] allowed to run to office with the criminal cases before them, allowed everybody at every level to compete whether criminal or not.<sup>721</sup>

Arguably, the retreat on the commitment to accountability began not so much with the mediation agreements as with the decision by the IREC to opt for reform rather than accountability beyond the ECK for what had happened with the process and supposed outcome of the presidential election:

We've had electoral reforms but remain unconsolidated. Because the integrity of the election result was neither here nor there.<sup>722</sup>

[Chair of the IREC, South African Justice Johann] Kreigler wasn't bad but could've been better, had he gone into [what happened at the national tallying centre, the] KICC which he refused to do.<sup>723</sup>

We didn't get truth and justice around the elections, that was dismissed as naïve. The Krieglerr Commission, we began to look as though we were the only ones who had a problem. Remember how Kreigler took us [KPTJ] on and made us responsible for the violence, remember how Karuti [who gave KPTJ's data and analysis of the elections] was handled?<sup>724</sup>

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<sup>720</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>721</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>722</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>723</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>724</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

Kriegler sidestepped accountability for the elections and we see the short-sightedness of that at the next elections. Kriegler least successful and led to a fraudulent election.<sup>725</sup>

Why the IREC took that turn is hard to explain. The desire not to upset the political settlement, with the Grand Coalition Government in place when IREC began, may have been part of it. But there was also the agency of its Chair:

South Africans working elsewhere in Africa don't have a good grasp of dynamics and tend to extrapolate own limited experience and impose it. South Africa's solution was a conciliatory one without accountability and the model that Kriegler sought to impose. Sidestepped fundamental issue of electoral fraud.<sup>726</sup>

Ended up with somebody leading the Commission who had his own notions about African people. Kriegler was a racist. Thinking about how he treated KPTJ. Remember the way Karuti's evidence dismissed.

The PNU lot also able to successfully manipulate that process. Some solid recommendations made [but] because those able to hang onto power not interested in reform, not implemented. When the IIEC [Interim Independent Electoral Commission, the immediate ECK successor] and the IEBC were set up, there was political interference as to who got appointed onto these bodies, we didn't put onto these bodies people best placed to do this work. Just the way those bodies set up, how they were staffed, it was obvious what their political input was, even whatever came out of the Kriegler process was frustrated. If you look at the report, sound reasoning on our electoral system and those discussions not followed. Clear we should be thinking about getting out of first-past-the-post but the body responsible didn't do that. Same thing with the IEBC, on boundaries, they were entrenched in the old system. All those political interests trounced the technical. Maybe they suffered from the fact that didn't have any internationals on board. They needed somebody without direct interests. The only post-agreement groups that didn't.<sup>727</sup>

Kriegler made good suggestions and proposals, half of which we've watered down.<sup>728</sup>

An independent electoral commission but no independence. Institutional model OK but social context wrong. Took these nine commissioners through public interviewing and vetting. Less than 12 months later, getting stories of disquiet internally. Because of corruption, trying to find a balance between a politically representative Commission and a professional Commission. Looking for electoral

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<sup>725</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>726</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>727</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>728</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

experts but those pushing them through, using the parliamentary approvals process, politicised the appointments process. Question about independence.<sup>729</sup>

The result was that there were the same problems with counting and tallying of the presidential vote in 2013 as there were in 2007:

We were condemned to repeating the same problems. Repeated it in 2013 and will have gone back to square one in 2017.<sup>730</sup>

We tried to plug the gaps in our electoral system and failed. Or plugged some holes and left others. In the 2013 elections, the problems with counting and tallying didn't go away. Back to discredited manual system, despite black and white recommendations. We took longer, we took a week to complete counting and announce presidential results. Which is unbelievable for an exercise decentralised to 33,000 polling stations. We took six days to know what those numbers were. What we thought was a success needs to be re-visited.<sup>731</sup>

The only difference was that, relative to 2007-8, the aggrieved opposition was willing to take its grievance with the process and supposed outcome of the presidential poll to the new Supreme Court, itself birthed by the new Constitution, concluded as a result of the mediation agreements. That said, both civil society and the opposition were dissatisfied with the manner in which the Supreme Court addressed their separate bodies of evidence and its final judgment:

We created a valve in terms of saying if you've a dispute with the elections, there's a place you can take it. But questions about whether the Supreme Court played that role. Did it help people get to the truth about the 2013 elections? The answer is not in the affirmative. Listening to people on the two big sides, there's still uncertainty about whether that election result the true verifiable result.<sup>732</sup>

What matters is what gives you political advantage. Not unthinkable that Kenyatta and Ruto, on opposite sides in 2007, would be buddies in 2013. In Kenyan context, that's what works. About numbers, what gets you to office. Have 50 per cent plus one rule, the polls say one thing, the outcome says something different. Looked like this going to go to a second round then, bam, there we are, we have 50 per cent plus one. We'd made ourselves believe we had different institutions, could take this to the courts. That court makes a ruling and, having submitted ourselves to it, what do

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<sup>729</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>730</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>731</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>732</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

you do with verdict at that point? Do you accept? Or cast aspersions on what we'd accepted?<sup>733</sup>

The Supreme Court didn't allow the audit of the results. If that'd been allowed, we would be talking with confidence about the final outcome.

The Constitution says you can't deny justice on the basis of technicalities but denied CORD [the Coalition for the Restoration of Democracy] on the basis of technicalities, as submitted affidavit [on issues around the use of IT] late.

In the civil society petition, the solid ground was the [voters'] registers. It was deliberate of the IEBC to use different registers. You use different registers to stand with the one that gives the opportunity to argue what you want to argue on 50 per cent plus one. It was not an accident to have registers with different numbers of people and not know which one to call the final register.

The Supreme Court ruling left a lot to be desired as it's full of contradictions and those contradictions have continued to dog it as time goes on. Unfortunate how the Supreme Court ruled in that petition and how it made some of the decisions it made. What happened in that election? Two things. Jubilee did not have 50 per cent plus one. Would they have had it if we went to the second round? They might have, looking at opinion polls. But the Supreme Court didn't want a second round. There's no single petition that's been filed thus far that they've allowed to go for a second round. No by-election.

Why? Thinking not about democratic justice but that should give people peace rather than justice. The general feeling was that peace was more important than the outcome of the election. Wherever I went, was told didn't give a damn about who won, only didn't want to go back to 2007. The triumph of the peace discourse. People are no longer concerned about democratic issues if take the space for peace. A legacy we have to deal with.<sup>734</sup>

[ICC] indictees came into office in questionable circumstances follow[ing] the Supreme Court judgment that raised questions about independence and left people fearful that gains could be swept away easily. Supreme Court ruling a disappointment. If had been a split judgement, would've indicated the way the country felt. The fact that 100 per cent unanimous gave the mistaken impression a 100 per cent endorsement, an election landslide. Emboldened the incumbents. A cloak of silence fell over the nation. The media became acquiescent. Voicing public dissent more difficult.<sup>735</sup>

The implication is that the intent or purpose of the mediation agreements have failed to be sustained, with the result that elections remain a potential trigger for violence:

The threats of violence in the run-up to the election in Naivasha, people transferring out of areas. Large swathes of Coast Province didn't vote because of violence on

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<sup>733</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>734</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>735</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

election day, attacks on polling stations, disenfranchising large sections of the population. Worse than in 2007 because people weren't prevented from voting then. But in 2013, significant sections prevented from voting.<sup>736</sup>

This is primarily due to the continued inability of the EMB to shield itself from political interference, particularly from the Executive and the absolute lack of consequences for such interference:

In 2013, may have failed to ask questions as didn't want to be seen as rocking the boat. My fear is that the opposite might happen the next elections, 2017. We remain an unstable country. Elections are going to remain our most vulnerable point. If we can sail through elections safely, might be able to teeter on until we find some balance somewhere. But where that balance is going to emerge, don't know. Don't think we've heard the last of accountability for 2007. These issues will come back again, either violently or through institutions. How to avoid this situation where every election is a nail-biting experience. Depends on commitment and discipline of our politicians.<sup>737</sup>

The electoral system is owned by both sides. If look at Kreigler [IREC] report, you'll see both sides manipulated the vote. Even in 2013, both sides committed irregularities. The IEBC failed in its duties [but] we'll never have free and fair elections without dealing with the political issue. Being ready to respect rule of law, follow the rules. Otherwise, each side trying to out-deal each other and incumbent having all the machinery. The people's will can only be actualised if an overwhelming majority on one side that can defeat corruption. Difficult for those at fault to reform themselves.<sup>738</sup>

The CIPEV's report was more promising in terms of not only identifying patterns of the post-elections violence and suspected perpetrators, including a stinging indictment of the security services, but also recommending the establishment of a Special Tribunal to try suspected perpetrators. Failure to establish the Special Tribunal meant that criminal accountability would be taken up by the ICC:

Unlike South Africa, we've never had a problem with truth-telling. Extensive documentation on who's responsible, people have been named again and again. Not

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<sup>736</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>737</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>738</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

like our killings happen in dark corners. Don't lack truth-telling, lack accountability. After the mediation, substantial gains toward that.<sup>739</sup>

Ultimately, however, legislation to establish the Special Tribunal failed to be passed by parliament no fewer than three times and, further to the release of names to be charged by the ICC, the Executive under both the Grand Coalition Government and then Kenyatta and Ruto was used to frustrate the ICC proceedings in every manner possible. The ICC itself made some errors in its approach to the Kenyan cases. The result was: 'Accountability for the violence not achieved in any meaningful manner.'<sup>740</sup>

The Waki Commission a success. The biggest failure was with Agenda one on disarming militias. The networks still exist in some form. Easy to resuscitate them.<sup>741</sup>

Militias. No Kenyan pretends that *Mungiki* not alive and well. Or the Kalenjin warriors.<sup>742</sup>

We had issues around the Special Tribunal. We didn't start off focusing on the ICC, we were quite sceptical, all the concerns we had around the ICC in other situations, [then Prosecutor Luis] Moreno [Ocampo] himself and the controversy surrounding him. But because the only game in town, we began engaging and weren't publicly critical although we were critical in meetings with them. We did keep harping on about accountability for all levels, low level, mid-level, high level. If could go back, would be more aggressive about that, pushing for alternative solutions. Dealing with armed groups, that was left to the ICC. No attempt to deal with that so later on morphed and became something else.<sup>743</sup>

My biggest disappointment with the ICC was the police. That was the easiest case to prove and didn't. That was the most important part for us in terms of accountability. Because if can transform state machinery, then can deal with militia. But not now. We're still vulnerable. The police, the military can be used as militia. And know they can get away with it.<sup>744</sup>

The ICC indictments were the first time people had seen such high-level people called to the dock to account for their actions. Saw the Kenyan delight in that

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<sup>739</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>740</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>741</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>742</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>743</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>744</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

because everybody knew people in government responsible for things and long overdue. Success story at beginning. But not a matter of if, a matter of when, because Ocampo always makes mistakes. The ICC indictments went terribly wrong. Didn't need to go that way if [the] Office [of the Prosecutor, OTP] had been less publicity-seeking. Could've sealed indictments until had completed investigations. But wanted the glory.<sup>745</sup>

Lawyers, including some I respect, believe the ICC also made mistakes. You do not charge people with serious crimes and let them walk. In situations where interference was possible, or even where not, when charged with such serious crimes, you do not let them walk.<sup>746</sup>

No time to waste, need to try the big fish for the justice of the many. In the process, lost concentration on that larger society. Nobody could deny justice was important and the ICC helped keep pressure on people who'd never have looked for justice for those affected. But that hybridity also allowed the global, the particular template, the particular form of seeking justice, to supersede and overwhelm local conversations. And introduced a politics of business as usual, politics into what could've been a different African agenda. And the rest is history.<sup>747</sup>

Apart from mis-steps made by the ICC, the problem was that with suspected perpetrators existing in both ODM and PNU, believed to be responsible for different patterns of the violence, there was no appetite within the Grand Coalition Government for accountability for the post-elections violence. The exception was for suspected perpetrators from the other side or from the Executive in respect of the security services:

National amnesia, forgetting uncomfortable truths. There was a political settlement, leave the violence alone. Questions of accountability are difficult. When people clamouring to get into government, accountability attractive as strengthens base. But when starts happening, people walk away from it. Realisation that both camps had been involved in crimes and desire to shield perpetrators. Everybody brought down, nobody had a higher moral ground. Created a complex context for accountability.<sup>748</sup>

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<sup>745</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>746</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>747</sup> Interview with Professor Funmi Olonisakin, founding Executive Director, the ALC, London, April 11, 2016.

<sup>748</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

Those involved able to continue to be part of political elite, manipulate the justice process and ensure no accountability. It was a mistake by the ICC to let them be here and not hold them.<sup>749</sup>

Young people were arrested [in the Rift Valley], Raila raised in Cabinet. Then the ICC. Which was good in terms of dealing with impunity but in terms of dealing with political formations, it weakened [ODM], it hit us hard.<sup>750</sup>

As for PNU:

Tried to intervene once or twice with Kibaki on the local tribunal, let's go with the tribunal. Initially Kibaki persuaded by idea of local tribunal. But not the sort of person to call people to State House, give parliamentarians money.

We went on some missions to the ICC, pleading for more time, which they gave us. The ICC saying: 'Come up with concrete legislation and results, we don't have to take up these matters'. But out of stupidity and buffoonery, people felt this tribunal not good.

The ICC [then] made decision that going to indict six Kenyans. Raila told Ocampo cannot be talking about six and not tell us, we're the government. [Ocampo] said difficult to mention names when some in envelope. When Kibaki heard name of Muthaura, he was furious, like he'd been struck by lightning.

The ICC would've gone in different direction if around Kibaki there were discussions that were open and objective. But could see the issue being brought to him was give the ICC a little space and you are going to end up there. You could see Kibaki fear those consequences. His concern was himself. Uhuru and Muthaura second. I've never seen Kibaki so scared, at a loss and helpless as when Ocampo was in his office. He was furious as had been told would eventually get to him. There are things that could've been done differently if not dealing with crude politicians who, instead of discussing what's on table, use[d] fear to derange process.<sup>751</sup>

Unfair to blame [the ICC] completely. Had underestimated the witness tampering, etc. The witnesses they had, if not tampered with, could've gotten their indictments.<sup>752</sup>

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<sup>749</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>750</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>751</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>752</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

Thus, although there were efforts to ensure accountability for the post-elections violence, they ultimately failed. That failure has, in turn, not only let down victims and survivors but potentially legitimised the use of violence for political ends in the future:

It was clear that the people wanted peace. The people were concerned about the rule of law. About justice and, in fact, with all the discussions on justice and the ICC, have always maintained that my concern is for the little people, the 1,300 killed, the 320,000 who lost their homes. They are not powerful, who speaks for them, when will they get justice? Rule of law and justice much more important for the little guys.<sup>753</sup>

Failed to resettle people. Haphazard and delayed.<sup>754</sup>

IDPs are not going to be given the support they deserve because they're a threat, a reminder to the political elite. There's been corruption in the way we've treated victims. There's been stratification, the same way we instrumentalise our ethnicity politically, we've done the same thing with victims. Narratives around victimhood have been created and we don't acknowledge some of them. Others get privileged. Even where there's been compensation, people left out. Because on the ODM side, perceived as being potentially pro-PNU. From the PNU side, because of their nomenclature and part of the country they come from. In the stereotype about who suffered, they don't feature. Groups who are numerically larger, we acknowledge what happened to them, they have access. And focus on certain types of violence. We know sexual violence the most widely experienced. Yet the focus has been on displacement. Even when we respond to victims, that's least attended to. Because victims of sexual violence primarily women and concerns not considered valid. Privilege some forms of victimhood over other.<sup>755</sup>

We're in a situation where they've gotten away with it. The most credible attempt to get accountability, it's failed. The ICC has no appetite to intervene in Kenya again. There's no deterrent. It's just a question of who controls the machinery of power, the Gikuyus control that and will never let go of it.<sup>756</sup>

Unintended consequences? Jubilee government. The damage that these false ICC narratives have done is incalculable. Didn't realise just how effective constructed political narratives can be. Not only propelled these guys to power but makes them vulnerable to blackmail by, for instance, bureaucrats who've helped them subvert the process. What we did was to lower the bar in terms of integrity and standards.

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<sup>753</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>754</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>755</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>756</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

If you're having to pay people to make witnesses vanish, what other standards of integrity are there? Stealing money is a small thing. Part of explosion of corruption by this government is due to that, trying to get out of the ICC. Unintended consequence and serious damage.<sup>757</sup>

Accountability has been thrown out of the window. The current government feels accountable only to the Gikuyu and the Kalenjin, [to] getting their own people to eat. They don't care about accountability. From 2013 to date, this is not a government about accountability or justice. Forget it.<sup>758</sup>

The whole bluff of having a new Constitution has been called. There's no accountability. Not in 2013. Not sure anybody will try to hold a politician to account given what's happened with the ICC. Enjoy your Constitution but, when it starts raining, it won't be your shield. [A parliamentary aspirant can be] identified as interfering with witnesses [yet] the High Court can stand up and say [he] can run in an election?<sup>759</sup>

Kenya a test case on how to deal with impunity. Politicisation of cases at the ICC frightened tentative supporters of accountability in the AU. The way the Kenyan cases have turned out has informed the way the AU is dealing with South Sudan. Have these influential voices like Kenya saying the ICC is race-hunting while have situations demanding ICC intervention.<sup>760</sup>

In the aftermath, acknowledging that accountability was always going to be politicised, the question of how to address claims for justice is still awaiting an answer:

Have to ask what was the alternative? The alternative is not impunity. Whichever process we ended up with would've resulted in these guys fighting back, other than summary execution at an early stage.<sup>761</sup>

There's no doubt the violence had to be dealt with. Needed criminal justice within a larger social justice thing. If you pursue one at expense of other, can lose both and end up with nothing. The big question is how to pursue this together to a societal equilibrium. The electoral violence provided opportunity for that. Perhaps if took a long-term approach, might have been an avenue to bring leaders and society together in a genuine way. But by focusing on criminal justice without the larger conversation and allowing outsiders to bring their own perspectives to this, lost an opportunity. And possible for the elite, including those governing and the well-to-do, civil society, prominent society, neither fish nor fowl, to begin a tussle for power, whose voice would be heard more. A new election also got hijacked.

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<sup>757</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>758</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>759</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>760</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>761</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

To conclude, where's Kenya? Kenya tried, the initial approach had snippets of 'Africanness' to it, had snippets of trying to deal comprehensively with positive peace, dared to look at root causes. But hijacked by the global template and ineptitude amongst African elites.<sup>762</sup>

Finally, several of the long-term issues identified by Agenda four were either not addressed or addressed so nominally as to fail to deal with the proximate and structural causes of the post-elections violence. These include economic grievances arising from systemic discrimination on ethnic grounds (compounded by systemic discrimination on ability, age and gender grounds), past gross and systemic human rights violations and historical dispossession from land:<sup>763</sup>

We can call it a victory but it is a Pyrrhic victory that just addressed symptoms of the problem. But the structural, root cause remained unaddressed. My fear is that that structural, root cause unaddressed may come to haunt Kenya come the next elections. A number of issues remain unaddressed despite our quote unquote success story. First, the economic causal factors have not been dealt with. Unemployment, poverty, inequality, exclusion, in particular affecting women, youth, people with disabilities, minorities and other marginalised groups. How is the national cake distributed? The grievances that come with that are still there and may come to haunt Kenya again.<sup>764</sup>

[The] TJRC, saw where that went. The land question, not by accident that [the National Land] Commission under siege. There was a national land policy [but] the public persona of the land question is again politicians handing out title deeds, giving land to peasants, [as] a favour. Supposed to have redressed historical injustices, not done. Created equity, in terms of land management, not done. Transparency, not even close. Have we seen any indictments around corruption in land? Not done. It's reversals we're seeing. The underlying questions not even on a shelf, in cold storage.<sup>765</sup>

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<sup>762</sup> Interview with Professor Funmi Olofinisakin, founding Executive Director, the ALC, London, April 11, 2016.

<sup>763</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>764</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

<sup>765</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

Initiatives to address Kenya's youth bulge and the question of youth un(der)employment were particularly thin for the: 'Younger generation of people who have higher expectations'.<sup>766</sup>

Kenya 'Missed the opportunity to tackle the youth problem'.<sup>767</sup>

Some things we did not do much about but scratched the surface. Youth unemployment, *Kazi kwa vijana* [Work for Youth].<sup>768</sup>

There's a generation we've lost, the Twitteratti. From 16-30 years, now it's the Kardashians. Where will change come from? A generation bred on the *Nyayo* [footsteps] philosophy [of the Moi dictatorship], *Nyayo* milk: work with the system, don't be critical, don't ask questions. Don't work hard, work smart. Cut corners, do deals, tenderpreneurs. That generation has no national principles and values, it doesn't register. Not even talking about reclaiming, lost. Not concerned about the commons. Maybe a phenomena among an elite, also an underclass here and in the different counties. The forgotten ones. The *Mungiki* not just as a criminal gang, but an ideological space, however illiberal. But this lower-class that would perhaps be more agitated was demobilised by the violence when the ceasefire happened.<sup>769</sup>

More critically is that the sense of political inclusion meant to be fostered by power-sharing in the Grand Coalition Government was not realised, given the constant political posturing and tensions during its term. The sense of political exclusion only deepened following Ruto's separation from Raila for the 2013 General Election and the rise to power, after yet another contested supposed presidential outcome, of Kenyatta and Ruto. The narrative spun was one of 'reconciliation' between the Gikuyu and the Kalenjin, ignoring the analysis of the proximate and structural causes of the violence that were meant to be addressed by Agenda four on long-term issues:

The government think[s] it was a conflict between the Gikuyu and the Kalinin when it was more fundamental. We're more divided than we were in 2007. The causes of violence in 2007 have been ignored. People are going to hibernate in their own counties, give up on the national level and start focusing on the local level. The trooping back to our identities. Nairobi is for Gikuyus who are in government. Is it

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<sup>766</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>767</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>768</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>769</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

helping the people be vigilant at the county level? No, because the county governments are as bad as the national government.<sup>770</sup>

We never went through those Agenda items. We got peace and forgot about them. The only reason we have peace in the Rift Valley is that they're President and Vice President together. If not... We never solved anything, peace is conditional and we've agreed. The moment we disagree, nothing has changed. We lost a fantastic opportunity.<sup>771</sup>

Diversity and how it's managed. The salience of the ethnic divide and cleavage is very pronounced here. When I was here for the APRM, when I got to the Rift Valley, Kenyans would openly talk about other Kenyans as foreigners. I was shocked, I had never come across that before in my entire life. They were not talking about Ugandans. They were talking Kenyans from another part of the country. It has not yet been dealt with. A Pyrrhic victory. Not something we can celebrate comfortably.<sup>772</sup>

Given Kenya's history (with three Gikuyu Presidents and one Kalenjin President) and lingering public anger (over the supposed win of two of those), the sense of political exclusion is, in fact, stronger than ever. Also stronger than ever is the sense that Kenyans are expected to align behind 'their' politicians, purely on the basis of ethnicity:

How the state is controlled and by whom, for whose benefit, is still a big issue. When a political group occupies state power, it's in whose interest? The nation? Or a particular group? By region, by ethnicity, or whatever. Contestation over state power has not been resolved to the extent that the state is considered a common good for all. It is an exclusive good for those who capture it.<sup>773</sup>

People are angry and divided. More ethnic distrust. People have grumbled about Gikuyus long before the violence. The 2013 election made it acceptable to say destined to have a Gikuyu President into perpetuity.<sup>774</sup>

If don't respect the current Constitution, might slip back to where we were in 2007-8. Kibaki tried to do away with ethnic politics. Kibaki, after having seen all those things, decided to popularise a political party that doesn't encourage ethnicity. He'd put mechanisms in place for those that voted and didn't vote for him. He learnt from post-election violence, wiser. He toned down issues of tribe.

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<sup>770</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>771</sup> Interview with Linus Gitari, former Group Managing Editor, the NMG, Nairobi, February 16, 2015.

<sup>772</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

<sup>773</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

<sup>774</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

They've re-surfaced, we're back to the KANU days, where we have to buy members of parliament (MPs), buy loyalty, wooing people to come to a political party, ganging up tribally. Our political parties are ethnically based. JAP [Kenyatta and Ruto's Jubilee Alliance Party] is a composition of tribal parties, what about those who will not join it? Those outside will have problems. This might cause us problems in the next elections.<sup>775</sup>

Unfortunately, as they enter parliament, they seem to be captured by ethnic barons and fall into the trap of ethnicity. Every appointment we're looking [at], where's so and so, the three communities, the Kikuyu, the Luo, the Kalenjin, these are three communities that have been a problem over the last 50 years.<sup>776</sup>

Have always known Kenya tribalistic. Had never bothered me as no skin off my nose, didn't operate in ethnic realms, my primary identity was a global intellectual. Two things happened. One, the Gikuyu traitor list [drawn up in during the crisis of 2007-8 to intimidate those Gikuyu not uncritically supporting Kibaki's so-called win]. When did I pledge allegiance to this identity? Have never been to any event that would warrant my being owned to extent could betray. Second was that Kenya is still a tribal society. 42 tribes and another small tribe of people called Kenyans. That's the smallest tribe, probably not more than 100 people, most endangered in times of crisis as most went to their bunkers and people like Muthoni [Wanyeki] had no bunker. Being obligated politically for which I could be killed. Being a minority and could be persecuted. Those two things changed my view about Kenya completely. There's before 2008 and after.<sup>777</sup>

The consequence is that Kenya remains fragile and unstable:

Whereas the surface has a ceasefire, underneath people are ranging themselves for different fights. Following trajectory of Rwanda, which is skirmishes in every era and then blow up. Or doing the new Rwanda. Or going the way of Zimbabwe in which get so tired, wait for the death of the regime. Not comfortable with it as somebody who aspires for more equality. Not sure about the endpoint. How many years did we say *hakuna matata* [no problem] before we exploded? This is a temporary respite and rather than using it to fix things, we're hurting more people, creating more animosity. Have you ever been to a blog where people are talking about Kikuyus? My god.<sup>778</sup>

The worry is that it may take a shorter time to implode than it did before—and that the next implosion may not be one that can be stopped in the same way:

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<sup>775</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

<sup>776</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

<sup>777</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>778</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

[Took] about 45 or so years to have a real national stand-off where looked at each other and said: 'No, not working'. Another 45 years? No. This will degenerate much faster. All looks calm but if conflict is about two non-reformist political caucuses, will remain in the same rut.<sup>779</sup>

Held as a great success story. A five-year quick win where everything was fixed. Kenya restored with dynamic young duo cleared by the ICC, therefore innocent and can do business with them. Until the next bout of violence breaks out, which it will, because underlying issues not dealt with. Close to the edge. Haven't addressed fundamental inequalities and injustices. Not careening towards violence, we're flirting with it. Don't like each other. Doesn't mean you want the whole thing to go down the tubes. Some of those people neutralised by the mediation process. Some remorse if interview Kibaki. Some learning. Some discontent mitigated by devolution.

The worrying thing about the 2008 violence is that it took us to a new place. Once move the line for where violence can happen, easier to do it again. Violence used to be in the basement of Nyayo House [a site of torture under the Moi dictatorship]. Now can be shot anywhere.<sup>780</sup>

Even more worrying is that the political leadership does not seem to have fully grasped the extent of Kenya's fragility and instability, continuing to seek to instrumentalise it for their own ends:

The lesson is have got to be the one that controls it so can address little uprisings in the Rift [Valley]. Perpetual violence and instability plays into their hands. Helps them delegitimise the Constitution, deal with their political enemies. Violence cemented as a strategy for gaining and keeping power. Political assassinations, brutality, manipulation of violence to make political points. They think they can barricade themselves in and protect themselves against violence as they're more violent, have more of a propensity to use violence. It's evil.<sup>781</sup>

What is lacking is political leadership that recognises this fragility and instability and seeks to address it rather than instrumentalise it:

We went through the crisis, we did get a Coalition Government, then we went to 2013 where again the outcome was disputed. There's a sense that divided, a lot of insecurity. Although got an agreement, a major milestone, did get a new Constitution, a major milestone, did not have champions to continue bringing us together as a nation. What changes need to happen in institutions, in those heading institutions?

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<sup>779</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>780</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>781</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

We have leaders that are not reformist. But the reformists in the two camps are being overshadowed by those in those camps who're trying to survive and, in that process, they're chipping away at the progress we'd made. What people need to see is critical debates that make people think and see there is reason in this, not hitting out at the other side. Nobody's saying: 'As a country, this is where we're headed.' We don't have champions of this peace accord, to make sure it's implemented, not only in letter but in spirit.<sup>782</sup>

The opposition continues to fail to provide alternatives. In Moi's day, difference between the opposition and KANU was night and day. Not today.<sup>783</sup>

Any major change in a system, must have [a] movement that captures power that believes in that change. Kenya has had those constitutional moments, when the people, their hopes and desires came together and the spirit of the movement to drive the country in a particular direction was not impossible. But the political class has always been the same political class, not in terms of individuals and personalities but in terms of interests, parochialism, greed. People voted knowing they wanted quantitative and qualitative change but the way leadership has emerged during and after those moments is always to advantage of the old school. Pressure from outside the political class weakens. Which gives space for the intelligentsia in the middle class to think and speak the same language [as] the crudest and backward elements, those using narrow ethnic interests to advance a political cause.<sup>784</sup>

The alternative leadership provided by civil society and the private sector before and during the mediation diminished when the political settlement was reached and the Grand Coalition Government came into being. Although civil society continued to monitor implementation of the mediation agreements, particularly as concerned truth and justice for the elections and the post-elections violence as well as transitional justice, it did not continue to capitalise to the extent that it could have on the coalitions built, particularly with the private sector, and the influence it had garnered as a result:

In societies like ours, where cannot have ideological movements in terms of political parties, civil society representative of the middle class. When the middle class takes up an idea, articulates it and part of the movement, can influence.

