

ELECTORAL MISMANAGEMENT AND POST-ELECTION VIOLENCE IN KENYA –THE KRIEGLER AND WAKI COMMISSIONS OF INQUIRY

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Abstract: *The 2007 general elections in Kenya were fiercely disputed and triggered widespread violence throughout the country. After former UN Secretary-General, Kofi Annan, brokered an accord between the rival parties leading to the formation of a grand coalition of the declared winner and the opposition, two official commissions of inquiry were appointed by the new government. One commission – dubbed the Kriegler Commission after the name of its chair – was mandated to review how the elections had been conducted and document how irregularities had led to the challenged results. The remit of the other commission – commonly referred to as the Waki Commission after the name of its chair – was to investigate the extent and causes of the violence that erupted in the wake of the elections. This article provides a reading of these two reports through the lens of the human rights instruments to which Kenya has acceded. It argues that an array of human rights was violated and that the causes underlying the eruption of post-election violence must be considered in terms of the deep-seated social structures and historical injustices that successive post-independence governments had failed to address.*

Keywords: *elections, violence, ethnicity, human rights, Kenya.*

A. INTRODUCTION

The 2007 general elections in Kenya were fiercely disputed and triggered widespread violence throughout the country. After former UN Secretary-General, Kofi Annan, brokered an accord between the rival parties leading to the formation of a grand coalition of the declared winner and the opposition, two official commissions of inquiry were appointed by the new government. One commission was mandated to review how the elections had been conducted and document how irregularities had led to the challenged results.¹ The remit of the other

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¹ Independent Review Commission on the General Elections held in Kenya on 27 December 2007. It is commonly known as the Kriegler Commission after the name of its chair, alternatively by its acronym IREC. The Kriegler Commission and IREC will be used interchangeably in the subsequent text.

commission was to investigate the extent and causes of the violence that erupted in the wake of the elections.² This article provides a reading of these two reports through the lens of the human rights instruments to which Kenya has acceded. It argues that an array of human rights was violated and that the causes underlying the eruption of post-election violence must be considered in terms of the deep-seated social structures and historical injustices that successive post-independence governments had failed to address.

Kenyans went to the polls on 27 December 2007 for the fourth time since the political opening of the early 1990s. While the 1992 and 1997 elections had been marred by irregularities and violence, the 2002 elections were remarkably peaceful and comparatively well managed. Commentators saw it as a shift from the 'hobbled' democratic process in the 1990s to a robust liberal democracy.³

Before dealing with the two commissions it is warranted to give a brief background to the Kenyan political system and style of politics. Kenyan politics has centred on personalities rather than policies. The political debate typically does not address burning policy issues. The party system is unstable, if it is at all justified to talk of a system. It is very easy to form a new party which has led to a myriad of some 130 registered parties, although some are dormant. Coalitions are formed and last for a while until fissures emerge, especially after elections. Until the 2007 elections the election manifestos of political parties and coalitions had tended to be similar, to the point of being almost indistinguishable. This style of politics engendered an unprincipled race for elected office which was seen to offer generous rewards not only in terms of remuneration (Kenyan parliamentarians are among the best paid in the world)⁴ but also opportunities to engage in lucrative activities bordering on the legal and sometimes being outright corrupt. Kenya's political system is singularly presidential. The president is both head of state and head of government and enjoys wide constitutional powers. As a result the electoral struggle was centred on the presidency. Ahead of the 2007 elections two main coalitions were formed: the Party of National Unity (PNU) under the incumbent president Mwai Kibaki, and the opposition Orange Democratic Movement (ODM) with Raila Odinga at the helm. The two main presidential contenders were thus Kibaki and his challenger, Odinga.

Kenya's electoral system is a so-called first-past-the-post in single member constituencies, which means that the candidate garnering the plurality of the votes (not necessarily the majority of 50 per cent or more) wins the seat. To be elected president one must gain a plurality of the national vote, be an elected member of parliament and secure at least 25 per cent of the votes cast in five of the eight provinces.

² Commission of Inquiry into Post-Election Violence (CIPEV). It is referred to as the Waki Commission after the name of its chair, and by its acronym. In the following text the Waki Commission and CIPEV will be used interchangeably.

³ Bård-Anders Andreassen, Gisela Geisler and Arne Tostensen: *A Hobbled Democracy: The Kenya General Elections 1992* (Bergen: Chr. Michelsen Institute 1993); Arne Tostensen, Bård Anders Andreassen and Kjetil Tronvoll: *Kenya's Hobbled Democracy Revisited: The 1997 General Elections in Retrospect and Prospect*, (Oslo: Norwegian Institute of Human Rights 1998).

⁴ Mars Group Kenya: *The Case against the Members of the 9th Parliament: A Critique of the 9th Parliament of Kenya (2003–2007)* (Nairobi: Mars Group Kenya, 2007) 7. Available at http://www.marsgroupkenya.org/publications/pubs/9th_Parliament1.pdf.

The electoral campaign was tough and large sums of money were spent on mass meetings and campaign materials such as balloons, caps, T-shirts, key chains, etc. as well as on radio and TV advertising and giant billboards of candidates. Campaign spending was unprecedented and questions were asked about the sources of funding. There are no legal restrictions on campaign spending, nor any requirement to declare sources. The stakes are high in Kenyan politics and in order to reach incumbency the aspirants to office are prepared to go to great lengths not only in terms of spending but also by resorting to electoral fraud and violent tactics.⁵

Following the general introduction, the first part of this article (part B) presents the gist of the findings of the Krieglér Commission on the management of the 2007 general elections as a backdrop to the subsequent discussion. The second part (part C) similarly recounts the findings of the Waki Commission on the post-election violence in the aftermath of the elections. The third part (part D) discusses the root causes of the violence and sets out an analytical framework for a discussion of the structural causes underlying the violence and argues that conflict entrepreneurs, by instigating violence, exploited grievances embedded in the existing social structures for their own short-term electoral benefit, with devastating consequences. It also raises the question of impunity. The fourth part (part E) details the violations of human rights that both commissions documented in terms of the International Bill of Human Rights. The final part F pulls together the various strands in a conclusion, with tentative pointers to the future.

B. THE KRIEGLER COMMISSION

The hotly disputed general elections of 27 December 2007 spurred demands for an independent inquiry into what had actually happened. The opposition ODM claimed their victory had been stolen through fraudulent manipulation of results when they were transferred from the returning officers at the constituency level to the national tally centre of the Electoral Commission of Kenya (ECK) in Nairobi. The incumbent PNU, however, denied any undue interference in the electoral process and said that the opposition would have to file complaints with the courts for adjudication if they suspected foul play. On 13 March 2008 President Kibaki appointed a 7-member commission to inquire into all aspects of the election, with particular emphasis on the presidential election.⁶ It was chaired by a South African judge, Johann Kriegler, and comprised six additional commissioners of Kenyan and foreign origin with long-standing experience in electoral management and related activities. Beyond the com-

⁵ For a fuller account of the 2007 elections in context, see Bård Anders Andreassen, Tiberius Barasa, Thomas Kibua and Arne Tostensen: *"I Acted Under a Lot of Pressure": The Disputed 2007 Kenyan General Election in Context* (Oslo: Norwegian Resource Bank for Democracy and Human Rights 2008). Available at <http://www.humanrights.uio.no/forskning/publikasjoner/publikasjoner/nordem-rapport/2008/0708.pdf>.

⁶ *Kenya Gazette*, Vol. CX, No. 23, 14 March 2008. Gazette Notice nos. 1982 and 1983; and *Kenya Gazette*, Vol. CX, No. 27, 4 April 2008, Gazette Notice nos. 2437 and 2438.

missioners, the Commission had a staff of 30 at its disposal, plus a non-Kenyan secretary who is a professor of political science specialised in democratisation and elections. The staff included investigators, legal counsels, researchers, etc. It was evidently considered important to compose a commission that was seen to be of integrity to ensure that its findings would not be challenged on account of an alleged biased composition.

