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**The Great Lakes Parliamentary Forum  
on Peace – AMANI Forum**

**REGIONAL PARLIAMENTARIANS FACT-  
FINDING MISSION TO KENYA ON THE  
POST-ELECTION VIOLENCE  
13<sup>th</sup> – 21<sup>st</sup> January 2008**



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Caption: Hon. Sheikh Abdul Karim Harelima (MP Rwanda) and Hon. Lydia Wanyoto (MP East Africa  
Legislative Assembly) in Kuresoi, Kenya

## EXECUTIVE SUMMARY AND FINDINGS

### Preamble

1. A delegation of Parliamentarians<sup>1</sup> from Burundi, Democratic Republic of Congo (DRC), Kenya, Rwanda, Uganda, Zambia and the East African Legislative Assembly (EALA) visited Kenya between 13<sup>th</sup> and 21<sup>st</sup> January 2008. The delegation was led by Hon. Sheikh Abdul Karim Harelimana, Secretary General of AMANI Forum Rwanda Chapter. The brief of the mission was to establish the facts surrounding the violence that rocked the country following the disputed December 2007 elections.

The fact-finding mission was also informed by the participation of several Members of Parliament, from the Great Lakes, who had been part of the AMANI Observer Mission to the 2007 elections<sup>2</sup>.

### The Findings

2. **Fact 1.** This is not an ethnic crisis. It is political and economic.

3. **Fact 2.** Discrimination in favour of the Kikuyu tribe, historically and in the Kibaki regime<sup>3</sup>, accounts for the regimentation of the other ethnic communities against them

4. **Fact 3.** President Kibaki and Hon Raila Odinga are being held hostage by their supporters. Subsequently, the BIG PUSH for the ethnic violence is now coming from below.

5. **Fact 4.** Political leaders have abdicated their role since the election fiasco and as a result, the 'crisis from below' has acquired a life of its own.

6. **Fact 5.** The controversy of tallying of presidential vote must be brought to a closure for the crisis to end.

7. **Fact 6.** The security forces are deployed to primarily secure strategic locations at the detriment of human life in needy rural areas. A list of the members of delegation is provided

<sup>1</sup> A list of members of delegation is provided as Annex I of this report

<sup>2</sup> The Election Observer Mission Report can be downloaded at [www.amaniforum.org](http://www.amaniforum.org)

<sup>3</sup> The *Kikuyu* unisation of government positions in particular.

## The National Dialogue and Reconciliation Committee<sup>4</sup>

8. Since Kofi Annan began the mediation process of the National Dialogue and Reconciliation Committee, three levels of play have emerged in this crisis. The first one brings together the political class and its appendages. And in the view of this report, this is the crucial level of play. At this level, there are two theatres; the Kofi Annan Mediation, which is the formal theatre on the one hand and the hardline caucuses around President Kibaki and Hon Odinga on the other. The challenge at this level is identifying an acceptable Lowest Common Denominator (LCD) between the two. And the question is this: does the Annan-led Initiative have a big enough 'stick' to force the hardline caucuses into a settlement?

9. The second level of play has two theatres, comprising of the external actors. These theatres are in turn defined by the 'degrees' of interest held by the actors. The first theatre is the global axis, and it includes institutions like the UN, EU and the countries<sup>5</sup> charged with the task of 'policing' the globe. The Annan Initiative has the imprimatur of this axis and their 'degrees' of interest in the crisis range from important to secondary<sup>6</sup>. The second theatre of play brings together countries whose economic survival is dependent on stability in Kenya. These include Uganda, Rwanda, Burundi, Southern Sudan, and Eastern Congo. Their interest in this crisis is primary, as it hinges on survival. Their options are therefore 'hard' and urgent. In the view of this report, this is a critical theatre and one whose actions must be carefully watched.

10. If the first level is a theatre for the political class, the third level has its actors as the rank-and-file Kenyans. There are two theatres at the third level. The first is the disjointed revolt from below. This revolt has acquired a life of its own and is gaining some independence from the political class. The ODM leadership is actually held hostage by this revolt in some areas. The second theatre has remained latent in this conflict, but supplies the 'cannon fodder' to the revolt. This is the 'bandit state' and its corresponding 'bandit economy' situated in places where the state is absent. Although this theatre is differentiated in its composition and response to the crisis, it remains a prime mover in the search for a settlement. Critical players here include militia formations like Mungiki, the Sabaot Land Defence Force and the economic predators who collect rents from petty traders. The grievances of these players are historical, class related and generational.

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<sup>4</sup> Refers to Kofi Annan, the Chief Mediator in the peace process.

<sup>5</sup> The interest of the US for instance, it is assumed, is that the Al Qaeda does not link up with a 'bandit formation' like the Mungiki to constitute a cell structure in the country. (Interview with a government officer during field work)

<sup>6</sup> We provide a matrix that defines the 'degrees' on interest in the report.



## Critical Factors for Annan to Succeed

11. The success of Kofi Annan's initiative will be determined by a combination of six factors, in the view of this report

**a. Political surrender by President Mwai Kibaki.**

The initiative must be able to bring pressure to bear on both negotiating parties to accept that the elections were flawed and that the only way out is a political settlement<sup>8</sup>.

**b. Ability to negotiate a power sharing formula**

The initiative should realistically arrive at the irreducible minimum for both parties and navigate around this Lowest Common Denominator to extract trade-offs.

**c. Capacity and willingness to brandish force on both constituencies**

This is the 'stick' argument. The initiative should have the capacity to use negative sanctions on both sides as a way of 'forcing' or persuading them into a political settlement.

**d. Ability to converge international interests**

International interests in this crisis range from survival for the Eastern African states, to general humanitarian interests for the world at

large. Those whose interest is economic survival want urgent action and are likely to move independent of the rest of the international actors<sup>9</sup>. The initiative's ability to converge these interests and unify their actions is critical.

**e. Ability to ensure that the distance between the revolt from below and the mediation process does not grow**

The question here is whether the deal brokered by the Annan-led process will be binding to the disjointed revolts from below. And whether the political class can persuade the revolting crowds to accept the results?

**f. Ability to maximise time in the context of changing spaces.**

With the passage of time, the situation in the country has stabilised. However, the revolt from below is only re-grouping should the initiative fail. Ability to balance expectations from the rank-and-file Kenyans with the urgency to come up with a workable compromise is critical.

<sup>8</sup> Condition generated against the insistence of government that the legal option is the only way to settle the crisis.

<sup>9</sup> This is intimated by the actions of both Uganda and Rwanda.

## The Strategic Choices

12. In the view of this report, the choices fall into two categories; the 'hard' and the 'soft' options. A few 'middle' options are also discussed. All these depend on whether or not the Annan-led Initiative will broker a peaceful settlement.

### The 'Soft' Options

13. **Option One:** *A Political settlement backed by constitutional amendments.*

Under this option, executive power should be shared between Kibaki and Raila. This settlement should then be constitutionalised under Section 47 of the current constitution.

14. **Option Two:** *Forensic Audit of Election Results and a Re-run.*

This option can be driven by a UN resolution and conditionalized through 'Gun-boat Diplomacy'. Special forensic experts and statisticians should be invited to do the forensic audit of the results. In the event a winner is not authoritatively established through this process, a re-run should be considered.

15. **Option Three:** *Gun-boat Diplomacy*

This is an option available to especially the regional leaders. It could revolve around several measures aimed at putting pressure on Kibaki and Raila and threatening action should they fail to come up with an acceptable solution to the crisis.

### The 'Hard Options'

16. **Option One:** *UN/AU Peace Keeping Force and Interim Government*

Failure of the state to get serious with the Annan talks or its unwillingness to 'climb down' and accept the fact that the electoral process was flawed will engender not only a collapse, but a re-igniting of mass action. This will facilitate a conjuncture between unarmed civilian initiatives on the one hand and activities of the 'bandit state' on the other. This will animate, polarize and militarize further the civic space currently occupied by bandit groups in the absence of the state.

This option will become imminent as it is realized that state institutions are polarized and paralyzed to curb ethnic, state and predatory violence. The popularity of this option will be driven by eminent negative effects the Kenyan paralysis is having on Uganda and Rwandan Economies. These countries are likely to rationalise their actions using international conventions and they could move in ahead of the UN-western axis, prompting the former to support them. This option is possible in the unlikely event of the Annan Talks collapsing.

