



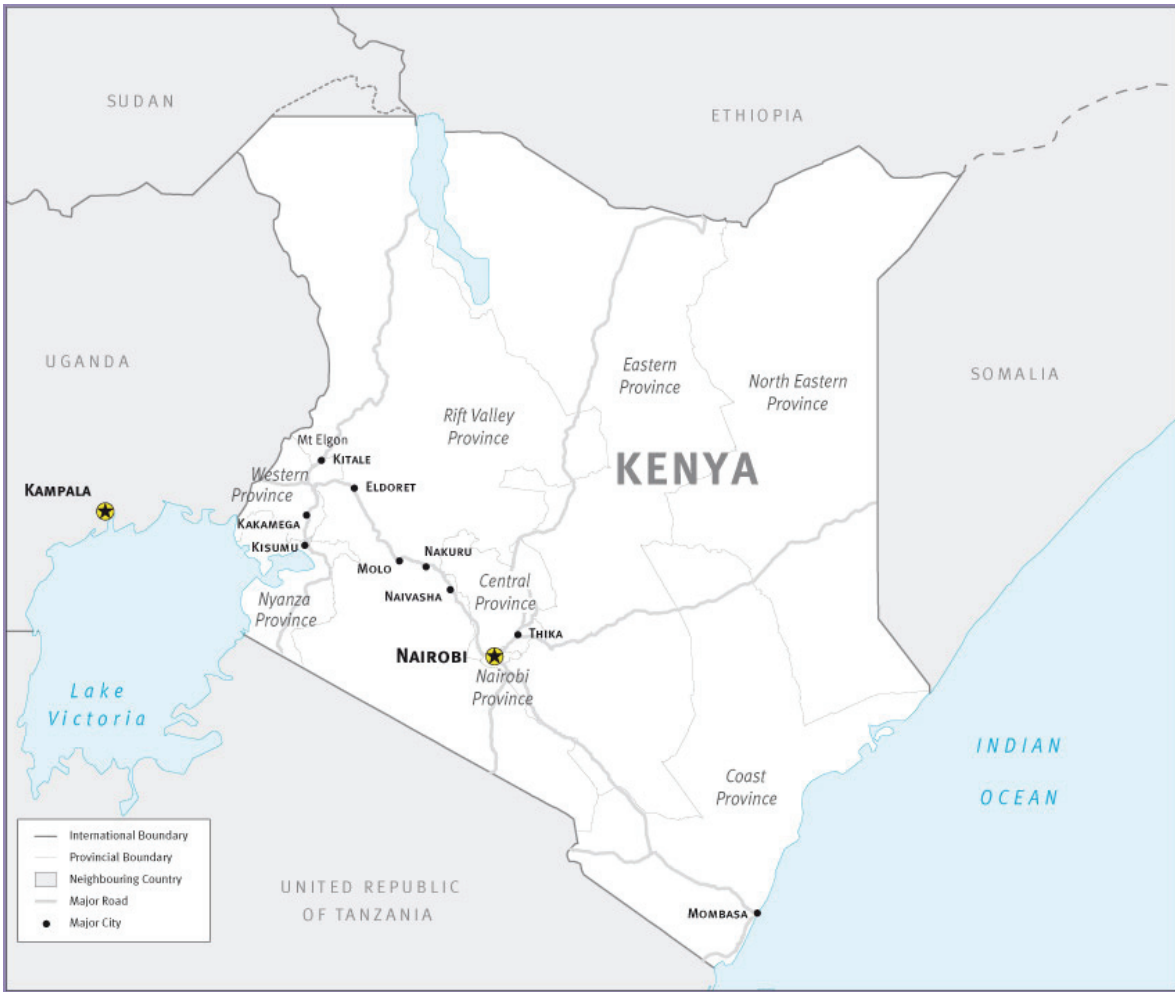
## **Ballots to Bullets**

### **Organized Political Violence and Kenya's Crisis of Governance**

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# Map of Kenya



## Summary

The scale and speed of the violence that engulfed Kenya following the controversial presidential election of December 27, 2007 shocked both Kenyans and the world at large. Two months of bloodshed left over 1,000 dead and up to 500,000 internally displaced persons in a country viewed as a bastion of economic and political stability in a volatile region.

The ethnic divisions laid bare in the aftermath of the elections have roots that run much deeper than the presidential poll. No Kenyan government has yet made a good-faith effort to address long simmering grievances over land that have persisted since independence. High-ranking politicians who have been consistently implicated in organizing political violence since the 1990s have never been brought to book and continue to operate with impunity. Widespread failures of governance are at the core of the explosive anger exposed in the wake of the election fraud.

The Kenya National Dialogue and Reconciliation between the political parties provides Kenya's leaders with a historic opportunity to step back from the brink and to reform and establish institutions that can help build long-term stability. The establishment of a Commission of Inquiry on political violence; an Independent Review Committee on the elections; a Truth, Justice and Reconciliation Commission; and the agreement on the general parameters for a constitutional review process - all agreed in such a short time frame - represent a serious and positive response to the crisis.

However, challenges remain in ensuring that the institutions created actually deliver accountability for recent and previous violence, correct injustices ignored by previous administrations, and tackle the systemic failure of governance that gave rise to the recent crisis. A particular challenge will arise because some of those individuals implicated in recent and previous episodes of politically motivated violence currently hold public office.

This report describes the main patterns of violence that have unfolded since Kenya's December 2007 general election, namely police use of excessive force against

protestors as well as ethnic-based killings and reprisals by supporters aligned to both the ruling and opposition parties. It also outlines the ways in which this violence is the outcome of decades of political manipulation of ethnic tensions, and of impunity intertwined with longstanding grievances over land, corruption, inequality, and other issues.