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<sup>782</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>783</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>784</sup> Interview with James Orengo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

Elements in civil society have been consumed. Their troops have been diluted. Movement towards progressive political change can only be achieved with stable and progressive intelligentsia within the middle class.<sup>785</sup>

A critical mass of Kenyans will have to force those things. An awakening of consciousness and civic responsibility among the middle class. Ours is looking for business, for involvement in government. We lost opportunities and we're suffering the consequences in a way we never expected, in terms of security.<sup>786</sup>

To build on those positive foundations, however, real internal tensions as well as perceptions of political bias, would need to be addressed:

When thinking about alternatives, not looking for perfection or for purists [but] for people who understand where it's broken and want to fix it. That coalition-building between civil society and business, people who do understand we can't keep doing this. Should reconvene, whatever political affiliations, biases, can't go on like this.<sup>787</sup>

Would've hoped the religious institutions would've come out, or even civil society but, in coming out, important not to be seen on either side, but raising principled questions.<sup>788</sup>

The question is, however, the extent to which those coalitions and that influence could realistically have been sustained past the crisis:

In terms of how women engage, the same challenges remain. The divisions on ethnic and party lines a challenge that's not been overcome. It is only in moments of crisis that women come together, then energy dissipates. There is still not much coming together to consolidate gains, push the boundaries and ensure gains retained or get even more.<sup>789</sup>

We dropped the ball but how many are we? We get exhausted. The way our organisations, our resources are structured. We had to keep doing our day jobs in addition to fighting for the nation. We had this success at the AU and didn't understand we needed to solidify it, get support among countries that are sympathetic. Became sporadic. It's difficult to reach out to the political class because we know they have no principles, politicians are like that, ethnic barons

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<sup>785</sup> Interview with James Orendo, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>786</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>787</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>788</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>789</sup> Interview with Mary Wandia, member of the Women's Consortium, Nairobi, February 27, 2015.

[out for] the distribution of spoils. We know we have to become more influential what we have to work with [is] a weak political opposition and we hadn't set out to build a social movement.<sup>790</sup>

Kenyan civil society rallies in a crisis but unable to sustain when not in crisis. Didn't pace itself for a long run. Civil society too small. Strength in past bolstered by alliance with the political opposition. Once [the political opposition] moved into the Coalition Government, see [civil society's] limitations, the urban nature, the ability of the government being able to pick off individuals, demonise them. Sustaining international attention on a single issue, place, hard to do.<sup>791</sup>

Another question is whether or not the time-frame was sufficient for the long-term transformation envisaged by the mediation agreements:

Naïve for international community and civil society to believe that battles won so easily and in such a short period of time. If you look at arc, steady improvements. On whole, moving. Just that set-backs depressing. Could've been further ahead. Don't always move in a linear fashion, don't always improve, but doesn't mean aren't moving.<sup>792</sup>

This country is a great country, we're still on our feet despite the massive looting. The economy grows. We still have opportunities and have the right constitutional framework. Silver lining today is when the regime wants to suppress you, the Constitution gives you many avenues to fight back.<sup>793</sup>

The confluence of interests between the domestic and the external also fell apart, initially over the ICC and then further to the coming to power of Kenyatta and Ruto and the Executive's winning back of the AU. That said:

The US has proved itself to be important. Even as Uhuru's people are saying we're going to go to China, still a yearning for approval from the US. And the US, more importantly, wants Kenya. Look at way the Ambassador, as soon as he was barked at, the line completely changed. Very different rhetoric from when came in and [US President Barack] Obama refused to visit. That's all shifting. The UK just follows suit. They need this country more than it needs them.

The international community's not going to come and rescue us twice. Certain amount of bloodshed ready to tolerate. But there's a tipping point. Violence has always been used, but always been manageable. What 2008 showed is that the

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<sup>790</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

<sup>791</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>792</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>793</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

genie can get out of the bottle easily. The indictments have been a check. Even if these haven't gone through, the ICC can still come back.<sup>794</sup>

With the benefit of hindsight, given the impacts realised under the mediation agreements as well as the real failures of the same, the question is the extent to which they have proven to address not just the trigger but also the proximate and structural causes of the post-elections violence. The answer seems to be that they did indeed provide a framework for all to be addressed. However, the expectation that all could be addressed in the time-frame set was unrealistic. And whether or not that framework could or would be utilised for all to be addressed was dependent on prioritising accountability, which the continued political leadership enabled by the political settlement was unwilling to do. The turning points with respect to the political leadership's compliance with the mediation agreements in fact had to do with accountability—as demanded by the new Constitution and, in particular, the international justice process under the ICC:

The process of a country becoming a nation tends to be a painful process. It's sad that with everything that we did, we haven't got where we could've been. [But] don't think unredeemable. Think just not quick wins.

We're still better off than we would've been if we didn't have the National Accord. It bought us time. It bought us a chance at creating a democratic state. Look at the Constitution. If we didn't have devolution in place, which was a safety valve, we would've had an outright conflagration. If we had gone to the [2013 General] Elections with the old Constitution, without having had the Waki Commission, without having had the few good recommendations out of [the] Kreigler [Commission] respected...

There are many things we gained out of the National Accord. But there are also things that, if we don't address, we could end up with [a] replay of 2007-8 and worse. The cost of having not ensur[ed] any justice for victims of the post-elections violence and the message that's been sent is that it's only people who are able to amass the instruments of violence and are willing to use them against citizens who are able to enjoy the benefits of power. It also means that people in leadership have no moral authority to question anybody else. So you have replication of conduct that runs contrary to and undermines the rule of law at all levels of leadership. Because the top leadership has no moral authority to say anything. People are talking about insecurity. How do you talk about insecurity when you have people like that in power? Do they respect the right to life themselves? I don't think you can do those things in any country and end up with peace. You can end up with

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<sup>794</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

short-term gains for a small elite. All we've done is postpone the possibility of violence. Unless we check this culture of impunity. Impunity pays off. No use being a thief. Just go to parliament. Because then you can ransack legally. The rewards of impunity still in place. We haven't learnt that lesson.<sup>795</sup>

The dialogue framework provided a basis through which Kenya would get together, with help of external experts, to address deep-seated problems. But it can only do so much. Point where we had the new Constitution and the so-called envelope [of suspected high-level perpetrators of the post-elections violence] was opened, marked another turning point. Started seeing reversals. Could feel the status quo fighting the emerging order. Since then, the TJRC's report hasn't been worked on, justice for the victims is off the agenda, yet to set up the International Crimes Division (ICD), post-elections violence cases not investigated or prosecuted, the focus has been on the ICC, the ICC cases themselves have deepened the polarisation, the ICC [suspects] are in government. We have gone full circle. We're back to 2007.

The mediation process fulfilled its mandate but there's just so much they can do after providing the framework and putting the country back on track. The strength of their intervention depends on the goodwill of leadership. The biggest challenge is leadership. Action on what we need to do. And to entrench respect for the rule of law and constitutionalism. No mediation can do that.<sup>796</sup>

When [it] come[s] to structural problems, the mediation is not the script. It will become indigenised when come to the constitutional outcomes desired, not determined by the mediation agreement. It's superficial, the whole thing was: 'Let's stop hostilities, fighting's not the way to solve these things, you guys come together and solve your problems.' The objective is the handshake and power-sharing. There's nothing to stop people from then [on]. What it does is launch processes and those processes are no longer bound by the framework of that mechanism.<sup>797</sup>

Need to calibrate that model [of conflict resolution] to local contexts and local needs. Nothing wrong with the model. Institutional reform not a bad thing. Worked. But our context is unique. Even when a seemingly reformed judiciary, still have gaps that people have can take advantage of to subvert the outcome.<sup>798</sup>

We're not finished. We've won some battles but not the war. Going to an election which will be as fraught as 2007. An energised Odinga and an energised government that doesn't want to lose power. The question we haven't answered is whether those people can be held accountable after they lose power. We haven't addressed the impunity question. The big elephant in the room. The Truth Commission didn't do what Truth Commissions are meant to do, draw a line. That

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<sup>795</sup> Interview with Atsango Chesoni, lawyer and member of the Women's Consortium, member of the CoE under the Grand Coalition Government, Nairobi, February 20, 2015.

<sup>796</sup> Interview with Mary Wandia, member of the Women's Consortium, Nairobi, February 27, 2015.

<sup>797</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>798</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

youth that's around, that's partly educated and idle and the impunity question and the lingering anger in the country. Whether it's the coast that feels humiliated by Kenyatta, or Lamu where land taken by Gikuyus, Luos who feel hated, the Kisii who feel neglected. The nationhood project has not started. May postpone the crisis but until we address these questions, we're not out of the woods. Raila epitomises the frustrations of the others in this country and the Gikuyu question is not unpacked.<sup>799</sup>

In conclusion, this chapter has explored the trigger as well as the proximate and structural causes of Kenya's electoral conflict of 2007-8. It has also explained the content of the AU's intervention to resolve the electoral conflict and how that was agreed. The roles played by different actors, internal and external, were detailed as concerned both ensuring the intervention happened and then informing its substantive content. Particular attention was paid, internally, to the roles of non-political actors and, externally, to the AU. Finally, the outcomes and impact of the intervention were detailed, in both the short and medium-to-long terms, with the focus being on surfacing both what enabled those impacts and reasons for caution about their being termed a 'success'.

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<sup>799</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

## 5. From the Organisation of African Unity (OAU) to the African Union (AU)

This is another background or contextual chapter. It focuses on the transition of the OAU to the AU as well as the political, economic and institutional imperatives for and expectations of that transition. It spells out the normative and institutional differences between the OAU and the AU, in preparation for an assessment of the effectiveness of the new AU. This assessment is then made by using the research findings on the implications for (electoral) conflict resolution arising from the AU's intervention in Kenya's electoral conflict of 2007-8.

### 5.1 Origins of and visions for regional integration

#### 5.1.1 *The ideology of pan-Africanism*

The ideology of pan-Africanism has underlain efforts at regional integration since at least the 1940s. It has been given expression in the work of African artists, creative writers, intellectuals and politicians from both the continent and the broader Diaspora—not as a comprehensive, singular or unitary ideology but nuanced in differentiated ways according to other ideological beliefs and theories of state formation and organisation. Whether it harks back to pre-existing unity prior to the arbitrary borders imposed by European colonisation is questionable.<sup>800</sup> Less questionable is that it is rooted in the experience of the African Diaspora, Africa's colonial past,<sup>801</sup> the education and encounters of African nationalists' abroad, and also in ideas of race. This is not to deny that the Maghreb or north Africa has always been engaged with pan-Africanism, but it has also always had other affiliations.<sup>802</sup>

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<sup>800</sup> Emerson, Rupert (1962) 'Pan-Africanism', *International Organisation* 16:2 March 1962, p 276; Nyerere, Julius (1963) 'A United States of Africa', *Journal of Modern African Studies* 1:1 March 1962, p 3.

<sup>801</sup> Nyerere (1963), p 1.

<sup>802</sup> Emerson (1962), pp 281-3.

Pan-Africanism has been termed essentialist, evoking as it does ‘African-ness’, mutual involvement and emotional unity,<sup>803</sup> a spiritual affinity across the continent. But it has also been deemed—by the first generation of African nationalists as well as by postcolonial Africa today—a historic necessity to harmonise relations, both politically and economically,<sup>804</sup> to extend anti-colonial emancipation and to defend Africa’s sovereignty.<sup>805</sup> It is invoked to address Africa’s underdevelopment, seen as resulting from the nature of Africa’s political and economic relations with Europe which date back to the 15<sup>th</sup> century and were shaped by the transatlantic slave trade, colonialism and neo-colonialism.<sup>806</sup> It is thus a pragmatic ideology, based on an awareness of African interdependence, the need to mitigate the potentially conflictual effects of Africa’s arbitrary borders and find collective solutions to African underdevelopment.<sup>807</sup>

Its early goals thus focused on developing and leveraging African unity to raise African living standards by concluding Africa’s decolonisation, ending apartheid,<sup>808</sup> minimising the effects of Africa’s arbitrary borders, maximising its human and physical resources and asserting influence globally while maintaining neutrality during the Cold War.<sup>809</sup> African nationalism was viewed as meaningless if it was not also pan-Africanism.<sup>810</sup> Thus, it is unsurprising that, post-independence, all independent African states became involved in one or more forms of regionalism.<sup>811</sup>

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<sup>803</sup> Nyerere (1963), p 1.

<sup>804</sup> Olowu, Dejo (2003) ‘Regional Integration, Development and the African Union Agenda: challenges, gaps and opportunities’, *Transnational Law and Contemporary Problems* 13:211, pp 216-7.

<sup>805</sup> Legum, Colin (1975) ‘The Organisation of African Unity: success or failure?’ *International Affairs* 51:2 April 1975, pp 208-9.

<sup>806</sup> Martin, Guy (1982) ‘Africa and the Ideology of Eurafica: neo-colonialism or pan-Africanism’, *Journal of Modern African Studies* 20:2 June 1982, p 221.

<sup>807</sup> Kloman, Erasmus H (1962) ‘African Unification Movements’, *International Organisation* 16:2 March 1962, p 387; Emerson (1962), p 283; Kouassi, Rene N’Guettia (2007) ‘The Itinerary of the African Integration Process: an overview of the historical landmarks’, *African Integration Review* 1:2 July 2007, p 1.

<sup>808</sup> Packer, Corinne A and Rukare, Donald (2002) ‘The New African Union and its Constitutive Act’, *American Journal of International Law* 96:2 April 2002, p 366.

<sup>809</sup> Kloman (1962), p 387.

<sup>809</sup> Emerson (1962), pp 388-9.

<sup>810</sup> Nyerere (1963), p 6.

<sup>811</sup> Kloman (1962), p 387.

As regional integration could be achieved only by negotiation and not through conquest,<sup>812</sup> disagreements on the process towards and shape of regional integration soon emerged despite agreements on the goals of pan-Africanism. However, these disagreements, on close examination, had less to do with the personal conflicts between different African nationalists at the time, and more with how these African nationalists viewed the possibilities and strategies for achieving ‘relative’ economic independence and advancing development.<sup>813</sup> For, to address and alter the nature of Africa’s political and economic relations with Europe, there were essentially three choices: to de-link from Europe; to obtain additional leverage with Europe by pursuing additional or alternative bilateral relations with other overdeveloped states,<sup>814</sup> or to pursue bilateral relations with other underdeveloped states, horizontally within Africa as well as beyond.<sup>815</sup> While the first choice was unfeasible, the differing preferences of the first generation of African nationalists with respect to the second two choices were soon evident in the different pan-Africanist groupings that emerged.

### *5.1.2 The early Pan-Africanist political and economic project*

The Pan-Africanist political and economic project had its basis in the 1945 Pan-Africanist Nationalist Conference held in Manchester, UK. That conference was followed by a series of Conferences of Independent African States, the first being held in April 1958 in Ghana, followed by Algeria in 1959 and the (then) Congo in 1960. That series was, in turn, followed by a series of All-African Peoples’ Conferences, the first being held in December 1958, also in Ghana. In contrast to the Conferences of Independent African States, the All-African Peoples’ Conferences

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<sup>812</sup> Nyerere (1963), p 2.

<sup>813</sup> Martin (1982), p 234.

<sup>814</sup> Martin (1982), p 234.

<sup>815</sup> Martin (1982), p 235.

included non-governmental as well as government participants, and observers from the Soviet bloc to channel Soviet financing for decolonisation.<sup>816</sup> Under the leadership of Kwame Nkrumah, thus, Ghana was central to the pan-Africanist political and economic project on the continent.<sup>817</sup>

From those series of conferences, different pan-Africanist groupings soon emerged. One reading has it that three geopolitical groups emerged: the first anglophone, intent on disengagement from European dependency; the second francophone, intent on maintaining its political and economic relations with the French metropole; and the third 'Arab', viewed as distinct from sub-Saharan Africa and having different priorities, such as the Palestinian cause.<sup>818</sup> Other readings, however, are less essentialist and more detailed or nuanced about the three pan-Africanist groupings that emerged, showing them to be both more heterogeneous across the supposed Maghreb/sub-Saharan divide as well as with differences based on the differing preferences outlined above.

The first pan-Africanist grouping eventually came to be known as the Casablanca powers. At its core was the Union of African States formed by Ghana, Guinea and Mali. The Union agreed to develop a Charter of Union, providing for mutual defence, common parliamentary institutions and common economic policies (including a loan from Ghana to Guinea) although it never did develop common institutions.<sup>819</sup> The Casablanca powers expanded to include the Maghreb. They were anti-colonial, pan-Africanist and socialist. However, the Casablanca powers internally differed, primarily on Mauritanian independence (opposed by Morocco) and unity within the Maghreb (and competition over the same between Egypt and Ghana).

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<sup>816</sup> Kloman (1962), p 392.

<sup>817</sup> Kloman (1962), p 402.

<sup>818</sup> Legum (1975), pp 209-10.

<sup>819</sup> Kloman (1962), p 390.

The second pan-Africanist grouping came to be known as the Monrovia powers. Ivory Coast, together with what was then Dahomey (now Benin), Niger and Upper Volta (now Burkina Faso), participated in the *Conseil de l'Entente*, which aimed to develop a customs union and a solidarity fund.<sup>820</sup> But at the core of the Monrovia powers was the African-Malagasy Organisation for Economic Cooperation formed by the Ivory Coast and what was then Malagasy. It had a common development programme and a common bank, the latter providing for investment and trade in coordination with the European Common Market. It also initiated what was to become the infamous Air Afrique (commonly known as Air *Peut-Etre* [maybe], due to its infamous unreliability).<sup>821</sup> The Monrovia powers expanded, however, from central and west Africa, to include what was then Brazzaville, Ethiopia, Liberia, Nigeria and Somalia.<sup>822</sup> They took a functional and gradualist approach to the pan-Africanist political and economic project.<sup>823</sup>

It was on the notion of Eurafrika and the ostensible complementarity and interdependence of this grouping with Europe that the sharpest division emerged between the Casablanca and Monrovia powers. While the Monrovia powers moved to consolidate political and economic relations with Europe through the trade agreements of the Treaty of Rome (later Yaounde I and II), the Casablanca powers viewed this consolidation as the rationalisation of neo-classicism and the international division of labour,<sup>824</sup> as well as the multilateralisation of bilateral dependency which would preserve colonial and linguistic cleavages, impede regional integration and prevent development.<sup>825</sup> The Treaty of Rome and Yaounde I in particular were seen as accomplishing nothing but a move from colonial divide and rule with no horizontal trade to perpetuating non-

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<sup>820</sup> Kloman (1962), p 396.

<sup>821</sup> Kloman (1962), p 395.

<sup>822</sup> Emerson (1962), p 287.

<sup>823</sup> Kloman (1962), p 397.

<sup>824</sup> Martin (1982), p 221.

<sup>825</sup> Martin (1982), pp 228-9.

viable states.<sup>826</sup> This division between the Casablanca and Monrovia powers did not subside until their much later joint negotiations of Yaounde II, together with Caribbean and Pacific states.

The third pan-Africanist grouping included central, eastern and southern Africa.<sup>827</sup> At its core was the Pan-African Freedom Movement of East, Central and South Africa, which included the nationalist movements of east Africa. These movements spanned the ideological range except with respect to anti-colonialism. Like the Monrovia powers, they also urged moderation on the pan-Africanist political and economic project.<sup>828</sup> This is perhaps unsurprising given that a more intergovernmental institution already existed in east Africa, initiated during colonialism. The East African Common Services Organisation (formerly the East Africa High Commission) provided for the joint administration of communications, transport, customs and currency as well as cooperation during the transition of east African states to independence. While a political and economic federation was discussed, aimed at settling intra- and inter-state difficulties posed by the status of the Buganda Kingdom in Uganda, the future of the 'Arab' coast (then under the Zanzibari Omani Sultanate) and the future of the Maa,<sup>829</sup> the discussions faltered following independence.

From meetings of and between these three different groupings, there was agreement in principle that mere cooperation was insufficient<sup>830</sup> and thus on the ultimate shape of regional integration. Politically, a unified foreign policy and defence strategy, together with African Military High Command, were seen as ultimately desirable.<sup>831</sup> Economically, an integrated industrial structure, communications network, intra-African and external trade policy, market and currency were also seen as ultimately desirable.<sup>832</sup> In practice and in the short term, however, few

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<sup>826</sup> Martin (1982), p 227.

<sup>827</sup> Kloman (1962), p 389.

<sup>828</sup> Kloman (1962), pp 400-1.

<sup>829</sup> Kloman (1962), pp 398-9.

<sup>830</sup> Nyerere (1963), p 3.

<sup>831</sup> Martin (1982), p 238.

<sup>832</sup> Martin (1982), p 237.

African nationalists and newly independent states were prepared to commit to a ‘leviathan’ over collaborative arrangements,<sup>833</sup> or to complete regional integration over functionalist ‘concentric circles’.<sup>834</sup> Nevertheless, as best articulated by Tanzania’s Julius Nyerere, this lack of agreement was not important.<sup>835</sup> He stressed the need to draw lessons from the African nationalist decolonisation efforts—where lack of clarity about the exact destination was not as important as advancing, however was possible, with each African state adopting its own strategies.<sup>836</sup> He stressed the need for newly independent African states to act as if already unified, avoid judgement of each other and, when disapproving, to avoid public disagreement and address newly independent African leadership directly and privately.<sup>837</sup> Doing this would increase knowledge and understanding of one another and consciousness of Africa’s interdependence.<sup>838</sup>

It was in this spirit that the OAU was finally born, as an intergovernmental organisation, with its founding treaty, the Charter of the OAU, entering into force on May 25, 1963. It was also in this spirit, however, that the OAU was later to flounder.

## 5.2 The OAU: 1963-2002

The Organisation of African Unity provided for the membership of all sovereign African states. Although it was geographically defined, membership was not open to colonial, settler-controlled or white regimes in Africa, implying its definition was also partially racial.<sup>839</sup> Its basic objective was achieving total African liberation<sup>840</sup> through negotiated settlements where possible and armed

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<sup>833</sup> Emerson (1962), p 280.

<sup>834</sup> Martin (1982), p 236.

<sup>835</sup> Nyerere (1962), p 3.

<sup>836</sup> Nyerere (1963), p 4.

<sup>837</sup> Nyerere (1963), p 5.

<sup>838</sup> Nyerere (1963), p 4.

<sup>839</sup> Austin, Dennis and Nagel, Ronald (1966) ‘The Organisation of African Unity’, *The World Today* 22:12 December 1966, p 522.

<sup>840</sup> Kouassi (2007), p 14; Legum (1975), p 214.

struggle where not.<sup>841</sup> Some of its early positions included: the non-recognition of apartheid and settler-controlled, white-minority-dominated South Africa; the non-recognition of Israel in 1973; trade relations with the European Economic Community (EEC) through Yaounde II; and non-alignment in the context of the Cold War.<sup>842</sup>

### 5.2.1 *Achievements*

The OAU is credited with providing an African political and economic centre in the postcolonial period.<sup>843</sup> It kept meeting,<sup>844</sup> providing a venue for the release of intra-African tensions as well as the forging of common African positions and policies.<sup>845</sup> In this sense, it contributed to postcolonial institution-building and international law-making.<sup>846</sup>

As to its basic objective—African decolonisation and ending apartheid—one reading has it that its Liberation Committee did not end the rivalry of nationalist movements in Angola.<sup>847</sup> But other readings credit its position on no negotiations with Portugal until the Angolan nationalist movements had a united front as being achieved.<sup>848</sup> It undertook quiet diplomacy with South Africa to enable settlement talks on what was then Rhodesian independence. While one reading has it that South Africa's transition to multiracial democracy cannot be attributed to its Dispute Settlement Mechanism,<sup>849</sup> it is evident that its Liberation Committee provided the channel for diplomatic recognition and support, as well as funding, for South African nationalist movements.

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<sup>841</sup> Legum (1975), p 215.

<sup>842</sup> Legum (1975), p 211.

<sup>843</sup> Legum (1975), p 208.

<sup>844</sup> Austin (1966), p 526.

<sup>845</sup> Legum (1975), p 211.

<sup>846</sup> Maluwa, Tiyanjana (2003) 'The Constitutive Act of the African Union and institution-building in postcolonial Africa', *Leiden Journal of International Law* 16:1 March 2003, p 170.

<sup>847</sup> Maluwa (2003), p 169.

<sup>848</sup> Austin (1966), p 526.

<sup>849</sup> Abass, Ademola and Baderin, Mashood A (2002) 'Towards Effective Collective Security and Human Rights Protection in Africa: an assessment of the Constitutive Act of the new African Union', *Netherlands International*

In terms of leverage and global influence, the OAU is also credited with ensuring a common African position on and cohesive and skilled negotiations with the EEC on Yaounde II and its successor, Lome I.<sup>850</sup>

## 5.2.2 Challenges

### *Realist interpretations*

Early predictions for the prospects for regional integration were fatalistic, seeing this endeavour as ill-fated if not doomed. Africa was seen as too complex, heterogeneous, large and unprepared for unity in the form of political and economic federation,<sup>851</sup> due to language barriers, the Maghreb's identification with the Mashreq or west Asia<sup>852</sup> and ideology.<sup>853</sup> In addition, African nationalism was considered recent and not deeply rooted, given its colonial roots and the continued relations of newly independent and peripheral African states with their former metropolises rather than one another.<sup>854</sup> Their sovereignty was considered a legal fiction,<sup>855</sup> particularly as postcolonial leadership began to shift from the early African nationalists to military commanders.<sup>856</sup> Thus, it was considered that there were no 'natural' political communities between ethnic communities across the continent as the pre-colonial African kingdoms and empires were gone, the newly independent African states were essentially imposed and emerging sub-regional groupings were new and unclear.<sup>857</sup>

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*Law Review* 49:1 May 2002, p 5; Baimu, Evarist and Struman, Kathryn (2003) 'Amendment to the African Union's Right to Intervene: a shift from human security to regime security?' *African Security Review* 12:2, p 5.

<sup>850</sup> Legum (1975), pp 216-8; Martin (1982), p 229.

<sup>851</sup> Kloman (1962), p 388.

<sup>852</sup> Austin (1966), p 528.

<sup>853</sup> Emerson (1962), p 285.

<sup>854</sup> Kloman (1962), p 387.

<sup>855</sup> Cited in Kioko, Ben (2003) 'The Right of Intervention under the African Union's Constitutive Act: from non-interference to non-intervention', *Review of the Red Cross* 85:852 December 2003, p 819.

<sup>856</sup> Austin (1966), p 523.

<sup>857</sup> Emerson (1962), p 276.

### *Institutionalist interpretations*

Later assessments of regional integration focused on the implications of the move from the Pan-Africanist political and economic project to multilateral diplomacy through the OAU.<sup>858</sup> The unlikely efficacy of any IGO was attributed to the constraint of consensus on mutual interest.<sup>859</sup> As Africa was assumed to have no hegemons capable of or willing to impose their will, the outcome was assumed to be adjustment to the lowest common denominator in terms of decision-making.<sup>860</sup>

The constrained powers of the OAU's Secretary-General,<sup>861</sup> the OAU's lack of educated and experienced administrative staff (particularly at its inception, given the education levels and experience available within African state bureaucracies post-independence, with any surplus gravitating more towards to the UN)<sup>862</sup> and the OAU's limited financial resources all mitigated against its optimal performance.<sup>863</sup>

The mismatch between the OAU's institutional design and its desired functions was also noted.<sup>864</sup> The initial assumption of zero or low transaction costs by the OAU's founders meant that compliance by its member states was also assumed, with no Executive being put in place to monitor and enforce its decisions, leading to opportunistic behaviour.<sup>865</sup> Over time, the OAU also faced competition from the relatively more effective RECs with respect to provision of public

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<sup>858</sup> Austin (1966), p 526.

<sup>859</sup> Legum (1975), p 208.

<sup>860</sup> Austin (1966), p 522.

<sup>861</sup> Kufour, Kofi Oteng (2005) 'The Collapse of the Organisation of African Unity: lessons from economics and history', *Journal of African Law* 49:2 October 2005, p 134.

<sup>862</sup> Austin (1966), p 525.

<sup>863</sup> Abass and Baderin (2002), p 12; Austin (1966), p 525.

<sup>864</sup> Tieku, Thomas Kwasi (2004) 'Explaining the Clash and Accommodation of Interests of Major Actors in the Creation of the African Union', *African Affairs* 103, p 252.

<sup>865</sup> Kufour (2005), pp 136-7.

goods (such as on security and trade).<sup>866</sup> For example, the armed conflicts in Liberia and Sierra Leone were addressed not by the OAU but by the Economic Community of West African States (ECOWAS). Similarly, the armed conflict in what had become the DRC was addressed by the Southern African Development Community (SADC).<sup>867</sup>

Thus, it is argued, the OAU suffered from both the ‘tragedy of the regional commons’ and the ‘anticommons’. With respect to the former, with no rules on entry into membership, free-riding occurred, leaving the OAU dependent on only a few policy entrepreneurs or hegemons (such as Nigeria and South Africa) to ensure the consistent supply of public goods (such as regional peacekeepers and movement on economic integration).<sup>868</sup> With respect to the latter, the assumption that all member states were both sovereign and equal led to consensus decision-making, with no provisions for decisive action and the OAU’s under-utilisation<sup>869</sup>—an institutional design that led to the OAU’s paralysis.<sup>870</sup> Given this, the OAU’s persistence was attributed to historical institutionalism and path dependence<sup>871</sup>—with its pursuit of international rents (in the form of ODA and military aid) being beneficial in the shape of increasing returns.<sup>872</sup>

### *Structuralist interpretations*

Persistent assessments of the OAU’s challenges have defined the original divide between the Casablanca and Monrovia powers over the OAU’s objectives and the pace at which regional integration was to be achieved<sup>873</sup> as being essentially a divide between radicals and conservatives,

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<sup>866</sup> Kufour (2005), p 138.

<sup>867</sup> Abass and Baderin (2002), p 5.

<sup>868</sup> Kufour (2005), p 139.

<sup>869</sup> Kufour (2005), p 141.

<sup>870</sup> Kufour (2005), p 133.

<sup>871</sup> Kufour (2005), p 133.

<sup>872</sup> Kufour (2005), pp 142-3.

<sup>873</sup> Kufour (2005), p 134.

contextualised and framed by the Cold War. Despite the OAU's position on neutrality and non-alignment, some newly independent African states were aligned with the Soviet bloc, others with their former Northern/Western metropolises (for example, under the notion of Eurafrika)<sup>874</sup> and yet others used the Cold-War divide for leverage.<sup>875</sup>

The desires for *etatism* or state consolidation on the one hand and pan-African unity on the other hand were, over time, viewed as being more contradictory than complementary<sup>876</sup>—as the national interests of newly independent African states became increasingly defined and extended.<sup>877</sup> The early generation of African nationalists, once in power, began to focus increasingly on domestic affairs<sup>878</sup>—or disputes with neighbouring states, often over borders and territory.<sup>879</sup> The Pan-Africanist political and economic project was effectively relegated to meetings of the OAU and UN or other elite encounters,<sup>880</sup> failing to build popular support.<sup>881</sup>

There were thus early disagreements within the OAU over addressing both inter- and intra-state armed conflicts in Africa (for example, in western Sahara, the Shaba rebellions, Benin's invasion and the Ogaden war). Despite the OAU's later position against 'unconstitutional changes of government',<sup>882</sup> military *coups d'état* were not prevented in Guinea Bissau, Niger and Sierra Leone. And neither was armed conflict prevented in Burundi, the DRC, Liberia, Rwanda or Somalia.<sup>883</sup>

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<sup>874</sup> Kloman (1962), p 404.