17. **Option Two:** *The Military Intervention Proposal*

According to the viewpoints of some regional leaders, the crisis at hand can only be resolved through a military intervention. But given the polarity in the security institutions, such an option could have its dangers. Similarly, should the 'coup-makers' come from the top officials

in the forces, the situation is likely to stabilise fast enough. Should they come from the middle, or below, it would be a protracted struggle. But the reason why this option needs to be watched is because it could be used to counter an outsider force invading the country to install an interim government. It could also be instigated by the regional leaders as a soft option.

#### 18. Option Three: *The Samsonian Option*

This is an option likely to be taken by Kibaki unwittingly. Like Samson in the Holy Bible, he could decide to bring down the 'temple' destroying everyone, including himself. The president is likely to take this option by hardening his position and refusing to cede some of the executive powers. But this option would also invite a reaction from ODM, including possible secession or armed struggle.

### Summary Recommendations

19. In the short and long-run, we recommend the following:

a. This is a political problem that calls for a political settlement

b. In the post-crisis period, government should ensure that the distribution of resources and opportunities is equitable

c. Political leaders should assume their responsibilities in the current crisis

d. Mechanisms to encourage community dialogue should be put in place.

e. The tallying of presidential vote should be accorded urgent attention. In the event that this fails to produce acceptable results, a re-run should be considered within an agreed period of time.

f. The lives of people and their fundamental rights should be given utmost priority in the deployment of security forces.



## Part A. Background Context

### A. Preamble

#### A.1. Introduction

- 1) On 27<sup>th</sup> December 2007, Kenya held its fourth multi-party elections since 1991 when section 2(a) of the constitution was repealed to provide for Multi-party system. The presidential elections turned out to be one of the most competitive ever, both in terms of actors as well as issues at play. Despite the rigorous and relatively violent campaign period, the voting process was generally peaceful, with a considerably high number of voter turn out. However the management of the final processes of vote tallying and the announcement of the winner of the presidential contest was described as flawed<sup>10</sup> and falling below par in so far as electoral processes are concerned.
- 2) The outcome of the controversial announcement of president Kibaki as the winner sparked violent protests and in some cases, ethnic clashes in many areas seen as pro-opposition. Over 1000 people have died, 600,000 displaced and property worth millions of shillings destroyed. The humanitarian crises that have been witnessed in parts of Rift valley, Nyanza, Western Coast and Nairobi provinces confirm the extent of the effect of the post election violence. While it is not known how protracted the situation will be, urgent measures need to be taken to address the root causes. This must be done through a broad based strategy that includes cooperation between elected leaders and humanitarian agencies.

#### A.2. Mission Brief

- 3) The post election violence that has rocked many parts of the country has not only created a humanitarian crisis but also destroyed societal fabrics that joined different communities together, despite their political differences. Claims of ethnic cleansing, mass eviction and mistrust among communities have been made. While calm may be slowly returning in some areas and efforts aimed to providing humanitarian assistance are underway, mechanisms for addressing the divisions in the communities need to be developed alongside this humanitarian assistance. Furthermore, the claims of mass killings and ethnic cleansing need to be verified and appropriate peace building and reconciliation steps undertaken.
- 4) A delegation of parliamentarians from Burundi, Democratic Republic of Congo (DRC), Kenya, Rwanda, Uganda and Zambia, members of the Great Lakes Parliamentary Forum on Peace- AMANI Forum was in Kenya on a fact finding mission. Led by Hon. Sheikh Abdul Karim Harelimana, Secretary General of AMANI Rwanda chapter, the mission arrived in Nairobi on 13<sup>th</sup> January 2008 and worked until 21<sup>st</sup> January. Its specific brief was as stated below.

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<sup>10</sup> AMANI Forum Election Observer Mission Report, EU Observer Mission Report, EAC Observer Mission Report



### *A.3 The Specific Mission Brief*

5) The objectives of the mission were as follows:

- a. To reiterate, as Members of Parliament from neighbouring countries, the need for peaceful dialogue and tolerance in the pursuit of solutions to the current political impasse and to advocate for national interests as opposed to personal interests
- b. To call upon the people and leadership of Kenya to work towards peace, for the sake of the Kenyan Nation and for the sake of the Great Lakes region
- c. To add our experience, as AMANI forum, to the current efforts to find lasting solutions, and especially, to make recommendations on political and legal choices that can contribute to prevent the escalation and expedite resolutions of election-related conflicts in Kenya
- d. To advocate for the effective involvement and participation of Kenyan women in ongoing efforts to secure peace - including the mediation process

## *A.4. Methodology*

### *A.4.1 The Team*

6) The AMANI Forum Regional Mission comprised of the following members of Parliament:

- Hon. Abdul Karim Harelimana, MP Rwanda, Leader of the Delegation
- Hon. Lydia Wanyoto Mutende, MP, East African Legislative Assembly
- Hon. Adia Leti Baudouin, MP Democratic Republic of Congo
- Hon. Jimmy Akena, MP Uganda
- Hon. Alfrida Mwamba, MP Zambia
- Hon. Richard Nimbasha, MP Burundi

In undertaking this mission, AMANI partnered with the Peace and Development Network (Peacenet Kenya) which provided local guides (in the specific areas visited).

### *A.4.2. Areas Visited*

7) During the mission, the team visited the following areas:

- Nairobi Region- Kibera, Mathare, Huruma, Kawangware
- Rift Valley- Nakuru, Eldoret
- Central Province
- Eastern Province
- Nyanza- Kisumu
- Coast- Mombasa

### *A.4.3 Groups and Institutions the Team met with*

8. During the mission, the team met with the following individuals, organisations and groups:

- Vice-President and Government Ministers
- ODM leadership

- Electoral Commission of Kenya (ECK) top leadership
- Representative of the Provisional Administration (Provincial and District Commissioners)
- Civil society and religious organisations based in Nairobi and the Provinces
- Humanitarian Agencies
- Community Leaders
- Youth and women Groups
- The team visited and interacted with internally displaced persons in the established IDP camps.

#### *A.5. Limitations of Mission Visit*

9) The team was faced with the following limitations while at the mission:

The team was unable to visit some specific places (notably Burnt Forest, and other areas close to Eldoret) due to violence that had erupted in those areas

- Some roads were barricaded (Eldoret-Kisumu road) therefore causing the team not to be able to visit some of the areas along this route (although they did carry out their assignment in both these towns respectively)

## Part B. A Situation Analysis

### B.1 Tracing the Original Sin: *Core Causes of the Crisis*

#### B.1.1 Historical Injustices

- 1) **Constituting Kenya.** At the on-set, the Kenyan state was constituted as a company – the Imperial British East Africa Company (K) and this underpinning economic logic continued to dog its fabric. The motivation derived from British strategic calculations aimed at defending the Nile River, critical to the survival of Egypt. The decision to transform the geo-strategic Kenya-Uganda railway into an economic venture animated not only European settlements through land alienation processes, but began the first veritable false process of state engineering.
- 2) **The Land Crisis.** Notably, the process of state construction was ethnic, exclusivist and extractionist. Defining this was its resource distribution logic. And indeed, the contemporary land question has its roots in the violent expropriation undertaken in favour of the British settlers. For instance, by 1920, 1,647 Kikuyus in Kiambu and Limuru had been turned into squatters in the Rift Valley and by 1953, 4,000 European settlers occupied 7.3 million acres of the most arable land in Kenya. Deprived of their land, they moved into the Rift Valley as squatters.

Their subsequent expulsion by colonial settlers engendered the *Mau Mau* uprising and the pseudo constitutional politics. The colonial administration responded to these revolts in three forms: Militarily, it instituted campaigns of suppression whose resultant effects were repression, dislocation, detention and death.<sup>11</sup> It also instituted minimum constitutional reforms that saw the setting up of African legislative councils with an ethnically based representation. But more critical; were the agrarian reforms in land tenure and rural economy in the Kikuyu country. This however, mainly rewarded loyalists while isolating radicals who were quickly pushed into the informal sectors in urban areas, especially Nairobi. The central objective here, being the creation of a conservative successor class that could act as a counterpoise against militant nationalist politics among the Kikuyu and across the nation.

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<sup>11</sup> A BBC documentary, *white terror*, points to a systematic rape and subsequent extermination of between 50,000 to 100,000 Kikuyus.

3. This successor class is currently housed in PNU, while the contesting ethnicities are part of the ODM brigade. Similarly, since the Mau Mau generation could not access land in Central Kenya, it migrated to the Kikuyu Diaspora in the Rift Valley through the One Million Acre Scheme. This generation is currently being evicted following the election fiasco. Overall, although the Kikuyu had misfortunes in that their best land was appropriated by the colonial settlers, they received compensations that put them ahead of the other communities. Their favoured position, arising from colonial engineering, is currently responsible for the unequal distribution of resources favouring them.