As the mediation process has recognized, a fresh start for Kenya requires thorough reforms of the institutions designed to safeguard and realize the full panoply of human rights, including the judiciary, the police, land tribunals, and the electoral commission. But unless the Truth, Justice and Reconciliation Commission and the Commission of Inquiry lead to real accountability for the perpetrators of current and previous episodes of political violence, incitement will remain a strategy for political leaders in Kenya. Human Rights Watch believes that there is no alternative to criminal prosecutions of those who have contributed to the violence, including for members of the police found to have used excessive force.

Kenya's recent crisis was triggered by election fraud, but many of the tensions that exploded in December 2007 were years or even decades old. In the 2002 general elections, Kenyans voted overwhelmingly for an end to dictatorial government, corruption, inequality, political violence, and systemic abuse of office. The National Rainbow Coalition (NaRC) headed by Mwai Kibaki promised a new constitution, commissions to address large-scale corruption and arbitrary land-grabbing by the elite, as well as measures to tackle landlessness, unemployment and police reform. One by one those promises were abandoned by the Kibaki regime as the NaRC coalition fell apart while impunity and corruption became further entrenched.

For many Kenyans, the rigging of the 2007 presidential election was the final betrayal of that agenda for change. Voting on December 27 proceeded smoothly with record numbers of registered voters and a record turnout. The parliamentary results were swiftly tallied and announced on December 29, resulting in major losses for the ruling Party of National Unity (PNU) party. The presidential vote, however, soon took a different turn.

Reaction across the country was swift and violent. Protests erupted even before the announcement of the presidential result on December 30, as delays and irregularities in the count sparked rumors of rigging. The government banned public gatherings and the police confronted street protests with excessive force, killing and wounding hundreds of peaceful demonstrators with live ammunition. Meanwhile, some people took advantage of the lack of law and order to loot, rape, and riot.

Mobilized opposition supporters—especially in the Rift Valley and the slums of Nairobi—attacked those whom they assumed had voted for Kibaki, and his PNU, in large part the Kikuyu. This assigned an ethnic dimension to the violence and angry Kikuyu then fought back.

Politics in Kenya has become to a large extent about competition between ethnic groups, and the 2007 election campaign had emphasized the ethnicity of the candidates and the parties. The opposition Orange Democratic Movement (ODM) built a political coalition based on the widespread perception that the Kibaki government had entrenched tribalism and governed in the interests of the Kikuyu community. The PNU, on the other hand, made Luo cultural traditions a target, claiming that an uncircumcised man could not rule Kenya. It was unsurprising therefore that the violence following the rigging should take an ethnic form. Indeed, pre-election violence in Kuresoi, Molo, and Mount Elgon throughout 2007 foreshadowed what was to come.

Irresponsible politics may have created fertile ground for violence but the Rift Valley's post-election bloodshed did not arise spontaneously. It emerged as a result of incitement before the election and coordination and organization, at least at the local level.

Around Eldoret local ODM mobilizers and other prominent individuals called meetings during the election campaign to urge violence in the event of a Kibaki victory, arguing that if Kibaki was announced as the winner it must mean the polls had been rigged and the reaction should be “war” against local Kikuyu residents. In the days that followed, attacks were often meticulously organized by local leaders.

Nor were the reprisal attacks by Kikuyu militia in Naivasha and Nakuru spontaneous. PNU mobilizers and local businessmen called meetings, raised funds, and directed youth in their attacks on non-Kikuyus and their homes.

Identifying those behind the attacks should be a focus of the inquiries into the violence. In addition, further investigations are required in order to determine the extent of links between the national leaderships of the opposition and ruling parties and those who carried out the violence. There is circumstantial evidence that suggests leaders may well have been at least aware of what was happening and did little to stop it. Some may have been more directly involved.

Across the country, the police response to demonstrations against the declared election results involved excessive use of force, leading to hundreds of deaths in late December and early January. As the country slid into inter-ethnic violence, there were examples of the police intervening to protect lives, but in many other situations the police appear to have had little will or capacity to prevent violence. Although the scale of the demands on the police in many parts of the Rift Valley and western Kenya means that failure to make arrests as violence was ongoing is possibly understandable, the limited extent and slow pace of investigations and prosecutions in recent weeks leave much to be desired.

Many Kenyans have little faith in the police to act in a professional, impartial, and timely manner; this reality only encourages vigilantes to take the law into their own hands. The new coalition government should urgently address the issue of police capacity by seeking assistance, including from the UN and foreign governments.

In addition to addressing the urgent protection needs and to ensuring accountability through the institutions established as a result of the National Dialogue and Reconciliation process, the priority for the coalition government must be what Kofi Annan has called a 'reform agenda.' Indeed the parties themselves have acknowledged as much. The roots of the crisis are old and deep. If the power-sharing arrangement for coalition government is to pave the way for a genuinely democratic Kenya, where the rule of law and fundamental civil and political rights are fully respected, a new culture of accountable governance is required.

International actors and civil society played a significant role in the political settlement in Kenya. They now have a role in ensuring that the coalition government seizes this chance to end impunity, deliver reform, and address the underlying causes of violence, many of which are long-standing human rights violations.



## **Methodology**

This report is based on two research missions to Kenya during January and February 2008. Researchers conducted over 200 interviews with victims, witnesses, perpetrators, police, magistrates, diplomats, Kenyan and international NGO staff, journalists, lawyers, businessmen, local councillors, and members of parliament across the country, from all major ethnic groups, by phone and in person, the vast majority in person. Interviews were conducted in English and Swahili without translators. Human Rights Watch also examined court records in Naivasha. Researchers visited the following areas: Nairobi, Kisumu, Kitale, Eldoret, Naivasha, Nakuru, and Molo.

For security reasons, many people spoke to Human Rights Watch on the condition of confidentiality, requesting that the report not mention their names or other identifying information. Details about individuals and locations of interviews when information could place a person at risk have been withheld.