<sup>875</sup> Kloman (1962), p 388; Packer and Rukare (2002), p 367; Tieku (2004), p 252.

<sup>876</sup> Emerson (1962), p 275; Austin (1966), p 520.

<sup>877</sup> Austin (1966), p 527.

<sup>878</sup> Emerson (1962), p 277.

<sup>879</sup> Austin (1966), p 525; Emerson (1962), p 289.

<sup>880</sup> Emerson (1962), p 290.

<sup>881</sup> Austin (1966), p 528.

<sup>882</sup> Abass and Baderin (2002), p 7.

<sup>883</sup> Austin (1966), p 528.

### 5.3 Reform and transition

#### 5.3.1 *The rationale for reform and transition*

##### *Political rationale*

With Zimbabwean independence in 1980, the end of apartheid and South African multiracial democracy in 1994, the OAU had achieved its basic objective.<sup>884</sup> While it still had a potential role to play, its Charter did not allow it to effectively play this role,<sup>885</sup> particularly as concerned its protection of sovereignty and non-interference.<sup>886</sup> The postcolonial African state was still in principle viewed as the illegitimate product of the balkanisation of European colonialism. However, the practical implications of postcolonial respect for the international legal principle of *uti possidetis* were now evident,<sup>887</sup> given gross and systemic human rights violations within most African states and the armed conflicts of the 1990s—many having to do with secession and almost all internal, although with external involvement.<sup>888</sup>

Pending reform of the UN Security Council and its lack of attention to conflict resolution in Africa, it was clear there was a need for a *pax Africana* and preventive diplomacy beyond the capacities of the OAU's dormant Commission for Mediation, Conciliation and Arbitration.<sup>889</sup> To meet this need, the OAU's inadequate financial and logistical capacities needed to be boosted.<sup>890</sup>

##### *Institutional rationale*

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<sup>884</sup> Abass and Baderin (2002), p 10,

<sup>885</sup> Packer and Rukare (2002), p 365.

<sup>886</sup> Packer and Rukare, 367

<sup>887</sup> Maluwa (2003), p 161.

<sup>888</sup> Abass and Baderin, p 40; Kioko (2003), p 812; El-Ayouty cited in Packer and Rukare (2002), p 367.

<sup>889</sup> Packer and Rukare (2002), pp 368-9.

<sup>890</sup> Abass and Baderin (2002), p 8; Kioko (2003), p 820.

To address the OAU's perceived irrelevance in the face of the growing role of the RECs,<sup>891</sup> it was evident that the OAU needed to address its lack of enforcement capacities.<sup>892</sup> A different, new approach was needed to strengthen the organisation, including through partnerships with emergent African civil society.<sup>893</sup>

#### 5.4 The AU: 2002-present

Thus the African Union was established in 2001 and launched in 2002, with the basic objective of meeting Africa's challenges in the context of globalisation,<sup>894</sup> through, eventually, bringing into being a borderless Africa. The approach adopted, however, was gradualist, this being deemed more rational and realistic than the Libyan proposal for a United States of Africa.<sup>895</sup> Regional integration was to occur through the coordination, harmonisation and integration of Africa's seven recognised RECs: the Arab Maghreb Union (AMU); the Common Market of East and Southern Africa (COMESA); the EAC; the Economic Community of Central African States (CEEAC); the Economic Community of Sahel-Saharan States (CEN-SAD); the ECOWAS; and the IGAD.<sup>896</sup> Politically, the RECs were to assume first responsibility for preventive diplomacy while the AU was to better guarantee human rights<sup>897</sup> as well as peace and security on the continent.<sup>898</sup>

#### 5.5 Differences between the OAU and the AU

##### 5.5.1 *Normative provisions*

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<sup>891</sup> Abass and Baderin (2002), p 6; Baimu and Struman (2003) p 40; Kufour (2005), pp 132-3.

<sup>892</sup> Packer and Rukare (2002), p 369.

<sup>893</sup> Kioko (2003), p 810.

<sup>894</sup> Kouassi (2007), p 14; Maluwa (2003), p 157.

<sup>895</sup> Maluwa (2003), p 169.

<sup>896</sup> Kouassi (2007), p 6.

<sup>897</sup> Abass and Baderin (2002), p 4.

<sup>898</sup> Tieku (2004), p 249.

Emerging as it did during the period of Africa's decolonisation, with territorial integrity being a priority for Africa's newly independent states,<sup>899</sup> the OAU's Charter gave primacy to the principles of self-determination, sovereignty and non-interference in member states' internal affairs.<sup>900</sup> Externally, given the Cold War context, it also stressed the need for non-alignment (despite existing defence pacts with France in former French colonies).<sup>901</sup> Internally, it emphasised consensus decision-making and politics.<sup>902</sup>

In comparison, the AU's Constitutive Act, notable for the speed of its entry into force,<sup>903</sup> waters down the principles of sovereignty and non-interference.<sup>904</sup> It stresses the need for democracy, gender equality and human rights,<sup>905</sup> providing for popular participation by ordinary Africans in the regional integration process.<sup>906</sup> It provides for a common defence policy<sup>907</sup> and, in an unprecedented manner, for the AU's right to intervene in grave circumstances, initially including crimes against humanity, genocide and war crimes.<sup>908</sup> It is thus the first regional or international treaty to enable 'humanitarian intervention' (and the exercise of R2P) although it does not specify whether such intervention shall be by diplomacy (including sanctions), mediation, peacekeeping or use of force.<sup>909</sup> Neither does it clarify the UN Security Council's role, even though a literal or strict reading of the UN Charter, to which all AU member states also subscribe, makes

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<sup>899</sup> Baimu and Struman (2003), p 39.

<sup>900</sup> Kouassi (2007), p 14.

<sup>901</sup> Austin and Nagel (1966), p 522.

<sup>902</sup> Legum (1975), p 214.

<sup>903</sup> Packer and Rukare (2002), p 365.

<sup>904</sup> Olowu (2003), p 222.

<sup>905</sup> Maluwa (2003), p 164.

<sup>906</sup> Kouassi (2007), p 13; Maluwa (2003), p 163.

<sup>907</sup> Kouassi (2007), p 10; Maluwa (2003), p 163.

<sup>908</sup> Maluwa (2003), p 163; Packer and Rukare (2002), p 372; Tiekou (2004), p 250.

<sup>909</sup> Baimu and Struman (2003), p 40.

clear that the onus for authorising use of force against any UN member state lies with the UN Security Council.<sup>910</sup>

It is the AU's right to intervene in grave circumstances that is held up as representing the most significant normative difference between the OAU's Charter and the AU's Constitutive Act—the shift from non-intervention to 'non-indifference'<sup>911</sup> and from sovereignty as control to sovereignty as responsibility.<sup>912</sup> Thus, the AU's Constitutive Act enables the AU to engage where the OAU had been hamstrung by non-cooperation,<sup>913</sup> potentially addressing the political rationale for the transition noted above.

The 2003 amendments to the AU's Constitutive Act provided for the establishment of the AU's Peace and Security Council (PSC).<sup>914</sup> They also, at Libya's behest, prohibited the use of member states' territories to subvert other member states and expanded the AU's right to intervene to member states where legitimate orders are under threat. While this expansion has been critiqued as moving the AU away from interventions' based on human security to those based on state security,<sup>915</sup> a positive reading is that the AU will not intervene when illegitimate orders are under threat.<sup>916</sup>

In terms of addressing the institutional rationale for the transition noted above, the AU's Constitutive Act contains no provisions for financing the AU.<sup>917</sup> It thus does not address the financial constraints experienced by the OAU (although this is now being addressed by a 2016 decision on taxing imports). However, in terms of enforcement, it provides for the AU to suspend

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<sup>910</sup> Kioko (2003), p 808.

<sup>911</sup> Kioko (2003), p 819.

<sup>912</sup> Cited in Kioko (2003), pp 818-9.

<sup>913</sup> Kioko (2003), p 813.

<sup>914</sup> Baimu and Struman (2003), pp 37-8.

<sup>915</sup> Baimu and Struman (2003), p 38.

<sup>916</sup> Baimu and Struman (2003), p 44.

<sup>917</sup> Packer and Rukare (2002), p 377.

participation in the AU by any government coming to power by unconstitutional means.<sup>918</sup> It also provides for the AU to impose sanctions on member states for non-compliance with AU decisions<sup>919</sup> as well as for the non-payment of dues.<sup>920</sup>

### 5.5.2 *Institutional arrangements*

A key question is whether an IGO is intergovernmental or supranational,<sup>921</sup> the criterion being the extent to which delegation can be said to have occurred. In this sense, the OAU has been described as being purely intergovernmental.<sup>922</sup> It had a single source of authority,<sup>923</sup> the Assembly of Heads of State and Government, assisted by the Council of Foreign Ministers. The role of its Secretariat, headed by an elected Secretary-General, was implementation.<sup>924</sup>

As concerns its basic objective, while its Coordination Committee for African Liberation did have a fund, this was not established under the OAU's Charter but through resolution in 1963.<sup>925</sup> It also had a Commission of Mediation, Conciliation and Arbitration, with 21 elected members, as well as other specialised Commissions.

In comparison, the AU is now described as being both intergovernmental and supranational.<sup>926</sup> It has more sources of authority,<sup>927</sup> including not only the Assembly of Heads of State and Government, assisted by the Executive Council of Foreign Ministers and a new Permanent Representatives' Committee (PRC) of Ambassadors, but also its Commission, which

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<sup>918</sup> Kouassi (2007), p 14; Maluwa (2003), p 165.

<sup>919</sup> Packer and Rukare (2002), p 373.

<sup>920</sup> Olowu (2003), p 223.

<sup>921</sup> Maluwa (2003), p 159.

<sup>922</sup> Kouassi (2007), p 15.

<sup>923</sup> Kouassi (2007), p 13.

<sup>924</sup> Kouassi (2007), p 15.

<sup>925</sup> Legum (1975), p 215.

<sup>926</sup> Kouassi (1975), p 15.

<sup>927</sup> Kouassi (1975), p 13.

has its own authority,<sup>928</sup> supported by seven specialised technical committees.<sup>929</sup> In addition, it has a new Pan-African Parliament (PAP), to provide for legitimacy and popular participation and, eventually, legislative authority.<sup>930</sup> And, finally, it has the African Court of Justice and Human Rights, with judicial authority to provide judicial recourse.<sup>931</sup>

The OAU's Mechanism for Conflict Prevention, Management and Resolution has been replaced by the AU's PSC. An additional Economic, Social and Cultural Council (ECOSOCC) provides for the participation of African civil society (including women and the Diaspora). The NEPAD also, through its APRM, provides for monitoring and evaluating the AU member states' normative commitments on political, economic and corporate governance as well as socio-economic development.<sup>932</sup>

Thus, political considerations are taken into account institutionally.<sup>933</sup> And although the AU's Constitutive Act was initially described as a shell requiring additional protocols to establish the institutions it promised,<sup>934</sup> it is clear that the AU is institutionally stronger than the OAU.<sup>935</sup>

### *The human rights architecture*

Gross and systemic human rights violations occurred throughout the 1970s in the Central African Republic (CAR), Equatorial Guinea and Uganda—with the first African intervention in the same being Tanzania's intervention in Uganda in 1978.<sup>936</sup> The OAU then provided for the promotion

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<sup>928</sup> Kouassi (1975), p 15.

<sup>929</sup> Packer and Rukare (2002), p 376.

<sup>930</sup> Maluwa (2003), p 168.

<sup>931</sup> Packer and Rukare (2002), p 373.

<sup>932</sup> Kouassi (2007), p 18; Olowu (2003), p 226.

<sup>933</sup> Mulat cited in Maluwa (2003), pp 162-3.

<sup>934</sup> Packer and Rukare (2002), p 377.

<sup>935</sup> Packer and Rukare (2002), p 376.

<sup>936</sup> Baimu and Struman (2003), p 39.

and protection of human rights through the African Charter on Human and People's Rights (ACHPR), which was adopted in 1981 and entered into force in 1986.

The ACHPR was the first regional and international human rights law to guarantee collective peoples' rights, prohibit the use of member states' territories for terrorist acts and provide for the right to national and international peace and security.<sup>937</sup> However, the Commission established to monitor it was inhibited by the principle of non-intervention, as was the OAU,<sup>938</sup> with even its ability to study the human rights situation within a given member state being dependent on that member state's consent.<sup>939</sup> In 1998, the OAU established the African Court on Human and Peoples' Rights by adoption of a protocol which came into force in 2004.

In contrast to the OAU, the AU, through the objectives and principles of its Constitutive Act, recognises the UN Charter, the Universal Declaration of Human Rights (UDHR) as well as the ACHPR. While respecting human rights is listed among member states' obligations, the AU's Constitutive Act also provides for the AU to guarantee respect for human rights within Africa, implying positive action that is both generic and specific.<sup>940</sup> However, the Constitutive Act does not provide for the right of the AU to intervene in respect of gross and systemic human rights violations (intervention is only in respect of the listed international crimes of: crimes against humanity, genocide and war crimes).<sup>941</sup> Neither does it provide for financing of the Commission and the Court.<sup>942</sup>

### *The peace and security architecture*

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<sup>937</sup> Abass and Baderin (2002), p 3.

<sup>938</sup> Abass and Baderin (2002), p 31.

<sup>939</sup> Abass and Baderin (2002), p 32.

<sup>940</sup> Abass and Baderin (2002), pp 29-30.

<sup>941</sup> Abass and Baderin (2002), p 3.

<sup>942</sup> Abass and Baderin (2002), p 35.

IGOs can provide for collective security (dispute-settlement among member states without the use of force except when a rule is broken) and collective defence (assistance through the use of force when a member state is under attack).<sup>943</sup>

The OAU's Charter provided for collective security, rather than collective defence, through coordination and harmonisation. However, the nature, extent and utility of this coordination and harmonisation remained unspecified—again due to upholding the principles of sovereignty and non-interference.<sup>944</sup> The functions and roles of the OAU's Defence Commission were undefined.<sup>945</sup> Dispute-settlement amongst member states was meant to be by peaceful means, through the Commission of Mediation, Conciliation and Arbitration.<sup>946</sup> The Commission's intervention was dependent on invitation and consent by the member states concerned,<sup>947</sup> as well as its (limited) financial resources.<sup>948</sup>

The OAU's first breach of the principles of sovereignty and non-interference took place only in 1981, through the deployment of the joint OAU/French peacekeeping force in Chad. It then also intervened in Western Sahara in 1984, leading to Morocco's formal withdrawal from the OAU (although Morocco continued to participate in the OAU as an observer and, in 2017, resumed its seat within the AU). The OAU later approached Nigeria with respect to the intervention in Liberia,<sup>949</sup> which took place under the auspices of ECOWAS.

The Mechanism for Conflict Prevention, Management and Resolution, established in Cairo in 1993, defined the OAU as the 'premier organisation' with respect to peace and security in

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<sup>943</sup> Malan, Mark (1999) *The OAU and African Subregional Organisations: a closer look at the peace pyramid*. Occasional Paper 36 January 1999. Johannesburg: Institute for Security Studies (ISS).

<sup>944</sup> Abass and Baderin (2002), p 9.

<sup>945</sup> Abass and Baderin (2002), p 9.

<sup>946</sup> Abass and Baderin (2002), p 11.

<sup>947</sup> Abass and Baderin (2002), p 11.

<sup>948</sup> Abass and Baderin (2002), p 12.

<sup>949</sup> Abass and Baderin (2002), p 10.

Africa, without, however, assigning legal implications to this definition,<sup>950</sup> leaving primary responsibility for the same with the UN Security Council. (In 2017, however, the AU and the UN finally agreed on a MoU that provided for this subsidiarity.) What it did, however, was outline a ‘pyramid’,<sup>951</sup> with the OAU as an intermediary between the UN and the RECs<sup>952</sup>—with the RECs having *de facto* and necessarily assumed responsibility for preventive diplomacy and the UN retaining responsibility for preventive observation, peacekeeping, peace enforcement and peacebuilding missions.<sup>953</sup> While this division of labour had the advantages of leveraging the RECs’ familiarity and more immediate interest in given armed-conflict situations, it also sometimes lent itself to partiality.<sup>954</sup>

With time, it was evident that most African conflicts were internal, even if externally supported, and directed at governments, even if ordinary Africans bore their brunt.<sup>955</sup> With that in mind, the OAU’s Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) Declaration upheld human security rather than the state security inherent to the OAU’s Charter.<sup>956</sup> However, the Declaration was adopted only in 2000.

As distinct from the OAU’s Charter, the AU’s Constitutive Act provides for common defence. It also limits non-intervention to member states,<sup>957</sup> providing for intervention by the AU itself as well as the right of member states to request intervention—in other words, by the AU’s own initiative or by a given member state’s request.<sup>958</sup> This right is outlined in the principles of

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<sup>950</sup> Abass and Baderin (2002), p 7.

<sup>951</sup> Malan (1999).

<sup>952</sup> Malan (1999).

<sup>953</sup> Malan (1999).

<sup>954</sup> Malan (1999).

<sup>955</sup> Abass and Baderin (2002), p 9.

<sup>956</sup> Abass and Baderin (2002), p 7.

<sup>957</sup> Abass and Baderin (2002), p 15; Baimu and Struman (2003), p 40.

<sup>958</sup> Kioko (2003), p 817.

the AU's Constitutive Act, a source of law-making.<sup>959</sup> And it is outlined as a right—although more than a privilege, a right is not a duty and thus is still discretionary.<sup>960</sup> However, consent from the member state concerned is theoretically now not required.<sup>961</sup> Therefore, the member state concerned can avoid AU intervention only if there is no decision to that effect or if it withdraws from the AU.<sup>962</sup> In this sense, this delegation of sovereignty<sup>963</sup> imbues the AU with more supranational than intergovernmental authority—with the AU having more authority than a given member state in the 'grave circumstances' enabling AU intervention.<sup>964</sup>

These provisions, it has been noted, essentially develop new international norms, in principle empowering the AU to intervene without UN Security Council determination, authorisation or reporting requirements.<sup>965</sup>

The Peace and Security Council (PSC) is responsible for monitoring peace and security on the continent and for initiating responses by the AU. But questions remain as to how to effect the right of AU intervention.<sup>966</sup> Will threshold criteria be established or will the determination continue to be case by case?<sup>967</sup> What shape will intervention take in what situations, given that the means to intervene could include: diplomatic or economic sanctions (the suspension of membership, expulsion, the withdrawal of diplomatic representation, restrictions on travel and so on or restrictions on production, imports or exports); or military sanctions (ending military cooperation and training, arms embargoes and so on)?<sup>968</sup> If intervention is military, through use of

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<sup>959</sup> Abass and Baderin (2002), p 14.

<sup>960</sup> Abass and Baderin (2002), p 15; Baimu and Struman (2003), p 40.

<sup>961</sup> Abass and Baderin (2002), p 13; Baimu and Struman (2003), p 44.

<sup>962</sup> Abass and Baderin (2002), p 16.

<sup>963</sup> Abass and Baderin (2002), p 19.

<sup>964</sup> Abass and Baderin (2002), p 15.

<sup>965</sup> Abass and Baderin (2002), pp 22-3.

<sup>966</sup> Kioko (2003), p 817.

<sup>967</sup> Kioko (2003), p 818.

<sup>968</sup> Cited in Kioko (2003), p 823.

force, questions need to be defined of: right authority, just cause, right intention, last resort, proportional means and reasonable prospects, as well as conflict of interest.<sup>969</sup>

## 5.6 The potential effectiveness of the AU relative to the OAU

Given all the above, the AU has been characterised as having moved away from the constraints on action imposed on the OAU.<sup>970</sup> The principles of sovereignty and non-interference have been diminished and intervention has been enabled. The question now is the extent to which this allowance addresses the political and institutional rationales upon which transition from the OAU was deemed necessary.

### 5.6.1 *Addressing the political rationale*

Theoretically, earlier pre-conditions for successful regional integration included geographic proximity, common historical background, political congruence and economic size. More recent pre-conditions include political stability, good governance, economic growth and institutions. One reading has it that the nature of institutions will impede regional integration in Africa.<sup>971</sup> However, issues related to earlier and more recent pre-conditions—particularly political congruence and political stability—could mitigate against Africa’s regional integration. The capacities of almost all African states with respect to internal security are limited and all are now also experiencing the privatisation of security provision (to both formal and informal actors). The AU aims to provide a countermeasure by building a larger security regime but as its foundational member states are problematic, this countermeasure may prove ‘hollow’ and ‘fruitless’ without intensified state-

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<sup>969</sup> Cited in Kioko (2003), p 823.

<sup>970</sup> Kufour (2005), p 132.

<sup>971</sup> Olowu (2003), pp 230-1.

building.<sup>972</sup> In addition, in the context of new nationalisms and xenophobia, freedom of movement is more constrained than previously.<sup>973</sup> Thus, whether regional integration can be achieved without national integration,<sup>974</sup> or whether regional integration will enhance national integration, remains to be seen. The question of potential conflict with the UN Security Council as to the normative and practical basis for AU action on African peace and security remains live,<sup>975</sup> as most recently evident in Libya.

Practically, as concerns both promotion and protection of human rights and peace and security, the extent of member states' surrender of sovereignty *vis a vis* the AU is likely to continue to be negotiated. As the exercise of the AU's right to intervene is on decision by the Assembly, the risk of inaction remains—although it is suggested that, as the Assembly's decision-making is now by either consensus or a two-thirds majority, this risk may be mitigated. In addition, it is expected that African popular opinion, as expressed by the Pan-African Parliament (PAP) and the ECOSOCC, may increasingly influence the Assembly's decision-making.<sup>976</sup> This is also the case with the risk posed by intervention by request aimed at upholding an illegitimate government or instrumentalising the AU to achieve internal ends,<sup>977</sup> as has been most recently evident in Kenya.

Beyond agreement on intervention, the AU will need to develop agreement on an intervention's objectives, strategies, mandate and duration<sup>978</sup>—particularly as the nature of armed conflict on the continent requires more than short-term military intervention.<sup>979</sup> Normatively, the AU's right to intervene where a legitimate order is under threat (while not defining a 'legitimate

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<sup>972</sup> Malan (1999).

<sup>973</sup> Olowu (2003), p 247.

<sup>974</sup> Olowu (2003), p 232.

<sup>975</sup> Abass and Baderin (2002), p 26; Baimu and Struman (2003), p 42; Kioko (2003), p 820; Malan (1999).

<sup>976</sup> Kioko (2003), p 816.

<sup>977</sup> Packer and Rukare (2002), p 373.

<sup>978</sup> Kioko (2003), p 823.

<sup>979</sup> Malan (1999).

order’) presumably will extend to unconstitutional changes of government, including military *coups d’état*, mercenary overthrows, replacements of governments by armed groups and refusals to relinquish power by losing electoral incumbents.<sup>980</sup> ‘Threat’ too is undefined,<sup>981</sup> but presumably is understood as threat from external intervention.<sup>982</sup> This differs from the other ‘grave circumstances’ allowing AU intervention in that it is not an international crime and could be used to violate human rights.<sup>983</sup> As already noted, it moves from human security back to state security—the original Libyan amendment covered both civil unrest and external intervention.<sup>984</sup>

Finally, it has been argued that the OAU’s ineffectiveness *vis a vis* human rights and peace and security was less normative and more about implementation/praxis.<sup>985</sup> As the AU’s member states remain the same, many with low legitimacy<sup>986</sup> and many themselves repressive,<sup>987</sup> political will may arguably continue to mitigate against intervention.<sup>988</sup> This is particularly so given that, despite the AU’s commitments to public participation, the AU was launched in the absence of the same amid little public knowledge of, and therefore apathy about, the reasons and hopes for the transition.<sup>989</sup>

### 5.6.2 Addressing the institutional rationale

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<sup>980</sup> Baimu and Struman (2003), p 41.

<sup>981</sup> Baimu and Struman (2003), p 41.

<sup>982</sup> Kioko (2003), p 812.

<sup>983</sup> Baimu and Struman (2003), p 42.

<sup>984</sup> Baimu and Struman (2003), p 43.

<sup>985</sup> Cilliers, Jakkie (2002) ‘From Acronyms to Action: the seminal assembly of the African Union’, *African Security Review* 11:1, p 97.

<sup>986</sup> Olowu (2003), p 236.

<sup>987</sup> Olowu (2003), p 215.

<sup>988</sup> Abass and Baderin (2002), pp 37-8; Kioko (2003), p 822; Kouassi (2007), p 20; Malan (1999); Maluwa (2003), p 167.

<sup>989</sup> Olowu (2003), p 234.

Despite the AU having more of a supranational character than the more purely intergovernmental OAU, the AU remains prone to the problem of acting according to its lowest common denominator.<sup>990</sup> Initial uncertainty about the harmonisation of old OAU structures with new AU structures<sup>991</sup>—such as the future of both the CSSDCA and the NEPAD<sup>992</sup>—have been resolved over time. However, despite recognition of the seven RECs, the question of overlapping memberships within the different RECs persists.<sup>993</sup> In addition, as concerns peace and security, ECOWAS, IGAD and SADC remain more engaged than the other RECs,<sup>994</sup> due at least in part to the difficult fit between structure and function (with some of the RECs geared more towards investment and trade than conflict).<sup>995</sup> Within the AU, as already noted, the institutionalisation of crisis-prevention and management mechanisms has yet to be completed, meaning that intervention remains *ad hoc* without standardised procedures.<sup>996</sup>

Capacity too remains a concern.<sup>997</sup> Commitments of financial resources are insufficient for the scale of costs required for effective intervention,<sup>998</sup> implying that external financing remains a necessity.<sup>999</sup> And, as concerns human resources, political appointments persist,<sup>1000</sup> compromising staffing,<sup>1001</sup> particularly in light of the legacy of bureaucracy and communications inherited from the OAU.<sup>1002</sup>

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<sup>990</sup> Cilliers (2002), p 97.

<sup>991</sup> Olowu (2003), p 215.

<sup>992</sup> Cilliers (2002), p 98.

<sup>993</sup> Malan (1999); Olowu (2003), p 241.

<sup>994</sup> Malan (1999).

<sup>995</sup> Malan (1999).

<sup>996</sup> Malan (1999).

<sup>997</sup> Malan (1999).

<sup>998</sup> Olowu (2003), pp 212-3; Kioko (2003), p 822; Packer and Rukare (2002), pp 375 and 379.

<sup>999</sup> Olowu (2003), p 248.

<sup>1000</sup> Olowu (2003), p 241.

<sup>1001</sup> Packer and Rukare (2002), p 375.

<sup>1002</sup> Malan (1999).

Relative to the OAU, however, the AU has improved means of monitoring and ensuring compliance, ranging from suspension and expulsion to sanctions, and thus transaction costs are better worked in.<sup>1003</sup> However, with respect to monitoring, the NEPAD's APRM is both voluntary and technocratic.<sup>1004</sup>

## 5.7 Implications for electoral conflict resolution from the AU's intervention in Kenya

Many implications can be drawn from the AU's intervention in Kenya. First, intervention by the AU in an African electoral conflict is preferable to intervention by the UN. If motivated sufficiently to act, the AU can be less bureaucratic and its intervention put in place more speedily. African interveners may also have more contextual knowledge and encounter less resistance from the parties to the electoral conflict (although not necessarily from the people):

An AU mandate. The mandate was broad, basically saying do whatever you can to calm the situation. From my point of view, it was better that way because Terms of Reference sometimes tie you up and remove the flexibility you may have had in being creative in resolving the situation. Time is of the essence and should avoid being too bureaucratic as that delays actions and decisions and can get people killed in the meantime. In Kenya, we had the room for manoeuvre and freedom of action without being limited by a resolution and, working with people on the ground, we were able to move. If a UN mandate, probably would've had a UN Security Council resolution and would've have to go to them and so on.

Didn't [otherwise] matter that the mandate was from the AU. For the people, didn't matter, they wanted peace and whoever could bring that was welcome.<sup>1005</sup>

Intervention by the AU is not, however, as envisaged by the African Peace and Security Architecture (APSA), necessarily best carried out by the relevant REC given that the interests and perceived bias of neighbouring countries may create resistance among one or more of the parties

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<sup>1003</sup> Kufour (2005), pp 143-4.

<sup>1004</sup> Olowu (2003), p 228.

<sup>1005</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

to the electoral conflict. For a REC's intervention to be successful, its members must share a common vision and strategy for resolution of the electoral conflict:

An interesting contrast between Kenya then and Burundi now. The fact that we are failing to contain that situation is the fact that we allowed the EAC to get involved and it got involved in a manner that did not open the doors for the AU. The EAC member states are not agreed on a strategy for Burundi. The fear was that if allowed the REC to intervene, we would not succeed and the Burundi case proves the case. Continentally, we are more effective when a REC is unanimous and proactive on the issue without prompting from us. [The] ECOWAS is the best model of subsidiarity. It is seamless. We don't need to prompt ECOWAS, it prompts us. Where the REC is proactive and there's unanimity, no contradictions. Where there isn't, it's better for the AU to intervene disregarding the REC. The only REC with best practice is ECOWAS and, to some extent, the IGAD.<sup>1006</sup>

Whether the relevant REC or the AU itself leads, a single mediation process, fully backed by the UN and influential member states, is necessary to prevent mediation forum-shopping by parties to the electoral conflict and to provide carrots and sticks to support the mediation process when necessary:

I reached out to everybody because it was an AU mandate and believed must have one process. Stands a better chance of success. If too many mediators, the parties play with you and forum-shop. Can go in circles. Look at the number of people trying to get involved in Burundi. Also the CAR. Can list whole groups of Special Envoys and can lead to complications.

Given previous experiences, I insisted in Kenya, one process. Museveni came in and said had a solution, Kibaki accepted it, Raila wanted to go to the White House and said: 'How can I agree with a solution I haven't seen?' Has to be clarity and the mediation process shouldn't be loaded with too many mediators.

Right from beginning, when got the mandate, was calling around to key countries, the EU, the UN and saying to work together. They were calling when I was in Kenya and said they were coming in and I said: 'Not now, I will tell you when'.