4. **Creating Ethnic Spaces.** The colonial state's construction of territorial spaces along ethnic <sup>12</sup> lines ensured that much as they created the space called Kenya, the result was the creation of polarized identities. Following the construction of these spaces, the first veritable national alliances that emerged congregated around ethnic notables such as Daniel Arap Moi who represented the Kalenjin, Masinde Muliro for the Luhya, Jaramogi Oginga Odinga for the Luo, Ronald Ngala for the coastal communities, and James Gichuru for the Kikuyu. In structural terms, these notables merely brought with themselves their ethnic powerbase structured around their previous associations. Indeed, when national associational spaces were opened, two grand alliances, the Kenya African National Union (KANU – dominated by the Kikuyu and the Luo, favouring centralism) and Kenya African Democratic Union (KADU – dominated by the Luhya,

the Kalenjin, Maasai, and other groups favouring a form of regional autonomy then known as *majimbo*) emerged. Although they emerged as political parties, their consciousness remained ethnic. And indeed, this ethnic consciousness expressed in political party terms under guards the current contest.

5. **Anti-Kikuyuism in the 1960s.** Land politics equally mediated the outcome of the Lancaster constitutional talks in the 1960s. The resultant constitutional arrangement sought to address the fears of the minorities through the *Majimbo* constitution where control of land was placed under the regions. The successor Kenyatta government was immediately confronted with the demands for land within and without his ethnic group. With the help of the British government, the Kenyatta government initiated land resettlement through the 1 million acre scheme which was increasingly slanted in favour of central province. <sup>13</sup> The fact that the majority of those who benefited from resettlement schemes in the coast province and parts of the rift valley animated apparent anti-Kikuyuism sentiments.

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12 There are 42 ethnic groups in Kenya. The Kikuyu are the largest, accounting for 21%, followed by the Luhya 15%, the Luo 14%, the Kalenjin 14%, Kamba 13%

13 See Leys C (1975), *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism, 1964-1971*, University of California Press



6. Feeling that the *majimbo* constitution had been pushed down their throats, the KANU elite vowed to deconstruct it once in power. This they did by absorbing KADU while also initiating several constitutional amendments such as Constitution of Kenya Act no 28 of 1964, which not only transformed Kenya into a Republic but made Kenyatta the head of State and Government, effectively centralizing power in his hands. There was also constitutional amendment Act no 38 of 1968 which put paid to the *majimbo* structure completely by freezing revenues to regional structures.

**7. Consolidating Kikuyu Hegemony.** The government's decision to institute Sessional Paper no 10 of 1965 with an underlying argument that resources would be directed in areas that could add value to the economy with the expectation of their percolation to the ground meant that the less developed areas would increasingly feel short-changed reinforcing the "termite economies".<sup>14</sup> For the Kikuyu elite in power, the state was critical to the consolidation of their control of the reins of economy. Being consumerist elite they presupposed the continuity of the exclusivist policies of the colonial government, and so, in 1967, the Trade Licensing Act was passed aimed at keeping the Asians out of the rural frontier.<sup>15</sup>

8. Concurrent to this economic behaviour were increasing tendencies of political intolerance and ethnic arrogance. These can be analyzed at two levels; the first level was the brittleness of state politics and eventual polarization that saw assassinations of Pio Gama Pinto in 1965 and Tom Mboya in 1969. Under the first level was the process of exclusion of Jaramogi Oginga and the proscription of his KANU faction (the Kenya People's Union) that he had formed after being thrown out of the party in 1966. This process transformed Kenya into a *de facto* one party state under an imperial president. It is also imperative to point out that the collapse of the grand KANU alliance meant a shift of one plate that led to ethnic polarities that would be reinforced not only by the assassination of Mboya (a Luo from Nyanza) but the oath taking process that sought to solidify the Gikuyu, Embu, Meru, Association (GEMA communities) around the presidency now constructed to belong to them. By the 1970s, the state began the process of ethnicizing both parastatals and governmental departments under the guise of Africanization, which later acquired the term 'Kikuyunisation'.<sup>16</sup> There was also the phenomena of corruption that crept into the state subsequent to the Ndegwa Commission recommendations of 1971 that allowed civil servants to engage in business. State institutions such as National Trading Corporation, Industrial Trading Development Corporation and the National Housing Corporation were increasingly used as sources for extracting critical resources for building ethnically based elite capital.<sup>17</sup>

<sup>14</sup> See Mukandawire, Op cit

<sup>15</sup> On state politics geared towards containing Asian economic expansion, see Himbara David, (1994) *Kenyan Capitalists, the State and Development, East African Education Publishers, Nairobi*

<sup>16</sup> Ngethe N, and Katumanga M (1998) "Restarting Institutional Growth in Kenya: Political and Institutional Dimensions", Harvard University

<sup>17</sup> See Himbara Op cit, 1994, see also Swainson Nicola (1980), "The Development of Corporate Capitalism in Kenya, 1918 – 1977", Heinemann

9. The wee years of the Kenyatta regime reinforced the brittleness of state politics, elite intolerance, and deinstitutionalization tendencies as those around Kenyatta sought to block his Vice president Daniel Arap Moi from succeeding him through the “change the constitution” movement of 1976. The determination to hold onto power was manifested by the formation of an extra-legal force known as the *Ngorokos*, whose objective was to eliminate those opposed to the scheme of keeping power within the GEMA reins.<sup>18</sup>

10. **The New Anti-Kikuyu Project.** It is against this history, that the possibilities of a Kikuyu presidency were ruled out until Daniel Arap Moi introduced Jomo Kenyatta’s son, Uhuru Kenyatta as his preferred successor. To counter this, during the 2002 election, the opposition fielded Mwai Kibaki under the National Rainbow Coalition (NARC). But the perceived ‘re-Kikuyunisation’ of the Kibaki government revived the anti-Kikuyu sentiments of the past. And it is against this background that Raila Odinga was able to regiment the rest of the country against the Kikuyu under ODM-K. Among the political instruments they used in this campaign was ‘Majimbo’, which was essentially a rallying call for ethnic re-distribution of national resources. The perceived Kikuyu ‘invasion’ of land belonging to other communities, and their economic dominance further animated the Majimbo call. Peasant interpretation of this was that ODM was calling for a form of ethnic cleansing. And this is why when the election crisis hit the country, the rural uprising against Kikuyu peasant settlers was spontaneous.

### B.1.2 Instrumentalised Ethnicity and Negative Campaigns

11. The president remained silent with respect to his party affiliation, until a month to the elections, when those around him coalesced to set up the Party of National Unity (PNU). His opponents soon registered their party Orange Democratic Movement of Kenya (ODM-K) and sought to organize party primaries in a bid to evolve a single candidate. It soon emerged that ODM was a coalition bringing together elite notables from communities outside the GEMA, upper Eastern and Central province. Like the NARC of 2002, what seemed to unify them was that dream for change. Like Daniel Arap Moi before him, the Kibaki elite strongly believed ODM Kenya would not hold due to ambitions of its political leaders and their standard mode of organizing for politics. The tendency in Kenya has always been characterized by the strategy where elite camouflage and conceal their logic of domination and control over political power by seeking to stand out as defenders of the ethnic interests.

12. Politics is symbolically constructed in a manner that makes it appeal to ethnic sentiments about common origins, destiny, collectivity and social responsibility. The aim here is to appeal to people by invoking solidarity and the myth of “protecting” the interests of the ethnic group from the constructed “enemies”, a factor that soon transforms the ethnic group into a veritable competitor to the state in a bid to command loyalty. The fact that this process takes place across the entire state ensures that ethnic groups are polarized. To cut across the ethnic divide, the elite soon seek to organize alliances based on the ability of actors to mobilize their

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<sup>18</sup> See Karemi and Ochieng, *The Kenyatta Succession*



ethnic groups and bring them like a pack of potatoes on the negotiating tables, a factor that determines the pecking order. The aim here is the capture of state power to facilitate access to its resources. In essence instrumentalization of ethnicity is an elite strategy for undermining class based cross ethnic alliance to facilitate power conservation. Given the constant mistrust and the construction of ethnic following as blocks, the exit of any single equally implies the exit of his ethnic block unless a counterpoise is found in alternative elite from the said ethnic group.