## Recommendations

To ensure accountability for human rights abuses and the prevention of future abuses, Human Rights Watch makes the following recommendations:

### On Accountability

#### *To the Government of Kenya*

- Ensure that individual organization, incitement, or participation in political and ethnic violence, excessive use of force by members of state security forces (including the police) is impartially and rigorously investigated, and that perpetrators are brought promptly to justice.
- Ensure that individuals recommended by the Commission of Inquiry and the Truth, Justice and Reconciliation Commission for criminal investigation and prosecution for their role in the violence and excessive use of force by state agencies are investigated and prosecuted by the relevant authorities.
- Act on the reports of previous efforts to establish accountability for past abuses, including the reports of the Akiwumi Commission and the Kiliku Commission, ensuring that individuals identified as culpable are further investigated with a view to criminal prosecutions.
- Ensure offenses under the Electoral Offences Act, including those identified in the course of investigations by the Independent Review Committee, are impartially and rigorously investigated, and that perpetrators are brought promptly to justice.
- Ensure that no one suspected of inciting or organizing political violence is appointed to cabinet positions or any other government post.
- Ensure that the police build on recent efforts to encourage victims of sexual violence to report crimes, take all reports of sexual violence seriously, and

investigate all allegations. Ensure that survivors of sexual violence are able to access appropriate medical care and psychosocial support.

- Ensure that Kenyan police and judicial institutions are willing and equipped to meet the task of providing for justice. Where necessary, request international assistance to provide training or other assistance in police reform and enhance investigative and prosecutorial capacity.

#### *To Foreign Governments*

- Provide appropriate support, as requested, for the National Dialogue and Reconciliation process and institutions established under its auspices, including the Commission of Inquiry and the Truth, Justice and Reconciliation Commission.
- Make future bilateral and multilateral non-humanitarian assistance conditional on human rights benchmarks including accountability of individuals responsible for current and previous episodes of political violence and excessive use of force by police.
- Maintain and extend foreign visa screening and asset freezes of those individuals suspected of implication in corruption, arbitrary seizure of land, and political violence, during the period of investigation and following convictions.

### **On Reforms to Safeguard against Human Rights Violations**

#### *To the Government of Kenya*

- Implement electoral reforms such as the gazetting of the Political Parties Act and provision for the independent appointment of electoral commissioners.
- Ensure full and fair settlements of land disputes in line with recommendations from the Njonjo Commission and Ndung'u Commission reports and international standards on the rights to property and land, including the rights to historic land of indigenous communities. This will require a new law that sets up powerful and adequately funded mechanisms to resolve historic disputes, including allocation of compensation when appropriate.

### *To Foreign Governments*

- Provide appropriate, coordinated support for initiatives aimed at addressing the full and fair settlement of land disputes and compensation for historical and current human rights violations.

## **On Displaced Persons**

### *To the Government of Kenya*

- Ensure that internally displaced persons are protected from further violence regardless of their ethnicity and location, and ensure that the fundamental and social and economic rights of all those displaced by recent and previous events are met, including through equitable access to food, health, and education services.
- Engage with civil society and internally displaced persons themselves to agree on a national plan for voluntary return, re-location or re-settlement of the displaced; that plan should take into account the long history of displacement in Kenya and the ongoing unresolved questions over land rights and should include a process of compensation for those who have lost their homes and property.

### *To Donor Governments, UN Agencies, and National and International NGOs*

- Assist the Government of Kenya in ensuring that adequate protection and assistance is provided to all displaced persons, without discrimination as to ethnicity or location.
- Provide additional assistance to the Government of Kenya and Kenyan NGOs, as required, to meet its obligations to displaced people, including in the settlement or resolution of long-standing disputes over land.

## Background: Kenya's Long-Term Crisis of Governance

Many commentaries on the post-election violence in Kenya have referred to the violence in contrast to Kenya's "stable image" or "reputation for stability."<sup>1</sup> If indeed Kenya did have such a reputation before the controversial general election of December 27, 2007, it took little account of Kenya's recent political history.

Every election since the establishment of a multi-party system in 1991 witnessed widespread violence.<sup>2</sup> That violence is linked to long-standing grievances and failures of governance that run deeper than electoral politics. Kenya has a history of widespread corruption and systemic abuse of office by public officials that has resulted in a situation in which encouraging statistics about economic growth (6.4 percent for 2007)<sup>3</sup> coexist with depressing figures of crushing poverty (58 percent of the population lives on less than two US dollars a day).<sup>4</sup> Political contests have become all the more charged because of what is at stake; those who achieve political power benefit from widespread abuses including impunity for political manipulation of violence, criminal theft of land, and the corrupt misuse of public resources—indulgences which occur at the expense of groups who are out of power.

The government of Mwai Kibaki came to power in 2002 pledging to correct these and other chronic failures of governance.<sup>5</sup> In one positive step, the Kibaki government

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<sup>1</sup> On the other hand, Salim Lone, the spokesman for the opposition ODM party, noted in an article before the election that, "simmering crises, whose most visible consequence is an epidemic of criminal mayhem in towns and villages as well as ethnic-cleansing attempts by land-starved communities seeking to drive 'outsiders' out, could combine to unravel this thin veneer of stability." Salim Lone, "Slithering Snakes," *BBC Focus on Africa*, October-December 2007, p.26.

<sup>2</sup> See Africa Watch (now Human Rights Watch/Africa), *Kenya - Divide and Rule: State Sponsored Ethnic Violence in Kenya* (New York: Human Rights Watch, 1993), <http://hrw.org/reports/1993/kenya1193.pdf>; *Kenya: Playing with Fire: Weapons Proliferation, Political Violence and Human Rights in Kenya* (New York: Human Rights Watch, 2002), <http://www.hrw.org/reports/2002/kenya/>. See also the Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya ("The Akiwumi report"), 1999 (Released in 2002 after a long campaign), available at: [http://marskenya.org/pages/stories/Akiwumi\\_Report/](http://marskenya.org/pages/stories/Akiwumi_Report/) (accessed February 21, 2008), and Kenya Human Rights Commission (KHRC), "Killing the Vote: State Sponsored Violence and Flawed Elections in Kenya" (Nairobi: KHRC 1998).