Apart from interviewing all principal stakeholders in Nairobi, especially the ECK and its staff, the Kriegler Commission went on an extensive five-week fact-finding tour with public meetings at 36 venues throughout the country. Experiences, concerns, opinions and proposals of over 1,200 respondents of all political persuasions, age groups, walks of life and communities were noted. These meetings afforded IREC a unique cross-section of Kenyan views and an invaluable sense of public opinion, perceptions, fears and aspirations of ordinary citizens who were determined to make a contribution to IREC's data gathering. There is reason to believe, therefore, that the findings can be considered fairly representative and thus credible.

The Kriegler Commission submitted its voluminous 401-page report on 17 September 2008. Two commissioners held a dissenting view on some of the findings reported in chapter 6. Unsurprisingly, the report spurred a lively public debate. Some quarters found the evidence of electoral mismanagement they had sought while others attempted to qualify the findings and file off their sharpest edges. Much of the discussion centred on the fate of the ECK which had been thoroughly discredited. A widely held popular view was that the electoral commissioners should be dismissed outright. However, the commissioners had security of tenure and could be removed only by court order.

1. INTERNATIONAL LAW

The point of departure for the Kriegler Commission was a consideration of the legal framework of the elections. In terms of international law, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) sets out the right of every citizen to vote and to be elected.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

The United Nations Human Rights Committee, which oversees the implementation of the ICCPR, issued in 1996 an authoritative interpretation of Article 25 in General Comment No. 25 (GC25).⁷ It serves as a clear and strong guideline with respect to what restrictions may or may not be introduced, as well as to the associated freedoms (of expression in Art. 18 and 19; of movement in Art. 12; and of association in Art. 22) that need to be adhered to for elections to be meaningful. Kenya acceded to the ICCPR on 1 May 1972. Accession to and ratification of the Covenant and, by implication, acceptance of the said GC25 requires the signatories to enact national legislation to ensure their citizens enjoy the stipulated rights regardless of constitutional form. GC25 sums up and covers very well the international consensus in general terms about the definition of elections and the principles for their proper conduct, yet allowing some latitude for variation with regard to electoral laws on the technical aspects of elections and systems of political representation.

2. DOMESTIC LEGISLATION

In domesticating the international human rights obligations stemming from the ICCPR Kenya has, as a principal duty-bearer, enacted legislation to give customised effect to the rather general precepts of the Covenant. The Constitution has entrenched the protection of a number of fundamental rights and freedoms in its Bill of Rights (Chapter V). A peculiar feature is that the right to vote and to stand for election is not included among them.

- Beyond the Constitutional provisions, the following election-related domestic laws are pertinent:
- The National Assembly and Presidential Elections Act;
- The Local Government Act;
- The Registration of Persons Act;
- The Election Offences Act;
- The Kenya Broadcasting Corporation Act;
- The Penal Code;
- The Public Order Act;
- The Societies Act (providing the regulatory framework for the political parties until mid-2008);
- The Political Parties Act, 2007 (enacted in mid-2007 but not in force at the time of the 2007 election).

Although the above legislation had shortcomings and was in need of revision, in the view of the Kriegler Commission it provided, broadly speaking, an adequate legal framework for the orderly administration of elections in accordance with international standards. It was, therefore, relevant to

⁷ General Comment No. 25 (57): Article 25 ICCPR (1510th meeting, 57th Session, 12 July 1996) [UN Doc. CCPR/C/21/Rev.1/Add. 7].

assess all the activities relating to the 2007 general elections so as to distinguish those that can be attributed to anomalies, failures and malpractices traceable to gaps or provisions in the Constitution and laws of Kenya from those that can be attributed to a bad culture encompassing impunity, disrespect for the rule of law and institutional incompetence.⁸

The Kriegler Commission found that Kenyans and their leaders engaged in an array of unacceptable practices in breach of the existing legal framework and human rights:⁹

- vote-buying and -selling;
- unapologetic use of public resources for campaigns;
- participation by public servants in campaign activities of certain camps;
- ballot-stuffing;
- organising marauding gangs and bully-boys to 'zone' regions and electoral areas and intimidate opponents;
- using and cheering and uploading hate speech and ethnic sentiments;
- demonising opponents and presidential candidates of opponent camps;
- using sexist tactics and violence to keep women out of the race.

Significantly, the Kriegler Commission did not put the blame for the reprehensible practices listed above on the shortcomings or ambiguity of the election-related laws. It stated quite clearly that it all happened in blatant violation of the legal framework: "IREC's analysis of the laws indicates that there is a legal framework to curb all the above itemised offences." Why, then, were these offences not curbed? The Kriegler Commission attributes the widespread irregularities to the historical legacy of the one-party state and the evolution of a culture of impunity.

Notwithstanding the nominal discarding of one-party rule the running of the country had remained essentially the same. According to the Kriegler Commission the political system was permeated by

the image, name and influence of the all-powerful President extending down to the grass-roots, where the DC [District Commissioner] and the galaxy of uniformed and plainclothes agents of the Commander-in-Chief hold unquestioned sway. ... The solution [to Kenya's problems] does not merely lie in constitutional and legislative changes. The culture of impunity in Kenya needs a fix too. The relevant law-enforcement institutions also need to do their jobs properly.¹⁰

It is for these reasons that "the 2007 general elections in Kenya were a resounding failure."¹¹ This very harsh verdict is expounded in the subsequent chapters of IREC's report in great detail.

⁸ Kriegler Commission, 22–23.

⁹ Kriegler Commission, 24.

¹⁰ Kriegler Commission, 23–24.

¹¹ Kriegler Commission, 23.

3. THE ELECTORAL COMMISSION OF KENYA (ECK)

Expectedly, the ECK is the subject of much discussion in the Kriegler Commission's report. Established under Section 41 of the Constitution, the ECK is the central institution of the electoral process, responsible for all the principal administrative functions, such as the delimitation of constituencies, voter registration and education, the acceptance and recording of candidate nominations by the political parties (independent candidates are not allowed in Kenya) and the organisation and conduct of polling. The ECK is supposed to maintain operational independence from the executive and therefore recruits its own staff down to the grassroots and does not depend on existing local administration structures. The ECK does not have significant quasi-judicial powers; the adjudication of election petitions is handled by the Judiciary. The mass media are regulated in terms of the Media and Kenya Broadcasting Corporation (KBC) Acts, even though the ECK must be consulted by the publicly owned KBC regarding the allocation of free airtime for political parties during the campaign. Through the Electoral Code of Conduct the ECK does, however, have some regulatory power over the conduct of political parties, but it has been difficult to enforce.¹²

There is no dedicated law to specify the constitutional provisions for the ECK. In handling the 2007 elections the ECK had 21 commissioners plus its chair, appointed by the President. This appointment procedure has been the subject of a long-standing controversy because of a widespread perception that parliament and society at large have not, as a rule, been adequately consulted. Ten commissioners were replaced in January 2007 and another five in October 2007.¹³ The extension of the chair's term of office was not confirmed until one month before polling day. The replacement of more than two-thirds of the commissioners by inexperienced newcomers so close to the election thus served to undermine the functionality of the ECK.

Over the years, the ECK had made numerous submissions and recommendations urging the fundamental reform of virtually every aspect of Kenya's constitutional and legal framework for elections to address shortcomings and to fill gaps. However, all these came to naught.¹⁴ Notwithstanding the weaknesses, the ECK with a permanent staff of some 500 appeared in 2007 as a credible institution with policies and procedures. Even so, it did not manage to deliver a satisfactory election.

4. THE ELECTORAL CYCLE

The ECK was, in effect, charged with ensuring that Article 25 of the ICCPR would be respected and with overseeing that the concomitant freedoms were adhered to. An election is not an event, however, it is a continuous process that extends over the full electoral cycle, of five years' duration in the case of Kenya. Once polling is over in one complete cycle the next cycle

¹² After the entry into force on 1 July 2008 of the Political Parties Act these powers changed significantly. But they were not applicable to the 2007 elections.