13. It is in this context that those around the president believed ODM-K would split into four parts, with Kalonzo Musyoka moving with the Kamba, Mudavadi with the Luhya, Raila with the Luos and Ruto with the Kalenjin. Believing in the inelectability of Raila as a Luo, they sought to back Kalonzo Musyoka. Instead, it is Kalonzo who remained with ODM Kenya having convinced its registered officials to stick with him. Raila Odinga on the other hand, got back Orange Democratic Movement (ODM) certificate that had been registered by one Mugambi Imanyara. He would soon win the nomination battle and riding with support of Musalia Mudavadi, Najib Balala, Joseph Nyaga, William Ruto and later on Charity Ngilu, he was able to knit together a veritable coalition spreading across the entire republic except the Central province.

14. While Raila's message was basically similar to that of NARC and the ODM during the referendum, it merely pointed to certain consistent factors, that Kenyans have consistently sought for change, a fact that has

kept them in a rebellion mode; that this aspiration has been betrayed to the point that whoever is willing to articulate it is constantly embraced; that these issues continue recurring pointing to the lack of political will by the ruling elite to deal with them. Appropriating these issues, Raila promised to create opportunities geared towards not only ending poverty and marginalization, but also facilitating resource distribution in contradistinction to the Kibaki regime's growth phenomenon that had merely enriched a few as noted.

15. This position was not hard to demonstrate more than 56% of the population live below poverty line. Top 10% of households control 42% of the total income, while the bottom 10% controls less than 1%.<sup>19</sup> The state is also characterized by widespread regional inequalities. Western, Nyanza for instance have poverty incidence of over 60% double that of central province at 32%.<sup>20</sup> There exist animated struggles over land manifested by ethnic clashes and demands for the writing of historical injustices committed by the colonial state over the Maasai, Kalenjin, and Sabaoti. Raila undertook to share power with his five colleagues in the structure he christened the *pentagon*. This promise sought to expurgate Kibaki's logic of centralism. Raila also promised a new constitution within 6 months, to devolve power and to deal with corruption. It is these two issues that would mark out the tempo and indeed animate the 2007 elections.

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<sup>19</sup> SID Pulling apart, Facts and Figures on Inequality in Kenya, 2004 pvii

<sup>20</sup> IEA Little Fact Book pxi

16. The whole question of devolution was instrumentalized in the central province to read, *Majimbo*, in this sense, understood to mean expulsion of the Kikuyu from parts of the country where they have settled. This was the position also taken up by a large number of religious leaders who urged that the issue be expunged from the electoral debate. The more it was opposed by the central province elite, the more others advocated for it as an antidote to ethnicized centralism. For the elite in central province, instilling fear of Raila among the Kikuyu was critical to their consolidating the ethnic base.

17. Former president Daniel Arap Moi for instance, shifted position and opted to back president Kibaki's re-election. Uhuru Kenyatta, his successor in KANU and leader of the official opposition opted to forego his candidature to back the sitting president. These actions were given different interpretations by Kenyans. Moi's decision coming right on the heels of the disclosures of the Kroll investigation report indicating that his family had looted more than Kshs 130 billion (more than US\$ 2.1 billion) gave an impression that he saw Kibaki to be the best person to guarantee him security. Uhuru's decision on the other hand was interpreted in the non-GEMA areas as attempts by the Kikuyu elite to consolidate control over power in anticipation for the

year 2012 elections. In effect then, geo-political imaginations seemed to be driven by two diametrically opposed but mutually reinforcing discourses. What was interpreted as an anti-Kikuyu *Majimbo* discourse and an opposite GEMA domination discourse unifying the Kenyatta, Moi and Kibaki families.

18. Odinga in this sense was adopted by the non-Gema ethnic groups as the only strong-willed character that could stand up to this coalition. The Kalenjin (Moi's own community) rejected the former president given the felt sense of exclusion that had seen many of their sons relieved of their positions after Moi handed over power. Many felt that despite having ceded their land to the Kikuyu, the latter treated them with contempt. Uhuru's decision to support Kibaki seemed to confirm discourses that painted the Kikuyu as a community that is so determined to stay in power that it is unwilling to support anybody else other than their own. The fact that indeed the Kikuyu are the only ethnic group that have maintained this voting pattern merely affirmed the feeling of the Kalenjin's commitment to Raila Odinga whom they adopted as their son with the name Arap Mibei, meaning one who comes from the lake (in reference to Raila's Luo homeland around Lake Victoria). In addition to the foregoing, was the question of the MOU that Raila had signed with Moslems which was also used to denigrate him.



### B.1.3 Results of the Presidential Election

19. As opinion polls continued to place Odinga in the lead, regime engineers began seeking options of containing him through institutional means. For starts, the president negated the spirit of IPPG<sup>21</sup>, by single-handedly appointing Electoral Commissioners to replace those whose terms had come to an end. As Head of State, he also used his position to buy support by tripling administrative districts across the entire republic and awarding title deeds for land. However, nothing would animate the electoral realm more than the decision to use elements from the Administrative police in the electoral activities beyond their official functions. It all began with the selection and redeployment to the Headquarters of these agents without any attempts to inform the public. Unfortunately, some of the members began leaking information on these activities to media houses, giving precise logistical details, a factor that resulted into the death of several of these police agents, especially in Nyanza province. This happening a day to the elections implied that the process would take place in an atmosphere that was tense. On the electoral day itself, there were accusations of malpractices and delays occasioned by organizational weaknesses which were generally interpreted as additional tactics geared towards rigging.

20. It is not therefore a surprise that when the process of counting began to take longer than was expected, the country could only find itself

the state was content in the initial hours that had placed Raila in an assailable lead, the situation began to change as results from regions said to be the power base of the president characteristically began to delay. And as they did, fears began to emerge as the numbers from these regions began to appear exaggerated. An examination by the agents of ODM pointed to glaring irregularities. By 29<sup>th</sup> December, it began to emerge clearly that things were going out of hand. More results began getting contested and at one point, it was decided that the agents from both sides be sequestered to run through the tallying process. The Chairman of the Electoral Commission equally expressed his exasperation in the delays being occasioned by certain returning officers whom he could not reach.

21. By the 30<sup>th</sup> of December, the delays and the exaggerations of figures had reached a point at which only a miracle would save the impending fires threatening to engulf the Kenyan state. At one point, the chairman of the Electoral Commission read out results from the Molo constituency that gave Mwai Kibaki's vote of 75,261 when in fact the tally in the counting hall had been 50,145. In Kieni constituency, while the president's tally had been given as 54,337, the figure that ECK read out was 72,054. It would eventually emerge that a million people had voted for Kibaki as a presidential candidate without bothering to vote for MPs.<sup>22</sup>

<sup>21</sup> Refers to Inter Parties Parliamentary Group that brokered the 1997 constitutional review deal.

<sup>22</sup> The president-elect would be pronounced to have won having lost a total of more than 20 out of 32 members of his cabinet. His coalition would be pronounced to have won 43 MPs compared to his ODM opponent with 102.

22. Despite attempts by ODM to present some of the returning officers, in a bid to refute the figures presented by the Electoral Commission, the Chairman was eventually pulled out of the results centre into an alternative room where he declared Mwai Kibaki president and proceeded shortly after to present him with a certificate facilitating a swearing-in-ceremony. This is what triggered the ethnic violence.

## **B.2 Other Causes of the Crisis**

23. **Governance system.** This system is non-responsive to popular demands and it engenders an absence of trust. It is built on a zero-sum formula where the winner takes it all and compromise is minimal. Similarly, the electoral system had no integrity as well.

24. **Inequality and poverty.** There is a structural inequality in distribution of resource that is reinforced by government in place and in perpetuity. This inequality is not just across ethnicities, but it cuts across the rural urban divide and class as well.

25. **Elite behaviour.** This is tied to the politics of ethnic instrumentalization and consolidation. The way the elite have instrumentalised ethnic formations in this crisis accounts in part, for its fervence

26. **Ethnic Hegemonism.** This refers specifically to the ethnic groups who settled in other areas. The political insensitivity and insulation of some of these groups accounts for their expulsion from some of the areas. The church that was burnt down with some victims trapped in it was for instance located in Kalenjin land, but whose name was drawn from a location in Kikuyu country. These isolationist tendencies were seen as provocative and as inviting ethnic repulsion.

27. **Absence of the State.** In places where the state had rolled back its frontiers, it was easier to instigate the violence. These are also the areas where the 'bandit state' has thrived as an alternative to the formal state.

28. **Exclusionism.** Exclusion of youth and women in both civil and traditional governance systems. The youth's involvement in militia is meant to be an attempt on their part to define their space.