<sup>3</sup> International Monetary Fund (IMF), Country Data: Kenya, World Economic Outlook database, October 2007, <http://www.imf.org/external/pubs/ft/weo/2007/02/index.htm> (accessed February 24, 2008).

<sup>4</sup> United Nations Development Program (UNDP), *Human Development Index 2007-8* (New York, United Nations Development Program, 2007), [http://hdrstats.undp.org/countries/data\\_sheets/cty\\_ds\\_KEN.html](http://hdrstats.undp.org/countries/data_sheets/cty_ds_KEN.html) (accessed, February 24, 2008).

<sup>5</sup> For an overview of the key human rights concerns and needed reforms raised in 2002 when the Kibaki government took power, see Human Rights Watch, *Kenya's Unfinished Democracy: A Human Rights Agenda for the New Government*, vol. 14, no. 10 (A), December 2002, <http://www.hrw.org/reports/2002/kenya2/>.

established the Kenya National Commission on Human Rights (KNCHR), an important and genuinely independent institution. In general, however, promises of reform were not fulfilled. Despite a promising start—which included improvements in freedom of expression and association coupled with strong economic growth—corruption, patronage politics, state-sponsored violence, and persistent police abuses have defined the order of the day.

The current crisis in Kenya will not be resolved through power-sharing alone. The Commissions established by the National Dialogue and Reconciliation process represent a strong and positive start, but if their recommendations are not implemented and no one is brought to justice, political violence could return to haunt Kenya again. Lasting solutions require a thorough overhaul of Kenyan institutions and a serious attempt to redress deep-seated problems that have been ignored or exacerbated for too long by those in power. Chief among these problems are the ownership and allocation of land, the constitution, and impunity for corruption and the organization of political violence.

## **A Century of Land Grievances**

Land seized by British colonists cut a swathe through Kenya’s modern-day provinces of Rift Valley, Nyanza, Western, and Central, creating an area that became colloquially known as the ‘White Highlands.’ In total, British and other European settlers took 20 percent of Kenya’s land, most of it prime agricultural spots.<sup>6</sup> At independence in 1963 some of this was handed over, not to the people from whom it had been taken, but to the new government and government officials, using the colonial laws that the British had themselves drafted. These laws made no provision for the collective land rights of communities.<sup>7</sup> The introduction of the concept of private individual property, without the recognition of collective land rights, upset the traditional arrangements of many indigenous groups, many of which based their land occupation and use on traditional collective practices, such as pastoralism.

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<sup>6</sup> Kenya National Commission on Human Rights and Kenya Land Alliance, “Unjust Enrichment: The making of Land-Grabbing Millionaires,” Living Large Series, Vol.2, No. 1, 2006, p.1.

<sup>7</sup> See for example, Kenya Land Alliance, “The National Land Policy in Kenya: Addressing Historical Injustices”, Issues paper No.2/2004.

Colonial laws also treated “natives” as incapable of holding direct land title, instead having land held “on trust” for them by governmental authorities.

After independence the new government under Jomo Kenyatta did not recognize customary land use in law or practice but instead sold the land it acquired from British settlers under the principle of ‘willing seller, willing buyer.’ But much of the land ended up in the hands of members of Kenyatta’s Kikuyu ethnic group rather than with the communities from which it had been taken.<sup>8</sup> Kenyatta also used the land for patronage purposes and to build alliances, a pattern that continued and increased under his successor President Daniel arap Moi.<sup>9</sup> Colonial “trust” land remained in place with respect to the historic land of certain groups, including many pastoralist groups who were still deemed, in effect, incapable of holding direct land title.

The National Rainbow Coalition (NaRC) that brought President Kibaki to power in 2002 was supposed to resolve the land issue once and for all. This was one of NaRC’s major campaign promises.<sup>10</sup> To that end, Kibaki launched the Ndung’u Commission to investigate patterns of corruption and unfair allocation of land and to propose remedies. The final report was deemed too controversial and the Kibaki government never implemented the recommendations.<sup>11</sup> The report notes the importance of land in Kenya, stating, “land retains a focal point in Kenya's history. It was the basis upon which the struggle for independence was waged. It has traditionally dictated the pulse of our nationhood. It continues to command a pivotal position in the country's social, economic, political and legal relations.”<sup>12</sup>

The report also noted that “the practice of illegal allocations of land increased dramatically during the late 1980s and throughout the 1990s ... and land was to

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<sup>8</sup> Kenya is made up of over 40 different ethnic groups: The three largest are the Kikuyu, the Luhya (a colonial term, actually made up of 16 smaller groups), and the Luo. Others include the Kamba, the Kalenjin (another colonial construction grouping together distinct Nilotic ethnic groups that share similar linguistic and cultural traditions: the Kipsigis, Nandi, Pokot (or Suk), Elgeyo, Endorois, Marakwet, Keiyo, Tugen, Sabaot, Sebei, Dorobo, and Terik), the Kisii, Masaai, Turkana, Teso, and the Meru.

<sup>9</sup> Kenya National Commission on Human Rights, “Unjust Enrichment”, p.1.

<sup>10</sup> See Human Rights Watch, *Kenya's Unfinished Democracy: A Human Rights Agenda for the New Government*, Vol. 14, No. 10(A), December 2002, <http://www.hrw.org/reports/2002/kenya2/>.

<sup>11</sup> See Kenya National Commission on Human Rights, “Unjust Enrichment.”