¹³ Kriegler Commission, 30.

¹⁴ Kriegler Commission, 41.

starts immediately, though generally with a lull in activity immediately after polling. Thereafter, electoral activity intensifies progressively up to the next polling day.

Between polling days and during various distinct electoral phases the ECK is expected to perform a number of functions. Arguably one of the most important is the compilation of a voters' roll. Kenya does not have a central register of vital events such as births and deaths that can be used as a basis for the continuous maintenance of a voters' roll. Instead, eligible voters have to be pro-active and register to exercise their right to vote. Although the ECK since 2002 has had offices throughout the country for continuous registration these have not been much used.¹⁵ As a result, two massive voter registration drives were conducted in 2007 involving 20,655 registration centres. The unusually long period of registration (altogether 67 days) resulted in 14,296,180 registered voters, which accounted for 71 per cent of the 19.8 million persons over the age of 18 years who had been issued national ID cards.¹⁶ A national ID is required for registration as a voter and in 2007 the government had acquired new equipment which enabled it to produce ID cards in large numbers, which, in turn, effectively contributed to enfranchising many young Kenyans. Still, IREC found the proportion of eligible voters low and the register biased. Women and young voters were under-registered, and the deletion of the names of deceased voters was ineffective.¹⁷

In the nomination phase the political parties take centre stage. Primary elections are the preserve of the parties and no national guidelines existed at the time as to how primaries should be conducted. As long as the nomination of candidates was conducted in accordance with the constitution or rules of the political party concerned – whatever they might be – the nomination would be deemed valid by the ECK. The problem is, however, that the parties do not keep updated membership rosters to verify who are paid-up *bona fide* party members entitled to vote in primaries. Consequently, the primaries of the main parties were chaotic and marred by logistical problems, in many cases erupting into violence. Disgruntled losers defected from their original party to others which were only too happy to accept additional candidates. In some instances minor parties competed for candidates rejected by the major parties. Ultimately, a total of 117 parties sponsored some 2,547 candidates for the parliamentary elections.¹⁸

A key element in ensuring broad popular participation in an election is voter education and civic education. The former refers to basic information enabling qualified citizens to vote, including the date, time, and place of voting, the type of election, identification necessary to establish eligibility, registration requirements and mechanisms for voting. Civic education, on the other hand, is a broader concept that involves educating citizens about their obligations and rights within a given political or ethical tradition. It conveys information about the electoral process and the link between basic human rights and voting rights, the relationship between elections and democracy and the conditions necessary for democratic elections as a means of public accountability, and how votes translate into seats. The ECK conducted an extensive voter education programme in the run-up to polling day. These efforts were com-

¹⁵ Kriegler Commission, 78.

¹⁶ Kriegler Commission, 78.

¹⁷ Kriegler Commission, 79.

¹⁸ Kriegler Commission, 82.

plemented by voter and civic education programmes run by civil society organisations, political parties, the media and faith-based organisations. Interestingly, in view of subsequent events, an integral part of these civic and voter education endeavours was an anti-violence campaign. Nonetheless, the civic and voter education programmes were widely considered inadequate.

The most intense phase in the electoral cycle, save for the polling itself, is the campaign period. There are no clear rules governing the duration of political campaigns in Kenya. In effect, the campaign leading up to the 2007 began in 2005 with the referendum on the Constitution. It was at that time that the opposition forces crystallised into the ODM which was later registered as a party.¹⁹ The 2007 election campaigns comprised media advertisements; public rallies, marches and demonstrations; mass meetings with designated speakers who sometimes arrived by helicopter; church prayer meetings; burial meetings; breakfasts, dinners and lunches; unsolicited bulk emails (or spam); impromptu meet-the-people tours; door-to-door campaigns; posters, billboards, stickers, distribution of caps, T-shirts, key chains, etc. These activities were costly and the amounts of money spent were massive and unprecedented.²⁰ At the formal start of the election campaign in November 2007, the three main political parties reportedly had election budgets of KES 1.2 billion, KES 950 million and KES 75 million for the ODM, the PNU and the ODM-K, respectively.²¹ The campaign period witnessed bribery, vote-buying and -destruction, and other unfair, if not illegal, activities. The practice of using state resources in partisan campaigns was again witnessed. The Kenya National Commission on Human Rights produced a report – *Still Behaving Badly* – which named politicians and documented their misuse of state resources, claiming that these practices were in breach of the Public Officers Ethics Act.²² The practices included the use of government vehicles (some disguised with civilian number plates) and aircraft in the campaigns, and the use of high-ranking (and some low-ranking) public servants in the campaigns of incumbent candidates.

The mass media played an equivocal role in the election campaign. On the one hand, the media are the guardians of freedom of expression and sources of information for the electorate. On the other hand, the media also disseminated hate speech. Hate speech can be defined as any form of speech that degrades, dehumanises or demeans others, promotes hatred and encourages violence against a group on the basis of religion, race, colour or ethnicity. More than before new means of mass communication were used to convey hate messages, e.g. bulk e-mail, SMS messages to multiple recipients, and a large number of FM radio stations transmitting in vernacular languages.²³

A significant new phenomenon of election campaigning in Kenya were the opinion polls that were conducted at certain intervals.²⁴ While they depicted a close contest between Kiba-

¹⁹ See Bård Anders Andreassen and Arne Tostensen: *Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution* (Bergen: Chr. Michelsen Institute 2006).

²⁰ Andreassen et al. 2008, *Supra.*, 39–50.

²¹ *Daily Nation*, 4 December 2007. The exchange rate at the time was KES 67 ≈ USD 1.

²² *Standard and Daily Nation*, 18 December 2007.

²³ Kriegler Commission, 100–101.

²⁴ Kriegler Commission, 101.

ki and Odinga, they all tended to predict a narrow victory for the opposition. This in no small measure contributed to solidifying a widespread perception that Odinga would win. When the announced results later said otherwise, the disappointment in the opposition camp was profound and spurred violence.

Most observers agree that polling proceeded by and large in an orderly and peaceful manner throughout the country, with a few exceptions. The problems arose first and foremost in the counting and tallying of the results. The credibility and acceptability of an election depends on the public perception that the officially announced election results accurately reflect the votes cast. While other factors also feature in the equation, such as the quality of the voters' roll and the nature of the electoral campaign, reliable counting and tallying are a *sine qua non* if an election is to be considered legitimate by the voters. However, in the words of the Kriegler Commission,

Counting and tallying during the period 27-30 December 2007 (and even thereafter) and the announcement of individual results were so confused – and so confusing – that many Kenyans lost whatever confidence they might have had in the results as announced. Rumours of rigging and fraud during the counting and tallying process spread like wild-fire, and the consequences were tragic.²⁵

In its report the Kriegler Commission discusses in great detail what transpired during those critical days but failed, by its own admission, to reconstruct what had happened and to put the record straight.

The conduct of the 2007 elections in Kenya was so materially defective that it has been, and will remain, impossible for IREC to establish true and reliable results for the presidential and parliamentary elections. ... The deplorable conclusion is thus that ECK turnout data and election results for individual candidates are so error-infected that they should not be used for any kind of statistical analysis.²⁶

The overall conclusion of the Kriegler Commission, amounting to a serious indictment of the handling of the 2007 elections in Kenya, was that the

conduct of the results transfer from polling stations to constituencies, the tallying in constituencies, the transfer of constituency-level presidential election results and the tallying at national level is – generally speaking – of incredibly low quality: it is actually not acceptable.²⁷

To make the situation worse, the way in which the swearing-in ceremony was conducted did not allay apprehensions that something was amiss. The Kriegler Commission had noted

²⁵ Kriegler Commission, 115.

²⁶ Kriegler Commission, 126 and 136.