### B.3 Our Conclusions: *The Facts*

- Although this crisis has ethnic manifestations, it is not an ethnic crisis. It is a political and economic problem.
- The discrimination in favour of Kikuyu accounts for the regimentation of other ethnic groups against them. Both historically and in the present situation.
- Kibaki and Raila are increasingly being held hostage by their supporters. The big push for the clashes is now coming from below.
- Political leaders have abdicated their roles since elections and hence the crisis has acquired a life of its own.
- The tallying Presidential contest must be brought to a closure for the political crisis to come to an end.
- The deployment of security forces is concentrated to secure strategic locations to the detriment of human life in needy rural areas.

### B.4 Recommendations

- This is a political problem that calls for a political solution.
- The distribution of resources and opportunities should be equitable.
- The Leaders should assume their responsibility in the current crisis.
- Mechanisms should be put in place to encourage community dialogue
- The re-tallying of the presidential vote should be accorded the urgent attention it deserves. In the event that this fails, a re-run should be considered within an agreed period of time.
- The lives of people and their fundamental rights should be given utmost priority in the deployment of security forces.



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## Part C. The Post-Mission Diagnosis:

### *From the National Dialogue and Reconciliation Committee (NDRC) to What?*

#### C.1 Theatres of Play

1. There are three levels of play in this crisis. The first one brings together the political class and its appendages. And in the view of this report, this is the crucial level of play. At this level, there are two theatres; the Kofi Annan led Mediation, which is the formal theatre on the one hand and the informal elite caucuses around President Kibaki and Hon Odinga on the other. The challenge at this level is identifying an acceptable Lowest Common Denominator (LCD) between the informal caucuses. And the fear is that the Annan-led Mediation does not have a big enough 'stick' to force the stubborn caucuses into a settlement. We explore this observation in a while.

2. The second level of play has two theatres, comprising of the external actors. These theatres are in turn defined by the 'degrees' of interest represented by the actors. The first theatre is the global axis, and it includes institutions like the UN, EU and the countries charged with the task of 'policing' the globe. The Annan Initiative has the imprimatur of this axis and their 'degrees' of interest in this crisis range from important to secondary<sup>23</sup>. The second theatre of play brings together countries whose economic survival is dependent on stability in Kenya. These include

Uganda, Rwanda, Burundi, Southern Sudan, and Eastern Congo. Their interest in this crisis is primary, as it hinges on survival. Their options are therefore 'hard'<sup>24</sup> and urgent. In the view of this report, this is a critical theatre and one whose actions must be carefully watched.

3. If the first level is a theatre for the political class, the third level has its actors as the rank-and-file Kenyans. There are two theatres at the third level. The first is the disjointed revolt from below. This revolt has acquired a life of its own and is gaining some independence from the political class. The ODM leadership is actually held hostage by this revolt in some areas. The second theatre has remained latent in this conflict, but supplies the 'cannon fodder' to the revolt. This is the 'bandit state' and its corresponding 'bandit economy' situated in places where the state is absent. Although this theatre is differentiated in its composition and response to the crisis, it remains a prime mover in the search for a settlement. Critical players here include militia formations like Mungiki, the Sabaot Land Defence Force and the economic predators who collect rents from petty traders. The grievances of these players are historical, class related and generational.

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<sup>23</sup> We provide a matrix that defines the 'degrees' on interest in the next section.

<sup>24</sup> For instance, military intervention.

## C.2 An Interest Analysis of the Theatres

### C.2.1 The Irreducible Minimum for PNU and ODM <sup>25</sup>

4. While coalescing the tribes around ODM and PNU, the parties used different methods. ODM picked on individuals as the vehicles to mobilise the ethnic groups. But they had a subsidiary agenda: through the identified ethno-regional leaders, the party wanted to effect a generational succession in selected communities. Primary amongst these was the ethnic succession of Arap Moi by William Ruto <sup>26</sup> in the Kalenjin Nation <sup>27</sup>. In the post election crisis, these ethno-regional leaders are held hostage by their communities <sup>28</sup>, a reality that seems to dog the Annan initiative.

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<sup>25</sup> Arising from the ethnic bondage, the different tribes have defined their irreducible minimum. This definition exists in the normative realm: it is not a written demand, but the leaders know that they cannot negotiate below the defined interest line for the ethnic communities

<sup>26</sup> Hon Ruto is one of the Pentagon members and was the Prime Minister-designate in an ODM government. The Kalenjin community, which he now leads, was the biggest voting bloc in ODM

<sup>27</sup> This should explain the protracted nature of the ethnic conflict in the Rift Valley. It was not just ethnic, the conflict was also generational and Arap Moi was seen as having sided with the Kikuyu in the election by supporting President Kibaki.

<sup>28</sup> *Sunday Nation*, 10<sup>th</sup> February 2008. Arguably, this is an advancement of the democratic project with respect to leadership accountability to its regional constituencies.

In the sense that the decisions they take collectively at the negotiation table have to be validated through tribal caucuses (*Sunday Standard*, 10<sup>th</sup> Feb 2008)

5. Unlike ODM which formed ethnic coalitions through individuals, PNU used the ethnic political parties. But compared to the ODM individualised approach, the PNU 'institutionalised' approach only collected pockets of ethnic support for the regime. As a result, president Kibaki did not owe his election performance to any of the other 42 tribes except his own. Although this reality released him to act independent of the larger ethnic bondage, it entrenched him deeper into the cause of the Kikuyu in the post-election crisis.

6. **The Minimum.** After the ethnic clashes, president Kibaki has been accused by his Kikuyu community of failing to protect them from the aggression of the 'hostile' communities <sup>30</sup>. They have further accused him of being soft and getting arm-twisted into sharing power in an election they believe he won fairly <sup>31</sup>. If he cannot protect them, they argue, the bare minimum is for him to retain power intact <sup>32</sup>: That is their irreducible minimum <sup>32</sup>.

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See the *Thaigayu Renaissance Movement, Epistle One* (January 2008). This is a Kikuyu underground peasant movement coming together to protect the Kikuyu poor against the aggression of other communities. From its disposition, it smacks of a Mungiki franchise.

Focus Group Discussion with residents of Huruma, Nairobi (January 2008)

Line of argument advanced by one of the Kikuyu Radio Stations in the listener call-in programmes.

This minimum is what PNU is taking to the table as international pressure, led by the US, is mounting

7. On his part, Hon Raila Odinga has been accused of cowardice by some of his hardline followers<sup>34</sup>. The hardliners we interviewed in this Mission intimated that they were ready to replace him and other Pentagon leaders should they digress from the original 'course'. While the Kibaki minimum is to retain power intact, with nominal sharing, the minimum for ODM is to take executive power from Kibaki. Their argument is to separate the office of Head of State, from that of Head of Government. In this separation, ODM wants to head the government through and executive prime minister. This is their bare minimum, given that they have abandoned their claim to the presidency. And it is this clash of hardline 'minimums' that continues to dog the Annan-led Mediation.

8. **The Hegemonic Gap**<sup>35</sup>. The irreducible minimum on both sides is further complicated by the existence of a 'hegemonic gap'. This gap happens when the regime-in-place is unable to displace the operations of the *ancien regime*. Either wittingly or otherwise, President Kibaki did not dismantle the Moi state. The begrudged Moi technocrats<sup>36</sup> regimented under ODM and used the party to re-launch their political relevance. As it turned out, these technocrats understood the mechanics of electoral politics better than the Kibaki administration. They had managed the ethnic

clashes of 1992 and 97, the transition from one-party to multi-party democracy, and the Moi succession. The formation and animation of some of the militia, including *Mungiki*<sup>37</sup> and Sabaot Land Defence Force was also done by government during their tenure in office.

9. During the immediate post-election crisis, ODM could therefore combine the political expertise<sup>38</sup> of the 'old opposition' within its ranks and that of the Moi technocrats to organise the uprising from below. And arguably, this is what has made the revolt from ODM areas most protracted. Similarly, it is this elite coalition that makes an armed struggle and secession by the ODM regions a probable undertaking. More so should the irreducible minimums fail to converge and the Annan Initiative collapses.

### C.2.2 The Disjointed Revolt from Below

10. Two ideals drive the civilian revolt from below. The first is political and its underwriters are the party 'biggies' in the two camps<sup>39</sup>. The second ideal is market-driven and the underwriters are situated in the 'Bandit Economy'. The conflict between the two is what makes the revolt disjointed.