<sup>12</sup> Quoted in, Roger Southall, “Ndungu Report Summary,” *Review of African Political Economy*, Vol. 32, No. 103, (March 2005), pp. 142-51.

become granted for political reasons, or simply subject to 'outright plunder' by 'a few people at the great expense ... of the public.'"<sup>13</sup> A common problem was corruption in the allocation of trust land for 'settlement schemes' established by the government. "[In] the establishment of settlement schemes ... the interests of the landless [were] ignored in favour of those of 'District officials, their relatives, members of parliament...' and other influential people [Commission: p.147]."<sup>14</sup> David Anderson of the University of Oxford estimates that, according to satellite mapping of the violence in the Rift Valley, 95 percent of the recent clashes in that area have occurred on land affected by these schemes.<sup>15</sup>

Kikuyu farmers, but also purchasers from other parts of the Rift Valley, bought land from politically connected people who had often acquired purported legal "title" to the land by legally dubious means. Others bought land from local people. While most of these purchasers of small plots of land did not directly participate in corruption, increased land pressures over time helped deepen a sense of local grievance over the unfair taking of their land that local politicians could use in their campaigns.<sup>16</sup> Animosity was incited and directed against the Kikuyu settlers, often ignoring the role of local leaders who contributed to and benefited from this corrupt allocation of land.

The Commission also found that "most illegal allocations of public land took place before or soon after the multiparty general elections of 1992, 1997 and 2002."<sup>17</sup> At the same time Kenya's population was increasing rapidly, making pressure on land an explosive problem by the turn of the twenty-first century.

The report of the Ndung'u Commission—and that of its predecessor the Njonjo Commission—also found clear solutions to the problems identified. The recommendations of the Commission included an inventory of public land, a

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<sup>13</sup> Ibid., p.146.

<sup>14</sup> Ibid., p.142.

<sup>15</sup> Human Rights Watch telephone interview with David Anderson, February 1, 2008.

<sup>16</sup> See Jacqueline Klopp, "Can moral ethnicity trump political tribalism?: The struggle for land and nation in Kenya", *African Studies* 61:2, 2002.

<sup>17</sup> Roger Southall, "Ndungu Report Summary," p.148.



comprehensive land policy, and the establishment of a Land Titles Tribunal that could review each and every case of suspected illegal or irregular allocation of land. Many of these sensible ideas are contained in the draft land policy drawn up by the Ministry of Lands in 2006.<sup>18</sup> However, neither that policy nor any of these important recommendations have been implemented. Kenya is also bound by international law, such as the African Charter on Human and Peoples' Rights, which requires it to ensure the right to property, and the right of all peoples to freely dispose of their wealth and natural resources. The African Charter says that dispossessed people have the right to the lawful recovery of their property as well as to adequate compensation.<sup>19</sup>

## Fifty Years of a Temporary Constitution

Kenya is still governed according to a colonial-era constitution that places overwhelming power in the hands of the central government and, in particular, the president, weakening parliamentary scrutiny and judicial independence, and creating the risk of a winner-takes-all calculus when it comes to elections. Constitutional reform has been a central talking point in Kenyan politics for decades, but to date every attempt to realize that vision has stalled.

Pre-independence differences over the kind of constitution Kenya needed have never been properly resolved. The leading political party before independence, dominated by Kikuyu and Luo politicians, was the Kenyan African National Union (KANU) led by Jomo Kenyatta. Other ethnic groups, wary of being dominated by the larger ethnicities, and thus losing control of their local resources (especially land), formed the Kenyan African Democratic Union (KADU) which favored a type of federalism, called *majimboism* in Swahili, which proposed semi-autonomous regions based on ethnicity.<sup>20</sup> The smaller ethnic groups including the Kalenjin, led by, among others, former President Daniel arap Moi, favored this kind of federalism. Opponents called it chauvinist and tribalist.<sup>21</sup> When KANU won the election, Kenya soon became a *de*

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<sup>18</sup> Kenya Ministry of Lands, Draft Land Policy, Nairobi 2006, on file with Human Rights Watch.

<sup>19</sup> See African Charter on Human and Peoples' Rights, Articles 14 and 21.

<sup>20</sup> See, for example, David Anderson, "Majimboism: the troubled history of an idea", in Daniel Branch & Nic Cheeseman (eds), *Our Turn to Eat! Politics in Kenya since 1950* (Berlin: Lit Verlag, 2008).

<sup>21</sup> *Ibid.*

*facto* one party state characterized by a strong centralized government. Regional powers were abolished.<sup>22</sup>

When Moi became president, federalist sentiments were suppressed, with its most vocal proponents being co-opted into supporting Moi. However, with the re-introduction of multiparty politics in 1991, the debate resurfaced with a vengeance. Politicians in the Rift Valley and the coast incited and organized pogroms against ‘outsiders’, mostly Kikuyu, Luo, Luhya, and Kisii migrants who had migrated to those regions seeking land and jobs, people whom the local politicians feared would not vote for them in the ethnicized politics of Kenya.<sup>23</sup> Thousands died and hundreds of thousands were displaced.<sup>24</sup> High-ranking politicians at the time, many of whom are still active in politics in 2008, made inflammatory speeches in support of this chauvinistic interpretation of *majimboism* that led to ethnically-based violence.<sup>25</sup>

When Kibaki’s NaRC came to power in 2002 it promised a new constitution within 100 days of its inauguration. Instead, differences about the drafting contributed to the collapse of the NaRC coalition. Kibaki delayed and watered down key reforms in the draft that emerged from the National Constitutional Conference, such as the reduction of presidential powers, the creation of a new post of prime minister, parliamentary oversight of the central government, land rights, and judicial independence. The government finally put the watered down draft to a national vote

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<sup>22</sup> Colin Leys, *Underdevelopment in Kenya, the Political Economy of Neo-Colonialism*, (London: Heinemann Ltd., 1975), p. 212.

<sup>23</sup> See John Lonsdale, “Ethnicity, Tribe and State in Kenya,” *Open Democracy*, January 17, 2008. [http://www.opendemocracy.net/article/democracy\\_power/kenya\\_ethnicity\\_tribe\\_state](http://www.opendemocracy.net/article/democracy_power/kenya_ethnicity_tribe_state) (accessed, March 4, 2008).