It was unusual in the sense that the whole world was focused on what going on and when sensed a possibility for resolution, everybody rallied and supported it. Can't think of any country that tried to create difficulties for us. We all worked closely together and that's a reason why the Kenyan experience was the first effective implementation of R2P.<sup>1007</sup>

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<sup>1006</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

<sup>1007</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

That said:

Can't claim purity of an African approach. Why? Because embedded in a global frame. We built a global agenda and claimed legitimacy, a two-pronged legitimacy. The AU, the appearance of an all-African mediation team was necessary for building legitimacy. At the same time, a bigger body, a universal body, demonstrated massive interest for all its own reasons. Albeit had the image of an African solution.<sup>1008</sup>

Second, the ground was laid for an AU intervention's success by domestic actors, notably civil society and the private sector. In advance of the AU intervention, civil society and the private sector had already mobilised and organised, engaged the public and begun a back-and-forth between the parties to the electoral conflict on finding accommodation:

The use of the media was significant at the beginning. People were very appreciative of the statements we [CCP] were making. For the reason that there seemed to be a vacuum in the country, the country was leaderless, Kibaki was there but not speaking, Raila was speaking, but about election being stolen and asking people to go to the street. People wanting a message of hope.

We used all the talent. The writers. The spiritual. The political scientists. We took the initiative, we did not wait. When we see a problem, let's start. Don't hold onto it, let people run with it.<sup>1009</sup>

This is a role that is critical (if insufficiently acknowledged) for a mediation process, going beyond substantive participation of non-political actors in the actual negotiations during a mediation process. Substantive participation can be facilitated even when actual negotiations may be limited to parties to the electoral conflict and assists not just with content but also with leveraging those parties. Civil society and the private sector are more interested in definitive resolution beyond political settlement but their engagement must be sustained if the political settlement is not to become an end in itself:

Important that bring in the people, even if not at the table. Have to carry them with you and explain and not create the impression you are cooking up something behind closed doors for politicians.

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<sup>1008</sup> Interview with Professor Funmi Olanisakin, founding Executive Director, the ALC, London, April 11, 2016.

<sup>1009</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

Civil society played an important role. The credit goes to the Kenyan people who were shocked and determined to redeem their country and get it back. We couldn't have achieved what we did without the support of the people and civil society.<sup>1010</sup>

Would've been good to have civil society in the room. Ended up being a negotiation between two sides. Business in the mix. Religious groups in the mix. Other players beyond political players. Maybe some sanity pushed in those things. Not just a political negotiation any more. Had to push agenda through negotiating team or one of the players.<sup>1011</sup>

The ruling elite started to dominate, capture, the state. And large parts of society got excluded from it. Kenya was hijacked in a sense. Liberal peace and that form of state-building, where superimposing these solutions, this medicine, this kind of state. Not challenging fact that, in own right, not legitimate. In the African context, something else needs to happen. As long as everyone feels represented.<sup>1012</sup>

Third, electoral, justice and security-sector institutions need be credible and independent of the Executive and other political influence to be able to, ideally, prevent electoral conflict. When they are not able to do so, non-state institutions, including civil society and the private sector, as well the public services, must be able to pick up the pieces further to an electoral conflict. In that sense, the Kenyan case may not be comparable to situations of electoral conflict that have deteriorated to the point where institutions become non-functional and thus unable to move on agreements reached through a mediation process:

There are key institutions involved in the stability of the nation and dealing with disputes. The frontline should be at the community level, they need to keep their eyes open and deal with issues as they arise. Secondly, the Judiciary is the peacemaker and we need to do everything we can to give it support to effectively and efficiently deal with disputes. Because when not dealt with, people take the law into their own hands. When have a Judiciary that's independent, it stabilises elections. If Judiciary can do its work properly and if people believe in it. But behind the Judiciary will be the police and the army.<sup>1013</sup>

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<sup>1010</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>1011</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>1012</sup> Interview with Professor Funmi Olonisakin, founding Executive Director, the ALC, London, April 11, 2016.

<sup>1013</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

Kenya was a peculiar peace process. We were not changing a regime forcefully, not coming out from a full-blown war, had our systems in place, had a functioning government, a well-educated middle class. We can call it successful [in] that reached an agreement and had structures to carry it through, a Judiciary, ministries. Could begin implementing and not too difficult for Kenya. However, in emerging democracies, especially in Africa, we need a leader for continuity, for implementing these peace agreements, people that were figures in this peace agreement, [like] Kibaki and Raila.<sup>1014</sup>

Fourth, political settlements, while apparently now the standard solution to resolving electoral conflicts, are at best a means to an end. Political settlements are a double-edged sword. They further weaken already weak political oppositions, removing a critical yet fragile check on the Executive. They depend on the sacrifice of accountability for electoral malfeasance and the instigation of political violence and, by doing so, incentivise the same. And they can serve to prolong political commitment to structural transformation:

We were definite that we do not want to create another problem, like removing the sworn-in President. Power-sharing is just a way of managing conflict, not satisfactory. Nobody in Africa accepts that elections are lost or won. People will not agree or acknowledge they've lost an election or they have been removed from positions of authority legally. This is the biggest problem. It's not in us. We've not reached that stage where we'll gracefully walk away. Look at what happened in 2007 and 2013. Just a repeat.<sup>1015</sup>

Can only look at it as a success if power-sharing a means to an end, not an end in [itself]. Laid the groundwork for reforms in many sectors, even if didn't succeed. [But] allowed the Coalition to continue for too long. The moment we had a new Constitution, should've gone straight to elections to elect people to carry reforms forward.

A good template for solving conflicts that entail violence and deaths and you need a quick fix. But without resolving the larger constitutional questions, it may become a template that you create a problem to have a working arrangement like in Zimbabwe, Kenya, now Burundi, Ivory Coast. You lose the bigger picture in the comforts of the immediate solution.<sup>1016</sup>

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<sup>1014</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

<sup>1015</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1016</sup> Interview with James Orenge, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

We [the AU] keep doing [power-sharing] even though we know it's wrong. We are supposed to be investing more in prevention. There are two types of prevention of conflict. Direct or operational prevention, which is the most popular: mediation, elections, peace support operations. It's not sustainable. Structural prevention is more long-term and addresses the root causes. We need to invest more in structural prevention which addresses development failures and governance failures.

Deal with socio-economic issues, ensuring inclusion, equal distribution of the national cake and deal with poverty, inequality and exclusion. Deal with governance issues, a state that's inclusive, participatory, responsive, responsible. Create a people's state instead of an elite state. Move to diversity, say to all Kenyans: 'How can we all belong to Kenya?' The way we manage diversity is destructive. Diversity has now become adversity. We turn it into an adversarial weapon. It generates adversity. Diversity should be an asset. Well-cultivated, well-harvested.<sup>1017</sup>

The need not to deal with the issues superficially but to tackle root causes. May not always succeed but have to try. To tackle root causes and not just get a quick fix because could've walked away after the Coalition Government was in and said work done, patted ourselves on the back and declared victory. But a lot to be done.<sup>1018</sup>

We're in a bad place. Government came in with such a majority, no check on them, no restraint. Have done so much damage. The economy. The country's reputation and standing. Security. They had one agenda, the ICC and nothing else. Everything they do has been ham-fisted, pushed aggressively with short-term goals in mind. Cannot think of one thing they've done that has a long-term view, where they've tried to persuade people. Everything rammed down people's throats with short-term aim of staying in power and making as much money as possible. They're going to leave this country broke, polarised, in terms of security, they're out of control, don't know what the KDF's doing in Somalia, probably brutalising people the way they brutalise people here. The coast, their response has increased secessionist sentiments. They've not dealt with any grievances. There's no single area of policy these people have impacted positively. They've ruined so much. By 2017, I don't know where we'll be.<sup>1019</sup>

Finally, accountability is the last frontier. Resistance to accountability, especially enabled by and following a political settlement, cannot be under-estimated. Admittedly, the international justice process in Kenya had its weaknesses:

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<sup>1017</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

<sup>1018</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>1019</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

International justice needs to be swifter. I [also] don't understand why these offenses are bailable. How can crimes against humanity be bailable? I mean, we deny chicken thieves bail.<sup>1020</sup>

But international justice was resorted to only when the Grand Coalition Government had also successfully thwarted all efforts at domestic justice, meaning that answers to the question of accountability are still unclear:

The way the PEV [post-election violence], the Waki thing, went. Meandered off in directions nobody would have anticipated. Would a different school of thought [have] led to a different outcome?<sup>1021</sup>

The thwarting of both domestic and international justice was, ironically, supported by the very AU that had put into motion the intervention that had held out the promise of accountability. For the resistance to accountability is shared by an increasing number of African leaders:

The AU is slowly being influenced by the fourth generation of African leaders, Uhuru, Kagame, this Ethiopian. It doesn't respect accountability. It does not see impunity the way we see it. It is much less about democratic ideals and more about social development. That's the crisis the AU is in. It's given up on democracy.<sup>1022</sup>

These African leaders draw on both reactionary and legitimate critique of the aims and reach of a purely criminal justice approach to accountability from African intellectuals:

The Left doesn't have any respect for the West as an answer or answers that borrow anything from the West. Take, for instance, [Professor Mahmood] Mamdani's views on Kenya and the ICC, he was categorical that ICC was a bad thing for Kenya. [Ade]Bayo Olukoshi himself thought good [Uhuru was] mobilising against the ICC. His argument was that mobilisation against the West was a good thing, to tame it. The Left is happy that, for the first time, Africa can call the shots on the international arena and be listened to. To teach the West a lesson. But a lesson to what end is important.<sup>1023</sup>

The infiltration of the global narrative into that emerging African approach. Quickly needed to seek a particular kind of justice. Where locals had a comprehensive picture, framed the injustices that led to conflict comprehensively, not only immediate injustices but the roots of it. They wanted, they demanded, a

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<sup>1020</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>1021</sup> Interview with Dr David Ndii, economist and member of KPTJ, Nairobi, November 17, 2015.

<sup>1022</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>1023</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

conversation around it. That two-pronged thing brought a particular kind of hybridity and demonstrated tensions between the local and international.<sup>1024</sup>

In conclusion, this second background or contextual chapter has focused on the transition from the OAU to the AU, and on the political, economic and institutional imperatives for and expectations of that transition. It has spelt out the normative and institutional differences between the OAU and the AU, the purpose being to assess the effectiveness of the new AU. This assessment has highlighted the implications for (electoral) conflict resolution arising from the AU's intervention in Kenya's electoral conflict of 2007-8.

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<sup>1024</sup> Interview with Professor Funmi Olonisakin, founding Executive Director, the ALC, London, April 11, 2016.

## **6. 'African solutions for African problems'**

This chapter explores and problematises the notion of 'African solutions for African problems'.

Using the research findings, it shows the different ways in which the AU's intervention in Kenya's electoral conflict of 2007-8 is understood as being an 'African solution' (or not). It explains factors that lead, in practice, to a decision by the AU to intervene, as well as what makes a member state agree to such an intervention. It outlines the objectives, model and advantages of such interventions and surfaces determinants of an intervention's 'success' (or not) as well as measures of such 'success'. It also explores the evolving relationship between the AU and the UN as concerns conflict resolution in Africa.

### **6.1 An African solution (or not)?**

The AU intervention in Kenya, despite problems of implementation as well as problems arising from the political settlement that lay at its heart, was largely seen as a success because that political settlement ended the violence and enabled—or at least laid the ground for—structural change. If it provides an abiding example of an 'African solution to an African problem', it provides too the opportunity to explore what made it 'African' beyond the fact that it was initiated and legitimised by an AU mandate.

Curiously, however, within the AU itself, as well as outside, the perception exists that while the face of the Panel of Eminent Personalities was African, it was less an 'African solution' than a Western intervention legitimised by the AU's mandate for the intervention. The AU's Panel of the Wise under the APSA had not yet been operationalised at the time of the intervention, the AU could neither financially nor technically support the intervention and it also couldn't provide the leverage—carrots and sticks—necessary to ensure the parties to the negotiations agreed:

The UN Secretary-General was anxious not to tangle with Kenya. That was the attitude and the AU should take credit. It gave us the mandate. While they'll say it was not their intervention, their mandate made a difference. If they wanted to own it, be involved, what would they have done and what resources would they have put in? Got one or two people seconded from them, the rest I had to raise. We had an office in Nairobi under [Ambassador] Nana [Effa-Apanteng]. Reported faithfully to them on a monthly basis [and] hardly got feedback.<sup>1025</sup>

The AU was less than ten years old [at the time] and its Secretariat support was limited. The AU was going to deploy the Panel of the Wise but hadn't at the time operationalised it.<sup>1026</sup>

The AU didn't have any money, it was the UN that serviced them [the Panel of Eminent African Personalities].<sup>1027</sup>

Initiated by the AU, suggested by the AU, but the push and pull not from the AU but the West. Remember Condoleeza coming. By the time the talks end, Kufour has left the AU, Kikwete comes over when there's a stalemate and brokered the final deal with Raila and Kibaki. So see AU at the beginning and at the end.<sup>1028</sup>

When look at the leadership of the AU then, you'll see a leadership that would listen to Western voices and Western voices clear that what going on untenable. Don't think the AU did this as concerned Africans. The AU was a convenient proxy. The AU could play ball where your big superpowers, where your big bilaterals, didn't want to be seen supporting either side. In most other contexts, the AU supports the status quo.<sup>1029</sup>

AU a good cover for the international community to be involved.<sup>1030</sup>

Within the AU Commission, this perception seems to be based on some of the very factors that, in the end, were also cited as making the AU's intervention a success. These include the gravitas and stature of the lead mediator and his ability to ensure that the rest of the international community got behind the AU mandate financially, technically and politically. The tension felt by

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<sup>1025</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>1026</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, Peace and Security Department (PSD), AU, Addis Ababa, February 22, 2016.

<sup>1027</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1028</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>1029</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>1030</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

some within the AU Commission is, in this sense, more about their lack of engagement with the mediation process as it unfolded, their sense that the lead mediator wasn't beholden to them and, as implementation of the mediation agreements rolled out, their apparent support for Kenya's growing resistance to accountability for the post-elections violence through the ICC:

It was the stature of Kofi Annan.<sup>1031</sup>

There was consensus among the PSC that Annan be the head. As a former UN Secretary-General and someone who remains engaged internationally [as my senior says, he was] 'not patriotic enough'. [When] he deployed to Kenya, he did not see this as an AU initiative. Saw it as an initiative driven by the international community.

He couldn't cope with the limited capacity at the AU at the time and decided to divorce himself. He deployed his own Secretariat from Geneva to support the process. We [the AU] had no political engagement with his office.<sup>1032</sup>

Annan was not just seen as an AU personality alone. The UN also saw him as their own. Fully supported by both. The UN provided technical support throughout.<sup>1033</sup>

Look at the AU Commission and member states separately. Of course, he was required to submit reports. But reports were sent as a way of informing the PSC, not for them to take decisions on how unrolling.<sup>1034</sup>

We had a little problem with Annan, he started reporting to the UN and others, not much input from the AU. It's about the primacy of the AU. Who gets the report first? Maybe we [the AU] said: 'He's telling more to these ones than us, we don't see him often.' He did report, but not as frequently as wished.<sup>1035</sup>

There's contention around whether the response to Kenya was led by the AU. Especially in light of embarrassing disassociation of Kofi Annan with the AU's political objectives in Kenya [later, in respect of the ICC's taking up of the Kenyan situation].<sup>1036</sup>

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<sup>1031</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1032</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1033</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, United Nations Office (UNO) to the AU, Addis Ababa, February 26, 2016.

<sup>1034</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1035</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1036</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

But he came here [to the AU] when he closed his files and gave them to the Chair. He said: ‘You’d appointed me, here are my final reports.’ [The Special Envoys] usually brief the Chair, because the Chair is the conveyor belt. [She] appoints them but has to account to the policy organs, the Executive Council or the Assembly.<sup>1037</sup>

Within Kenya, however, the perception is that the AU intervention was ‘African’ in that the groundwork was laid for it by domestic constituencies and the participation of the same in its content, acceptance and implementation enabled it to succeed:

Kenyans actually resolved their own conflict. We resolved it. The way we did it was to put Kenyans together and look for solutions. Those papers were being written by our own professionals as to what we wanted or what was a citizens’ agenda. Kofi Annan told us [CCP]: ‘Why do you want me here? You have the solution.’ We were honest with ourselves and said: ‘Yes, we know we have the solution, but we can’t do it because everybody thinks we belong to one of the sides in contention in this election.’ And he says: ‘OK, what you need to do is to help me, what do you want?’

I don’t know why we haven’t built a monument for the people, not anybody else. The AU mandate was a cover for Kenyans.<sup>1038</sup>

## 6.2 What informs the AU decision to intervene?

The AU intervention in Kenya also provides an opportunity to surface the reasons that inform the AU’s decision to intervene or not. Factors both internal and external to the AU inform a decision to intervene.

The first internal factor is leadership, of both the AU itself (which Head of State chairs the AU Summit) and the AU Commission:

There was, at that time, leadership. [Former Malian President] Alpha Konare, Obasanjo, who were keen to get involved.<sup>1039</sup>

[The then AU Chair] Kufour had a keen interest in what was happening in Kenya, shared history with Kibaki and had also been the mascot of a new benchmark for governance in Africa because Ghana among the first to take part in the APRM. So

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<sup>1037</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1038</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1039</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, Open Society Foundation (OSF), Nairobi, February 1, 2016.

emblematic of the new Africa, not the Paris Club giving rankings on whether we were a risk.<sup>1040</sup>

In addition, under the design of the APSA, not only the PSC but also the AU Commission Chair has the discretion to act based on information arising from the Continental Early Warning System (CEWS):

Article 12 of the PSC Protocol establishes the CEWS. Rarely do we [the AU] miss a situation that's escalating. In Kenya, had been monitoring from the beginning, from reports about armed youth groups in the Rift Valley. Once there's early warning, it goes to the Commissioner [responsible for peace and security], who brings it to attention of the Chair. The Chair can decide to take it to the PSC, which decides whether intervention can occur or not. Or the Chair herself has the authority to undertake preventive diplomacy and intervene.<sup>1041</sup>

A second internal factor is the normative basis for intervention provided by the Constitutive Act and the design of the APSA as well as an awareness in both the AU's political leadership and the AU Commission of the historical reasons for the design of the APSA and the desire to avoid another Rwanda-like situation:

The AU having 'African solutions to African problems' rhetoric.<sup>1042</sup>

The OAU was guided by non-interference. After the genocide in Rwanda, it became clear certain principles had to be put aside when threats of genocide or massive violations of human rights existed. The foundation is in the Constitutive Act and the sub-articles under Article 4. The doctrine of non-indifference. African solidarity. We [the AU] cannot let an African country go down the drain.<sup>1043</sup>

The AU has learnt lessons from the genocide in Rwanda. The AU was developing its theory of non-indifference. If there are war crimes, crimes against humanity, genocide, it doesn't need the authorisation of the country, it has to go in and find a solution. [In Kenya, there was already] a massacre, 1,000 people.<sup>1044</sup>

The AU Constitutive Act is specific about that. It needed to be stopped and was an opportunity to test our APSA. Four pillars, the peace fund, the CEWS, the Panel of

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<sup>1040</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>1041</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

<sup>1042</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>1043</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1044</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

the Wise, the PSC and the African Stand-By Force (ASBF). That's what we were trying to do. There was also the human factor in that, after the 1994 genocide in Rwanda, seeing machete-wielding people is in itself traumatising. I fought in Rwanda in 1994, I was with the Rwanda Patriotic Front (RPF). For anybody from that region who sees these things, we're affected at a personal level. Talking about Burundians and Rwandans.<sup>1045</sup>

Kenya thus provided a test case for the AU in terms of its new doctrine of non-indifference, its APSA and its belief in preventive and proactive diplomacy before escalation and in lieu of a purely military response:

[Kenya was] associated with other, related cases. Cote d'Ivoire and, to some extent, Burkina Faso. If one looks at the three, what you find is the AU is increasingly playing an important role in mediation. The AU has consistently tried to promote conflict management through mediation. Even if [one] look[s] at Libya, which wasn't an electoral crisis. Of course, if escalates, possibility of deployment of forces. Kenya not an exception. Kenya represented opportunity for the AU to demonstrate its ability to mediate conflict.<sup>1046</sup>

Outside the APSA under the PSC, however, were parallel and related normative and institutional developments under the DPA. These have to do more directly with elections in and of themselves, not just elections as a potential trigger for conflict:

The AU's standpoint about no illegal taking over of government, the treaty on democracy and good governance. The role the AU played in Kenya reinforced its resolve against illegal takeovers of government. [That is] why it had the courage to tell Egypt [following the military takeover that it] will suspend you. [It's] tried to enforce that everywhere, Mali, Burkina Faso.<sup>1047</sup>

The AU deploys observers before elections, long-term and short-term. Long-term observers go a month in advance, sometimes longer if we sense it's going to be complicated, not just the ballot but the outcome and acceptance of that. In Kenya, it was clear there would be clashes after the elections. We were on the alert and it turned out to be as foreseen. So immediately after, when trouble began, the AU was able to mobilise because it had foreseen trouble.<sup>1048</sup>

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<sup>1045</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

<sup>1046</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1047</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>1048</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

They [the AU] didn't want that type of problem to spread because there were a lot of elections in Africa, particularly presidential elections, and many ended in crisis.<sup>1049</sup>

As for external factors, the first has to do with the country involved. The AU's alacrity with respect to Kenya was not just because of Kenya's economic importance for countries in the hinterland who depend on transit trade through Kenya: 'Let's not forget the strategic importance of Kenya in the region'.<sup>1050</sup> It was also because of the historical perception of Kenya as being secure, stable and on an upward trajectory and the idea that it couldn't be allowed to fail:

Kenya was seen as a stable economy, with a stable government. It's the biggest economy in east Africa, it's the entry point for so many countries, it's the port, it's the hub. Therefore, this unexpected eruption of violence in Kenya—it was sudden, it was quick and very ferocious—in a country not expected to go into an ethnic type of attack. If Kenya, the implications for others in the region would be disastrous. That's the reason people rushed in quickly. The consequences were too much for anybody. If Kenya, considered stable, were to go up in flames, where is the end?<sup>1051</sup> In Kenya, the AU moved fast as Kenya's an economic powerhouse in east Africa and knew that, should Kenya burn, the ripple effects on neighbouring countries would be huge. The prices of fuel went up in Burundi and Rwanda as rely on the port of Mombasa.<sup>1052</sup>

What Rift Valley means, the highway through, if collapses, East Africa collapses.<sup>1053</sup>

At the regional level, people didn't want to see a civil war in a country seen as a success.<sup>1054</sup>

The idea that Kenya would disintegrate was scary. Like Ivory Coast, a pillar of that region. Many regional and international bodies in Kenya. Kenyan exceptionalism.

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<sup>1049</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

<sup>1050</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016; Interview with James Orenge, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>1051</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1052</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

<sup>1053</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>1054</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

Stability in bad neighbourhood. Sense that Kenya on the move. Had been possible to make positive changes and have an outcome. Not a DRC, Somalia, Liberia.<sup>1055</sup>

The AU responded the way it did because of Kenya's standing within the African continent. Kenya had this exceptionalism going for it that provoked reactions from everybody, including the AU. Can have countries like Congo, Somalia failing, but not Kenya. Kenya too important in the sub-region and Africa itself to be allowed to fail.<sup>1056</sup>

Partly the shock of Kenya becoming Burundi, Rwanda. The AU likes these islands of stability. So many factors appeal about Kenya, things function. So when things went wild, they took the right step.<sup>1057</sup>

Kenya's regional position. It's cliché when people keep saying Kenya is not Zimbabwe. But that did play out.<sup>1058</sup>

Arising from this was the related fact of the response of the sub-region, on grounds of both immediate economic impacts and potential political implications if Kenya collapsed:

There was a mobilisation of the region, with the involvement of Kikwete.<sup>1059</sup>

Rwanda and maybe Uganda played a role in pushing the AU to resolve this given the movement of their goods.<sup>1060</sup>

The second external factor has to do with the response from domestic constituencies, including civil society, and their ability and contacts to encourage a vigorous AU response:<sup>1061</sup>

[It was] also capacity of Kenyan groups to make the AU take Kenya more seriously than it would've taken other countries like Congo, Somalia.<sup>1062</sup>

The advocacy worked, the focus on the AU. KPTJ was setting the agenda. Pushing for negotiations that were credible, strong and high-profile and making that work. That battle won in Addis Ababa as the AU took a position which was unusual as

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<sup>1055</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>1056</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>1057</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>1058</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>1059</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1060</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>1061</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>1062</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

usually status quo. Kenyan civil society has got tremendous respect across Africa. Has good links across Africa and those links used.<sup>1063</sup>

[Civil society] is important. Particularly in the case of massive violence. [We get] calls from the ground. Letters from civil society saying please help us. We have to be careful not to react emotionally and rush in before we've controlled the parameters. Much is done quietly and not in the public eye. Can't rush as could go and do more harm than good. It takes time as government might prevent [our Special Envoys, human rights monitors and observers] from coming in, as in Burundi and Egypt. Sometimes it's not the number one making problems. Usually it's somebody around him, as in Egypt. In Libya, it was external factors. The delegation was refused entry as NATO [the North Atlantic Treaty Organization] was about to bomb it. In Kenya, we were lucky. Annan was appointed, dealt with the region and came in with force.<sup>1064</sup>

A third external factor is the response from the rest of the international community (although, as the Libyan example also illustrates, the AU may differ from the UN and decisions of the UN Security Council in particular on how to intervene). In Kenya, however, the interests of the AU were well aligned (at least initially) with those of the rest of the international community and the AU felt the pressure to respond:

The interests of the international community within Kenya. The leverage the international community had and the interests it had in getting Kenya resolved correctly, applied also to the AU.<sup>1065</sup>

The AU was under pressure. Because the Americans had said it won't let Kenya go the Rwanda way.<sup>1066</sup>

The AU itself feels that time has lent itself to three different models of intervention: direct (through, for example, the AU Chair); indirect (through its high-level Special Envoys, many members of the Panel of the Wise); or through the sub-region:

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<sup>1063</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>1064</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1065</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>1066</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

Have direct involvement, [indirect involvement] and the third type [of intervention] comes from the region, with the AU giving support to the region, as in Burundi now.<sup>1067</sup>

However, that typology explains the messenger, not the message. The content of what's sought remains consistent—with averting or ending violence being key and that being seen as best achieved through a political settlement. In addition, the internal and external factors taken into account to provoke the sending of the message, regardless of the messenger, do not all pertain in the same kind of alignment at all given points in time. And the message or the model for intervention through mediation may have run its course: '[That was] the era of transitional justice, coming in and salvaging places with a formula'.<sup>1068</sup> It was: 'Different from what's happening now. Look at Burundi'.<sup>1069</sup> And: 'Also just a lucky moment. If doing this now, don't know if would have the same intervention'.<sup>1070</sup>

### 6.3 What makes a member state accept an AU intervention?

The AU's intervention in Kenya provides the opportunity to tease out the factors that influence a member state's acceptance of an intervention. The first factor concerns the member state's normative commitments, failure to adhere to which has consequences:

A country will accept intervention because all 54 states of Africa are AU members, except Morocco. Decisions of the PSC are binding on member states under Articles 7 and 16 of the PSC Protocol. Otherwise, they face sanctions.<sup>1071</sup>

The AU had been rejected by Kibaki's people but the message got through that wouldn't get recognised.<sup>1072</sup>

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<sup>1067</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1068</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>1069</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

<sup>1070</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>1071</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

<sup>1072</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

The second factor is the domestic acceptability of the face and leadership of the intervention. Here, there is a preference for peers perceived as politically neutral: ‘The AU came in as had that distance and the one convenient place where could do this thing’.<sup>1073</sup>

The leadership, you had the Chair, the President of Ghana. Had also Mkapa, part of the Panel of the Wise, or Salim [Ahmed Salim], people from region. At the time, Kofi Annan was still a well-respected figure of international relations.<sup>1074</sup>

Kufour said important to agree who’ll facilitate the talk and he suggested his countryman, Mkapa, Graca and said would check with the other side [the ODM]. As [he was the] respectable head of AU, we [the PNU] accepted it and the opposition also accepted it.<sup>1075</sup>

The fact that was Annan himself, a man of such stature, who came to mediate. He had the respect of everybody else and they all pushed behind him.<sup>1076</sup>

The third factor is the calculation of the balance of power domestically by the incumbent:

Do you think Kenya had a choice [about accepting the intervention]? The guy [Kibaki] knew he’d lost the election, everybody knew he’d lost the election, but had the army, the influence of the Gikuyu leadership and needed an exit strategy. The streets were also organised. The more they were organised, the balance of power was not in their favour. Most people were killed by the police and that only encouraged the people in the streets.<sup>1077</sup>

Kenya did not oppose that as found itself in a situation where it had no other option. There was no functioning government. There were massive violations. There was no way they could refuse. I wouldn’t say they accepted but they consented.<sup>1078</sup>

The strength of the opposition cannot be discounted. [The] balance of power may have been the case in Kenya.<sup>1079</sup>

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<sup>1073</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>1074</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

<sup>1075</sup> Interview with Martha Karua, negotiator for the PNU, Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.

<sup>1076</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1077</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

<sup>1078</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1079</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

Then the opening of a front where Raila is seen to be talking to some of these people [the AU and key member states]. A moment they [the PNU] would have been loath to allow to happen. Imagine if front page was Raila meeting with all these international names.<sup>1080</sup>

The fourth factor is the calculation of interests domestically by the incumbent, including on how to best preserve itself, whose intervention may enable the least ceding of power and what could be lost through a mediated negotiation with the opposition:

The elite are unified, they understand their interests, are cohesive. They go to a certain limit, but not to an extent that's disastrous for all of them. The fight was in the elite but the consequence was in the population. When that consequence was big and people were taking matters into their own hands, the elite in both camps felt they could lose, it would be a mutual disaster if could no longer control what was going on. The aftermath, what happened, like wildfire, threatening the elite from both sides. They recognised the conflict couldn't easily be resolved unless they made a deal within the elite. Made a compromise as going all the way would've brought new forces into play that would take power from their hands.<sup>1081</sup>

The AU looked like a friendlier space as has always tended to err on the side of incumbents. African leaders are all too aware of their governance flaws [and] would be more tolerant of deficiencies.<sup>1082</sup>

A misreading by PNU and those in power at the time of the shape and form that mediation would take. If they'd known that this would acquire a life of its own, for example, the Waki Commission, even with all its problems, the Kreigler Commission. Were basically told: 'You didn't win the election', which isn't a statement of endorsement. Nobody at the point of saying: 'Let the AU come in' had envisaged AU ballooning into all that then took off.<sup>1083</sup>

A fifth factor was pressure from the AU, the region and the rest of the international community:

Most [member states], if not all them, unless they request that intervention, resist. Burundi and many others would say: 'No in the name of national sovereignty, can solve own problems.' That's the standard answer. But that doesn't discourage the AU. We can send Special Envoys. Usually, they don't accept they have problems but eventually they do when receive the high-level delegations. So they resist, many

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<sup>1080</sup> Interview with Mugambi Kiai, former Kenya Programme Officer, OSIEA, Nairobi, April 29, 2015.