²⁷ Kriegler Commission, 127.

the perception of unseemly haste that pervaded the swearing-in of President Kibaki the evening of 30 December 2007. Such perceptions are extremely important. Elections are inherently divisive and the inauguration of the head of state offers a golden opportunity for a public display of united patriotism, unity in diversity at the commencement of the new term of office of the president and Parliament.²⁸

In other words, the inauguration of the perceived winner of the presidential election contributed further to the division of Kenya into two opposing camps and laid the ground for a violent aftermath. In fact, the very legitimacy of the state was at stake. Legitimacy is a quality conferred upon a political entity by those who are subjected to it or form part of it, typically citizens of a state. The citizens thus grant the state authority to act on their behalf, albeit with the means to hold it to account through elections and other means. To determine whether a state enjoys legitimacy in the citizenry is a matter of empirical investigation of a subjective phenomenon that depends on beliefs, perceptions and expectations. When the performance of state institutions falls short of certain normative standards it may still be considered legitimate – or not. The verdict ultimately rests with the citizens.²⁹

Three dimensions of legitimacy pertain to the state: (i) *how* the state functions (input), i.e. legitimacy linked to the rules and procedures through which binding decisions are made (participation, management, justice), often referred to as ‘procedural democracy’; (ii) *what* the state does (output), i.e. legitimacy in terms of the perceived effectiveness and quality of service delivery, generally dubbed ‘substantive democracy’; and (iii) the *beliefs* underpinning legitimate state authority and the shared sense of identity (citizenship, ethnicity, religion, language, etc.) upon which it rests. It must be underscored that efforts to build state legitimacy in ethnically divided societies such as Kenya must take cognizance of *all* the dimensions of legitimacy simultaneously.

With regard to the administration of the elections, about half the population clearly did not consider that the ECK had abided by the proper procedures and thus rejected the results, whereas the other half was prepared to accept the electoral outcome despite irregularities. In terms of the substantive output dimension of legitimacy, an even larger proportion of the population felt service delivery to have fallen far below expectations, especially among the poor who saw little benefit from high growth rates. The post-election violence aggravated the situation and further contributed to undermining state legitimacy. It has been pointed out that the state monopoly of force had been broken by gangs and vigilante groups long before the 2007 elections.³⁰ The behaviour of the police in 2007/8 entrenched perceptions that the law-enforcement agencies did not act in an impartial manner. These failures on the part of the state were interpreted through ethnic lenses because no robust all-Kenyan identity had been constructed. It can thus be argued that state legitimacy in Kenya had become fragmented along ethnic lines.

²⁸ Kriegler Commission, 149.

²⁹ Séverine Bellina, Dominique Darbon, Stein Erik Sundstøl and Ole Jacob Sending: *The Legitimacy of the State in Fragile Situations* (Oslo: Norad 2009).

³⁰ Susanne D. Mueller: “The Political Economy of Kenya’s Crisis” (2008) 2 *Journal of Eastern African Studies* 185, 187–194.

C. THE WAKI COMMISSION

While the Kriegler Commission addressed the conduct (or misconduct) of the 2007 elections, the Waki Commission focused on the post-election violence that was triggered by the mismanagement of the electoral exercise. The Kenya National Commission on Human Rights (KNCHR) produced a similar report which in many respects complements and overlaps with that of the Waki Commission.³¹ In fact, the Waki report referred to the KNCHR report, and the publication of the latter was embargoed until after the publication of the former.

As the chair of the commission Philip Waki, a Kenyan national, had two other fellow commissioners – one from New Zealand and one from the Democratic Republic of Congo. In addition, two Kenyan legal counsels were appointed to assist the Commission.³² In the course of its work the Commission had at its disposal a secretariat of 48 staff (investigators, including two female investigators to examine sexual violence (one international and one Kenyan), a psychologist counsellor, researchers, and support staff).³³ It also recruited a political scientist as a consultant.

Public inquiries are not courts of law but are influenced by Kenya's common law tradition. Thus, the Waki Commission adopted a mix of both adversarial and inquisitorial methods.

The Commission visited all areas heavily affected by post-election violence and arranged public hearings. Assistance was sought from civil society organisations (CSOs) to obtain information, contacts, and expertise. A number of these CSOs attended the hearings through lawyers who represented victims and communities. The lawyers of the various parties brought useful perspectives before the Commission that might have been missed altogether had they been excluded. In addition, the participation of these same lawyers enabled the Commission to reach out to witnesses who might not otherwise have come forward. It is noteworthy that a number of the lawyers had sharply opposing points of view. This increased the credibility of the testimonies received. Great care was taken to protect the witnesses who testified *in camera*.³⁴ It was generally realised that the Commission provided a unique opportunity and venue for individuals who had suffered horribly to tell their stories. Overall, the Commission relied on background material and reports from government, non-governmental, and community-based organisations and individuals; recorded statements of victims taken by investigators and the sworn testimony, statements and exhibits of witnesses.

The Commission's work was funded by the Government of Kenya (GoK) and the multi-donor Trust Fund for National Dialogue and Reconciliation, managed by the UNDP. The GoK provided office space, security, and transport, while the donors paid the Commission's expenses, including staff costs. The GOK also assisted the Commission during field visits and

³¹ Kenya National Commission on Human Rights: *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence* (Nairobi: KNCHR 2008).

³² Waki Commission, 1.

³³ Waki Commission, 549–551.

³⁴ Waki Commission, 3–5.

hearings. In addition, the Commission received support from local authorities as well as from faith-based organisations during its field visits.³⁵

1. THE MAGNITUDE, DISTRIBUTION AND NATURE OF VIOLENCE

Pre- and post-election violence is not new in Kenya. Two commissions had already investigated the violence surrounding the 1992 and 1997 elections.³⁶ What appeared new was rather the magnitude and gravity of the violence. The images and accounts of the post-election violence in the national and international media bore witness to dramatic and horrific events. The Waki Commission documents in great detail, and province by province, the violence that was perpetrated, including graphic testimonies by victims. For the purpose of this article it will suffice to summarise key figures and main features.

The total number of deaths recorded by the Waki Commission was 1,133, the majority of which (744) occurred in the Rift Valley, followed by Nyanza (134) and Nairobi (125).³⁷ The causes of death included burns, arrow shots, mob injustice, blows by blunt objects, severe wounds, sharp pointed objects, assault, drowning, hypothermia, suffocation injury, stoning, shock, hanging, gunshot and unknown causes. Gunshots and sharp pointed objects (e.g. knife stabbing) were the two main causes and some way ahead of the others.³⁸ The long-term psychological effects of trauma are difficult to assess but are likely to be considerable. The destruction of property was extensive: a total of 117,216 private properties (including residential houses, commercial premises, vehicles and farm produce) were destroyed, as were 491 government-owned properties such as offices, vehicles, health centres, schools and trees.³⁹

Approximately 350,000 persons were displaced from their normal place of residence and/or business. Internally displaced persons (IDPs) are defined as persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violation of human rights or natural or human-made disaster, and who have not crossed an internationally recognised state border. These IDPs were concentrated in Western, Nyanza, Rift Valley, Central, Nairobi and Coast Provinces.⁴⁰ They took refuge in churches, police stations and *ad hoc* camps that were hastily set up by state and humanitarian agencies.

³⁵ Waki Commission, 1.

³⁶ Republic of Kenya: *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and other Parts of Kenya* (Kiliku Report) (Nairobi: Government Printer 1992); Republic of Kenya: *Report of the Judicial Commission Appointed to Inquire Into Tribal Clashes in Kenya* (Akiwumi Report) (Nairobi: Government Printer 1999).

³⁷ Waki Commission, 310.

³⁸ Waki Commission, 313–314.

³⁹ Waki Commission, 347.

⁴⁰ Waki Commission, 352.