<sup>24</sup> See Africa Watch (now Human Rights Watch/Africa) *Kenya - Divide and Rule: State Sponsored Ethnic Violence in Kenya* (New York: Human Rights Watch, 1993) and Republic of Kenya, Report of the Parliamentary Select Committee to investigate Ethnic Clashes in Western and Other Parts of Kenya, 1992.

<sup>25</sup> For instance in 1992, the Minister for Local Government, William ole Ntimama, was quoted as saying in a speech, with Moi’s Vice-President, George Saitoti, in attendance as guest of honor, that, “the Gikuyu [Kikuyu] should prepare to be ‘repatriated’ to ‘their motherland’, leaving the Rift Valley to its ‘native peoples’” NCCK, *Cursed Arrow*, quoted in David Anderson, ‘Majimboism: the troubled history of an idea’.

in 2005.<sup>26</sup> Raila Odinga and those opposed to the draft won an easy victory, and Kenya's struggle for constitutional reform was set back to square one.<sup>27</sup>

Anger about the failure of the constitutional process and demand for a new one was again a defining issue of the 2007 general election campaign, with ODM promising a 'majimbo' federalist constitution. As the International Crisis Group noted, "The Orange movement tried to dissociate itself from the violent and ethnic chauvinist stigma attached to the *majimbo* debate but also knew the confusion would rally maximum support among the Kalenjin, Maasai, Turkana and Samburu communities of the Rift Valley, as well as coastal populations."<sup>28</sup>

## Political Violence and Decades of Impunity

The political manipulation of ethnicity is almost a tradition in Kenyan politics, along with impunity for those implicated in fomenting political violence.<sup>29</sup> Among the most explosive periods in Kenya's post-independence history was between 1991 and 1993 when President Moi tried to stir up sentiment against the Kikuyu in the Rift Valley. The purpose was to consolidate Moi's vote in the Rift Valley (the area with the most parliamentary seats) among the Kalenjin by driving out those unlikely to vote for him, in particular the Kikuyu.<sup>30</sup> The clashes in the Rift Valley and on the coast left up to 1,500 people dead and 300,000 displaced.<sup>31</sup> The clashes were provoked and often inflamed by politicians in both the ruling and opposition parties, but ruling party members were rarely if ever chastised, much less prosecuted, for their role in inciting violence. As Human Rights Watch noted in 1993:

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<sup>26</sup> Those against the watered down draft became known as the 'orange' movement and the government 'yes' camp became known as the 'bananas' after the symbols assigned by the Electoral Commission. The anti-camp coalesced into the Orange Democratic Movement (ODM) that opposed the government in the 2007 elections. For a good summary of the political fallout from the referendum see International Crisis Group, "Kenya in Crisis," Africa Report No. 137, February 21, 2008, <http://www.crisisgroup.org/home/index.cfm?id=5316&l=1>.

<sup>27</sup> International Crisis Group, "Kenya in Crisis," February 21, 2008.

<sup>28</sup> *Ibid.*, p.10.

<sup>29</sup> See Kenya Human Rights Commission, "Warlord Democracy," December 2002.

<sup>30</sup> Africa Watch, *Divide and Rule* and National Christian Council of Kenya [NCCCK], *The Cursed Arrow: A Report on Organized Violence Against Democracy in Kenya* (Nairobi, 1992); Inter-Parties Symposium, *Report on the Clashes by the Task Force* (Nairobi, 1992).

<sup>31</sup> Africa Watch, *Divide and Rule*.

The violence has coincided with calls by high-ranking Kalenjins within the government for the creation of a *majimbo* system of government in Kenya, a federal system based on ethnicity. The proponents of *majimboism* have simultaneously called for the expulsion of all other ethnic groups from land occupied before the colonial era by the Kalenjin and other pastoral groups, including the Maasai, Turkana, and Samburu. Inflammatory statements by these figures have been ignored by the government, while similar calls made by opposition politicians have led to immediate action, including arrest and detention.<sup>32</sup>

No one was held accountable for organizing those clashes, despite the naming of many senior politicians in government reports.<sup>33</sup> Violence sparked again around multiparty elections in 1997-98, and investigations once more pointed the finger at politicians for inciting and organizing it.<sup>34</sup> The government-sponsored Kiliku and Akiwumi judicial inquiries documented incitement, financing, and land-grabbing by hundreds of individuals connected with the administration. The Akiwumi report in particular, which had a wide-ranging brief to investigate the clashes from 1991, included an appendix listing 189 people “adversely mentioned” in the report including Mwai Kibaki, current Minister for Internal Security, George Saitoti, and numerous members of parliament, former MPs, district and provincial commissioners, councillors and government employees.<sup>35</sup>

The Akiwumi report, completed in 1999, was initially suppressed and only released in 2002 just before the Kibaki government came to power. The report’s findings were completely ignored by the incoming administration. Justice Akiwumi recommended

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<sup>32</sup> Africa Watch, *Divide and Rule*, p.2.

<sup>33</sup> For example, according to the parliamentary report on the violence: “Evidence received by the Committee . . . Several witnesses also alleged that some of the persons funding the wages of the "warriors" were the Hon. K.N.K. Biwott, EGH, MP; the Hon. Rueben K. Chesire, MP; the Hon. Ezekiel K. Barngetuny, MP; the proprietor of Guest House at Kedowa market, Kipkelion division; and the Hon. Wilson Leitich, MP.” See Republic of Kenya, Report of the Parliamentary Select Committee to investigate Ethnic Clashes in Western and Other Parts of Kenya, 1992, p. 75.

<sup>34</sup> See for example, The Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya (The Akiwumi report); Human Rights Watch, *Playing With Fire*; and KHRC, *Killing the Vote: State Sponsored Violence and Flawed Elections in Kenya*.