<sup>1081</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1082</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

<sup>1083</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

if not most, but we don't give up. The only place we gave up was with [Muammar] Gaddafi for external reasons as the NATO had decided to bomb it.<sup>1084</sup>

Ultimately was the willingness of the parties involved to sit down. Goes back to consent. Consent the basis on which the mediation kick-started. The particularities of Kenya aside, could not have happened without consent of the government. Of course, lots of pressure.<sup>1085</sup>

It's the political pressure, economic pressure and nobody wants to be a pariah, simply put. Can be as tough as want to be, but interconnected, part of the region, the world, and will accept that.<sup>1086</sup>

The fact of how quickly and how big the response was from the AU and UN.<sup>1087</sup>

Don't forget Museveni had been here, Kagame was talking to him, so there was pressure to talk. Pressure from the region.<sup>1088</sup>

External actors had huge stakes in forcing the government to the process.<sup>1089</sup>

The final factor is pressure from domestic constituencies, including civil society and the private sector:

[Civil society] was important. They did play an important role in pushing for a peaceful solution. They did not participate much in the negotiations [which were] between the two blocks of parties. What we suggested at that time and afterwards, although it may be difficult to bring all civil society into the negotiations as a third party, was consultation. Annan and his team were dealing with all relevant stakeholders in the country. They must be brought in as guarantors of whatever peace is reached. They had a stake in peace and they had to be involved in implementation, in making sure the parties stuck to whatever they signed or else there'd be political consequences.<sup>1090</sup>

#### 6.4 Objective/model of an intervention?

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<sup>1084</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1085</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1086</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

<sup>1087</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1088</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>1089</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1090</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

The design of the APSA is clear, premised on subsidiarity, with the first level of intervention being the relevant REC. However, in practice, the AU is flexible and has evolved a three-pronged option for intervention: intervention by the relevant REC; what it terms indirect intervention through a high-level mediator, mediation team or Special Envoys, both from and external to the Panel of the Wise; and what it terms direct intervention through the AU Commission Chair and relevant senior staff:

There are cases we intervened directly, like in the Comoros. There are cases where we appointed somebody like Kofi Annan, who ran the show in Kenya and we were not involved directly.<sup>1091</sup>

There are also cases where intervention is through the sub-region.

We [the AU] have offices in some places [but] even if we have an office on the ground, it's constrained, it can be accused of bad reporting and kicked out. [So] we send high-level delegations. That's why we use neutral Special Envoys. It's not easy, I can tell you.<sup>1092</sup>

The AU is also careful about enabling incumbents to save face by ensuring those leading the high-level delegations are often peers:

When it's difficult, [we use] Heads of State. Let him [the incumbent being encouraged to consent to an intervention] talk to his peers, feel glorified.<sup>1093</sup>

Otherwise, the AU is not directive with those leading the intervention, who are assumed to know what to do and how to do it:

The people appointed are meant to know the issue. We're not directive, there's a broad framework and they're free to do whatever within that. Some like that. They have the walls and the room is empty and they have space to manoeuvre. That's worked well. The imagination of the Special Envoys. Unless there's a complication,

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<sup>1091</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1092</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1093</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

unless they [parties to a conflict] cannot agree among themselves, it's up to the facilitators. The mechanics, we leave to them.<sup>1094</sup>

This changes only if those intervening on behalf of the AU want more direction: 'Others like guidelines, [for example] Kikwete said: 'Tell me what to do.'<sup>1095</sup>

'Intelligence [is] crucial. Because, if right intelligence, can pre-empt.'<sup>1096</sup> Analysis and intelligence to inform the AU and its high-level delegations can come through internal mechanisms, such as the CEWS under the APSA, the long- and short-term electoral observation teams under the DPA or AU offices. But it can also come from external sources, including civil society:

On analysis, we get information directly or [from] reports [by] AI [Amnesty International], Human Rights Watch (HRW), local organisations and even people travelling here. It can be overwhelming, we have to sort it out.<sup>1097</sup>

The AU's objective in intervening is clear, regardless of what may have provoked the conflict. Whatever the trigger, proximate or structural causes of a given conflict, the objective is: 'Always, if fighting, stop fighting. It's always to restore peace and stability.'<sup>1098</sup> Although military deployment is possible both normatively and in terms of the institutional developments towards the ASBF, mediated negotiations are the first and preferred option if conflict and violence have

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<sup>1094</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1095</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1096</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

<sup>1097</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1098</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

not already set in: ‘The objectives are to end the suffering of the people. Stop the violence. Then move onto dialogue.’<sup>1099</sup> For example:

[At the end of 2015 and in early 2016] in Burundi, we told them you need to dialogue. [But] they’re sliding into hell. Appealing that the AU should have a stand-by contingency force to intervene if need be. That’s a country that requires a stand-by force which needs to move quickly.<sup>1100</sup>

The AU Commission’s proposal to intervene militarily in Burundi was, however, rejected by the Heads of State at their January 2016 Summit. That the proposal was even tabled, however, seems to have impressed upon the incumbent that dialogue was a better and unavoidable option.

Similarly:

For the DRC, it’s the same thing. It’s not into serious fighting so need immediately serious dialogue. If not, violence will set in. Stop violence, restore peace and stability, dialogue and come out with an outcome that you agree to by consensus.<sup>1101</sup>

The critique that has arisen as to the extent to which political settlements can compromise, addressing not only the trigger but also the proximate and structural causes of conflict, is seen by the AU as both secondary to its over-arching objective as well as, if important, something that can and should be addressed by the detail in the agreements reached:

[A political settlement] is sometimes confused as a return to the status quo. That’s left to the mechanisms, the modalities, of the agreement signed.<sup>1102</sup>

The priority of structural change potentially enabled by constitutional revisions envisaged in the agreement is also impeded by the focus on enabling political settlements to hold:

Constitutional review is always a first step. When a power-sharing agreement is not provided for, need to start the process of looking carefully at how to accommodate

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<sup>1099</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1100</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

<sup>1101</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1102</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

agreement in the Constitution. The second is about resource-allocation [for new political offices that may be established] and constitutional review covers that too. Certain resource implications. Constitutional implications. The resource one's not substantial, so intangible. But reviewing the Constitution—have only started in Somalia and has taken three years to set up review committee.<sup>1103</sup>

Critique on the extent to which political settlements can compromise accountability between immediate and longer-term issues is similarly seen as secondary to the overall objective. A trigger to conflict could include, for example, constitutional amendments unfairly weighting the electoral playing field or electoral malfeasance. Other concerns for accountability include consequences of the conflict, such as gross and systemic human rights violations, for example breaches of international humanitarian law. The search for accountability is also seen as leverage to get parties to the table. This is evident from acceptance of the notion of sequencing—that is, peace first, justice later—even when the AU itself has commissioned investigations into such violations and breaches. For example, in South Sudan:

[The] IGAD had to plead with the AU not to release the report [of the AU Commission of Inquiry on South Sudan, AUCISS]. The opposition wanted that report because thought would touch the President and his people and they'd be free. But we know that both sides are in. We cannot go forever without getting peace, and when we do, the first thing should be to bring people to answer why they killed one another. Want it to be sequenced. In [Kenya], well done. Most of those who negotiated were part of the discussions and eventually ended up being asked to account for themselves.<sup>1104</sup>

The mediators have the leeway to run the mediation as they see fit and content arising is left to them and the parties but the AU does, however nominally, sign off on the same:

Every decision made has to go to the policy organs, the PSC and, if [it] can't do it, we call a special ministerial or a Summit.<sup>1105</sup>

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<sup>1103</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1104</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1105</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

Heads of State Summits are normally held only twice a year, in January and June.

#### 6.5 What determines success?

There are several implicit determinants of an AU intervention's success. The first determinant of success is whether or not the AU can wholly occupy the space for intervention, to ensure there's a single intervention that both the relevant REC and the rest of the world get behind:

One of the continuing questions is how Kofi Annan and his team managed to muster the process without the destruction you find in mediation, forum-shopping, when the parties feel they've been pushed to the extreme in one particular forum and then [the] process starts all over again. In case of Kenya, one of the amazing things is how had a single mediation process that was well-managed, focused pressure on parties [and] everybody lined up behind [it].<sup>1106</sup>

Related to this is the need for agreement between the relevant REC, the AU and the rest of the international community on both analysis of the conflict and what needs to be done to resolve it. This requires alignment of the interests of all three groups:

Where there is a convergence of opinions on the problem and the solution, it has worked. Where the strategic interests are not so divergent, it has worked.

South Sudan took many years to accomplish. Independence was successful because those divergent didn't have critical roles to play. People agreed on separation from the Sudan. Contrast that with what happened after. Different interests—internal and external. The Chinese, the Americans, the Norwegians. In the neighbourhood, Uganda supporting one side, Kenya, Sudan. Definitely not going to get a common solution. Same as Burundi, where majority of neighbours favour [President Pierre] Nkuruniza's illegitimate process. Difficult for the rest of the world to engage.

[On the other hand,] take Mali, there were no divergent interests as far as terrorism is concerned, at least on the surface. So could get all forces working in one direction. In Kenya, the same thing. High-level appointee to mediate and facilitate, region mobilised, and the AU and the international community on the same page. Remember the pictures at the signing ceremony, they were happier than the people signing themselves. Uganda, despite the disgraceful nature of the elections, is an expression of the strategic interests concerned.

This is why when there's a crisis that the AU is involved in directly, through Special Envoys, through a region, we always say: 'let's speak with one voice'. We

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<sup>1106</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

are calling on the others to respect that. Because when interests are not aligned, we have a problem.<sup>1107</sup>

The AU is proactive about trying to ensure member states of the relevant REC do align as necessary. It can either displace or take over from the relevant REC, as in Kenya, where there were:

sub-regional dynamics. For example, Museveni show[ed] not everybody on board with same approach, sense of partisanship. [So] didn't bring in sub-regional leaders. West Africans brought in.<sup>1108</sup>

Or the AU can engage to bring recalcitrant members on board:

If there's misalignment, it's to work on it. If resistance [by] a member state, is to work on it. Have been to meetings on South Sudan. Even when [US President Barack] Obama came, he said: 'Oh, the region, you're divided.' Museveni said we shouldn't be airing differences in front of [him]. It was embarrassing.

The way the AU does it in difficult situations like Libya or Burundi right now, to avoid the problem of different interests, because countries have their own relationships, is through those Heads of State who head the regional groupings. Those chosen [as Special Envoys] are meant to bring the regional perspective on this and negotiate a compromise. So even if one country has particular relationship, the region has to develop a common approach consistent with what the Heads of State have decided. In Burundi, they must stop the fighting, they must stop the escalation between Rwanda and Burundi. They must be aligned to that. Individually, they can have their own relationships, but they must respect the AU.<sup>1109</sup>

Both the AU and the UN have also taken steps to ensure better alignment between them.

These steps include institutional arrangements for information-sharing, improving common analysis and then agreeing on the comparative advantage of intervention by either the REC, the AU or the UN:

Today, what the UN trying to do with the AU is joint horizon-scanning at the onset of any crisis, joint analysis between the sub-regional organisation, the AU and the

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<sup>1107</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1108</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>1109</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

UN, meeting regularly to analyse threats, identify danger spots and work together to agree on common solutions. Within that joint-ness, subsidiarity can work. Can say to the sub-region: 'You're closest to the theatre, so take the lead, but within a common framework.' [If the REC is] not going in, then the AU, then the UN. [For example,] when obvious IGAD couldn't resolve South Sudan, the question was whether to replace it. Our conclusion was that, if IGAD [was] side-lined, it was going to be a spoiler. That's where IGAD+ came from, to keep it engaged. That's moved it forward.<sup>1110</sup>

That said, the challenge of alignment with the rest of the international community remains, particularly as concerns permanent member states of the UN Security Council:

The other [question] is how strategic is that crisis. The more strategic it is, the less chance there is of having consensus. It is about containing the crisis, not resolving it. And any small trigger can re-launch the crisis at any given time. The DRC is having that problem. There is no unity of purpose. If there was, the DRC wouldn't be at war from independence to now. [But this is] not only in Africa. Syria today is demonstrating that. The international community has divergent views on how to resolve the Syrian crisis. So the more strategic a situation is, the more divergent opinions you're going to get on it because of divergent strategic interests in the crisis.<sup>1111</sup>

A second determinant of success is the balance of power domestically. This is the balance between the opposition and the incumbent, as well as in terms of the general sentiment of the population as expressed by civil society and the private sector:

Balance of power. In Zimbabwe, although a part of the population supported the opposition, it was not enough to displace ZANU [the Zimbabwe African National Union]. But [in Kenya], there was a well-organised opposition, structured, with support of the population. Kenya wanted to change.<sup>1112</sup>

Where you have unity of purpose at the grassroots, pushing in one direction, it is difficult for the AU or UN or whatever to adopt a position contrary to the same. An example is Burkina Faso, where the people said never. [The] ECOWAS, the AU and the UN had to follow the people's line. They were organised, they knew what they wanted, it was impossible to do otherwise. This is not the case in South Sudan [or] in Burundi, [where] civil society is divided down the middle, there is no critical mass within the country to dictate what outsiders should do to resolve the crisis.

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<sup>1110</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

<sup>1111</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

<sup>1112</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

Once the internal constituencies are united in what they want, with a republican democratic platform, not an ethnic one, they'll end up dictating the response of the international community. Where the people are united around broad democratic principles, have a chance for success because then the international community has the base to help them succeed and prevent a shift of focus away from what the people want. We must build the critical mass internally around democratic, human rights principles, not religious affiliations or ethnic belonging. Then every chance for success.<sup>1113</sup>

A final determinant of success is the sustained commitment of the parties to implementation of the agreements reached after a political settlement. The sustained engagement of the mediators in monitoring implementation can assist with this:

The problem is that mediations are political and eventually politicians will be in charge of what's agreed, implementation. But this always held up by political dynamics. Can only do so much if political actors go back on what agreed. And elements of that did happen. One plus [in Kenya] was the mediation team was willing to stay for an extra number of years monitoring implementation.<sup>1114</sup>

## 6.6 How is success measured?

The evident measure of success, related to the AU's primary objective in intervening, is whether or not mediated negotiations ensure the violence ends or escalation is forestalled:

Those are the benchmarks. Talking about visible, massive violence. Dialogue, return of refugees, compensation. In a sense, Kenya was successful as met those benchmarks.<sup>1115</sup>

Beyond the obvious, however, the first measure of success is reaching a political settlement, usually including accommodation of the opposition by the incumbent in power-sharing:

Success criteria are traditionally defined in terms of a peace agreement. [In] the Kenyan crisis, the agreement that led to power-sharing was a benchmark for success. Secondly, the narrative about what could've happened without the agreement. The jury will always be out as to whether or not there'd have been a

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<sup>1113</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1114</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>1115</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

large-scale crisis, but the agreement was seen as a preventive response that helped reduce the scale of violence. The third aspect is linked to how the agreement was used as a model for addressing similar crises on the continent even though the [AU] Charter [on Democracy, Elections and Governance] is clear that a winner should be seen as the legitimate authority.<sup>1116</sup>

Do you think the Kenyan experience is enough? Another situation, more complex, is Zimbabwe. The same problem, a ruling party refusing an election result. Some similarities in the way they dealt with the issue in that region and here. Governments of national unity.<sup>1117</sup>

A second measure of success is the extent to which the mediation agreements go beyond addressing the trigger of the conflict to addressing its proximate and structural causes. In this sense, the political settlement is ideally not an end in itself but a means to an end:

Can only look at it as a success if look at power-sharing as a means to an end, not an end in itself. It disciplined politicians for some time, brought them to the table to discuss and agree. Laid the groundwork for many reforms in many sectors, even if didn't succeed. Reform of the state and its institutions.<sup>1118</sup>

Less power-sharing and more the will of actors to impose a re-start from zero. That's what didn't exist in Zimbabwe or in Cote d'Ivoire. The actors reached an agreement on reconstruction. Power-sharing was a means of sharing responsibility for that reconstitution. In 2005, there was the [failed] constitutional referendum. To return to that question in a manner that was more constructive was important. That was the spirit of the deal.<sup>1119</sup>

The mediation process in Kenya tried to go an extra step in terms of focus on root causes, which doesn't always happen around, for example, electoral disputes, long-standing conflicts like in Sudan, South Sudan.<sup>1120</sup>

There are longer-term measures of success, however:

Can only measure success over a decade, not after a political deal's signed. Look at South Sudan, just signed and still going downhill.<sup>1121</sup>

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<sup>1116</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1117</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

<sup>1118</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>1119</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

<sup>1120</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>1121</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

The first of these longer-term measures of success is implementation of agreements intended to address proximate and structural causes of the conflict:

The process is never perfect, but must have a minimum, that people are free to express their views, and inclusiveness, political and economic.<sup>1122</sup>

Why did Burundi go bad [again]? Structural issues, of course, low growth and so on. Keep looking at Rwanda, the jury's out. People say: 'Oh Kagame's done so much for his country.' But unless there's real democracy and people can voice their anger, it's not sustainable.

[So] how do you measure if successful? When a country shares equally resources and power and everybody feels included in the system. Ultimately, what all looking for is a government that's inclusive, accountable and that delivers basic services to its people. But also, more and more, want the right to voice opinion without being sent to jail. Cannot have prosperity without democracy and vice versa. The two are linked.<sup>1123</sup>

In recognition of the drop in the parties' interest in resolving these proximate and structural causes of conflict beyond the political settlement, clarifying the reform mandate of governments formed through the same by limiting their terms of office may be necessary:

We may have failed. Had we had power-sharing for a shorter period of time, the moment we had a new Constitution, should've gone straight to elections to elect people to carry the reforms forward.<sup>1124</sup>

A contrary view is, however, that transitional leadership committed to reform may need to stay on to conclude resolution of the proximate and structural causes:

When look at Rwanda, Uganda, or even Liberia, people key when peace agreement signed [have] stayed on and although we don't agree with people changing the Constitution and staying on longer, need people who've brokered that deal to continue for at least ten years, especially if genuine in terms of wanting to see change in their own country.<sup>1125</sup>

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<sup>1122</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

<sup>1123</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

<sup>1124</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>1125</sup> Interview with Florence Mpaayei, former Executive Director, NPI and member of CCP and the Women's Consortium, Nairobi, February 26, 2015.

Whatever the transition period, whether or not there is a recurrence of conflict at the end of the same—and over the same trigger—is the final longer-term measure of success:

Burundi had done all of this, gone into post-conflict and boom, it came back. Burkina Faso, the same thing. Elections alone is not a determinant as you can have escalation afterwards. For the CAR, we say congratulations, it went peacefully. Not that you have elections, but that it went peacefully.<sup>1126</sup>

## 6.7 The evolving relationship with the UN and subsidiarity

The AU has been assertive about its responsibility and right to intervene in response to both a lack of UN interest in some African conflicts and an inappropriate interest in others:

There are extremists on both sides. The big countries used to pursue their own interests and didn't take African interests into consideration. Look at Somalia. Would've been abandoned until a threat to them.<sup>1127</sup>

However, over time, both the AU and the UN have recognised the challenges posed when the two intergovernmental bodies are pulling in different directions during a conflict:

The UN/AU Mission in Darfur (UNAMID) [for example], wasn't good practice, but was the first [attempt at a collaborative intervention]. Obvious mistakes that could've been prevented.<sup>1128</sup>

The UN and the AU policy, decision-making, organs, particularly the Security Council and the PSC have gone a long way in recognising that collaboration in addressing challenges to peace and security in Africa is the only way to go. We've seen that attempts by the AU alone or the UN alone are not successful. The Security Council has recognised it's impossible to address peace and security challenges without the AU. And the AU also has found it difficult without the participation of the UN and the RECs because they have the resources and the readiness to engage [respectively].<sup>1129</sup>

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<sup>1126</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1127</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1128</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1129</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

The AU's intervention in Kenya has, in fact, been termed the first example in which the AU and the UN were completely aligned:

[Kenya] was one of the first [crises] where the AU and the UN collaborated fully. There'd been cases before where it was either the AU alone or the UN alone or the AU and UN deploying mediators, facilitators, in situations in crisis. That one of the first where the AU and UN fully worked together. Did become part of a necessary pattern for the future.<sup>1130</sup>

Kenya thus set the stage for a new understanding and practice of subsidiarity as concerns the AU (as well as its RECs) and the UN. The AU's intervention in Kenya was:

Followed by the Sudan. IGAD did it but there was support for [the] role of Kenya, [of General Lazaro] Sumbeiywo, in the peace process that led to the Comprehensive Peace Agreement (CPA). After that, the UN fielded the AU High Level Implementation Panel (AUHIP) headed by [former South African President Thabo] Mbeki, [former Burundian President Pierre] Buyoya, there was no way the [UN] Secretary-General could've fielded a stronger team. When I was appointed [UN] Special Representative for Sudan/South Sudan, I recognised the lead of the AU and supported the effort of the AUHIP. It was led by the AU but supported by the UN and IGAD. It was the first collaboration where one organisation took the lead and all other organisations supported and participated.<sup>1131</sup>

The change in practice and recognition of the benefits of the same has led to new institutional arrangements with respect to AU/UN collaboration and cooperation on interventions in conflict situations. These go beyond joint horizon-scanning to a new strategic framework, benchmarking, capacity-building, technical support and, in at least one instance, financial support through UN assessed contributions:

We've gone a long way. We've come to agree the two organisations should have a framework for their cooperation, to systematise it. Start from beginning all the way through. The partnership has been *ad hoc* at the beginning but, over time, the recognition that it had to be more predictable, sustainable, strategic is gaining ground. Trying to be systematic, to identify a common understanding of the cause of these conflicts [so] we can go into pre-emptive measures. If understand, all right,

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<sup>1130</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1131</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

what to do to prevent them? [If] it erupts, [how] to address? Then identify relative advantages Africa has, the AU, the RECs, the UN. And design a way of engaging.

The AU has political officers on the ground, [the UN] does too, they could have consultations to find facts, to exchange ideas to interpret those facts and then come with proposals to the two Secretariats before decision-making bodies here and there...the more we do that and propose the same, the more similar the approach on how to deal with it. That's what we're trying to do right now. Secretariat to Secretariat, that framework is drafted already, both have contributed and it's ready as a basis for collaboration.<sup>1132</sup>

Cooperation between the AU and the UN in a number of areas. The UN has established an office in Addis Ababa on capacity-building for the AU, the 10-year capacity-building programme. It's just gone through a review process. At a technical level, strong cooperation [as with the] AMISOM. The AU and UN have conducted numerous benchmarking exercises in Somalia. The UN is using assessed contributions to support. Unprecedented.<sup>1133</sup>

This has led to on-going discussions on how to further institutionalise AU/UN collaboration and cooperation through acknowledged subsidiarity arrangements with respect, first, to a shared understanding of the normative basis for the same under the UN Charter:

It is within the framework of Chapter 8 that the AU's engaged. Increasingly, its engagement is military, peace-enforcement or peacekeeping and that requires the endorsement of the Security Council. The simple logic is that both the Security Council and the PSC consider challenges to peace and security as their challenges. They are collaborating to address a common challenge. If common, shouldn't be left for Africa to look for solutions and implement. A joint responsibility.

Hopefully, an example for the UN's collaboration with other regional organisations. We're not in 1945 anymore, the world's changed and the way the UN does business with regional organisations that are taking more responsibility, that recognition is necessary and must be accommodated in this global architecture.<sup>1134</sup>

This shift has been enabled by improved relationships with and respect from the AU's increased bilateral relationships:

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<sup>1132</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1133</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1134</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

It's moving better because of our relationship with key member states, China, Russia, the US. But also because the relationship between the PSC and the UN Security Council has improved. The AU doesn't need [then UN Secretary-General] Ban Ki-Moon to bring issues to the UN Security Council. All [its permanent members] have missions to the AU. All we can call directly and goes straight to capital. That's improved compared to the OAU and the early times of the AU.<sup>1135</sup>

Commitment to these new subsidiarity arrangements are evidenced through new financing proposals for AU interventions now on the table:

There has to be burden-sharing, financing. Should the UN [be] considering this is an African responsibility? It is the responsibility of the UN as well. Trying to get to that level where both working on challenges in Africa, how best to address them and how to share the burden, including financial[ly]. It is not that the UN is 'helping' Africa. But contributing so that Africans do what best at doing or are ready to do in addressing these challenges.<sup>1136</sup>

The funding of AU operations, like in Somalia. The UN Security Council came here when coming back from Burundi and had an informal session here on Burundi and Somalia. The PSC said: 'We're doing your job, you have to pay us back for doing this job, don't ask us to bring 25 per cent.' The issue of funding is more important than Chapter 7 and Chapter 8. The problem is on peace operations. Most UN missions are stabilisation missions under Chapter 6. When the AU deploys, it's for peace enforcement. Funding, equipment, all that gets involved. That's not moving.<sup>1137</sup>

[Is Somalia] an exception rather than an emerging rule? The need for the UN to authorise logistical support to the AU from the UN once there is a mandate from the UN SC. Also, talks on how to improve funding. The US is pushing for 75 per cent from the UN and 25 per cent from member states.<sup>1138</sup>

Financing is one challenge, about which, however, proposals are on the table. Other challenges remain, including on Africa's standing demand for UN reform, particularly as concerns the permanent members of the UN Security Council and the fact that while encounters between

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<sup>1135</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1136</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1137</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1138</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

the PSC and UN Security Council have now been regularised, decisions arising from those encounters are not binding. There is still no joint decision-making process:

The clamour for UN reform from African stakeholders is not getting the necessary momentum and attention. Politically, still some friction. The UN would always want to be recognised as the primary if not only decision-making organ. The PSC, on the other hand, sees itself as a primary decision-making organ as far as African conflicts are concerned. The PSC and the UN SC, they meet every now and then to exchange views but most views exchanged are not binding as don't have joint decision-making processes. So still some disagreements. But have seen progress. There is a continuous conversation to improve, harmonise.<sup>1139</sup>

Trickle-down through the two Secretariats is also a challenge:

It's the UN Secretariat [that's the problem] more than the UN Security Council. It's more institutional. The UN Secretariat believes it has primacy over everybody else. You can see it in their interactions. It becomes difficult. We said: 'Why don't you follow the new trends in the AU? How can you propose a framework [for collaboration with the AU] that doesn't mention *Silencing the Guns, Agenda 2063*? Try to relate. Try to make sure you know what you're doing. Otherwise, will reject. They still have work to do. They need to connect properly at the AU, even at the highest level.<sup>1140</sup>

## 6.8 Advantages and distinguishing characteristics of the model

The question arises as to whether or not the objectives or model of AU interventions are more advantageous than or any different from external unilateral or UN interventions. For one, having an African face to the intervention is preferable for practical and strategic reasons that are as basic as language and, more fundamentally, understandings of the political culture at play:

The composition [of non-African interventions] is problematic. In Burundi, why bring somebody from Uruguay, who doesn't even speak the same language? When can ask the Ugandans, who speak same language, who are more or less the same people? We know each other better, we approach each other differently. You don't know the cunning ways people have to mislead you. Ban Ki Moon was misled in Burundi. The President spoke in Kirundi. The Foreign Minister translated. Ban Ki Moon said he's accepted inclusive dialogue. Nkurunziza said except with people

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<sup>1139</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1140</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

who tried to overthrow him. It's a trivial example but important. They laughed at him, the Secretary-General.<sup>1141</sup>

While the objectives and models may be universal, having an African face—and preferably a senior one—to the intervention may also assist with acceptance of the intervention and ensure better contextual knowledge and empathy on the part of the mediators:

I was looking at the Kenyan situation. Success is related to the weird notion of solidarity which exists among Africans. If they'd brought a *mzungu* [white] guy there, they wouldn't have accepted him. It was the authority, the African-ness, the solidarity. A key factor in the acceptability of the mediation. First Kufour and later on Kofi Annan.<sup>1142</sup>

Involvement of the AU was critical in sense that if internally initiated, would have been too many roadblocks. President Kufour put his credibility [behind the process], having come from a country which had those difficulties, then they overrode those problems and became a democracy. His person contributed significantly. The mediator was an independent person who was not necessarily interested in who the victor was, the loser, but a process to bring the country back to sanity and stop the violence. The level and authority of the intervention was important. Kofi had just been Secretary-General of the UN and was highly regarded and the AU had chosen somebody with those credentials.