Apart from the sheer number, certain egregious features of the violence warrant highlighting. First, sexualised violence was rife. The Waki Commission heard heart-wrenching accounts of rape, gang rape, sexual mutilation, defilement, sodomy, forced circumcision, loss of genitals and hideous deaths. In some cases family members were forced to witness their parents and siblings being raped, killed and maimed. The Waki Commission found that

the perpetrators of the post election sexual violence included the following: state security agents (e.g. administrative police, regular police, and members of the General Service Unit (GSU)), members of organised gangs (e.g. Mungiki, Kalenjin warriors, and others), neighbours, relatives, supposed friends, and individuals working in IDP camps.⁴¹

In the view of the Waki Commission sexualised violence was used as a means to pressure people to leave their homes, to penalise them for having voted for the ‘wrong’ candidate, tribe, or party, and to dominate, humiliate and degrade them and to cow their communities into submission. The rampant sexualised violence occurred under conditions of lawlessness bordering on chaos.⁴²

A second feature of the violence was the operation of organised and marauding gangs. Their origins differ and some had been in existence for a long time before the 2007 elections. One case in point is the *Mungiki* which emerged in the early 1990s as an extreme Kikuyu nationalist-cum-religious movement with a programme to revive Kikuyu customs and traditions, allegedly connected with prominent politicians. It gradually degenerated into a mafia-like criminal organisation involved in robbery and extortion of *matatu* drivers and shop owners.⁴³ Its role in the post-election violence was mainly in revenge actions against non-Kikuyu communities. Other gangs, probably not as well organised and tightly knit as *Mungiki* proliferated and included the *Taliban*, *Chinkororo*, *Kamjeshi*, *Jeshi la Mwenje*, *Siafu*, *Bukhungu*, *Jeshi la Darajani*, *Jeshi la Mzee*, *Ghetto* and *Baghdad Boys*, consisting predominantly of young men, some allied to politicians on an ethnic basis.⁴⁴

It should be recalled that Kenya’s is a young population: roughly half is below the age of 18. The unemployment rate is very high. As a result, there is a large pool of idle, poor youth who are easily mobilised for a small ‘fee’ to commit all sorts of reprehensible acts. Furthermore, scores of young idlers, especially in urban slums, jumped on the bandwagon and joined in the rioting and destruction ‘for the fun of it’ because they had little else to do. Others, criminals devoid of political motivation, took advantage of the post-election chaos and insecurity to loot for personal gain.⁴⁵ While these gangs took part in the violence, many of them had his-

⁴¹ Waki Commission, 254.

⁴² Waki Commission, 254–255.

⁴³ See Peter Mwangi Kagwanja: “Facing Mount Kenya or Facing Mecca? The *Mungiki*, Ethnic Violence and the Politics of the Moi Succession in Kenya, 1987–2002” (2003) 102, *African Affairs* 25.

⁴⁴ Waki Commission, 29; see also Kenya National Commission on Human Rights: *On the Brink of the Precipice: A Human Rights Account of Kenya’s Post-2007 Election Violence* (Nairobi: KNCHR 2008) 34 para. 112; 36 para. 123; and 42 para. 161.

⁴⁵ Andreassen et al. 2008, *supra*., 22.

tories of violence dating back to the early 1990s and had become, in the analysis of the Waki Commission, part of a culture in which “institutionalised extra-state violence” was considered a ‘normal’ means of political struggle. In other words, the monopoly of legitimate force by the state had been broken.

Third, and arguably more importantly, the role of the state security apparatus was examined by the Waki Commission. Echoing the analysis of the Kriegler Commission, the Waki report also points to the powerful presidency as a source of trouble. The Office of the President controls the Provincial Administration which had already acquired a degree of notoriety and abuse before independence. Access to the powerful presidency was therefore seen as the goal of electoral contestation. Previous studies have shown that the presidency can be and has been used for the reallocation of resources from one ethnic community to another.⁴⁶ The ‘winner-takes-all’ or the ‘our-turn-to-eat’ attitudes⁴⁷ to politics raised the stakes of the struggle, effectively turning it into a zero-sum game where one’s gain is another’s loss.⁴⁸ This style of politics represents a departure from the spirit of democratic governance which is based on compromise and the sharing of resources. Concomitant with the amassing of power in the presidency, which had proceeded since independence through a high number of constitutional amendments,⁴⁹ other state institutions, especially the judiciary and other institutions of restraint, had been weakened and were in some cases on the verge of collapse. Above all, state institutions had lost legitimacy and were infested with ethnic thinking which played out in the post-election violence.

The Waki Commission asked pertinent questions as to how prepared the state security agencies were and whether they could have acted more decisively to prevent what transpired. The elaborate security apparatus at several levels comprises the Cabinet Security Committee (CSC), the National Security Advisory Committee (NSAC), the Joint Security Intelligence Secretariat (JSIS), the Provincial Security and Intelligence Committee (PSIC) and the District Security and Intelligence Committee (DSIC). The Waki Commission established that the security apparatus had in its possession a wealth of knowledge and intelligence about the great potential for significant violence in and around the 2007 general elections. However, it found no evidence of the use of the material collected. Nor could it be established whether this intelligence was shared in a timely or appropriate manner with the government through the CSC or, if it was, whether it influenced decision-making at that level, nor whether the NSAC disseminated the intelligence to the provincial and district committees.⁵⁰

⁴⁶ See Joel D. Barkan and Michael Chege: “Decentralising the State: District Focus and the Politics of Reallocation in Kenya” (1989) 27 *Journal of Modern African Studies* 431–453.

⁴⁷ The very title of a recently published book about the former head of Kenya’s anti-corruption agency, John Githongo, refers to this mode of thinking. See Michela Wrong: *It’s Our Turn to Eat: The Story of a Kenyan Whistle-Blower* (New York: Harper Collins 2009).

⁴⁸ Waki Commission, 31.

⁴⁹ C. Odhiambo-Mbai: “The Rise and Fall of the Autocratic State in Kenya” in Walter Oyugi, Peter Wanyande and C. Odhiambo-Mbai (eds): *The Politics of Transition in Kenya: From KANU to NARC* (Nairobi: Heinrich Böll Foundation 2003) 51–95.

⁵⁰ Waki Commission, 361.

With regard to the preparedness of the police force, the Waki Commission found scant planning and preparations. Work had commenced far too close to the event, failed to take account of the intelligence received and information available on the ground, and did not encompass preventive activities designed to reduce and/or ameliorate the impact of the violence.⁵¹ In short, the police failed to discharge its duty to prevent violence and protect life and property. By contrast, the military, although primarily charged with the defence of the territory of Kenya, were well prepared and assisted the police in restoring infrastructure.⁵²

The response to the violence by the police ranged from heroism to abject failure in discharging the most basic of the mandated roles. A particular grievous aspect of police behaviour was the excessive use of lethal force which led to the death of scores of innocent citizens. A large number of citizens was shot dead, some from behind, when the police fired directly into groups of protesters or crowds suspected of looting or destroying property.⁵³ The Waki Commission adduced credible evidence that some police officers engaged in criminal acts such as murder and rape, theft and bribery. Many testimonies also pointed to ethnic divisions within the police force to the effect that officers belonging to a particular ethnic community turned a blind eye to crimes perpetrated by their ethnic kin.⁵⁴ Similarly, the Administration Police affiliated to the Provincial Administration were perceived not to be impartial.⁵⁵

The Waki Commission has documented very thoroughly what transpired during the two months of harrowing violence after the disputed election in terms of facts and inferred conclusions. It also pointed to some root causes of the violence that pre-dated the elections. It is necessary to dwell on these deep-seated historical injustices and inequalities to arrive at an appreciation of the underlying frustration and anger that took such a violent course.

D. DEEP-SEATED STRUCTURES AND CONFLICT ENTREPRENEURS

Kenya comprises some forty different tribes, ethnic groups or communities. In the evolution of Kenyan politics the ethnic dimension has been present since the formation of the two principal parties around the time of independence.⁵⁶ The then two largest ethnic communities – Kikuyu and Luo – coalesced into the Kenya National African Union (KANU), advocating a strong unitary state. The smaller ethnic communities, including the European settlers, were wary of the KANU coalition and feared the domination of those two communities. To defend their interests, therefore, they formed the Kenya African Democratic Union (KADU). KADU took strong exception to a unitary state and favoured *majimboism* instead. This concept has been variously construed or misconstrued along a continuum of state forms. At one end, it

⁵¹ Waki Commission, 371.