<sup>35</sup> The Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya (The Akiwumi report).

investigation and prosecution of those mentioned in the report but not one case was opened as a result of his findings. The Task Force report on the Establishment of a Truth, Justice and Reconciliation Commission was equally shelved.<sup>36</sup>

The referendum campaign of 2005 also witnessed campaigning along ethnic lines. The Kenya National Commission on Human Rights (KNCHR) documented incitement and hate speech during the referendum campaign and called for the investigation and prosecution of 16 sitting and former members of parliament.<sup>37</sup> Nothing happened. In a further report,<sup>38</sup> KNCHR documented more examples of incitement and hate speech during the 2007 general election campaign. No investigations or arrests have been made.

From August 2007 onwards, violence broke out well before the polls as candidates jockeyed for nominations within the parties.<sup>39</sup> The European Union observers noted that 34 election-related deaths had been reported, and catalogued 190 violent incidents, ranging from intimidation to murder, between August and December 2007, most occurring in Western, Nyanza, and Rift Valley Provinces.<sup>40</sup> The EU mission noted that, “In most cases, abuses did not receive an appropriate response from the police and the judiciary and there was therefore impunity towards perpetrators. Candidates were also observed using hate speech on a limited number of occasions.”<sup>41</sup>

Pre-elections, throughout 2007, there was a considerable increase in violence in Kuresoi, Molo, and Mount Elgon between different ethnic groups supporting different candidates, resulting in 200 deaths and up to 70,000 displaced.<sup>42</sup> Several politicians

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<sup>36</sup> Jaqueline M. Klopp, “Violence and Impunity in Kenya”, unpublished monograph, School of International and Public Affairs, Columbia University, 2008, on file with Human Rights Watch.

<sup>37</sup> The relevant sections of the law are section 95 and 96 of the Kenyan penal code, See Kenya National Commission for Human Rights, “Referendum Report” (2006) [http://www.knchr.org/index.php?option=com\\_content&task=view&id=73&Itemid=85#10](http://www.knchr.org/index.php?option=com_content&task=view&id=73&Itemid=85#10) (accessed February 5, 2008).

<sup>38</sup> Kenya National Commission for Human Rights, “Still Behaving Badly”, Nairobi, December 2007.

<sup>39</sup> See for example, IDP Network of Kenya, “Internal Displacement and Analysis Kuresoi Constituency.” December 2007 and European Union Election Observation Mission (EUEOM), Kenya 2007, “Preliminary Statement,” Nairobi January 1, 2008.

<sup>40</sup> EUEOM, “Preliminary Statement”.

<sup>41</sup> Ibid.

<sup>42</sup> See [www.ogiek.com](http://www.ogiek.com) for a useful archive of newspaper reports of violence in the Kuresoi, Molo, and Mt. Elgon regions over several years, including in the run-up to the 2007 general elections.

and local leaders were implicated in this violence,<sup>43</sup> but no politician has yet been held accountable for their role in violence. The IDP Network of Kenya before the election complained that:

This crisis is both political as well as administrative; in many cases the provincial administration is the core source of the clashes. In Kuresoi the District Officer, Chiefs, and Sub-chiefs, as members of the previous KANU regime, were rewarded with positions after they took an active part in 1992 clashes in the area...The Kibaki government failed to fire them and replace them, even though they have failed in their duty to uphold law and order.<sup>44</sup>

The report also details several cases where local leaders have been arrested and set free as a result of suspected political interference.<sup>45</sup> Human rights activists in Molo reflected similar frustrations with the administration and the police. They cited an example of one chief who had been arrested five times for his role in inciting and organizing violence but who had been released each time.<sup>46</sup>

The election campaign itself was virulently divisive, with politicians on both sides characterizing their opponents in derogatory terms linked to their ethnicity. The European Union Observer Mission noted: “The campaign atmosphere was also characterized by a strong ethno-political polarization between the two main contenders in the presidential election and their alliances, leading to a generally tense atmosphere in their respective regional stronghold towards the other side.”<sup>47</sup>

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<sup>43</sup> See IDP Network of Kenya, “Internal Displacement and Analysis Kuresoi Constituency” and European Union Election Observer, (name withheld) interview with Human Rights Watch, Nairobi, January 8, 2008.

<sup>44</sup> IDP Network of Kenya, Internal Displacement Alert, p.5.

<sup>45</sup> Ibid.

<sup>46</sup> Human Rights Watch interview with monitors for Kenyan National Commission on Human Rights, Molo, February 18, 2008.

<sup>47</sup> EUEOM, “Preliminary Statement”.

## Human Rights Violations in the Context of the General Election

### The Hijacking of Kenya's 2007 Presidential Poll

While it is true that the post-election violence in Kenya has deep-seated roots, the immediate trigger for the violence was the rigging of the election. This was not only a proximate cause of the violence but also an abuse of Kenyans' democratic rights.

The principle of free and fair elections is enshrined in Kenya's constitution<sup>48</sup> and provided for in numerous other acts of parliament.<sup>49</sup> In addition, Kenya has signed and ratified international and regional treaties relating to human rights, including the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights, which contain standards on the conduct of democratic elections.<sup>50</sup> Furthermore, it has agreed and endorsed the African Union's 'Principles Governing Democratic Elections in Africa'.<sup>51</sup>

Kenya's December elections should have been an important milestone for Kenya and for Africa. After a closely-fought campaign, Kenyans registered and turned out to vote in record numbers. There were serious irregularities reported on both sides in some areas.<sup>52</sup> But the most damaging acts of fraud were committed during the final stages of tallying the presidential poll, when the Electoral Commission of Kenya (ECK)

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<sup>48</sup> Constitution of Kenya, Section 5, as amended 1992, states: "5. (1) The President shall be elected in accordance with this Chapter, and subject thereto, with any Act of Parliament regulating the election of a President." available online at: [http://www.kenyalaw.org/kenyalaw/klr\\_app/frames.php](http://www.kenyalaw.org/kenyalaw/klr_app/frames.php) (accessed February 24, 2008).