Kibaki happier with an African process than a non-African process. The opposition and civil society were seen as amenable to the West. So that intervention that came from the AU was critical in the sense that Kibaki would find it easier to talk to his colleagues, President Kufour and ultimately Kikwete.<sup>1143</sup>

It is similar models. [But] there's better knowledge, empathy, when it is people who've faced similar problems next door. That's why see African former leaders, African personalities, being appointed by the AU or even the UN to facilitate, mediate. The solutions may be similar. How you reach them, however, would be different given knowledge of that context.<sup>1144</sup>

There is now a pool of such senior Africans for the AU to draw upon:

We're lucky. We've plenty of former Heads of State that are credible. Like Kikwete. We called him to say: 'Take up Libya.' He was in retirement, milking his

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<sup>1141</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1142</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

<sup>1143</sup> Interview with James Orenge, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>1144</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

cows, but now works for this thing. Konare was there, taken for Egypt. Mogae for South Sudan. They're ready, Heads of State who finished their terms. In terms of mediation, facilitation, high-level delegations, we have no problem. The staff, usually from Peace and Security, are attached to the high-level delegations in terms of keeping track of what they're doing. If not sufficient, we hire people from outside. Because finally, they're acting on a decision of the AU Commission that'll be presented to AU policy organs.<sup>1145</sup>

It is not that external unilateral or UN interventions cannot also ensure the face of the intervention is African, however. It is more that the AU, as the continent's IGO, is able to easily convene and deploy such senior Africans with the weight of the continent behind it:

Who else would do it? Who else would provide cover if we're not in a regional body? I've worked for the UN in eastern DRC with General Obasanjo, was a senior advisor. They had to call us in. Don't think anybody from anywhere else would've put those Congolese together. See Museveni trying to do it again.<sup>1146</sup>

One distinguishing characteristic of an AU intervention is that if mediation fails, it is quicker to move to military intervention not to hold the peace but to gain the peace, despite abiding difficulties with obtaining consent from the member state in question to do so:

The UN is engaged in peacekeeping which pre-supposes there's peace to keep. May have little peace, 60 per cent, 80 per cent, but not 100 per cent. Therefore necessary to engage in both peace-enforcement and peacekeeping. In enforcement, Africans are more willing to engage. They are next door, they are ready to intervene when conflict erupts to protect civilians, to ensure humanitarian access and contain, prevent, disasters in-country and spillover into the neighbours. The AU is more ready to engage at earlier stages of the conflict and, once some stabilisation, then the UN has a greater capacity to deal with the multifaceted engagement necessary to stabilise conflict areas. That has happened in Mali, in the CAR and in Somalia. The UN recognises the importance of this and that's why it has been approving enforcements. A pattern is developing. We recognise the reasons for this pattern, count the advantages of engaging at different periods of a conflict and recognise it as beneficial to both.<sup>1147</sup>

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<sup>1145</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1146</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1147</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

Traditional peacekeeping is tied to consent, interposing between warring factions [to] get a peace agreement. What we do at the AU is almost the reverse. Consent difficult but leverage. Deploy in high-intensity situations [and] that's not the norm. Look at Mali, Somalia. Offensive operations. The same in Bangui. If went there in 2013, wouldn't have been able to leave the airport. But the AU disarmed. It is a comparative advantage to deploy in high-risk areas. It is not what troops are used to doing and it is unlikely [many troop-contributing] countries would allow, like India and Bangladesh. No peace agreement? We force an agreement. So it is a partnership of necessity, not altruism.<sup>1148</sup>

Not the example of Rwanda, that the UN was there when the mayhem started, never intervened, lost millions.<sup>1149</sup>

## 6.9 Challenges to and critiques of the model

Despite normative commitments under the Constitutive Act enabling AU intervention in a member state to prevent or given the commission of crimes against humanity, genocide and war crimes, total abandonment of notions of sovereignty in such cases has not occurred and obtaining consent of incumbents is still a challenge. There are many facets to this challenge. First are purely logistical considerations, including obtaining an Article 4 decision from the AU's highest policy organ, which meets only twice a year under normal circumstances, and then obtaining support for offensive deployments from the UN Security Council:

Article 4h can only be evoked by the Assembly of Heads of State and requires a two-thirds majority to say yes. Heads of State meet only twice a year. If a crisis is happening or there are imminent violations, how can you have an extraordinary session in time to prevent another Rwanda?

Divisions in the UN Security Council also expose the difficulty of deployment without state consent. [For example,] the AU was going to rely on the UN to endorse the PSC's [proposed] mission for prevention in Burundi (MAPROBU). We needed the UN to provide logistical support—such as airlift[ing] troops from Entebbe to northern Burundi, provid[ing] them with food, water.

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<sup>1148</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1149</sup> Interview with Ambassador Bethuel Kiplagat, member of CCP, Chair of the TJRC under the Grand Coalition Government, Nairobi, week of April 27, 2015.

Difficulty to deploy because of lack of consensus within the UN Security Council. It did not think that unilateral intervention was a good option.<sup>1150</sup>

More profoundly, however, is interpretation in practice of the norm, not as to standards of proof of the potential commission or commission of international crimes but at the political level, within the AU policy organs:

It is not about proof of violations. If there is a credible basis an intervention would prevent violations, Article 4h can be evoked. Not just in response to genocide, war crimes and crimes against humanity.

One area we've seen challenges in terms of implementation is Article 4h of the Constitutive Act. There is a gap between what member states have signed onto and challenges they face, especially when have a relatively stable state in question. In 2007, when IGAD intervened in Somalia, there was a political vacuum so it was easy to intervene without consent of the Government of Somalia as, at the time, there was no government. Going back to 2013, when deployed in Mali or the CAR in the same year, those interventions were in support of efforts by the Lake Chad basin states and Benin. These interventions [were] with consent of the target state. In Burundi, the AU invoked Article 4. However, it would be impossible for the AU to intervene without the consent of the government of Pierre Nkurunziza. This is over and beyond procedural implementation—that's technical—the political requirements are more important. The AU has not aspired to that political state of mind to intervene without consent.

For an intervention to be possible—not even if it works—it could be in either one of these scenarios. A gap or failure in governance and lack of state capacity as in Somalia or when have consent of state. That's as far as the AU can go.<sup>1151</sup>

There are also problems of norm conflict and precedence, as evidenced by tensions within the AU Secretariat itself—between political norms falling under the DPA's mandate and peace and security norms falling under the PSC's mandate. There have been:

A number of declarations by DPA on interpretations of Charter that are dissonant with what the PSC wants. That was the case in the Sudan. The DPA said not sending observers as the election won't be fair or credible. But the PSC mandated the AU Commission to do so. The same in Egypt. The AU, based on strict interpretation, advised the PSC that [what'd happened was] an unconstitutional change of government and Egypt should be suspended. Two days later, the AU was going to

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<sup>1150</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1151</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

deploy a high-level representative to Egypt and the interim government was willing to negotiate and dialogue with the AU and other parties. On basis of which Egypt could be reinstated. A mismatch between what have embraced as legal documents and what we do politically.<sup>1152</sup>

These political problems of interpretation are arguably rising as the leadership of the AU gradually changes too:

The AU is slowly being influenced by the fourth generation of African leaders, this group of Uhuru, Kagame, this Ethiopian. It doesn't respect accountability. It does not see impunity the way we see it. It is less about democratic ideals and more about social development. That's the crisis the AU is in. It doesn't think about democracy. It's given up on democracy.<sup>1153</sup>

It's a reflection of the contradictory trajectory Africa has gone through since independence. At independence, had visionary leaders almost everywhere, they had ideas which they put on paper and tried to implement. What was lacking was the cadre corps, which was absent to extent that many leaders had to import Africans from the Diaspora as colonial education didn't create that cadre corps. Today, it's the exact opposite. Visionless leadership. And an educated, talented cadre corps without guidance from the top. Important to push for visionary leadership. That is lacking. Always at two extremes. Abundance of this and lack of that. And reversals. The relationship between leaders and followers that we have today.<sup>1154</sup>

In addition, solidarity amongst the current crop of leadership can be blind: 'This is our African brother, if doing it, doesn't mean evil.'<sup>1155</sup>

Thus the Burundi example highlights the persistent challenge of AU intervention under

Article 4:

The AU was faced with about three different political challenges. In-house on reaching consensus. With the Government of Burundi on obtaining its consent. And within the UN Security Council, on consensus to allow for extension of its logistical support to MAPROBU. Broader lesson is that consent is still the name of the game. We haven't matured as a political organisation beyond that.<sup>1156</sup>

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<sup>1152</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1153</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>1154</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

<sup>1155</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

<sup>1156</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

Beyond the political difficulties of realising the intentions of Article 4 are design questions. The APSA's design is based on subsidiarity, with the relevant REC meant to step in before the AU. Neighbouring countries to a country in conflict may have divergent interests in the country at stake or in the normative principle which may have triggered the conflict. This is especially so with conflicts arising from electoral contestation:

Yes, there's critique that neighbouring countries are intervening but have vested interests, are not impartial and should therefore be carefully weighed.<sup>1157</sup>

For example, in Burundi:

There's a misalignment of interests between Rwanda and Tanzania. The division among Heads of State was visible at [the 2015] EAC Summit, which ended with Kagame leaving, saying: 'These guys going downhill.' Kenyatta said: 'We're not going to stand by for that to happen' but then stood by. It took the [AU] Chair to intervene to move away from their own internal difficulties.<sup>1158</sup>

Similarly, in:

South Sudan, the same thing, IGAD was divided. If the agreement was signed, or initialled, in August [2015], it was because the [AU] Chair insisted. Because IGAD was paralysed.<sup>1159</sup>

The options when this happens are either that: 'The region must accept that the AU will deal with it'<sup>1160</sup> or the AU must play a role in ensuring that the responsible REC does. The AU can sometimes add its weight to the REC's intervention, as in Burundi, or can expand those at the table, as in

South Sudan:

Neighbouring countries have vested interests, they will pursue them and engage anyway. It's better to recognise that and have their participation based on same principles, values, that interventions are based on everywhere rather than just let

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<sup>1157</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1158</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1159</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1160</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

them be. May not be able to contain if don't give expression through positive engagement.<sup>1161</sup>

A further challenge can be posed by the choice of mediators and their history with the country in question. A history can give contextual knowledge but it can also mean that the mediators do not begin with a clean slate as to the particular iteration of the conflict at hand. Further, a history with the country in question can mean that the parties are able to run rings around the mediators. Again, this challenge emerged with respect to South Sudan:

One year I've stayed in Addis [as an IGAD mediator], I've learnt a lot of things. Ethiopians not mediators. They can't mediate anything, they can prescribe. South Sudanese, however weak they are, they will not accept any prescription. They'd rather discuss, talk, come to an agreement on their own. [One of the mediators, former Ethiopian Minister for Foreign Affairs Seyoum] Mesfin was being helped by Khartoum to host [former Ethiopian President] Mengistu [Haile Mariam] who established the Sudanese Peoples' Liberation Movement (SPLM) in Ethiopia. Not a good choice. To make it worse, have a General [Mohammed Al-Daby] from Khartoum [which] controls most of Riek Machar's militia generals. Ethiopia has said if doesn't work, will hand over to AU. Nigerians. Egyptians. South Africans. They won't understand this region, the South Sudanese. Without bragging, if I pulled out, that thing collapses the same day. If Kenya pulls out, that thing collapses. The South Sudanese are there only because Kenyans are there. And they believe that we will do justice to their cause.<sup>1162</sup>

Beyond the potential interests of the RECs are interests of the rest of the international community. For example, again with respect to South Sudan, the:

Americans are the ones who decided this should go to Addis [Ababa]. We'd organised to do it here [in Kenya]. There are always external interests.<sup>1163</sup>

We lack the wherewithal to make sure what we're talking about we're able to implement without external assistance. The moment external assistance comes in, talking about conditionalities, whether subtle or direct.<sup>1164</sup>

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<sup>1161</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1162</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1163</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1164</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

Who pays the piper calls the tune. IGAD cannot support itself. It depend[s] on handouts from other people. The Troika, the IGAD partners' forum, the Chinese. They call the tune.<sup>1165</sup>

Then there are challenges posed by parties to the conflict themselves. In some conflict situations, the parties do not have clearly defined interests amenable to being negotiated through mediation. In South Sudan, for example:

The CPA negotiations were about ideology. In the CPA, they understood what they wanted. The others wanted to block as much as possible. The current situation is different. Dealing with people whose capacity is under question on both sides. They don't know what they want. The government wants to hang onto power by whatever threats that exist. The opposition doesn't know what it wants. Just wants to be part of government. When we started these negotiations, they were saying [South Sudanese President] Salva [Kiir] must leave. There's no constitutional way of removing a Head of State other than by elections or overthrowing them, which is unconstitutional, using military power. They weren't able to remove him using military power and they're waiting for his time to run out. He's being clever. He's going to use parliament to extend his life. I don't know where we've going.<sup>1166</sup>

In other conflict situations, there are parties who've learnt how to effectively 'flip the script' by framing their resistance to the intervention itself, to the nature of the intervention or to its content—particularly as concerns accountability—in terms of a new and populist supposed anti-imperialism. In Kenya, for example, the PNU was initially taken aback by the AU's response as:

They hadn't focused on [the AU]. They didn't take it seriously. They didn't understand the process. [But] after that first triumph [at/by the AU], they learnt the lesson, got smart people to help them and flipped the script. Kenya instrumentalised the AU. [But] their so-called 'pan-Africanism' has no lasting quality, [it's] instrumental and a chip on the shoulder.<sup>1167</sup>

What this new framing of resistance to intervention, its nature and its content draws upon is, unfortunately, legitimate critique within the African academy of external interventions and the recent shift from notions of state responsibility to individual criminal responsibility as concerns

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<sup>1165</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1166</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1167</sup> Interview with Gladwell Otieno, Executive Director, AfriCOG, Nairobi, February 26, 2015.

accountability for gross and systemic human rights violations and breaches of international humanitarian law:

The [African] Left doesn't have any respect for the West as an answer or answers that borrow anything from the West. Take, for instance, Mamdani's views on Kenya and the ICC. He was categorical the ICC was a bad thing for Kenya. Bayo himself thought good [Uhuru was] mobilising against the ICC. His argument was that the mobilisation against the West was a good thing, to tame it. The left is happy that, for the first time, Africa can call the shots on the international arena and be listened too. Some happy China's in place now to teach the West a lesson. But a lesson to what end is important.<sup>1168</sup>

This sort of instrumentalisation of the AU and denial of domestic demands for accountability have negative impacts on domestic constituencies' belief that the AU can and will deliver 'African solutions for African problems':

It lacks traction at the grassroots. Deep inside, they feel the brotherhood, the sisterhood. But they are also aware their political leadership is cynically exploiting that sentiment, they have used that since independence to entrench themselves in power. Those championing this are those whose backs are against the wall at home. People have refused to buy into it. The population is cynical. People don't believe—not because the concept is bad but because it has been exploited shamelessly for the political leadership to entrench itself in power.<sup>1169</sup>

Yet, as seen in Kenya, domestic constituencies are an invisibilised but necessary part of the success of any AU intervention. They lay the ground for the intervention, provide pressure for an intervention to happen, substantive inputs when it does and pressure again for its agreements to be accepted. But the capacities of domestic constituencies vary across the continent, meaning that this hidden piece is not always able to complete the puzzle:

It doesn't work in countries with low levels of literacy. Would not work in Somalia, would not work in South Sudan. South Sudanese will not resolve their problems on their own. They were telling us: 'The leaders are the ones who led the people into war and their leaders are the ones who'll lead their people out of the war.' Those leaders couldn't lead us out of war. Don't expect civil society in South Sudan to.

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<sup>1168</sup> Interview with Professor Karuti Kanyinga, political scientist and member of KPTJ, Nairobi, February 20, 2015.

<sup>1169</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

South Sudanese civil society are the weakest link. It's not developed. It's part of government.<sup>1170</sup>

Most importantly, however, are challenges that arise from what is the core of the mediation agreements, the political settlement. That this continues to be the core of the mediation agreements is not inevitable given the flexibility the mediators have:

The mediation team, when deployed, what are options on the table? Don't think about textual interpretation. Politically practical.<sup>1171</sup>

But accommodation in some sort of power-sharing arrangement has become almost formulaic even where it has no contextual basis, as in South Sudan:

Power-sharing has no basis in South Sudan. [Kenya]'s had a basis, a contested election. This is a removal from office of some people. But also about power. And power is control of resources. We haven't succeeded in de-linking political power with control of resources.<sup>1172</sup>

If one looks at Zimbabwe, after Kenya, a similar model. Initial proposal on how to address crises in Libya and Cote d'Ivoire [were also] linked to power-sharing. Linked to how it worked in Kenya and how was seen as an effective model for crisis-management in the continent. In discourse on R2P, always say that Kenya is a classic example because of its preventive nature. The success tied to the peace agreement, the preventive aspect and how used as a cascade to similar crises.<sup>1173</sup>

[Power-sharing] may become a popular template that creates a problem to have a working arrangement like in Zimbabwe, Kenya, now Burundi, Ivory Coast.<sup>1174</sup>

The first problem is that power-sharing undermines democratic principles and the notion of fair electoral competition:

Power-sharing [is] becoming a problem to the AU as undermining the Charter on Democracy[, Elections and Governance].<sup>1175</sup>

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<sup>1170</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1171</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1172</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1173</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1174</sup> Interview with James Orenge, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

<sup>1175</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

Power sharing is a postponement of the crisis. Democracy itself is power-sharing. But where you name it power-sharing because there is no decisive victor and people agree to disagree, it's shaky. Sooner or later, going to collapse. Long-term, it's not a solution.<sup>1176</sup>

Although contestation of electoral processes and outcomes is valid more often than not, as in Kenya, the danger is that the trend towards power-sharing does not address the difficulties of dealing with unfair electoral processes and outcomes. Kenya, for example, was:

For everybody, a five-year project that ended with the elections. In 2013, when allegations of electoral fraud came up without widespread violence, feeling that Kenya had been fixed, had had a peaceful election. Whether free and fair, that wasn't the question. Donors all over the place and not a single one had proper evidence about electoral fraud. That was success, from a violent election to a non-violent election and, at that point, not interested in hearing about election fraud.<sup>1177</sup>

What [the AU] hasn't done consistently, due to capacity and self-interest, is consistently and systematically look into democratic practices within countries. So long as countries have had elections, any kind of elections, too complicated for the AU to get into the quality of elections. That's the problem the AU has to address and the push for it to do so is not strong enough right now as panders to wishes of Presidents so no clear way of making progress on it.<sup>1178</sup>

What this does is incentivise violent electoral contestation:

When have a customary practice of power-sharing, find the opposition wants to attract the international community even if it knows, reasonably, it's not going to win. Listened to opposition leader in Uganda and what's being said by the EU EOM about its doubts and rigging of elections. Don't discount that. But would you have honestly felt Museveni would have lost? Impossible. If one looks at the role he plays in the region and the support he gets from the international community. It has to be a context-driven if power-sharing is contemplated as it is not part of our legal instruments and have to be careful in terms of practice so that the opposition doesn't create artificial violence to ensure that the international community creates the same.<sup>1179</sup>

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<sup>1176</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

<sup>1177</sup> Interview with Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.

<sup>1178</sup> Interview with George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the CIPEV under the Grand Coalition Government, Nairobi, January 15, 2016.

<sup>1179</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

The second problem is that the focus on power-sharing can mean that the mediation process doesn't provide sufficient attention to the proximate and structural causes of conflict:

Looking at peace settlements of different kinds, asking whether a difference where people made own peace in own way and where peace imposed externally, whether regionally or internationally. [First] when violence ended on the battle field [as in] Rwanda and Ethiopia. [Second] where there was external intervention, the UN came in, the AU came in, devoted a billion a year for peace operations, 15,000 to 17,000 troops [as in] Sierra Leone, DRC, Cote d'Ivoire. Third, almost hybrid [as in] Kenya. Which forms of political settlement have demonstrated the potential for sustained peace? What features separate one form of peace settlement from [the] other[s]? forms. If turn to Kenya, Rwanda, an eerily stable peace and yet victor's justice prevails. To what extent did they return to conversations that led to war to settle things? Same for Ethiopia. To what extent is [peace] a foregone conclusion, seeing the conflicts now in Ethiopia? Victor's justice does not settle the issue permanently. If you look at Cote d'Ivoire and Sierra Leone, had massive investments, occurred when the UN was critiquing its own work: 'Why do we keep returning to the same places and can't make lasting peace?' That was the first time there [were] elections as an exit strategy, field missions without troops, a focus on peacebuilding and peace-consolidation. Yet did not return to substantial conversations. When look at Sierra Leone today, peace was consolidated but negative peace. Likewise in Cote d'Ivoire.

[Yet] when looking at massive violence, fixated on ending violence as end in itself. Negative peace, the absence of violence, dominates the template. The idea that we can have stable peace through positive peace or social justice is always window-dressing. The UN has disaster responses, does the same things, scratches the surface of what happens.<sup>1180</sup>

[Power-sharing] may slow down progression towards a lasting constitutional settlement. In Kenya, if we [the opposition]'d stayed out of government, a more lasting solution may have been found, not in 41 days but within a year or two years. The problem may be deeper than resolving the problem of political players. Where there are deep and historical conflicts and hostilities, sharing of power may be a postponement of those problems. A reactionary regime can use sharing of power as a temporary respite and emerge out of those difficulties. They can always pay the price to fight, engage, disengage and it becomes a perpetual cycle. Which Kenya may turn out to be [in] if things go on the way they're going.<sup>1181</sup>

The rise and fall of violence across time [is like] a bell curve, where have no attention to resolving issues as haven't manifested themselves, then escalate to a crisis at top of curve and depending on how resolved, de-escalate. Mediation

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<sup>1180</sup> Interview with Professor Funmi Olanisakin, founding Executive Director, the ALC, London, April 11, 2016.

<sup>1181</sup> Interview with James Orenge, negotiator for the ODM, Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.

responds to moments of crisis and doesn't usually address itself to latency, root causes.<sup>1182</sup>

The focus on power-sharing also lends itself, in the medium and long term, if not in the short term, to the sacrificing of accountability. In Kenya, for example:

The first hole is justice. All this started with the killing of people. Up to now, don't know who killed them and IDPs are in limbo. In a society without justice, people deliver justice themselves. Can disrupt the country. All these negotiations have not allowed justice to be done. In all cases, Zimbabwe, Cote d'Ivoire, victors' justice. Up to now, Africa doesn't know what to do with massacres. Despite the Charter. Article 58 of the Protocol on the PSC. Still have long way to go to believe people have to pay for massacres.<sup>1183</sup>

Justice was part of the agreement, that there'd be redress for the victims, guarantees of it not happening again. That's what said, don't know how much that's been pursued, not fully pursued. People were horrified by what happened and don't want to see a relapse. Therefore, even if what should've been done has not been done, people would rather not see conflict again by having to push for redress. Don't want to open wounds.<sup>1184</sup>

The sequencing now commonplace but proven ineffective—peace before justice—arguably needs to be reversed:

In the short-term, [power-sharing] calms things down. Cannot use the South African example. In South Africa, had one party come to power with an overwhelming majority. Not where the vote is split down the middle and we're asking those with 51 per cent victory to oversee justice and reconciliation. Sequencing needs to be looked at critically. What comes first? Elections before justice and reconciliation or vice versa? Justice and reconciliation should precede power-sharing, elections. [Not] rush to elections and leave justice and reconciliation to the victor when the victor's a party to the conflict. If you want justice and reconciliation, then go into elections not as a contest of yesterday's armed groups but political entities, having resolved issues that brought about war. Otherwise, only pushing the country back to the pre-conflict period.<sup>1185</sup>

The focus on power-sharing in that sense is not sustainable:

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<sup>1182</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>1183</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

<sup>1184</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

<sup>1185</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

While have seen progress in terms of immediate crisis-management, not sure whether, in the next eight to ten years, there won't be reversal of those gains. That timeline as coincides with political transition and, when have political transition, there's always the potential for crises. That tells a story. That we need to invest in long-term durable solutions rather than short-term *ad hoc* solutions to simply stabilise situations. Our entire architecture is driven more by stabilisation than by change.<sup>1186</sup>

Why is it that countries in post-conflict situations are relapsing? What is it we're doing right, what is it we're doing wrong? Has to do with the way we do business, always looking for quick fixes. A political problem, so a political settlement. Not enough security, so peacekeepers. After, costing too much, so need an exit strategy. What's an exit strategy? An election. But an election creates winners and losers and that's why there are relapses. The sequencing should be reversed, need the politics last.<sup>1187</sup>

The problem of relapse relates too to the duration of the intervention beyond the political settlement:

People, organisations, run to help parties in conflict make peace. After that, implementation is left up to the parties and they don't have the commitment to continue. That's why you have conflicts that linger or there's a relapse. Good that it hasn't relapsed in Kenya with same velocity.<sup>1188</sup>

What all of these challenges have forced, despite the AU's intention to work on preventive diplomacy, is an increasingly militarised response to conflicts in Africa, which poses even more challenges:

What we're doing in Somalia, with *Boko Haram*, the Lord's Resistance Army (LRA) do[es] not address the root causes. Trying to degrade *al Shabaab*. Kill or capture [Joseph] Kony. Eliminate *Boko Haram*. Do[es] not address root causes that are driven by political economy of those countries. Difficult for us to continue not to have precarious peace on the continent.<sup>1189</sup>

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<sup>1186</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1187</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

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<sup>1189</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

Growing militarisation of the APSA response to crises on the continent. In last five years, have deployed more than 100,000 uniformed personnel and 500 civilians. The amount spent in Somalia, in-kind and direct, exceeds a billion dollars. Prioritising deployment of forces on the ground is not only expensive but makes us divest efforts from trying to improve conflict prevention.<sup>1190</sup>

## 6.10 African solutions?

The assessment of the AU's intervention in Kenya and how that has informed continually evolving practice with respect to more recent AU interventions provides the opportunity also to assess the notion of 'African solutions for African problems'. Behind this idea are impulses and motivations about self-determination that are both reactive and proactive.

Reactively, the notion was initially:

A reaction to Western countries not only choosing when to engage and when not to engage but also how to engage. Many African countries felt not taking into consideration African concerns.<sup>1191</sup>

Where does this come from and in whose interest was it authored? African solutions have to be premised on pan-Africanism from [Kwame] Nkrumah, but also well and alive before him in the Diaspora. Some have added another notion of African renaissance. It comes from the outside trying to hide external interventions in Africa behind the veil.<sup>1192</sup>

This is especially so given the failure to respond to African calls for reform of the UN

Security Council:

You have the first generation of African leaders, [Zimbabwean President Robert] Mugabe and company, still calling that Africa must have at least two permanent seats on the UN Security Council. It is for Africa to be the pen-holder on African matters instead of the UK, France.<sup>1193</sup>

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<sup>1190</sup> Interview with Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, PSD, AU, Addis Ababa, February 22, 2016.

<sup>1191</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1192</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

<sup>1193</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

It's saying: 'Let's implement Chapter 8 [of the UN Charter]. Let us try first. Give them [Africans] the mandate and let them try. If we have complications, then will call. This is often misunderstood. Because of the perceptions outsiders have of Africans' ability to handle our own issues. They say: 'We cannot trust them [Africans], they'll do nothing.' The question is the stereotyping of Africans as incapable. There's a basic wisdom in Chapter 8. The UN doesn't lose anything.<sup>1194</sup>

The whole concept's about ownership. Can see where Africa's coming from, a feeling of subjugation among some of the African elite. It is born out of a frustration with the West, who's imposed its will. The concept of subsidiarity is at risk. If there's a problem, Africa should have the first shot. The UN shouldn't come in unless Africa exhausts its means. The whole concept of Chapter 8 of the UN Charter, ownership of regional organisations without the use of force. Going beyond abstaining from use of force.<sup>1195</sup>

'African solutions to African problems' is a [resurgence] of anti-colonial sentiments still pervasive in Africa, particularly in the remainder of the first generation of freedom fighters, like Mugabe, and entrenched in liberation movements in South Africa, Namibia, Algeria that used armed struggle. Today, it is taking the form of anti-neo-colonialism on one hand and, on the other, the assertion of sovereignty. In this lies the contradiction, because pioneers of the anti-colonial struggle saw sovereignty through the prism of a continent-wide agenda, not those of individual states. That was the dividing line, the Casablanca and Monrovia groups. At the centre was the sovereignty of the African continent, not African states. Today, it's a lot of words and not a lot of substance because ruling elites are entrenched in what they can get in micro-states rather than the continental agenda.

Then there are the examples. Libya, where 'African solutions' were swept aside by Western powers, then they went it alone. Africa is still bitter about the way [former Libyan President Muammar] Gaddafi was removed ignoring the African position. Some of us still believe Gaddafi was not removed because he was a brutal dictator suppressing his people but because he was carrying a dangerous message about turning the AU Commission into an Authority and putting his money where his mouth was.<sup>1196</sup>

An evolution of the idea of 'African solutions' from the postcolonial period to now, five decades later. From the OAU because of shared history, shared experiences, the pursuit of African liberation, seeking freedom from European domination. But divorce came right after. Colonialism and the two publics: the civic public and the

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<sup>1194</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1195</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

<sup>1196</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

primordial public. The primordial public was moral and connected to the private realm. The civic public was amoral and disconnected from the private realm. The elite never [had] a conversation about this and move[d] to a new contract. Went to the primordial public to seek validation for themselves. The OAU became a club of many dictators internally suppressing their people yet sitting at the table representing them.

The Cold War ended and Africans realised we were on our own. The OAU Charter couldn't be sustained on the basis of non-intervention. Turnaround in the 1990s. The Constitutive Act a function of different leadership, no more than six Presidents, who had the idea we should begin to re-structure conversations, amongst Africans, but also between Africans and externals. The new AU, NEPAD, the PSC Protocol and Architecture, new. A normative framework that altered the Charters of different regional institutions radically. Starting with ECOWAS. In 1993, a new treaty that said can go into a neighbour's country and rescue people because of Liberia and Sierra Leone.

The international [community] is not the best place to do this. They'll never be part of it completely. The UN won't have a lot in common with the locals. If not violence, doesn't matter.<sup>1197</sup>

There are, however, contradictions to the manner in which this self-determination is being sought:

Africa's not saying leave our problems to us. If so, wouldn't have come up with the NEPAD. NEPAD is Africa going to the Group of 7 (G7) saying we want to become a power to challenge your dominance and we're coming to partner with you to make sure it works. Mix human rights, democracy, governance and give the powers you want to challenge the stick to beat you. A neo-colonial project if you compare it to the Lagos Plan of Action which was more Afrocentric. The Lagos Plan of Action was looking at how Africa could mobilise continental resources to develop, independent of outside forces. NEPAD a proposal to the outside world to have outside world help Africa rival it.<sup>1198</sup>

Regardless of those contradictions, proactively the notion has increasingly:

Meant not only to utilise the knowledge, understanding, that neighbouring countries have in trying to understand and resolve causes of conflict. Better understanding, closer knowledge of conflicts next door by those culturally, in terms of geography. But also that Africa must be first in line in resolving its own problems. Doesn't mean Africa has nothing to learn from the rest of the world, the good, the bad. We're part of this globe, we learn from each other, we gain from experiences elsewhere. Knowledge of the culture, the societies, the forces in conflict, comes

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<sup>1197</sup> Interview with Professor Funmi Olonisakin, founding Executive Director, the ALC, London, April 11, 2016.