<sup>34</sup> Notes from the field visit in the Rift Valley

<sup>35</sup> Francis Bayat, *Politics of the Belly* (1990)

<sup>36</sup> This group could not get amnesty or inclusion from the Kibaki regime. Also used the ODM platform to launder their monies and persona. The group includes military and intelligence topdogs, and strategic civil servants retired 'unfairly'.

<sup>37</sup> During the 2002 elections, the Mungiki were supplied with Army Land Rovers by the Moi regime for purposes unknown to the public. This was an indication that they were closely connected with the then regime.

<sup>38</sup> Mainly in the area of organising mass action.

<sup>39</sup> The politicians and businessmen suspected of funding these activities are the ones earmarked for travel bans by the western nations.



11. *The Party Biggies*. Although they provide motive, inspiration and cash to the revolting mobs, the political leaders do not control the revolt in full. In our assessment, this enterprise is acquiring a life of its own and its convergence with the interests of the political leaders is based on convenience. That is, so long as there is a concurrence of will and purpose between the revolt and the politicians, the party 'biggies' can control the rioting mobs. When the interests diverge, the will of the mobs tends to reign supreme over that of the political class. And this is why an agreement with the political leadership alone, under the Annan Initiative, will not guarantee a return to peace.

12. *The Bandit Economy*. As a 'driver of revolt', the bandit economy resonates more with the mobs compared to the party 'biggies'. This economy is a form of 'exit' from the formal civic sphere and thrives on crime and violent opportunities. Under this, the revolt has become a market activity where the mobs levy protection and other forms of 'taxes' on travellers and vulnerable groups. The 'Bandit Economy' is also responsible for the supply side of the violence. The Small and Light Weapons (SALW) are trafficked and supplied to the mobs through informal 'criminal' networks. Currently, the mobs are arming themselves in readiness for the unlikely collapse of the Annan-led Talks with the NDRC.

13. **Important:** So long as the revolt is controlled by the politicians, the possibilities of a return to peace are high. But should the revolt be driven by the 'Bandit Economy', controlling it using formal structures might prove impossible. More so in the unlikely event of an armed struggle.

### C.2.3 The Annan-led Mediation and the Global Axis

14. **The Interests**. Core players in the Global Axis include the Regional states, African Union, the United Nations, the US and the UK. Their interests that range from survival to vital geo-strategic and economic concerns.

15. An unstable Kenya has far reaching impacts on the region. Underlying this is the fact that Kenya constitutes a convergence of the Great Lakes, the Horn of Africa, the Indian ocean and the wider global system. Any animated conflicts would spiral into the region. So far, we have experienced the disruption of transport valves and humanitarian activities geared for Southern Sudan, Somalia and the Great Lakes region. Given the instability in Somalia, the ongoing US-led operations against Al Qaeda, and the influx of small arms both in the region, state collapse in Kenya is likely to affect not only Kenya, but the entire African continent

16. It is also imperative to note that instability in Kenya could feed other geo-political imaginations<sup>40</sup> held by other actors. These include *inter alia*, the Oromo Liberation Front (OLF), and The Lords Resistance Army (LRA) and their contestations with parent governments. An exit of ODM from the capital could also animate centrifugal forces to either agitate for exit or recapture of the centre. Exit processes may also animate reordering of geopolitical imaginations in the Horn of Africa and the Great Lakes region.

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<sup>40</sup> This is about the systems of visualizing the world, its representation, how it is talked about and acted upon geographically by major actors over the last two centuries



Economic resistance, especially the blocking of roads, burning of transport instruments and actions directed at the Rail artery is increasingly asphyxiating not only the state but the region also.

17. **Differentiated Response.** The Global Axis has the capacity to bring pressure to bear on the warring constituencies to settle. So far, they have ceded this responsibility to the African Union through the Annan Initiative. Collectively, the regional states can put pressure on their own and through the UN. But because of the urgency of their interests, the regional states are likely to move faster than the rest of the Global Axis in the event of the failure of the Annan-led initiative with the NDRC. It is in this context that we should view the submissions on military intervention by regional actors.

18. So far, the Annan Initiative can be credited with an end to ethnic violence and the current standoff between the two parties. However, as the mission witnessed in the Rift Valley<sup>41</sup>, youths are beginning to arm themselves for a protracted struggle should the talks fail. And the imaginations here are fuelled by the hardline positions occupied by the ODM and PNU leaders in the negotiations.

#### C.2.4 Critical Factors for Annan to Succeed

19. The success of Kofi Annan's initiative will be determined by a combination of six factors, in the view of this report.

<sup>41</sup> For instance in Kuresoi, Eldoret and Kericho which are all ODM strongholds

#### g. Political surrender by President Mwai Kibaki.

The initiative must be able to bring pressure to bear on all the negotiating parties to accept that the elections were flawed and that the only way out is a political settlement.<sup>42</sup> This is where the crunch lies. If the president agrees on a settlement, the crisis will end. If he remains adamant, a resolution will not be forthcoming. In other words, the decision to settle or not is driven by him, and not the interests around him.

#### h. Ability to negotiate a power sharing formula.

The initiative should realistically arrive at the irreducible minimum for both parties and navigate around this Lowest Common Denominator to extract trade-offs. The tricky issue here will be the sharing of executive powers and how to constitutionalise<sup>43</sup> the 'deal'.

#### i. Annan's capacity and willingness to brandish force

This is the 'stick' argument. The initiative should have the capacity to use negative sanctions on both sides as a way of 'forcing' or persuading them into a political settlement. Although it has the support of the global community, it must demonstrate a capacity to force a settlement. Otherwise, the warring parties will turn it into a 'diplomatic seesaw'.

<sup>42</sup> Condition generated against the insistence of government that the legal option is the only way to settle the crisis.

<sup>43</sup> The ODM argument is that the crisis has forced Kenya into a 'constitutional moment' which requires a constitutional re-engineering. The PNU side argues that the settlement must be within the confines of the current constitution.

j. Ability to converge international interests

International interests in this crisis range from survival for the Regional states, to general humanitarian interests for the world at large. Those whose interest is economic survival want urgent action and are likely to move independent of the rest of the international actors <sup>44</sup>. The initiative's ability to converge these interests and unify their actions is critical.

k. Ability to ensure that the distance between the revolt from below and the mediation process does not grow

The question here is whether the deal brokered by the Annan process will be binding to the disjointed revolts from below. And whether the political class can persuade the revolting crowds to accept the results? Currently, the distance between the political class and the revolt from below is growing. The danger is that, as it militarises itself, the revolt could altogether ignore the negotiations and charter an independent cause.

l. Ability to maximise time in the context of changing spaces

With the passage of time, the situation in the country has stabilised. However, the revolt from below is only re-grouping should the initiative fail. Ability to balance expectations from the rank-and-file Kenyans with the urgency to come up with a workable compromise is critical.