⁵² Waki Commission, 369.

⁵³ Waki Commission, 419–420.

⁵⁴ Waki Commission, 423.

⁵⁵ Waki Commission, 425.

⁵⁶ E.S. Atieno Odhiambo: “Hegemonic Enterprises and Instrumentalities of Survival: Ethnicity and Democracy in Kenya” in Bruce Berman, Dickson Eyoh and Will Kymlicka (eds): *Ethnicity and Democracy in Africa* (Oxford: James Currey 2004) 167–182.

translates into a quasi-federal arrangement with a high degree of devolution of decision-making authority to lower tiers of government, i.e. to the level of a *jimbo* (meaning 'administrative district' in *Kiswahili*, plural *majimbo*). At the other end of the continuum, one finds variants bordering on exclusive habitation and control of a given territory by specific ethnic groups: territory and ethnic settlement were supposed to be coterminous to form a 'homeland'. The introduction of a *majimbo* form of governance today, some argue, would imply 'ethnic cleansing' of 'settlers' and 'outsiders' in ethnically homogeneous administrative units. Many perpetrators of post-election violence subscribed to this interpretation of *majimboism* and did in fact engage in ethnic cleansing. The Waki Commission noted the use of particularly derogatory hate speech labels attached to 'outsiders' such as *madoadoa*, meaning 'stains' or 'spots' that one needed to get rid of.⁵⁷

A plausible reason why *majimboism* resurfaced in the 2007 election campaign was the persistence, even reinforcement, of disparities in resource allocation between various ethnic groups, especially land. In a largely agrarian economy such as that of Kenya, the importance of access to and ownership of land can hardly be overstated. The struggle for land dates back to colonial times when the best agricultural land was alienated from the indigenous farmers to make way for settlers from abroad.⁵⁸ Indeed, the Mau Mau revolt of the 1950s was principally a struggle over land with the added political quest for independence.⁵⁹ The apprehensions of the immediate post-independence years on the part of some ethnic communities were widely perceived to have become a reality.⁶⁰ This was particularly true with regard to land. Settlement schemes had produced a skewed distribution of land ownership which corrupt allocation of public land had aggravated.⁶¹ An analysis of Kenya's poverty profile showed great disparities between provinces and a high gini coefficient that measures income inequality.⁶² In other words, *majimboism* had a material foundation that found expression in ethnic sentiment. Ethnicity could thus arguably be seen as an epiphenomenon.

⁵⁷ Waki Commission, 43.

⁵⁸ E.S. Atieno Odhiambo, *Supra*.

⁵⁹ See among a large body of literature the seminal work by Gary Wasserman: *Politics of Decolonization: Kenya Europeans and the Land Issue 1960–1965* (Cambridge: Cambridge University Press 1976).

⁶⁰ Nic Cheeseman: "The Kenyan Elections of 2007: An Introduction" (2008) 2 *Journal of Eastern African Studies* 166, 170.

⁶¹ See Christopher Leo: *Land and Class in Kenya* (Toronto: University of Toronto Press 1984) and Karuti Kanyinga: *Re-Distribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya* (Uppsala: Nordic Africa Institute 2000); on corrupt land deals, see Republic of Kenya: *Report of the Commission of Inquiry into the Illegal/ Irregular Allocation of Public Land – Ndungu Report* (Nairobi: Government Printer 2004).

⁶² Lineth N. Oyugi: "Poverty Profiles and the Evolution of Poverty Reduction Strategies in Kenya" in Flora Kessy and Arne Tostensen (eds.): *Comparative Poverty Reduction Strategies in Eastern and Southern Africa*, (Dar es Salaam: Mkuki na Nyota Publishers 2008).

Majimboism figured prominently in the constitutional reform process that led to the Bomas draft constitution, albeit not necessarily under that label.⁶³ More palatable terms were used such as devolution, federalism or *ugatuzi*, but the substance and purpose remained more or less intact: a more equitable distribution of resources throughout the country for the benefit of all ethnic communities. However, the Bomas draft constitution was not formally put to a referendum. Instead, the so-called Wako draft, rejecting *majimboism* and widely seen as the counterpart to the Bomas draft, was subjected to the 2005 referendum and defeated.

1. STRUCTURES, PERCEPTIONS AND CONFLICT ENTREPRENEURS

Quite apart from the individual politicians' quest for power, the fierce electoral struggle in 2007 was largely about two policy alternatives regarding the distribution and redistribution of resources in society. The incumbent party by and large carried the mantle of the erstwhile KANU at independence, emphasising a unitary state and economic policies conducive to growth with little regard for the distribution of its benefits. However, some redistributive measures were taken by means of Constituency Development Funds. The PNU pursued a conventional conservative policy package. The opposition, by contrast, advocated radical devolution of decision-making authority to lower levels of government, i.e. the benign variant of *majimboism*, and the allocation of state revenue to those devolved structures commensurate with their responsibilities. Arguably, the ODM represented a form of social democratic policy stance. These admittedly crude alternatives could be read out of the election manifestos.⁶⁴

Given the ethnicisation of Kenyan politics it must be conceded that although the policy packages of the two main contenders could be couched in non-ethnic terms, the electorate perceived the differences along ethnic lines: a central feature of Kenyan politics since before independence.⁶⁵ The ethnic affiliation of the leadership of the PNU and the ODM differed. At the helm of the PNU was President Kibaki – a Kikuyu – and his closest associates hailed from the Central Province and the western parts of Eastern Province (Meru and Embu), in other words around Mount Kenya. The leader of the ODM was Raila Odinga – a Luo – who associated himself with a crop of ethnic leaders from the Kalenjin of the Rift Valley, the Luhya of Western Province, and the Mijikenda of the Coast Province. Whereas ODM sympathisers wanted devolution of power and redistribution of resources in their favour, the adherents of the PNU were largely defending their power and wealth. It so happened that they also belonged to different ethnic communities, even though each ethnic community also comprises rich and poor people.

⁶³ For details, see Preston Chitere, Ludeki Chweya, Japhet Masya, Arne Tostensen and Kamotho Waiganjo: *Kenya Constitutional Documents: A Comparative Analysis* (Bergen: Chr. Michelsen Institute 2006).

⁶⁴ Andreassen et al. 2008, *supra*, 54–65.

⁶⁵ See e.g. F. Wafula Okumu: "Ethnic Politics and the Decay of the State in Kenya" in E. Ike Udugu (ed): *The Issue of Political Ethnicity in Africa* (Aldershot: Ashgate 2001) 99–123; and Fred Jonyo: "Ethnicity in Multiparty Electoral Politics" in Ludeki Chweya (ed): *Electoral Politics in Kenya* (Nairobi: Claripress 2002) 86–107.

It should be noted that perceptions are critical even if they are not always based on facts. But that is inconsequential. For people act on the basis of their perceptions whether or not those perceptions are grounded in reality. It was this situation of perceived and real historical injustices and social disparities that conflict entrepreneurs exploited for their short-term gains. When wide disparities in land, wealth and provision of social services have existed for a long time and continue to widen, the political tensions stemming from them may be considerable and reflected in the political struggles of the day. This was no doubt the case in Kenya. The ethnic communities that considered themselves as marginalised – broadly speaking aligned to the ODM – saw an opportunity for justice in winning the election. However, when that victory and opportunity seemed to slip from their grasp on account of the mismanagement of the elections, which was then seen as ‘stolen’, they reacted with violent anger.