<sup>1198</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

into play when designing, approaching solutions. Not just in Africa, everywhere.<sup>1199</sup>

They are our neighbours. Whatever happens affects us immediately. We know them better. When the neighbour's house burns, can't call 911 which doesn't exist in Africa, we have to run with our buckets of water.<sup>1200</sup>

This knowledge and understanding is assumed to come from the use of African personalities and institutions in AU interventions and to result in greater acceptance of, legitimacy for and ownership of these interventions:

What are we trying to do now? Recognise the importance of African experience, African personalities, African institutions without losing sight of fact there are tested methods, generalities, applicable anywhere. Africans seen as important to give an African character, better understanding, better empathy, better acceptance by those in conflict.<sup>1201</sup>

When have these Heads of State going to Bujumbura, Nkurunziza will listen to them more than Ban Ki Moon.<sup>1202</sup>

Something about Kaunda in the room that would make Kibaki behave. Would be different if had a Japanese, an American. This is purely cultural. A bunch of African elders has a different thing to it than a bunch of *mzungus*. Particularly when dealing with that kind of emotive [issue]. The peer thing. They are likely to understand their peers better, they can put themselves in their shoes: 'If I was in their shoes, what would I accept?' Something to be said to be done by Africans. Especially now as building a critical mass of African statesmen and distinguished Africans from African institutions, [former head of the African Development Bank, AfDB] Donald Kaberuka, a critical mass. The tendency of things to get lost in translation. Even when occurs, the tolerance is higher as can throw in a couple of Bantu proverbs and gloss over things. An international norm process, but run by Africans. The label is helpful. 'African' has more political resonance than 'global'. Some sense of responsibility. Ownership. Have to make it work. More pressure to deliver. 'International': don't have to make it work, can blame other people.<sup>1203</sup>

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<sup>1199</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1200</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1201</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1202</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

<sup>1203</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

With that in mind, some of the institutions and mechanisms under the APSA have consciously been designed in a manner that essentially re-imagines and re-invents ‘tradition’, including on accountability:

Africa has got a rich mosaic of traditional practices in conflict resolution and these have to be instrumentalised today. The symbol of womanhood, the symbol of the elder. Consultation, consensus-building, peer pressure, peer influence and the use of traditional approaches. The military is the last resort. That is the software Africa is propagating.<sup>1204</sup>

Remember the days of Nyerere and then [former South African President Nelson] Mandela in Burundi. At point when involved, not Presidents in their respective countries, not sponsored by the AU. Representing themselves, seen as guys who could walk into a room and get people talking. The model of a single Eminent Person presenting themselves as an Elder, using that authority, rather than an institutional base. Would be an African approach.<sup>1205</sup>

‘African solutions?’ Africans have tried to adapt institutions, including through using traditions. Culture plays a role. For example, the Panel of the Wise, including within the regions. [The] ECOWAS, [the] SADC, all have Panels of the Wise. That wasn’t there in Katanga and Biafra.<sup>1206</sup>

This is African, when we sit under the tree, everybody including the ignorant are allowed to say what they want to say. You don’t reject them, you’re trying to build a consensus, so at the end of the day, everybody says, ‘yes’.<sup>1207</sup>

The approach, how we do business. Africans, we talk to each other: ‘My brother, my sister’, that’s an African way of doing things: ‘I feel your pain’.<sup>1208</sup>

In the [Eritrean] society I come from, if somebody killed somebody, the father of the murderer would come to the bereaved’s family with a big stone on his neck, bow down, say: ‘Remove the stone and kill me.’ It was an expression of remorse, a way of saying: ‘I’m sorry’. The father was never killed. Compensation was agreed upon, unfortunately usually in the form of a girl, to have the two families intermarry and leave it behind them. That’s a bigger atonement than money.

We have something to offer. Reconciliation is an African contribution, dating back to South Africa’s Truth and Reconciliation Commission (TRC). Would’ve been difficult to resolve through legal means only. Now, there are new

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<sup>1204</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

<sup>1205</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>1206</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

<sup>1207</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

<sup>1208</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

Truth Commissions everywhere. Reconciliation is an important element of peacemaking. It's impossible to redress through punishment alone. That's not justice unless it's perceived as such by the victims. [Former Chadian President Hissen] Habre, being tried 15 years after, far away. The ICC. We need it more. But the way it's pursued, with trial way away in The Hague and victims don't know what's going on. Africa has healing as well as justice.<sup>1209</sup>

Rwanda and the *Gacaca* system. Much as it has weaknesses, a solution to problems in that country. *Mato Oput* in northern Uganda to address problems linked to the LRA atrocities.<sup>1210</sup>

Other than the use of African personalities and institutions, including those drawing on and re-inventing African 'tradition', three things distinguish an 'African solution'. The first of these is speed. In part, this means being able to deploy relatively quickly:

Even the problems we're having in Burundi, if the AU had moved fast, as they did in Kenya, Burundi would be quiet. The way they moved into Mali, it was fast. If the AU can do it the way they did to Kenya, Mali and what's happening now in Burundi, would be in a better position as a continent.<sup>1211</sup>

Yet, the speed of an 'African' approach also means being willing to take the time that an intervention needs to succeed, as in Kenya but also in the Sudan:

The Thabo Mbeki Panel demonstrated 'Africanness' in the Sudan by saying: 'Not going in quickly to mediate this crisis. Going to take all the time have in the world. To understand it. To build trust and trust-building takes a long time.' The UN approach is blinkered when comes to things like that, there's no money to invest in long processes of trust-building.<sup>1212</sup>

Second, when preventive diplomacy fails, the AU is more prepared for peace-enforcement rather than peacekeeping alone:

The Constitutive Act and the normative embedding of the idea of the protection of people and non-indifference. 'African' idea. The readiness to intervene and use force is an African approach. African interventions do not shy away from the use of force if they have to. They abandon neutrality to rescue people. ECOMOG [The Economic Community of West African States' Monitoring Group] in Liberia,

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<sup>1209</sup> Interview with Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, UNO to the AU, Addis Ababa, February 26, 2016.

<sup>1210</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

<sup>1211</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

<sup>1212</sup> Interview with Professor Funmi Olanisakin, founding Executive Director, the ALC, London, April 11, 2016.

ECOMOG in Sierra Leone, ECOMICI [The Economic Community of West African States' Mission in Cote d'Ivoire] in Cote d'Ivoire. The AU trying to respond to Darfur. Something 'African' in the idea of intervention, that compelled the UN to change its own approach. A uniquely African contribution to the global UN architecture.

Different than the UN Charter. Because of the principle of non-intervention, at end of the Cold War, with all these crises happening, the UN was ineffective. The UN has had to rely on regional actors to do that. A scramble for UN credibility through the idea of joint, hybrid, re-hatted missions. Africans go in and, when stabilised, the UN comes in. The UN needs troop-contributing countries, Africans plenty among them.<sup>1213</sup>

On Burundi, people are saying, 'Why not deploy the force?' The Heads of State considered it and said that if deployed without consent, people will die. Nkurunziza would go for the people first, not the force. What if he shoots our planes in the air? They knew that when dealing with a madman with a knife at his throat, when you advance, he can kill himself. They gave him some rope and will secure more that way. That's an African way.<sup>1214</sup>

The approach used is different in the sense that when a UN peacekeeping mission is deployed, even if with a protection of civilians mandate, it's more or less military.<sup>1215</sup>

Third and perhaps most importantly is whether the intervention both draws upon and enables resolution to be found based on the wishes of the population in question:

Kenyans resolved their problem. We didn't discriminate against anybody coming in with ideas but eventually people were tasked according to their experience and knowledge. Everybody brought in something. Kenyans themselves coming together, saying we've reached the precipice and we want to go back. On both sides of the divide, everybody wanted a solution.<sup>1216</sup>

Have more and more think-tanks, universities, Africans themselves critical of their own societies. They have an influence and actions are taken from the same. People taking own responsibility rather than people telling them what to do. Not just about democracy, but unconstitutional changes of government. For example, in Egypt, can't say an uprising. When [Burkinabe President Blaise Compaore] decided to go for a third term, people started demonstrating every day. The regional Heads of

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<sup>1213</sup> Interview with Professor Funmi Olonisakin, founding Executive Director, the ALC, London, April 11, 2016.

<sup>1214</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

<sup>1215</sup> Interview with Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.

<sup>1216</sup> Interview with General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015.

State said can't be silent. Many examples where populations force leadership to take responsibility. Those also lead to 'African solutions'.<sup>1217</sup>

The dominant narrative and approach, the liberal peace, the building of a particular kind of state, in the absence of own internal narrative, rarely produce results. Without re-visiting internal narratives [about] what led us to violence, cannot build stable peace. At centre of national conversation, always identity questions, ethnicity. One question [is] to what extent [peace] settlement returned to issues that pre-dated the conflict? At the start, Kenya got it right in terms of what looking at. That's an African approach, having that conversation.<sup>1218</sup>

But the objectives and the model of the intervention are universal:

It was an 'African solution' in the sense that the AU acted quickly, gave us the mandate and designated the Panel without waiting for the UN. Took initiative to resolve the problem. When it comes to the agreement reached, was it strictly African, can it be replicated, had it been done elsewhere? Can be seen as broad and has happened in other parts of the world. Sat and talked for six weeks, then they continued for some time and that's 'African'. But, in any situation, have to talk, whether in Syria or the DRC.<sup>1219</sup>

What is an 'African solution'? What's the 'African-ness' of the solution? If you look at Kenya, sponsored by the AU, with support by the UN, what was 'African' about it? Was it Kofi Annan? Was it the other regionals involved in it? Was there an African theory, a theory of the 'African-ness' of this thing? When think about the KNDR, it functioned within the realms of what would be mediation anywhere in the world. [It was] under the AU [but the] resources, technical support not from the AU. Is there a theory about the African-ness of the solutions we're talking about?<sup>1220</sup>

Unfortunately for us, international defaults to Western. Once that happens, get historical baggage. The African thing removes those dynamics. We must not underestimate the fact that being done by Africans. [But] why should an 'African solution' to conflict be different from a European solution to the Yugoslavia conflict? Ethnic conflict, electoral fraud, not African but universal. Historical injustice, human rights abuses, what's African about those things? Obviously it is not African. It is an international thing done by Africans for themselves. Where we go wrong, because it's Africa, has to be some voodoo thing under a tree. [And] doesn't have to be rigorous.

When people come to structural problems, the mediation is not the script. It become[s] indigenised when come to the constitutional outcomes desired, not the

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<sup>1217</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

<sup>1218</sup> Interview with Professor Funmi Olonisakin, founding Executive Director, the ALC, London, April 11, 2016.

<sup>1219</sup> Interview with Dr Kofi Annan, lead mediator, Panel of Eminent African Personalities, KNDR, by telephone, May 6, 2016.

<sup>1220</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

mediation agreement. It's superficial, the whole thing was: 'Let's stop hostilities, fighting's not the way to solve these things, you guys come together and solve your problems.' The objective is the handshake and power-sharing. [But] what it does is launch processes and those processes are no longer bound by the [mediation] framework.<sup>1221</sup>

#### 6.11 A new regression?

Given the challenges arising from the objectives and model still largely pursued by the AU with its interventions—including those arising from political settlements, the risk of loss of focus on the proximate and structural causes of conflict, the lack of attention to accountability and the risk of relapse—there is reason to believe the AU's trajectory towards realising its reactive and proactive intentions has now diminished, if not reversed. In addition, new conflict risks have emerged, including those arising from civil and 'uncivil' society's resistance to the ignoring of these challenges. This kind of resistance was not foreseen by the AU's normative framework, and use of its APSA to address them is proving insufficient:

'African solutions' evolved at different times, have entered a new period. The re-emergence of conflict. Conflict relapse has reared its head in different ways. People taking on their governments in untidy ways. Unconstitutional change of government. Start barring *coups* and then ordinary human beings take to the streets in Tunisia, then in Cairo. Burkina Faso recently. The AU asking itself how to deal with this. When people non-violently arguing against these years of separation of the state from the people, don't feel part of the state. Terror. The Sahel. The Horn. *Boko Haram*, *al Shabaab*. The local fallouts that confirm these states have not worked, are hardly viable. A reversal where the UN's gone. Burundi. South Sudan, where had new state on the basis of the liberal peace and the illiberalism of that peace. Incomplete conversations about the ICC: 'Why only Africans before the ICC?' But justice is needed in African countries. African instruments have been called into question. Our normative framework [on] unconstitutional change of government is threatened, the APSA is used for terrorists, without looking at the social base. Our architecture is challenged. We've come full circle. Two steps forward, two steps backward.

Despite evolution over time, it's falling flat on its face, it's slipping away. Intervening narratives suggest African solutions are pathetic as the UN bears primary responsibility for peace and security globally and should be involved and

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<sup>1221</sup> Interview with Dr David Ndi, economist and member of KPTJ, Nairobi, November 17, 2015.

why should Africa do it alone? Africa relegated, side-lined. Just like the UN, we run quickly to the low-hanging fruit, start retreating to the military as the default solution, become seduced by the UN's own instruments when dealing with failures of the UN itself.<sup>1222</sup>

There is also a shift in the collective leadership of the AU, from the leadership that brought in the normative and institutional transformations under the Constitutive Act to a leadership that saw these transformations as at least practically beneficial to the current leadership, that instrumentalises these transformations to its own benefit. This last leadership's reaction to the promise of accountability initially envisaged by the AU's intervention in Kenya is seen as particularly damaging:

Have to look at AU in older, broader context. South Africa helped: 'Come on, Africa cannot be the backwater it's always portrayed as and needs to deal with own issues like corruption, like elections.' A Mbeki-type moment, philosopher-presidents, like 2003, Mbeki, [former Senegalese President Abdoulaye] Wade, Kufour. Had AU troops intervening in a muscular way in Sudan because of Darfur as didn't want a genocide on its watch. Same logic re: Somalia. Hissen Habre.

The Kibaki, Kufour generation were believers in RECs. Boots on the ground to protect economies in the region. ASBF to say: 'Can't have instability as has negative economic outcomes.' Involvement to protect economic interests.

That logic is no longer there. Except Museveni and Kagame's cheeky interventions in DRC. The Kenyan case has messed that up. Because people like Uhuru went into the AU not with an ideological stance but as a barricade against the ICC. We're the poorer on accountability, especially for violence. The positions that African leaders took, subsequent to the peace, weakened the hand of the AU.

This imperialist, race-hunting conversation that Uhuru began at the AU is dangerous. It frightens off everybody who might want to get involved. And says: 'If going to get involved, just bring your money and leave us alone.' A departure from R2P. If the AU said it has R2P, it would throw doors open for everybody else. The EU, the US, sensitive to being accused of neo-imperialism. So can talk about 'African solutions to African problems' but it's closing everybody off, cooping in, creating a space for impunity.

A spanner's been thrown into the works. Continent in contradictory situation. Have an AU that's neither fish nor fowl. Have a hiatus. We're the poorer for it.<sup>1223</sup>

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<sup>1222</sup> Interview with Professor Funmi Olonisakin, founding Executive Director, the ALC, London, April 11, 2016.

<sup>1223</sup> Interview with Kwamchetsi Makokha, journalist and member of KPTJ, Nairobi, April 23, 2015.

There are, therefore, several issues to be addressed, in order to better and more fully realise the promise of ‘African solutions’. The first is to shift the focus from development and enforcement of the AU’s peace and security architecture to development and enforcement of the AU’s democratic norms and institutions:

Would appeal to the AU to move fast where there are political problems and change the political culture on the continent. See what Kagame has done, Rwandans are afraid, should leave instead of amending Constitution to let rule for life. When leaders want to disrespect the Constitution, the prime duty of the AU is to intervene at the beginning of the problem. It starts by amendments of the rules [of] the game. The AU shouldn’t wait, it should be proactive, it should monitor to see which country wants to deform the Constitution.<sup>1224</sup>

Africa has a way to go. The AU can be made more inclusive. As long as African Presidents feel they should be allowed to do what they want, as long as former radicals like Museveni end up being more conservative than Moi, people like Kagame who are smarter than the others. Hard to think of Presidents without starting at the bottom. As long as process leading to [current Nigerian President Muhammadu] Buhari, to [current Senegalese President Macky] Sall, OK. But if process leads to a [current South African President Jacob] Zuma or a Mugabe, need to start at the bottom, making African countries more democratic, a sense that Presidents not indispensable.<sup>1225</sup>

Some of the problems? Sovereignty. Second, leadership. Third, citizen engagement. Fourth, subsidiarity. Fifth and finally, the state, the extent to which the continent is democratising. How are we creating open societies? The extent to which the state is controlled and managed but also the space for citizen engagement. These factors conspire to constrain the extent to which the Union is able to achieve its mandate.<sup>1226</sup>

The second issue to address in order to realise the potential of ‘African solutions’ is to use the AU’s democratic norms and institutions to foster leadership in line with the same as well to challenge the perceived autocracy of the AU leadership:

Some initiatives not AU per se, driven by particular individuals within the AU. With regard to the NEPAD, certain personalities, for example, Mbeki, Obasanjo,

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<sup>1224</sup> Interview with Francis Atwoli, Secretary-General, COTU, Nairobi, January 12, 2016.

<sup>1225</sup> Interview with Maina Kiai, former Chair, KNCHR, Nairobi, February 4, 2016.

<sup>1226</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

took initiative. [The] AU tends to be driven by personalities, including at the Secretariat.<sup>1227</sup>

A mediation that allowed changes in society. A Constitution. What has changed is the normative framework that allows people fighting for their rights to use it. Separation of powers between parliament and the presidency. The counties. Decentralisation is remarkable. The population feels it's playing a role. But success means boundaries move in terms of conduct of politics. That hasn't changed. Politicians haven't changed. They've just moved their madness to the local level.<sup>1228</sup>

People say the AU is a club of dictators. The AU's not a people's organisation, it's a member states' organisation.<sup>1229</sup>

The third issue is to address openly the institutional design problems that arise from the principle of subsidiarity in the APSA, including through sharing comparative experiences of the RECs:

Need leadership. Don't have it. Not nationally. Not regionally. Two, conflicting agendas. [On Burundi, for example], definitely the EAC agenda is different from that of the AU.<sup>1230</sup>

In West Africa, always to try to find solutions that are more positive, based on a long tradition of interaction, learning from problems of the 1990s. West Africa has no work permits from January [2016]. Leaders play a role. ECOWAS was created by two military leaders and transformed after. Don't know why EAC hasn't learnt. Who solved situation in Uganda, Tanzania! That's no longer happening. That needs to be looked at.<sup>1231</sup>

We have centripetal forces in Africa calling for a united African approach. Difficult with the micro-states that we have. Economy of scale is the whole continent of Africa, not micro-states coming together. Then have centrifugal forces of the micro-states pulling apart. In that lies the contradiction of African ownership of African problems. As have seen in South Sudan and other places, Africa doesn't speak with one voice. Saw the positions of Uganda and Kenya in South Sudan. Not an African position. Their strategic micro-interests were playing out in Juba and other places. Not a single African solution. Same in Burundi now. Tension between centripetal

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<sup>1227</sup> Interview with George Wachira, member of CCP, via Skype, April 28, 2015.

<sup>1228</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

<sup>1229</sup> Interview with Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, PSD, AU, Addis Ababa, February 24, 2016.

<sup>1230</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

<sup>1231</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

and centrifugal forces and interests that go with them. That's the key challenge facing that whole concept.<sup>1232</sup>

A clash between Chapter 7, requiring endorsement of the UN Security Council and Chapter 8, going ahead without any dictate. Africa usually look[s] for an endorsement, not because it needs it, but because having the endorsement gives legitimacy, because Africa depends on external funding. This is the challenge between asserting ownership and imposing 'African solutions' without means of backing them up. You expose yourself to conditionalities, we saw it in Mali, in the CAR.<sup>1233</sup>

Fourth, is to address the continued powerlessness engendered by reliance on external sources of financing for the AU. This lack of power is seen in the objectives and models of African intervention as well as the incapacity to assert consistently the APSA's supremacy in conflict resolution in Africa:

Frankly, we can talk as much as we want about 'African solutions' but we need to be mindful of the international system. It is not amenable to Africa expressing its own system. It would be an incomplete story without an interrogation of the international order dominated by powerful actors whose interests by and large are to reduce Africa to a sphere of exploitation of natural resources rather than Africa becoming an influential player.

The way we're dealing with our conflict situations is problematic. We're still pursuing the liberal peace model. These are foreign-imposed, not endogenous, don't have roots in Africa. Why is this the case? We don't use our own resources. We rely on the Western world and their resources come with ideas as conditionalities, [their] ideas now rule the world.

We have what we call the African governance architecture. The same on the peace and security side. The development side. *Agenda 2063*. The challenge affecting all architectures is that we can go so far but no further. As you push, there's a limit. Our programme budget is funded by our partners to upwards of 90 per cent. Frankly, our agenda is not our own.<sup>1234</sup>

The money's external, belongs to the EU, the P5, belongs to everybody but Africans. We have failed to put money where our mouth is. This is the biggest problem with the APSA. Six states contribute 75 per cent of the assessed contributions. South Africa, Algeria, Nigeria, Ethiopia, used to be Libya, don't even

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<sup>1232</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

<sup>1233</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

<sup>1234</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

think Egypt anymore, maybe Angola. Just manage to pay the day-to-day costs of the institution, staff salaries. But all the lofty peace and security projects, from mediation to the use of force, are paid for by outsiders. That's the shame of the continent. Remember who paid for Kofi Annan? When Libya was being bombed, allowed NATO to decide the fate of Libya. Wrote to the EU to ask for 320,000 Euros because needed to travel to Libya to talk to Gaddafi. Of course, the EU said: 'No' because taking its own position and warned, if take one more step, cannot guarantee safety as will be bombed out of existence.

The disconnect between ruling elites and their societies. Self-interests, group interests, first. Peacekeeping resources also include the ability to maintain their regimes in power. Costs money to maintain a military. If look at what gets funded in the APSA, it is the ASBF, yet has never been operational, used to maintain national armies. The Peace Fund has the least. The Panel of the Wise has the least. That money needs to go where the mouth is.<sup>1235</sup>

If you're going to propagate ['African solutions'] but do not have the means to implement [them], what then? That's what happened in Libya. Nobody prevented Africa from asserting its solutions in Libya. The truth of the matter is that Africa did not have the means to impose its will. If you don't have an army, a military, you can shout and nobody's going to listen to you.<sup>1236</sup>

People think donors play a role. Not invalid, but less than before.<sup>1237</sup>

There are numerous proposals on the table on decreasing the AU's financial dependence on the West, concerning both internal resource-mobilisation and the diversification of sources of external financing. The resolution from the June 2016 Summit adopting Kaberuka's proposal on a tax on all imports into Africa needs to be pursued:

Trying to increase the internal mobilisation of resources. In June [2015], at the Johannesburg Summit, Africa [determined]—based on *Agenda 2063* adopted at the 50<sup>th</sup> anniversary—to make sure that, by 2020, Africa's able to fund 100 per cent of its operational budget, 75 per cent of programmes and 25 per cent of peace operations. Intended to reduce dependence and avoid conditionalities. Today, external sources fund 80 per cent of its budget. The Obasanjo report on alternative sources of funding for the AU. Options. Taxing hospitality. Taxing oil producers. All options he came up with are facing opposition. [The] last Summit appointed Kaberuka and his Terms of Reference are on alternative sources of funding.<sup>1238</sup>

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<sup>1235</sup> Interview with Professor Funmi Olonisakin, founding Executive Director, the ALC, London, April 11, 2016.i

<sup>1236</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

<sup>1237</sup> Interview with Ibrahima Kane, Head, AU Advocacy Programme, OSF, Nairobi, February 1, 2016.

<sup>1238</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

Obasanjo was commissioned by the Union to work out alternative sources of funding. We are yet to see results from that but we need our budget to come from the Union. Want operational 100 per cent, programme 75 per cent and peace 25 per cent.<sup>1239</sup>

Look into Obasanjo's panel on alternative funding, the people who argue most ferociously against it, mostly outsiders.<sup>1240</sup>

The other is diversifying its partnerships. Africa/China, Africa/India, Africa/Middle East. To differentiate between those who've subjugated Africa from the colonial period on [and those] who don't put conditions on partnerships with Africa. Is it sufficient? Don't think so because no matter what China, India are doing, their primary drive is for markets. Cannot depend on outside forces for own development.<sup>1241</sup>

The fifth and final issue to address is to move with more alacrity towards continental integration:

Why it is the countries approaching a minimum economy of scale are the most conflict-racked? Many countries at war today are the same countries at war during independence. The Congo. The Sudan. Somalia's been at war since independence. Algeria. Egypt. Nigeria. Countries with promise, the human and material resources [to] serve as engine[s] of growth for the continent. Size matters. If won't allow bigger countries to live in peace, you think will allow Africa to become one continent?

It's difficult to talk about one Africa today, with one approach. Except when the AU tries to channel a common position. But not common to Africans, just its leadership. Don't see how soon we can realise the critical mass to develop a continental vision.

If lose integration, difficult to implement 'African solutions'. The most viable option is to bring about greater political and economic integration, backed by the will of the people. Is it possible? Yes. It is difficult? Yes. Because people like being big fish in small ponds. The faultlines at independence still manifest today, centripetal and centrifugal forces, being capitalised on at every turn and that's going to continue until realise cannot go it alone. The whole drive from the OAU to the AU was this. That was a key, to have an integrated continent. Vulgarised, bastardised. The local accomplices still at play. The British, the French.

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<sup>1239</sup> Interview with Dr Khabele Matlosa, Head, DPA, AU, Nairobi, May 7, 2016.

<sup>1240</sup> Interview with Professor Funmi Olonisakin, founding Executive Director, the ALC, London, April 11, 2016.

<sup>1241</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

That's going to continue until Africa realises the stupidity of doing business as it does now.<sup>1242</sup>

In conclusion, this chapter has explored and problematised the notion of 'African solutions for African problems'. It has shown the different ways in which the AU's intervention in Kenya's electoral conflict of 2007-8 is understood as being an 'African solution' (or not). It has also explained the factors that lead, in practice, to a decision by the AU to intervene as well as the factors that ensure a member state agrees to such an intervention. It has outlined the objectives, model and advantages of such interventions and surfaced determinants of an intervention's 'success' (or not) as well as measures of such 'success'. Finally, it also explored the evolving relationship between the AU and the UN as concerns conflict resolution in Africa.

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<sup>1242</sup> Interview with Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.

## 7. Conclusion

This chapter contains the conclusions of this thesis, referencing back to the original research questions and their hypotheses. It summarises the conditions under which supranational institutions decide to intervene and what provides leverage for such interventions—the key two conclusions here being the importance of a domestic base to legitimise and give real meaning to an external intervention, and the importance of domestic and international actors for regional actors’ interventions to both occur and ‘succeed’. In addition, this chapter critically analyses the nature and medium-to-long-term consequences of such interventions, noting that political settlements inevitably mitigate against addressing—in full—the proximate and structural causes of a(n electoral) conflict and accountability. It therefore challenges the notion of any ‘African solutions’ that continue to be predicated on political settlements.

Taking the AU’s intervention in Kenya’s 2007-8 electoral conflict as a case study, *the key or primary research questions had to do with determining the conditions under which supranational institutions intervene in member states, thereby limiting sovereignty, in order to realise their normative commitments, critically examining the nature and consequences of such interventions. Additional research questions had to do with determining what provides leverage in respect of such interventions. The hypothesis was that it was the combination of regional with international and domestic pressures that ensured the ‘success’ of the AU’s intervention through mediation.*

*The secondary set of research questions had to do with critically examining the meaning of ‘African solutions for African problems’, as well as the intended and unintended impacts of the same. The hypothesis here was that, consonant with predictions of the ‘liberal peace’, the political settlement in the form of power-sharing itself, in the medium-to-long term, contributed to*

*undermining implementation of the KNDR agreements with respect to addressing proximate and structural causes of the violence—undermining democratic consolidation and mitigating against accountability.*

#### 7.1 Conditions under which supranational institutions intervene in member states

The allowances of the AU's Constitutive Act—specifically those enabling AU intervention in a member state to pre-empt or end the commission of the international crimes of crimes against humanity, genocide and war crimes—have proven to provide a robust normative foundation for such intervention.

That said, these normative allowances alone did not explain the AU's intervention through mediation in Kenya's 2007-8 electoral conflict. A first additional—and critical, if not decisive—factor was the AU's political leadership at the time. That political leadership was still concerned about demonstrating the efficacy of those normative allowances—and addressing criticism of them (for example, with respect to the AU and Zimbabwe). The AU's political leadership at the time also had the confidence of both sides of the political divide. A lack of confidence in the non-partisanship of the EAC's political leadership at the time also explains why the EAC effort to engage gained no traction, despite the EAC being the institutionally responsible REC under the subsidiarity on which the APSA is based.

A second set of additional—and equally critical—factors had to do with strategic considerations. The implications of Kenya's deterioration were not just internal—they were sub-regional (with, for example, transit trade to the hinterland being immediately affected by the nature, speed and spread of the post-elections violence). This catalysed sub-regional pressure for the AU, if not the EAC, to act decisively. Similarly, Kenya is of geopolitical importance to the rest

of the world, being, for example, an erstwhile leader in terms of security in the sub-region as well as host not only to the only global UN agency in the global South but also to the sub-regional operations of many Northern/Western transnational corporation subsidiaries. This catalysed pressure from the rest of the international community for decisive action as well. In turn, this raised the question of ‘ownership’ of any intervention—if the AU did not intervene, then the rest of the international community would, which was unpalatable to, in particular, the incumbent political party.

The final set of additional—and critical—factors had to do with internal dynamics. The balance of power internally was important. The outcome of the presidential vote was in question, with the incumbent claiming victory but the outcomes of the parliamentary vote put the political opposition ahead. This bolstered domestic appeals for intervention—domestic academic, civil society and private-sector constituencies understood that the situation was untenable as—questions about the integrity and legitimacy of the supposed outcome of the presidential vote aside—the incumbent would not be able to govern without concessions to the political opposition. This fact, in turn, bolstered the AU’s belief, shared by the rest of the international community, that intervention would, in fact, ‘work’.

## 7.2 What leverage for such interventions?

While understanding the conditions under which the AU intervened is important, of equal—if not more—importance is understanding what made the political protagonists in Kenya accept the intervention. For the political opposition, the answer is more obvious. The ODM understood the AU intervention as claim-recognition in respect of the supposed outcome of the presidential vote.

For the incumbent, the answers are less obvious. The first answer has again to do with agency—political leadership, eventually, within the PNU. Kibaki, who re-assumed the presidency, was, in the end, concerned about both his legacy and his personal standing. More sober advice from trusted civil servants (as opposed to political party members and leadership) may have come into play.<sup>1243</sup> Kibaki and the civil service were also concerned about Kenya’s standing—in the sub-region, the region and the rest of the world—Kenya having traditionally played a leadership role in the maintenance of security in the sub-region.

The second and initial set of answers has to do, however, with the disarray within the PNU occasioned by the nature, speed and spread of the post-elections violence following the announcement of the so-called presidential results and Kibaki’s dusk swearing-in. It became evident that the PNU’s initial scenario planning had been erroneous and there was no ‘Plan B’, particularly given both tensions within the security services (between, for example, the heads of the regular police and the criminal investigations) and their apparent inability to contain the post-elections violence.

As the PNU became increasingly concerned about the ODM’s influence regionally and internationally, it finally began to see an AU intervention as preferable to intervention by the rest of the international community. AU intervention would be comparatively face-saving as well as, initially, being deemed more manageable (evidenced by the contestations once the AU intervention had begun on the language of the mediation, the nature of the political settlement and the division of ministerial portfolios). In this sense, the second set of answers has to do with the incumbent’s evolving strategic assessment of its options.