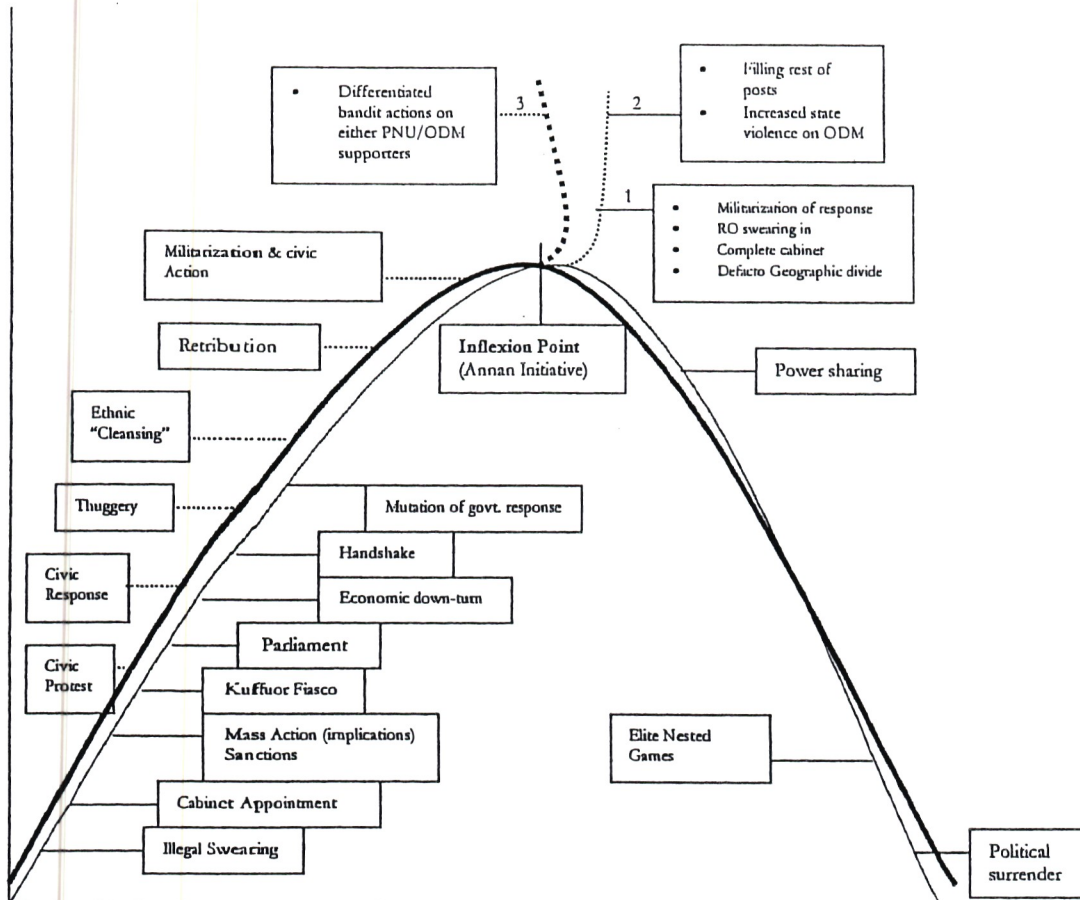
### C.2.5 The Post-Annan Possibilities

20. Figure 1 below is a simulation of possible post-Annan escalations or de-escalations. The figure has two curves, the first one (blue) representing the disjointed revolt from below, and the second (red) representing the elite process under the Annan initiative. At the peak of both the curves, we have plotted the Annan mediations as the inflection point. In mathematics, this is the highest point on a curve. At this point, the curve can either go up or come down.

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<sup>44</sup> This is intimated by the actions of both Uganda and Rwanda.

Figure 1: Escalation-De-escalation Simulation



- Note**
- Blue – Revolt from below
  - Red- Elite Nested Games

21. As the curve shows, the distance between the revolt from below and the solutions coming from the political class grew as the violence escalated. However, the Annan initiative has been a convergence point for the two

processes. But should the initiative fail, the two curves will surge upwards with an escalation in violence. Similarly, and critical, the two processes are likely to advance in separate ways as the curve shows.



## Part D

### *Strategic Choices and Options*

#### D.1 Actor Assumptions

##### D.1.1 Party of National Unity (PNU)

1. In dealing with the impending crisis, the PNU, which currently constitutes government, has advanced from a number of assumptions. Its political choices are as a result determined by these considerations. Three of these, *inter alia*, are worth of mention.

- a. That the ODM 'revolt' will wear out, resulting in a return to normalcy and a subsequent engendering of Kibaki's legitimacy <sup>45</sup>.
- b. That 'consensus through dominance' as opposed to 'consensus through dialogue' is the only method that will work in this crisis. This is to be achieved through extreme police violence including arrests and prosecution. The idea is to 'dominate' ODM into submission using force, and deliberate political frustration.
- c. That failure to achieve the first two should invite a co-optation of ODM MPs into the PNU government independent of the ODM structure. This process was already witnessed in the election of the National Assembly speaker witnessed by the mission team members <sup>46</sup>.

<sup>45</sup> Alluded to numerously following the 'ceasefire' brokered by Annan as part of Agenda 1 of his mission.

<sup>46</sup> During this election, it was alleged that the PNU government had 'bought' some ODM MPs to tilt the balance in favour of its candidate. Its candidate lost to the ODM one with a simple majority.

##### D.1.2 Orange Democratic Movement (ODM)

2. On its part, ODM is engaging on the basis of three assumptions.

- a. That president Kibaki is a rational actor who will give in to international and domestic pressure.
- b. That Kibaki will take the political settlement route as opposed to the legalistic route. That the option of dissolving parliament and calling for a snap election <sup>47</sup>, which is within Kibaki's constitutional powers, cannot be taken as his options are narrowed.
- c. That in the unlikely event of an UN/AU externally motivated invasion <sup>48</sup> we should expect political surrender from Kibaki.

##### D.1.3 Testing the Assumptions

3. In the view of this report, the assumptions on both sides of the divide are wanting. For starters, if indeed the revolt from below has a motive and a force of its own, it will not wear out as anticipated by the Kibaki side. We should also note that the ODM retreat from the streets in favour of the diplomatic route is calculated. So far, they are ahead of PNU on

<sup>47</sup> Different from a re-run in that it will involve sending everyone, including the MPs, back to the polls.

<sup>48</sup> Referring to a military invasion rationalised using humanitarian grounds.



the diplomatic front. Similarly, a presumed return to normalcy arising from this retreat will not necessarily legitimise a Kibaki presidency. Return to normalcy can only be a function of a negotiated construction of shared common perceptions between ODM and the government.

4. On the part of ODM, there is a misreading of Kibaki's resolve to retain power. Our reading of Kibaki so far is that he will resist political surrender. And rather than give in to a humiliating UN/AU intervention, he could use the legal/constitutional route to block them<sup>49</sup>. Failure to do so, he could 'surrender' through the Samsonian Option<sup>50</sup> in, which he dissolves parliament and calls for fresh general elections with a new ECK<sup>51</sup>. Rather than take the political route, president Kibaki is likely to go the constitutional/legal route.

#### D.2 The Strategic Choices

5. The choices available in this crisis will depend on the results of the Annan-led talks. If the talks yield a positive result, the choices available will be soft, but if they collapse, the hard choices will have to be taken. The full range of choices therefore run between the 'soft' to the 'hard' options as discussed below.

<sup>49</sup> For instance, he could use certain Articles of the UN or AU charters to forestall such aggression. He could also argue that the charters have not been domesticated yet, and in the absence of a domestic Act giving them the force of law, they do not apply in the case of Kenya. Such arguments will of course be put to test legally, and probably ignored politically.

<sup>50</sup> We elaborate on this in the next section.

<sup>51</sup> A UN/AU intervention in such circumstances could be seen as advancing *ultra vires* and in 'bad faith' given that it is a viable constitutional option generated locally.

#### D.2.1 The 'Soft' Options

##### 6. Option One: *Power Sharing as a Constitutional/Political Settlement*

This option will only happen if the Annan-led mediation process succeeds and president Kibaki succumbs to the idea of political surrender. Under this option, executive power should be shared between Kibaki and Raila. The sharing can be through a separation of state functions from government functions, with each headed by separate persons<sup>52</sup>. As a model, ODM will be comfortable with this and not the 'Section 16 approach'<sup>53</sup> favoured by PNU.

**Advantages:** This would end the crisis at hand, and put Kenya back to its democratic path. It would also end the era of 'one-manism' in which a strong presidency holds the rest of the country at a ransom.

**Disadvantages:** The ODM-Kenya and PNU<sup>54</sup> would be 'losers' in such a constellation. And given that their luminaries are the ones spearheading the negotiations, they might sabotage such a settlement.

<sup>52</sup> This is the model proposed by the Bomas Constitution (2003) which was written following countrywide consultations by the Constitution of Kenya Review Commission (CKRC). The draft formed the basis of the one taken through the Referendum of 2005 where Kibaki lost to the ODM brigade.

<sup>53</sup> Under this approach, executive power rests with the president and the prime minister is non-executive and holds office at the pleasure of the president.

<sup>54</sup> PNU would be a loser by way of losing executive powers to a strong Prime Minister. This would mean that the Kibaki hardline ministers would report to Raila.

### 7. Option Two: *Forensic Audit of Election Results and a Re-run.*

This option has already been agreed upon by the Annan Mediation team as part of its Agenda 3. An Internationally constituted group of specialists is to examine the results of the election with the aim of establishing the extent of their 'truthfulness' and consistency with the will of the people as expressed on 27<sup>th</sup> December 2007. In the event a winner is not authoritatively established through this process, a re-run should be considered.

**Advantages:** This will at least reveal the 'truthfulness' of the results. In the absence of truth, there can be no justice.

**Disadvantages:** The acceptability of the emerging truth might be difficult to handle <sup>56</sup>. Similarly, a re-run might present results that are unacceptable to either sides of the divide.