The Waki Commission asked whether the violence was spontaneous or pre-planned and premeditated. Both the Waki Commission found elements of pre-planning and organisation. Initially, the violence was spontaneous, in part a reaction to the perceived rigging of elections. In the Rift Valley and Coast Provinces, members of the Kikuyu and Kisii communities were targeted because they were perceived to be associated with the PNU and President Kibaki and seen as the beneficiaries of the ‘rigged’ election. In Nyanza and Western Provinces, the spontaneous violence was mostly directed against government facilities and gradually took the form of looting and destruction, and while it also targeted the Kikuyu and Kisii communities. The intention appeared to be not to kill them but rather to expel them and destroy their property. Subsequently, however, “the pattern of violence showed planning and organisation by politicians, businessmen and others who enlisted criminal gangs to execute the violence. That was the case particularly in Rift Valley and Nairobi.”⁶⁶

In a tense situation rooted in deep-seated structural cleavages largely expressed in ethnic terms so-called conflict entrepreneurs would find easy resonance in the electorate by appealing to ethnic loyalties and sentiments.⁶⁷ Notwithstanding the elements of spontaneity, the observed violence could hardly have been so extensive and sustained for so long without active mobilisation by and various forms of support (transport and funding) being channelled through the agency of conflict entrepreneurs. Like a combustion engine, a latent tense political situation needs ignition to flare up into manifest violence. Conflict entrepreneurs are individuals or groups of individuals who exploit a specific political situation and incite violent conflict in order to obtain political or other gains. The gains could be economic wealth or political power accruing to individuals or communities with whom they associate. In the situation around the 2007 elections – and in 1992 and 1997 for that matter – the gains to be reaped were votes in favour of individual candidates, their parties and ethnic communities. While the bungled 2007 elections triggered some spontaneous rioting and looting, the violence spread and was sustained by the intervention of conflict entrepreneurs. Abetted by FM radio stations broadcasting hate speech, the conflict entrepreneurs succeeded in provoking violence on a large scale. However, this was only possible because there was an ethnic resonance in the populace grounded in age-long ethnic animosity and material social structures.

⁶⁶ Waki Commission, 347–348.

⁶⁷ This conceptual framework draws on Espen Barth Eide: “‘Conflict Entrepreneurship’: On the Art of Waging Civil War” in Anthony McDermott (ed): *Humanitarian Force* (Oslo: PRIO 1997) 42–69.

Anybody who has spent some time in Kenya will have heard anecdotes and jokes told by members of the different ethnic groups about other communities, stereotyping them in a negative light. While most such stories may be innocent they can also become virulent in situations of heightened political tension.

All human beings are carriers of multiple identities: nationality, religion, profession, gender, race, etc. Ethnicity is but one identity. The possession of several identities means that none occupies an exclusive place, although one of them may be primary and take precedence over others. Generally, multiple identities tend to cancel each other out or at least temper each other in daily life. It is when one identity – be it e.g. ethnicity or religion – becomes exclusive that it is susceptible to manipulation for hatred and violent purposes. Amartya Sen puts it well:

The art of constructing hatred takes the form of invoking the magical power of some allegedly predominant identity that drowns other affiliations, and in a conveniently bellicose form can also overpower any human sympathy or natural kindness that we may normally have. The result can be homespun elemental violence, or globally artful violence and terrorism. ... Violence is fomented by the imposition of singular and belligerent identities on gullible people, championed by proficient artisans of terror.⁶⁸

The manipulative conflict entrepreneurs seek to foster and produce such an overpowering identity. They tend to succeed in certain contexts only, typically in tense situations where much is at stake. The tension surrounding the 2007 elections in Kenya was a situation that provided fertile ground for the manipulation of ethnic identity and loyalty. By invoking the perceptions of historical injustices and the base stereotypes of ‘other’ communities – aided by vernacular FM radio stations and hate speech – the conflict entrepreneurs succeeded in mobilising exclusivist ethnic loyalties for violent action. Again, Sen’s words are insightful:

The martial art of fostering violence draws on some basic instincts and uses them to crowd out the freedom to think and the possibility of composed reasoning. But it also draws ... on a kind of logic – a *fragmentary* logic. The specific identity that is separated out for special action is, in most cases, a genuine identity of the person to be recruited. ... What is done to turn that sense of self-understanding into a murderous instrument is (1) to ignore the relevance of all other affiliations, and (2) to redefine the demands of the “sole” identity in a particularly belligerent form.⁶⁹

In extreme circumstances people cling to their exclusive identity as the most profound expression of themselves, failing which they are exposed and vulnerable to the belligerence of ‘others’. The aftermath of the 2007 elections in Kenya was such an extreme circumstance.

⁶⁸ Amartya Sen: *Identity and Violence: The Illusion of Destiny* (London: Allen Lane 2006) xv and 2.

⁶⁹ Amartya Sen, *supra.*, 175–176, also quoted in John Githongo: “Kenya – Riding the Tiger” (2008) *Journal of Eastern African Studies* 359, 363.

Sen's general argument is supported by the analysis of ethnicity in the Kenyan elections by Bratton and Kimenyi who emphasise contextualisation in tense situations.⁷⁰

2. CULPABILITY AND IMPUNITY

The Waki Commission was very concerned about the culture of impunity that had evolved since the early 1990s. Impunity simply means exemption from punishment. In other words, it refers to the failure to bring perpetrators of human rights violations to justice, and constitutes, therefore, a denial of the victims' right to justice and redress. The Kiliku and Akiwumi Commissions both identified culprits though no one has been indicted. Responding to an apologetic statement by a civil servant on the failure to press charges on the basis of the Akiwumi Commission, the Waki Commission's outburst is telling: "There must be an end to this cowardice and pious sense of self preservation in public service if impunity will be eradicated in this country!"⁷¹ Similarly, the Ndungu Commission on illegal allocation of public land has come to naught. In the words of the Waki Commission,

In view of the lack of any visible prosecution against perpetrators of politically related violence, the perception has pervaded for sometime now that the Attorney General cannot act effectively or at all to deal with such perpetrators and this, in our view, has promoted the sense of impunity and emboldened those who peddle their trade of violence during the election periods, to continue doing so.⁷²

The culture of impunity was considered one reason why violence had been 'normalised' as a means of political struggle. The discontinuation of this impunity is seen as an imperative if Kenya is to recover from the wretched state in which it currently finds itself. Part of that effort is the restoration of the legitimacy and credibility of the Judiciary which has been severely tainted.⁷³

Although the Waki Commission was preoccupied with bringing the perpetrators to account with a view to addressing the impunity issue, it conceded that it was not a police investigation. By its own admission the evidence it had gathered was not sufficient to meet the threshold of proof required for criminal prosecution, i.e. *prima facie* evidence beyond reasonable doubt. This notwithstanding, the evidence adduced by the Commission forms a firm basis for further investigation of alleged perpetrators, especially those who bore the greatest responsibility for the post-election violence.⁷⁴ The Commission therefore recommends the following course of action:

⁷⁰ Michael Bratton and Mwangi S. Kimenyi: "Voting in Kenya: Putting Ethnicity in Perspective" (2008) 2 *Journal of Eastern African Studies* 272, 273 and 275.

⁷¹ Waki Commission, 462.

⁷² Waki Commission, 455.

⁷³ Waki Commission, 462–464.

⁷⁴ Waki Commission, 17.