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<sup>1243</sup> One informant credits, in particular, the then Head of the Civil Service, Francis Muthaura.

But the third—and most important—set of answers has to do with the pressure brought to bear on the PNU, interestingly and particularly from domestic constituencies. Politically, the post-elections violence was perceived of as most affecting the PNU's political constituency—the security services seemed unable to contain it and, worse, were ultimately charged with substantially contributing to it.<sup>1244</sup> Economically, the political opposition's protests of the supposed presidential outcomes initially took the form of economic sabotage (for example, through a short blockage of the port, blockages of the roads through the Rift Valley to western Kenya and the hinterland as well as uprooting of the railway tracks). The impact on Kenya's private sector was immediate—and it was the private sector, of all domestic constituencies, that had the most access to and influence over the PNU.

As mentioned above, given the effects of transit trade, regional pressure for action was immediate and strong, leading to much attempted engagement with the incumbent by various regional leaders and regional leadership fora such as the Forum of Retired African Presidents in advance of the AU intervention. Pressure from the rest of the international community was also largely both consistent and immediate—with important Northern/Western bilateral and multilateral representatives providing, once the AU intervention had begun, the incentives and disincentives (or 'carrots and sticks') to see the AU intervention through.

What is of note with respect to this third set of answers is that domestic, regional and international pressures were, in the Kenyan case study, mutually reinforcing—with domestic pressures, to an atypical and unusual degree, providing the lead for regional and international pressures to follow. This confirms the research's initial hypothesis that it was the combination of

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<sup>1244</sup> The report of the CIPEV noted that the majority of deaths during the post-elections violence were as a result of bullets and attributed the same to the security services.

regional with international and domestic pressures that ensured the ‘success’ of the AU’s intervention.

### *7.2.1 Atypical and unusual leverage: the still insufficiently acknowledged role of domestic constituencies*

Both the AU and the philanthropic and diplomatic communities have been, rightfully, credited with ensuring the ‘success’ of the mediation. The AU’s choices for the mediation team ensured a more joined-up approach between the region and the rest of the international community than is often the case. The mediation team provided strategic guidance to shepherd the mediation to a conclusion (by, for example, making pre-emptive announcements to the public, moving the negotiation when necessary and, finally, negotiating solely with the Principals in the presence of a peer who had just taken over the political leadership of the EAC).

Beyond process, substantively, the AU and its mediation team were also well informed about the proximate and structural causes of the post-elections violence, beyond the electoral trigger. Kenya had recently completed the APRM process and one of the APRM team members joined the mediation team.

For the philanthropic and diplomatic communities, the elections and ensuing conflict were, in a sense, the ‘final nail in the coffin’ of belief in the credibility of the supposed political transition of 2002. Despite steadily rising levels of economic growth post-2002, these actors were increasingly disappointed with the results of their post-2002 investments (in, for example, accountability). Given their questioning of the supposed presidential results and their alarm at the nature, speed and spread of the post-elections violence, they were ready to support the AU

intervention, particularly as they had confidence in the AU's mediation team, the Panel of Eminent African Personalities headed by former UN Secretary-General, Kofi Annan.

The advocacy-oriented philanthropies invested in supporting the mobilisation and organisation of domestic constituencies—providing funding, for example, as well as facilitating civil society's regional and international advocacy. The US, initially pro-PNU, changed its stance, arguably due to advocacy with the US Congress and Senate as well as analyses from American Africanists on Kenyan policy. In the end, the entire Northern/Western diplomatic community backed the AU intervention not just with financial and technical support to the Panel of Eminent African Personalities, but also with targeted (including individually) 'carrots and sticks' to see the mediation through. But both the philanthropic and diplomatic communities pegged their messaging and other efforts on demands and positions largely emanating from domestic constituencies.

In the immediate disarray following the announcement of the supposed presidential results, the dusk swearing-in of Kibaki and the ensuing post-election violence, Kenyan civil society provided the alternative leadership that the political protagonists could not. The umbrella KPTJ moved from publicly 'breaking ranks' by those from ethnicities deemed supportive of the incumbent to collating and analysing the data on both the elections and the patterns of post-elections violence, making this data publicly available and advocating with the region and the rest of the world. The umbrella CCP publicly encouraged dialogue between the political protagonists and made the first invitations to regional leaders to engage. As the AU intervention got underway, the Women's Consortium added its voice to the demands and positions on the table, and proved to have access to both sides of the political divide.

The Kenyan private sector provided unprecedented national media access to the alternative leadership from civil society, with CKW focused more on the international media. The Kenyan private sector also convened Kenyan mediators and supported them in their formation of CCP. Kenya private-sector umbrella organisations also quickly provided their own analyses of what needed to happen to end the post-elections violence, publicly backing the mediation as well as providing it with its own demands and positions.

In summary, it was Kenyan civil society, including the women's movement, and the Kenyan private sector that laid the ground for the AU intervention through engaging both the public at large and critical constituencies across the country, providing practical support to responders on the ground as well as religious organisations. Kenyan civil society also engaged political protagonists, although different umbrellas had varying degrees of access to either side, key regional figures (potential mediators as well as the AU and its mediation team), and the rest of the international community through increased advocacy with the local diplomatic community as well as in key capitals.

Substantively, the alternative leadership provided ensured that data and analysis of both the elections and the patterns of the post-elections violence were publicly available, together with proposed solutions for the same. This, collectively, provided a narrative of events for the historical record, and to frame and fill out the mediation agreements—with content that addressed not only the electoral trigger, but also the proximate and structural causes of the post-elections violence. It also, collectively, provided a domestic anchor and legitimacy not only for the AU intervention but also for actions by the rest of the international community to see the mediation through. It also, over time, had the effect of softening the 'hardliners' on both sides of the political divide.

It was also Kenyan civil society, including the women's movement, and the Kenyan private sector that maintained domestic pressure for full implementation of the agreements reached under the KNDR—providing too a medium- and longer-term source of analyses and technical capacity for such implementation.

### 7.3 A critical examination of the nature and consequences of such interventions

The AU intervention in Kenya is deemed a 'success' because it contributed to stopping the violence by acknowledging that the presidential elections had been flawed, with the KNDR agreements eventually leading to the disbandment of the EMB and preparing the ground for reform (if not accountability), including of the electoral dispute-resolution mechanism. This, in turn, enabled a political settlement that went beyond accommodation of the political protagonists. The KNDR agreements enabled finalisation of the almost two-decades-long constitutional reform process, restoring separation of powers and checks and balances as well as—critically—providing for devolution and guarantees for women's political participation. The KNDR agreements also prepared the ground for conclusively addressing historical grievances, including dispossession from land, gross and systemic human rights violations and systemic discrimination by ethnicity.

However, implementation of various KNDR agreements proceeded with varying degrees of difficulty and, ultimately, yielded different results. Importantly in terms of lessening electoral temperatures, the Constitution of Kenya 2010 did not, in the end, provide for proportionality in the electoral system. Neither did it therefore provide a means to reach the target set for women's political participation.

With the benefit of hindsight, in terms of the process of the AU intervention, the selection criteria for the mediation team members were more implicit than explicit and the mediation team was provided with no terms of reference. While the gravitas and skills brought to the table worked and the mediation team had the flexibility to proceed as it saw fit, the ‘success’ it registered is thus neither necessarily guaranteed nor necessarily replicable. In terms of the substance of the KNDR agreements, time would tell that the ‘devil lay in the detail’, with the lack of specificity negatively impacting, for example, the formation, size, cost and effectiveness of the Grand Coalition Government.

More fundamentally, time would also demonstrate the problem with the model of the political settlement itself, which proved to be a ‘double-edged sword’ in the medium-to-long term. Not only did it effectively reward the incumbent and enable its entrenchment (as all previous political settlements in Kenya have done), but it diminished the political opposition, if not to the extent experienced during the one-party dictatorship. The lack of limitations placed on the mandate and duration of the Grand Coalition Government meant that all implementation of the KNDR agreements was subject to continual negotiation, and that the Grand Coalition Government failed to see itself as transitional.

This continual negotiation meant, for example, that the Constitution of Kenya 2010 did not adopt a purely parliamentary system, introduce proportionality into the electoral system or adopt devolution as originally proposed. All of these were measures intended to lessen the political incentives for capturing the Executive and thus to reduce electoral temperatures.

While institutional reforms of the electoral system, the security sector and the justice system took place, following yet another contested presidential election in 2013 (and the handling of the same by the new EMB and the new Supreme Court), public confidence in institutions is

again, in 2017, at a low. These institutional failures were arguably enabled by the fact that, going into the General Elections of 2013, there has still been no individual (criminal) accountability for electoral malfeasance in 2007 or for the post-elections violence of 2007-8. This failure to pursue accountability was justified on the basis of not destabilising the political settlement. Thus, as in the case of all Kenya's previous political settlements, reform was chosen over accountability, in effect legitimising the use of violence for political ends (including by the security sector). A base for violence still exists too, given that the KNDR agreements on addressing unemployment, underemployment and the 'youth bulge' have always been weak.

Political exclusion persists, as does the instrumentalisation of ethnic (deemed political) identity. Political leadership is still lacking and, over time, the alternative leadership provided by Kenyan civil society, including the women's movement and the Kenyan private sector, has waned. Thus, elections remain a trigger for violence, given the new EMB's failure to exercise independence<sup>1245</sup> as well as the lack of consequences for Executive interference in the EMB and for fomenting political violence. Kenya is still fragile, with the potential to take a shorter time to implode and with less likelihood of political violence being stopped in the same way in the future. The moral of the story is that a political settlement can only ever be a means to an end, not an end in itself—regardless of who brings it about. Key questions for the future of the model of the political settlement, including within the AU, include how to limit the mandate and duration of resulting coalition governments to make clear their transitional role, and how to maintain the confluence of domestic, regional and international pressures to realise that transition.

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<sup>1245</sup> Towards the end of 2016, the Independent Electoral and Boundaries Commission (IEBC), brought into being by the KNDR agreements, was disbanded following protests by the political opposition and a new and limited political settlement on its reconstitution.

#### 7.4 Implications for ‘African solutions for African problems’

The conclusions of Chapter Five have to do with the lessons learnt from the AU’s intervention in Kenya’s electoral conflict of 2007-8. In comparison to a UN intervention, an AU intervention is preferable because it is less bureaucratic and therefore quicker, it is met today with less resistance than a UN intervention may be, and it can bring to the table more contextual knowledge. However, first, an AU intervention is not always as per the APSA, which clearly spells out that the relevant or responsible REC intervenes first. For interests within relevant or responsible RECs may be (or may be perceived as being) biased or partisan given that the RECs invariably include neighbouring member states.

Second, a single mediation process is important. And, as demonstrated by the Kenyan case study, the success of an AU intervention depends on the ground prepared by domestic constituencies and is also inevitably embedded in the global. An ‘African solution’ may be as much enabled by domestic constituencies as by the AU intervention itself. Also, an ‘African solution’ still depends on the rest of the international community not pulling in disparate directions.

Third, the efficacy of domestic constituencies’ leadership, data and analysis can ensure that more than a political settlement is agreed to—that not only triggers of conflict but also proximate and structural causes are addressed in agreements arising from an AU intervention. However, the mobilisation and organisation of those domestic constituencies needs to be sustained past the crisis point to ensure that those agreements are implemented in letter and spirit. When this organisation and mobilisation is not maintained, then what follows inevitably degenerates to serve solely the interests of the political protagonists involved.

Fourth, reform of electoral, justice and security-sector institutions—inevitably part of a political settlement plus—is not enough. To ensure that these reformed institutions are indeed

credible, effective and independent in the medium-to-long term, (individual criminal) accountability for their past failures cannot be sacrificed to reform alone for the purposes of holding the political settlement together. The mantra of ‘sequencing’ peace and justice simply does not work—justice can be achieved only at the start, when political protagonists are still unsettled and have not yet re-entrenched themselves. Viable ‘African solutions’ need to take into account the fact that (individual criminal) accountability is still the ‘last frontier’.

Finally, political settlements can be only a means to an end. In and of themselves, they tend to weaken the political opposition, diminish checks on the Executive and not only sacrifice accountability but also distort or postpone genuine structural reform.

#### 7.5 (Re-)conceptualising ‘African solutions for African problems’

Chapter Six extrapolates from the AU intervention in Kenya’s electoral conflict of 2007-8, with references to other, more current AU interventions, to critically analyse (and problematise) the very notion of ‘African solutions for African problems.’ The AU’s intervention in Kenya has been widely hailed as a ‘success’ for the AU. It was, indeed, initiated and legitimised by the AU.

Curiously, however, within the AU, it is seen by some as a Northern/Western intervention. The AU Panel of the Wise, the part of the APSA intended to lead preventive diplomacy efforts, had not yet been operationalised at the time of the Kenyan electoral conflict. The AU could not financially or technically support the AU’s intervention in Kenya (and some in the AU felt that support was unwanted). Neither could it provide the ‘carrots and sticks’ to make it work.

Ironically, the factors that ensured support from the rest of the international community made the AU intervention work. The gravitas and stature of Kofi Annan as lead mediator ensured the North/West backed him and the rest of the Panel of Eminent African personalities financially,

technically and politically. He was not, therefore, beholden to the AU. And, despite his submission of regular reports to the AU, the AU became less engaged as the mediation unfolded. Finally, as the accountability process for the violence rolled out—moving from the proposed Special Tribunal in Kenya to the ICC—he took a stance different from that of the AU, pushed as the AU was by the incumbents in Kenya.

Equally of interest is that, within Kenya too, the intervention was seen as ‘African’ not just because the AU had mandated it or because the Eminent African Personalities were all Africans, but because of the groundwork laid for it by domestic constituencies and the participation of domestic constituencies in ensuring acceptance of its process, substantive content and implementation. That said, the Kenyan case study still provides a basis from which to tease out responses to key questions as follows.

#### *7.5.1 What informs an AU decision to intervene and how does it intervene?*

A decision to intervene is made following assessment of analysis and intelligence from the CEWS under the APSA, (long-term) elections observation under the DPA, its satellite offices or external sources (including African and other civil society). Internally, leadership of both the AU and the AU Commission (AUC) matters, the latter given that the APSA’s design allows both the PSC and the AUC Chair to act on information arising from the CEWS. The AUC Chair, critically, determines whether, when a REC is faltering, the AU bolsters the REC’s effort or decides to intervene directly (through the AUC Chair’s office) or indirectly (through delegations of peers from the Panel of the Wise).

Leadership also matters in terms of being able to utilise the normative and institutional basis provided by the Constitutive Act and the APSA’s design with full awareness of the historical

reasons for the existence of those norms and that design. Similarly, leadership matters in terms of being able to utilise the normative and institutional developments within the DPA, which, relative to the PSC, tends to see electoral processes as a potential trigger of insecurity not solely in and of themselves but also because of what proximate and structural grievances tend to come to the fore during electoral processes.

Externally, the country involved matters—its economic and geopolitical importance. The response of the sub-region matters—the economic and political impacts of a conflict not only within the country concerned but also across its borders, in its neighbouring states. The response of domestic constituencies also matters—civil society’s contacts with and ability to engage the AU. And, finally, the response of the rest of the international community matters—as does its alignment with the AU.

#### *7.5.2 What makes a member state accept an AU intervention?*

Evidently, the member state’s normative commitments and the potential consequences of non-adherence to the same underlie acceptance or ‘consent’ to an AU intervention. But, as illustrated by the Kenyan case study, more political or strategic considerations matter more. These include the domestic acceptability of the face and leadership of the AU intervention, with a preference for peers deemed at least politically neutral. They also include a frank assessment of the balance of power internally by the incumbent (can it deal with the political opposition itself or not?) as well as a calculation of interests domestically by the incumbent (whether it thinks the AU intervention can be used to preserve itself with the least possible ceding of power).

Finally, pressure matters—pressure from the sub-region, the AU and the rest of the international community. This is in addition to pressure from domestic constituencies, not so much civil society but more the incumbent’s political constituency and, particularly, the private sector.

### *7.5.3 Objectives of an AU intervention and measures and determinants of its ‘success’*

As mentioned above, the AU intervenes on the basis of subsidiarity, ceding to the relevant or responsible sub-region first. If the relevant or responsible REC does not work, the AU can then intervene directly through the offices of the AU and AUC Chairs or indirectly, in a face-saving manner through the use of peers within the Panel of the Wise. The AU is non-directive with respect to an indirect intervention, leaving the peers to exercise their own discretion although it will sign-off on what the peers accomplish. Preventive diplomacy is preferred to military interventions—however, relative to the UN, the AU prides itself on being militarily able to achieve the peace and not just hold it (this is particularly true of the REC of the ECOWAS).

The objectives of an AU intervention are basic: to stop any fighting and restore peace and stability. Triggers must be addressed, through political settlements, the core of any agreements reached, with proximate and structural causes, if addressed at all, going into the detail. Accountability is seen either as leverage to get to a political settlement or as something to come ‘later’—the assumed necessity of ‘sequencing’ peace and justice has become a truism.

Arising from the objectives above, an AU intervention is considered ‘successful’ if, in a given conflict, escalation is forestalled and violence is ended. Achieving a political settlement is the key ‘success’ measure—seen more as an end in itself than as a means. But, a political settlement addressing more than the trigger is a higher measure of ‘success’—although seeing implementation of a ‘political settlement plus’ through to the end, fully addressing proximate and

structural causes of conflict, is rarely within the AU's remit. If it were, greater attention would be paid to limiting the reform and temporal mandate of any coalition government or government of national unity arising from the political settlement. In effect, this involves clarifying from the outset that any government arising is purely transitional in nature.

There are two most important determinants of an AU intervention's 'success'. The first of these is the initial balance of power domestically between the incumbent and the political opposition. Second is the general sentiment of the population, expressed through independent organisation and mobilisation of civil society, including the women's movement, and the private sector.

Another key determinant of an AU intervention's 'success' is whether the AU can wholly occupy the intervention space, ensuring (as in the Kenyan case study) a 'single mediation'. This requires agreement and interest alignment between the relevant or responsible REC, the AU and the rest of the international community on both analysis of the conflict situation and how best to address it. Achieving this agreement and interest alignment is now more explicitly taken up by the AU. It can, with the relevant or responsible REC, engage it, displace it or take over from it. With respect to the rest of the international community—specifically the UN—efforts are still underway on evolving institutional arrangements for information-sharing, common analysis and assessing the comparative advantage of intervention by either party. These efforts are, however, still difficult given lack of full agreement on the primacy of the AU or UN (and still often varying interests of the UN Security Council's permanent members).

The AU's position is that it has primacy over any African conflict situation given the history of inappropriate UN responses (or, even, lack of responses). It sees its expanding role as fully in line with Chapter 8 of the UN Charter, despite the mandate given to the UN Security

Council under Chapter 8. But the relationship between the AU and the UN with respect to peace and security on the continent has changed over time, with the AU intervention in Kenya being viewed by both sides as the first fully aligned intervention, bringing about a new understanding between the two institutions and better practice in conflict situations on the continent that have arisen since. New institutional arrangements are still being worked out for a new framework agreement formally announced in April 2017, including on joint horizon-scanning, capacity-building, technical support and, as has happened at least once before, financial contributions to AU interventions from assessed contributions of African member states to the UN under the logic that the AU is assuming part of the UN's previous role. ('Burden-sharing' in this way is one of the financing proposals currently on the table, even after the 2016 decision to fund the APSA through a tax on all African imports.)

The improvement in working relationships over time has been aided by the presence of UN Security Council permanent member missions to the AU in Addis Ababa, Ethiopia, the seat of the AU, and better direct bilateral relationships. That said, UN Security Council reform (through the addition of one or two African permanent members) remains a demand from the AU, and trickledown of agreements at the highest levels of the AU and the UN through their respective Secretariats and relevant agencies is still not always easy.

The final critical determinant of an AU intervention's 'success' is the sustained commitment of the protagonists to the political settlement (plus), the mediators (through, as in the Kenyan case study, medium-to-long-term monitoring of implementation) and of all sources of pressure—domestic, regional and international—on the protagonists over time, beyond the immediate political settlement.

#### 7.5.4 *Advantages of and challenges to realising ‘African solutions for African problems’*

The advantages of an AU intervention, illustrated, for example, in the Kenyan case study, include not just its African ‘face’, but what lies (or is assumed to lie and sometimes does) behind that African ‘face’—from knowledge of relevant languages to understanding of the political culture. An AU intervention increasingly lends itself to better acceptance by the political protagonists, given their expectations of empathy and higher contextual knowledge. The ever-expanding pool of respected ‘senior’ Africans now available able to front and lead AU interventions also lends itself to easier convening for deployment into given conflict situations. And, should preventive diplomacy not work, the AU (and its RECs, particularly ECOWAS) are more ready to move to military intervention to gain rather than simply hold the peace.

That said, despite the normative allowances for AU intervention under Article 4 of the Constitutive Act, it is clear that achieving consent to an AU intervention remains both something the AU feels it must do as well as something that is still difficult to do. For interpretation of the conditions enabling intervention under Article 4 is not yet one of pure evidentiary standards of proof but one of political considerations. In addition, there are still internal conflicts about applicable norms and which norms have precedence within the AU—those pertaining to acceptable political behaviour under the DPA still being relegated below those pertaining to peace and security under the PSC.

The AU’s leadership has also changed since the transition from the OAU to the AU—with peer solidarity amongst the current AU leadership posing more of a problem today in hindering decisive AU intervention than it did before (up to the time of the AU intervention in Kenya). The subsidiarity on which the APSA is based is increasingly proving a challenge too, given the often evidently divergent interests of neighbouring states within the relevant or responsible REC.

The choice of mediators, and their given histories in a particular member state, can also prove problematic. On one hand, those with histories in the given state can bring more contextual knowledge to the table. But, on the other hand, they can also be perceived as (or accused of being) not being politically disinterested when they have their own, independent analysis of the conflict situation at hand, or stronger affinities, historical or not, to one or other of the political protagonists. That said, if the mediators selected have no history in the given member state, it can be easier for the political protagonists to manipulate them.

Divergent interests of the rest of the international community—particularly those with leverage or ‘carrots or sticks’ over the member state in question—can also pose challenges. This is especially so when the political protagonists themselves have unclear political interests or political preferences they are unable or unwilling to articulate in the context of an AU intervention. The use of populism to oppose demands for accountability is a growing problem. This is especially so when the role of domestic constituencies for whom accountability is critical is invisibilised. In addition, while domestic constituencies prepare the ground for an AU intervention, providing pressure as well as substantive inputs, their capacities to do so are varied across the continent—particularly in protracted conflict situations in which they may be (and often are) directly repressed and targeted by incumbents.

Finally and perhaps most importantly, an AU intervention’s ‘success’ continues to be seen primarily in terms of achieving a political settlement that de-escalates and ultimately ends violence. But the power-sharing that is at the heart of most political settlements has become formulaic. In the medium-to-long term, it undermines democratic principles, particularly that of electoral competition. It avoids the difficulties of addressing electoral processes and outcomes that do not maintain the integrity of the vote and, in fact, incentivises violent electoral contestation,

particularly when it sacrifices accountability to reform. The ‘sequencing’ of peace and justice, now also formulaic, simply doesn’t work. And, as the political settlement does not necessarily address the proximate and structural causes of conflict beyond the trigger, it is ultimately not sustainable, leading to relapse at the next electoral process, depending on the duration of the intervention. Thus, more militarised responses may be what’s called for next, as the objectives and ‘success’ measures of preventive diplomacy prove themselves simply too slight in the longer term. This supports the original hypothesis that, consonant with predictions of the ‘liberal peace’, the political settlement in the form of power-sharing itself contributes to undermining implementation of agreements under the political settlement, in turn undermining democratic consolidation and mitigating against accountability.

#### *7.5.5 Final thoughts on ‘African solutions for African problems’*

The notion of ‘African solutions for African problems’ arose as a reaction to the North/West choosing whether, when and how to engage in African conflict situations, particularly pending UN Security Council reform. In practice, articulation of this idea has proactively (rather than reactively) highlighted the need to utilise knowledge and understanding of the region through devices such as the use of respected, ‘senior’ African personalities, mandated and legitimised by African institutions, to increase the acceptance, legitimacy, ownership and depth/substance of interventions, including re-imagined or re-invented ‘traditional’ African institutions.

Distinguishing features of ‘African solutions for African problems’ have indeed been speed (even if willingness to stay engaged beyond the immediate crisis point still varies), reliance on preventive diplomacy in the first instance but a readiness for peace-enforcement if preventive diplomacy fails, and more intentional drawing upon and use of the citizenry in such preventive

diplomacy. However, the objectives and measures of ‘success’ of this approach—particularly that of the political settlement between political protagonists—cannot be said to be specifically ‘African’. They are, in fact, universal and as prone in Africa as elsewhere to common limitations. These include: regression; a lack of clarity on how to address new conflict risks (such as those posed by ‘uncivil society’ or armed groups without an interest in engagement); and a failure to address accountability for all who instrumentalise violence to achieve political ends.

Questions arising for the AU include that of confronting the nature of leadership—bottom-up as well as top-down—through according as much attention to the AU’s democratic architecture as to its APSA. They also include addressing the APSA’s design problems—the challenges in practice of reliance on the principle of subsidiarity and critically assessing the comparative experiences of the RECs. Another key question is how to diversify and diminish the AU’s continued reliance on external financing—through realising proposals on the table for internal resource-mobilisation and continental integration. Beyond improving institutional functioning and independence, however, is the more fundamental challenge—that of addressing the problems inherent in the political settlement.

This concluding chapter has referenced back to the original research questions and their hypotheses. It has summarised the conditions under which supranational institutions decide to intervene, and outlines what provides leverage for such interventions. The two key conclusions here are the importance of a domestic base to legitimise, anchor and give real meaning to an external intervention, and the importance of domestic and international actors for regional actors’ interventions to both occur and ‘succeed’. This chapter has also critically analysed the nature and medium-to-long-term consequences of such interventions, noting that political settlements inevitably mitigate against addressing—in full—the proximate and structural causes of a(n

electoral) conflict and against ensuring accountability. It has therefore challenged the notion of any 'African solutions' that continue to be predicated on political settlements.

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3. Atsango Chesoni, lawyer and founding/lead member of the Women's Consortium, member of the Committee of Experts (CoE) under the Grand Coalition Government, Nairobi, February 20, 2015.
4. Ambassador Frederic Gateretse-Ngoga, Acting Head, Conflict Prevention and Early Warning Division, Peace and Security Division (PSD), African Union (AU), Addis Ababa, February 24, 2016.
5. Linus Gitari, former Group Managing Editor, the Nation Media Group (NMG), Nairobi, February 16, 2015.
6. Billy Kahora, Editor, *Kwani* and founding/lead member of Concerned Kenyan Writers (CKW), Nairobi, February 12, 2015.
7. Ibrahima Kane, Head, AU Advocacy Programme, Open Society Foundation (OSF), Nairobi, February 1, 2016.
8. Professor Karuti Kanyinga, political scientist and founding/lead member of Kenyans for Peace with Truth and Justice (KPTJ), Nairobi, February 20, 2015.
9. Martha Karua, negotiator for the Party of National Unity (PNU), Minister for Justice under the Grand Coalition Government, Nairobi, April 30, 2015.
10. George Kegoro, former Executive Director, the International Commission of Jurists (ICJ)-Kenya, Executive Secretary of the Commission of Inquiry into the Post-Elections Violence (CIPEV) under the Grand Coalition Government, Nairobi, January 15, 2016.
11. Maina Kiai, former Chair, Kenya National Commission on Human Rights (KNCHR), Nairobi, February 4, 2016.
12. Mugambi Kiai, former Kenya Programme Officer, Open Society Initiative for Eastern Africa (OSIEA), April 29, 2015.
13. Mugo Kibati, former Vice-Chair, Federation of Kenya Employers (FKE), Nairobi, April 29, 2015.

14. Ambassador Bethuel Kiplagat, founding/lead member of CCP, Chair of the Truth, Justice and Reconciliation Commission (TJRC) under the Grand Coalition Government, Nairobi, week of April 27, 2015. Kiplagat also served as: the lead mediator for the Intergovernmental Authority on Development (IGAD) intervention in Somalia that resulted in the establishment of the Transitional Federal Government (TFG); a member of the African Peer Review Mechanism (APRM); and, more recently a member of the East African Community (EAC) Panel of the Wise for its intervention in Burundi.
15. Kwamchetsi Makokha, journalist and founding/lead member of KPTJ, Nairobi, April 23, 2015.
16. Dr Khabele Matlosa, Head, Department of Political Affairs (DPA), AU, Nairobi, May 7, 2016.
17. Ambassador Haile Menkarios, Special Representative of the Secretary-General to the AU, Head, United Nations Office (UNO) to the AU, Addis Ababa, February 26, 2016.
18. Florence Mpaayei, former Executive Director, Nairobi Peace Initiative (NPI) and founding/lead member of both Concerned Citizens for Peace (CCP) and the Women's Consortium, Nairobi, February 26, 2015.
19. Dr Abdel Fatou Musah, Director of Political Affairs, UNO to the AU, Addis Ababa, February 23, 2016.
20. Dr Musifiky Mwanasali, Special Advisor for Political and Diplomatic Affairs, Office of the Chairperson, AU, Addis Ababa, February 25, 2016.
21. Dr David Ndi, economist and founding/lead member of KPTJ, Nairobi, November 17, 2015.
22. Binaifer Nowrojee, Executive Director, OSIEA, Nairobi, February 14, 2015.
23. Dr Jide Martyns Okeke, Senior Civilian Planning and Coordination Officer, Peace and Security Department (PSD), AU, Addis Ababa, February 22, 2016.
24. Professor Funmi Olonisakin, founding Executive Director, the African Leadership Centre (ALC), London, April 11, 2016.
25. James Orengo, negotiator for the Orange Democratic Movement (ODM), Minister of Land under the Grand Coalition Government, Nairobi, January 10, 2016.
26. Gladwell Otieno, Executive Director, African Centre for Open Governance (AfriCOG), Nairobi, February 26, 2015.
27. General Lazaro Sumbeiywo, member of CCP, Nairobi, January 16, 2015. Sumbeiywo also served as: the lead mediator for the IGAD intervention in the former Sudan that led to the agreement on the Comprehensive Peace Agreement (CPA); and, more recently, a lead mediator for the IGAD intervention in South Sudan.

28. George Wachira, member of CCP, via Skype, April 28, 2015.

29. Mary Wandia, member of the Women's Consortium, Nairobi, February 27, 2015.