## 2.2 The Middle-Range Options

### 8. Option One: *Gun-boat/Dayton* <sup>57</sup> *Diplomacy*

This is an option available to especially the regional leaders. It would revolve around several measures aimed at putting pressure on Kibaki and Raila and threatening action should they fail to come up with an acceptable solution to the crisis. The strategy here would be to threaten negative sanctions on Kibaki,

and demonstrate a willingness to intervene militarily. The aim is to convince actors, especially recalcitrant ones, about the presence of will, and hence availability of costly options. At the core of Gun-Boat/Dayton Diplomacy is the maxim that "force is best when it is known to exist, but is not brandished". The threat of it should get both Kibaki and Raila to act rationally.

**Advantages:** Inexpensive in its implementation and would leave the institutions of state intact. Similarly, it would stabilise at least two-thirds of the country <sup>58</sup> should it be used to drive the soft options.

**Disadvantages:** The option is undermined by the element of time, which both the internal and regional impacts cannot afford.

### 9. Option Two: *The Samsonian Option – Dissolving Parliament*

This is an option likely to be taken by Kibaki unwittingly. Like Samson in the Holy Bible, he could decide to bring down the 'temple' destroying everyone, including himself. The president is likely to take this option by hardening his position and refusing to cede some of the executive powers. Under this option, Kibaki would dissolve parliament as a way of 'ducking' international pressure to share power. With this, he would call a fresh general election.

<sup>55</sup> The group is to commence work no later than 15<sup>th</sup> March 2008.

<sup>56</sup> If Mr Odinga is shown to have won, the Kibaki supporters will cry foul. And the reverse should also be expected.

<sup>57</sup> Dayton here refers to the Dayton Military base in the Bosnian/Serb peace conflict where the two sides of the divide were taken to the base and 'forced' into an agreement.

<sup>58</sup> Referring specifically to the ODM areas.

**Advantages:** This option, including the one above, have the advantage of being constitutional and local in origin. If such an election is conducted under the auspices of a reconstituted ECK or the supervision of an international agency like the UN, it would take Kenya back to its democratic path.

**Disadvantages:** This option would be resisted by ODM who would reject it through a process of civil disobedience. Similarly, it has the potential of increasing ethnic strife given the polarity being experienced by the country.

### 2.3 The 'Hard Options'

#### 10. Option One: UN/AU Peace Keeping Force and Interim Government

Failure of the state to get serious with the Annan talks or its unwillingness to 'climb down' and accept the fact that the electoral process was flawed will engender not only a collapse, but a re-igniting of mass action. This will facilitate a conjuncture between unarmed civilian initiatives on the one hand and activities of the 'bandit state' on the other. This will animate, polarize and militarize further the civic space currently occupied by bandit groups in the absence of the state.

The result of this will be to go for a UN/AU military intervention rationalised through humanitarian grounds. This option will become imminent as it is realized that state institutions are polarized and paralyzed to curb ethnic, state and predatory violence. The popularity of this option will be driven by the negative effects the Kenyan paralysis is having on Uganda and Rwandan Economies. These countries are likely to rationalise their actions using international conventions and they could move in ahead of the UN-western axis, prompting the former to support them.

This option is likely to advance with two purposes. The first is to install a 'puppet regime'<sup>59</sup> that would oversee a constitutional review process and an election in two years. The second would be the recognition of one of the sides in the divide, hence forcing the opposing side into a submission. In taking the second option, an opportunity cost analysis will have to be taken. That is, the intervening forces will have to ask: What is the opportunity cost of installing Mr Odinga as president, or recognising Kibaki and forcing the loser into submission?

#### **Advantages:**

- It will stem state collapse
- Has potential to impose elite consensus through interim structural arrangements, such as a new electoral commission, and a post election consociational<sup>60</sup> structure
- Easy to mobilize through external and regional interest salience especially the convergence between survival and vital interest

#### **Disadvantages:**

- This will be a stop gap measure that is unlikely to address the immediate root causes of the problem engendering the capture of the state by differentiated regional and global forces
- Focus will be mainly on elections in a bid to knit up a functioning political structure rather than state building
- There is a potential for mutation of conflict *a la* DRC
- The dynamics of the Bandit forces will be missed out
- Threats for an extended transition exist
- The legal and constitutional basis for such an undertaking are unclear

<sup>60</sup> Concept refers to the positive discrimination in favour of minorities in a situation where a majority dominates

• An unpopular intervention from outside could elicit popular revolt internally, unifying the two sides of the divide against the external aggressor

#### 11. Option Two: *The Military Intervention Route*

According to proposals by some regional actors, the crisis at hand can only be resolved through a military intervention. But given the polarity in the security institutions, such an option could have its dangers. Similarly, should the 'coup-makers' come from the top dogs in the forces, the situation is likely to stabilise fast enough. Should they come from the middle, or below, it would be a protracted struggle. But the reason why this option needs to be watched is because it could be used to counter an outsider force invading the country to install an interim government. It could also be instigated by the regional leaders as a soft option through the cheque book diplomacy<sup>61</sup>.

Advantages: Solution would be internal and would face less resistance compared to an external intervention. Similarly, the option would stomp out the menace posed by the 'bandit state' and its senseless killings.

Disadvantages: The option is unconstitutional, and therefore criminal. If carried out by junior officers it would be bloody and result in a protracted war. There is the danger that the military, once involved in an enterprise like this, would not leave power.

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<sup>61</sup> This is a situation where regional leaders conspire with the top dogs in the forces to carry out such an enterprise.



## Annex 1. An Interest and Option Analysis

12. The figure below analyses the 'degrees of interest' of the international actors, their preferred options, capacity to implement the options and the possible speed of implementation. From the table, it is clear that the most affected actors by the Kenya crisis are the regional states. The interests of these states fall in the survival category and that is why their actions are likely to be implemented

immediately, should the Annan-led talks fail. The interests of the other external actors supporting the Annan-led Initiative are critical. However, the speed of their actions should the talks fail can only be short-term because of the institutional requirements for external interventions. Overall, however, all the interested parties have power sharing as their preferred way out of the crisis

Table 1: Interest and Options Matrix

Interest Category	Actor	Actor Options	Capacity to implement options	Timing of action options
Survival	<ul style="list-style-type: none"> <li>• Uganda</li> <li>• Rwanda</li> <li>• Burundi</li> <li>• DRC</li> <li>• SPLA</li> </ul>	<ul style="list-style-type: none"> <li>• Military intervention</li> <li>• AU military intervention</li> <li>• Power Sharing</li> </ul>	High	<u>Immediate</u> . If the Annan talks collapse and a return to mass action happens, the actor options here will be taken with instantaneous immediacy
Critical	<ul style="list-style-type: none"> <li>• AU</li> <li>• US</li> <li>• EU</li> <li>• UK</li> </ul>	<ul style="list-style-type: none"> <li>• Gun-Boat/Dayton diplomacy</li> <li>• UN/AU military intervention</li> <li>• Power sharing</li> </ul>	High	<u>Short-term</u> : The actors must seek the authority of relevant bodies for this to be effected.
Vital to General	Other vital European states  Asian states	<ul style="list-style-type: none"> <li>• Gun-Boat/Dayton diplomacy</li> <li>• UN/AU military intervention</li> <li>• Power sharing</li> <li>• Forensic option</li> <li>• Samsonian option</li> </ul>	Limited	<u>Long-term</u> if any.

## Annex 2

### **The Mission Team Members**

Hon Sheikh Abdul Karim Harelimana, Secretary General, AMANI Forum Rwanda  
(Leader of Delegation)

Hon Alfrida Mwamba, M.P. Zambia, Secretary General, AMANI Forum Zambia

Hon Adia Leti, M.P. DRC, Regional Executive Committee Member

Hon Jimmy Akena, M.P. Uganda, Member, AMANI Forum Uganda

Hon Richard Nimbasha, Senator Burundi, Member, AMANI Forum Burundi

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### **Technical Support**

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Joseph Hongo, AMANI Forum Regional Secretariat Office

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### Annex 3. About “The Great Lakes Parliamentary Forum on Peace – AMANI Forum

An idea conceptualized in the year 1998 in Kigali led to the establishment of The Great Lakes Parliamentary Forum on Peace – AMANI Forum, an independent, voluntary, action based organization of African parliamentarians. The Forum brings together parliamentarians committed to peace and to peaceful resolution of conflicts, both within their own countries and in the region as a whole.

Ten years on, the Forum prides itself with having grown into a wide network of Great Lakes region parliamentarians through eight national chapters. These include: Burundi, Democratic Republic of Congo (DRC), Kenya, Rwanda, Tanzania, Uganda, Zambia and the East African Legislative Assembly (EALA). The continued growth of the Forum has increased its avenues for enacting its peacebuilding role and has also positively impacted on its performance and reputation.

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