- Not to publish the names of alleged perpetrators and instead place the names with supporting evidence in a sealed envelope to be handed over to the Panel of African Eminent Personalities pending the establishment of a special tribunal in Kenya;
- In default of setting up such a tribunal, consideration should be given by the Panel to forwarding the names of alleged perpetrators to the special prosecutor of the International Criminal Court (ICC) in The Hague to conduct further investigations in accordance with the ICC statutes.⁷⁵

Before and after the publication of the Waki Commission's report a debate arose about amnesty for the scores of youths who had in one way or another taken part in the violence. Careful not to contribute to the entrenchment of the prevailing impunity culture the Waki Commission warned against a blanket amnesty for all and sundry in the post-election mayhem. However, conceding there were both 'big fish and small fry' among the perpetrators, the Waki Commission reluctantly admitted that it might be necessary to consider an offer of amnesty to minor offenders in exchange for truthful confession and assistance in the arrest and prosecution of the planners, organisers, financiers and, in the case of security agencies, the perpetrators of the post-election violence.⁷⁶

In the end, the government failed to set up a local tribunal to try the 'big fish', and their names, which were contained in a sealed envelope, were, therefore, handed over to the ICC for further action. This was apparently interpreted to mean that the 'small fry' would go scot free. However, when visiting Kenya in October 2009, Kofi Annan made it perfectly clear what he saw as a two-pronged approach to prosecution. Having failed to set up a local tribunal to try the main perpetrators, leading to the involvement of the ICC, did not mean that the minor perpetrators should not be tried. A double approach was deemed necessary in order not to contribute further to the culture of impunity: a local mechanism was needed for dealing with the minor perpetrators.⁷⁷

It was to be expected that the Waki Commission's report would provoke responses from various quarters. The government took strong exception to the allegation of government complicity in the planning and perpetration of violence.⁷⁸ Some remained as defensive as they had been when giving testimony and some remained silent. However, a loud populace called for the implementation of the recommendations of the Commission to put a stop to the culture of impunity.

⁷⁵ Waki Commission, 18.

⁷⁶ Waki Commission, 470–471.

⁷⁷ *Daily Nation*, 8 October 2009. Available at <http://allafrica.com/stories/printable/200910081020.html>.

⁷⁸ See official government statement at http://www.communication.go.ke/media.asp?id=741&media_type=2.

E. GROSS HUMAN RIGHTS VIOLATIONS

The international human rights regime ascribes the role of principal duty-bearer to the state parties to the various conventions to which the rights holders address their grievances in case of violation. Significantly, it is not only incumbent on the state to desist from itself violating rights. It is also obligated to see to it that other actors refrain from engaging in violations. In other words, one must consider both acts of commission and omission on the part of the state.

It is common to distinguish between four modes of relating to human rights: to respect; to protect; to promote; and to fulfil. With regard to the two commissions under consideration the duty to respect and protect are immediately most relevant. To promote and fulfil typically relate to economic, social and cultural rights but they are also pertinent to the discussion in this section which primarily deals with civil and political rights.

The Kriegler and Waki Commissions both documented gross and widespread human rights violations. In the case of the Kriegler Commission, there was a blatant breach of Art. 25 of the ICCPR. The seriously mismanaged elections denied the citizens of Kenya their right to freely choose their leaders and their democratic right to take part in public affairs. Associated freedoms such as those of thought and expression – Art. 18 and 19 of the ICCPR – were also violated when voters and campaigners were constrained in expressing certain opinions in specific areas considered the exclusive zone of a particular party. In many instances they were harassed and intimidated. Similarly, liberty of movement and choice of residence – Art. 12 of the ICCPR – were violated when roads were barricaded, citizens stopped and harassed on their way to political rallies. The fate of the IDPs is a particularly grave example. The freedom to associate – Art. 22 of the ICCPR – in political parties was perhaps not violated overtly but indirectly through the harassment of adherents to particular parties. But the prohibition of incitement to discrimination and ethnic hatred – Art. 20 of the ICCPR – was blatantly violated because ethnic animosity was fanned during the election campaign.

The gross violations documented by the Waki Commission were arguably more tragic because they involved so-called integrity rights and had such devastating effects. The most fundamental integrity right, the inherent right to life as stipulated in Art. 6 of the ICCPR was violated as reflected in the high number of deaths resulting from the violence. Similarly, the Waki Commission heard testimony of numerous cases of cruel, inhuman and degrading treatment in breach of Art. 7 of the ICCPR. Likewise, the right to choose one's residence (Art. 12 of the ICCPR) was certainly violated when scores of people were forced to leave their homes on account of their ethnic affiliation. The high number of IDPs attests to the gravity of this violation. Many IDPs are still suffering from this violation.

The Waki Commission devoted considerable attention to the action and inaction of state institutions. In respect of the violence the state failed grievously to protect its citizens. It was especially serious that some public servants allegedly took part in the violence and became accomplices. These effects resulted from the gradual deterioration of the quality of state institutions, including their infestation of ethnic partiality.

The devastation in the wake of the post-election violence in terms of the destruction of property and productive capacity will no doubt have a bearing on the fulfilment of economic and social rights as well. The reconstruction of infrastructure, health facilities, schools and

production facilities will require resources that could have been used for further development purposes. Similarly, restoring agricultural production will take time. The tourism sector has suffered and the industry is currently experiencing a downturn. All of this is reflected in the drop in economic growth. Foregone revenue from transit traffic across Kenya's territory to Uganda, Southern Sudan and the Great Lakes will also be felt in the coffers of the state and the private sector. The combined effect is a constrained revenue situation and fewer resources for development, poverty reduction and the fulfilment of economic and social rights.

The African Charter on Human and Peoples' Rights was adopted in Nairobi in 1981 and acceded to by Kenya. In large measure the African Charter echoes the provisions of the ICCPR and the ICESCR and was thus grossly violated as well.

The Waki Commission devoted considerable attention to violence against women and children, both of whom were particularly vulnerable in the post-election strife. Although the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not explicitly cover violence against women or rape, what transpired during the first two months of 2008 could nevertheless be seen as violations of CEDAW. Similarly, Article 19 of the Convention on the Rights of the Child (CRC), which provides for the protection of children against all forms of physical and mental violence, was blatantly violated on a large scale. The trauma of experiencing gruesome acts of violence against parents and other relations is likely to haunt the surviving children for the rest of their lives.

Taken together the Kriegler and Waki Commissions provide ample, credible evidence of human rights violations in terms of an array of articles contained in the ICCPR with indirect repercussions for rights in the ICESCR. Similarly CEDAW, the CRC and the African Charter were grossly violated.

F. CONCLUSION

This article has provided summary accounts of the findings of the Kriegler and Waki Commissions of Inquiry into the misconduct of the 2007 election and the violence in its aftermath, respectively. The Kriegler Commission's report is a damning indictment of the Electoral Commission of Kenya and other state institutions. Correspondingly, the Waki Commission pointed to the breakdown of the rule of law and the evolution of a culture of impunity that contributed to the devastating post-election violence. It also adduced evidence against the main culprits who acted as conflict entrepreneurs who found resonance in base ethnic mobilisation for violent action in a tense political situation. The two commissions were considered against the backdrop of Kenya's political system and style of politics which are seen as main causes of the calamities. Particular attention was drawn to the deep-seated historical injustices and inequalities that underpinned the ethnic animosity.

The two commissions document gross and widespread violations of a host of human rights, not least many articles contained in the ICCPR. The devastating effects of the violence are furthermore likely to bear adversely on the ability of the Kenyan state to promote and fulfil economic and social rights.

Only one year after the publication of the Kriegler and Waki Commission reports it is premature to pass judgement as to their lasting impact. Past reports of similar commissions of

inquiry have been inconsequential. It is not surprising, therefore, that some cynics take the view that nothing will change because the culture of impunity is too entrenched. The persistent bickering among the political elite appears to give some credence to that cynicism. Others are hopeful that the events that unfolded around the 2007 elections and their aftermath were so dramatic that Kenyans will not allow the reports to be shelved and the recommendations ignored. Only time will show but a debate has been spurred as to what the future might look like.⁷⁹

Kenya is now facing three major challenges. The immediate task is to heal the seriously damaged relationships between ethnic communities that stood pitted against each other in early 2008. It will take time and patience. The second challenge is to restore the economy to its buoyant condition prior to the 2007 elections, and to restore the reputation of Kenya in the region and beyond. It is not enough, however, to achieve high rates of growth; attention must be given to the distributive effects of growth as well. The third challenge is by far the hardest: to redress the historical injustices and bridge the gap between ethnic communities in terms of land ownership and access to social services.

⁷⁹ Mwangi wa Githinji and Frank Holmquist: "Kenya's Hopes and Impediments: The Anatomy of a Crisis of Exclusion" (2008) 2 *Journal of Eastern African Studies* 344–358.