<sup>49</sup> National Assembly and Presidential Elections Act (Chapter 7), Local Government Act (Chapter 265), Election Offences Act (Chapter 66), Societies Act (Chapter 108), Registration of Persons Act (Chapter 107), Police Act (Chapter 84), Public Order Act (Chapter 56), Kenya Broadcasting Corporation Act (Chapter 221) and also in Presidential and Parliamentary Elections Regulations, National Assembly and Presidential Elections Practice Rules (Electoral Code of Conduct), National Assembly and Presidential Elections Regulations (Registration of Electors), National Assembly Elections Rules (Election Petition), Local Government Election Rules, Societies Rules, Registration of Persons Rules.

<sup>50</sup> Kenya ratified the African Charter on January 23, 1992 and the ICCPR on May 1, 1972. See the African Charter, Article 13, and the ICCPR, Article 25.

<sup>51</sup> Kenya is a member of the African Union, the successor to the Organization of African Unity (OAU) which adopted the Declaration on Principles Governing Democratic Elections in Africa at its 38<sup>th</sup> Ordinary Session held in Durban, South Africa in 2002.

<sup>52</sup> See Kenya Elections Domestic Observation Forum (KEDOF), "Preliminary Press Statement and Verdict of the 2007 Kenya General Election", December 31, 2007; European Union Elections Observation Mission (EUEOM), "Preliminary statement: Doubts about the credibility of the presidential results hamper Kenya's democratic progress", January 1, 2008; Commonwealth Observer Group "Kenya General Election 27 December 2007: The Report of the Commonwealth Observer Group", January 17, 2008.

presided over what was by all appearances a desperate last-minute attempt to rig the contest in favor of incumbent Mwai Kibaki.<sup>53</sup>

In the closing hours of the tabulation process a lead of over one million votes for opposition candidate Raila Odinga evaporated under opaque and highly irregular proceedings and was transformed into a razor-thin margin of victory for Mr. Kibaki.<sup>54</sup> The result was also entirely at odds with the Orange Democratic Movement's successes in the parliamentary vote in which ODM won 99 seats to PNU's 43.<sup>55</sup>

The entire process quickly fell apart in confusion. In the face of public outrage and mounting pressure to reverse the move, five electoral commissioners publicly denounced the apparent fraud.<sup>56</sup> Even the head of the ECK later said that he could not determine who actually won the vote.<sup>57</sup> Nonetheless, Mr. Kibaki tried to pre-empt any challenge by having himself hurriedly sworn in to a second term in office before Kenyans even had time to register their anger and concern. All domestic and international observer missions swiftly issued statements condemning the tallying process and casting doubt on the result of the presidential election.<sup>58</sup>

When the announcement of the presidential election was made at the Kenyatta International Conference Centre on December 30, journalists were told to leave the

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<sup>53</sup> Ibid.

<sup>54</sup> There are several good accounts of the fraud in the tallying process, see for example Kenyans for Peace with Truth and Justice, "Countdown to Deception: 30 Hours that Destroyed Kenya", Nairobi, January 17, 2008, [http://www.knchr.org/dmdocuments/KPTJ\\_Final\\_Press\\_Release.pdf](http://www.knchr.org/dmdocuments/KPTJ_Final_Press_Release.pdf) (accessed March 4, 2008) and International Crisis Group, "Kenya in Crisis", Africa Report No. 137, February 21, 2008, [http://www.crisisgroup.org/library/documents/africa/horn\\_of\\_africa/137\\_kenya\\_in\\_crisis\\_web.doc](http://www.crisisgroup.org/library/documents/africa/horn_of_africa/137_kenya_in_crisis_web.doc) (accessed March 4, 2008).

<sup>55</sup> Electoral Commission of Kenya, Official Results, at: [http://www.eck.or.ke/elections2007/index.php?option=com\\_content&view=article&id=3&Itemid=3](http://www.eck.or.ke/elections2007/index.php?option=com_content&view=article&id=3&Itemid=3) (accessed March 1, 2008).

<sup>56</sup> Human Rights House, 'Members of the Election Commission of Kenya Express Concern over Result,' Nairobi, January 1, 2008, also available at: <http://www.humanrightshouse.org/dllvis5.asp?id=6146> (accessed, February 24, 2008).

<sup>57</sup> Human Rights House, "I acted under pressure - says Electoral Commission Chairman, Kivuitu," Nairobi, January 2, 2008, also at: <http://www.humanrightshouse.org/dllvis5.asp?id=6145> (accessed, February 24, 2008).

<sup>58</sup> See Kenya Elections Domestic Observation Forum (KEDOF), "Preliminary Press Statement and Verdict of the 2007 Kenya General Election", December 31, 2007; European Union Elections Observation Mission (EUEOM), "Preliminary statement: Doubts about the credibility of the presidential results hamper Kenya's democratic progress", January 1, 2008; Commonwealth Observer Group "Kenya General Election 27 December 2007: The Report of the Commonwealth Observer Group", January 17, 2008.



building. Almost immediately, the government, through then Internal Security Minister, John Michuki, ordered broadcasters to suspend live broadcasts. This was not only an infringement of the freedom of the press, but contributed to considerable tension across the country as Kenyans, eager to know what was happening in Nairobi, were denied the chance to scrutinize their own democratic process.<sup>59</sup>

Violence erupted even before the announcement of results as concern and suspicion about delays spread through the country. Within hours of the results' announcement, Kenya began to slide into violence.

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<sup>59</sup> EUEOM "Preliminary statement."

## Use of Excessive Force and Extrajudicial Killings by Police

In Kenya there are three branches of police: the regular Kenya Police; the General Service Unit (GSU), a specialist unit trained in riot control; and the Administration Police, a division initially established to protect the administration but deployed to assist the regular police where necessary. All three branches in any given region are subject to the ultimate control of the Provincial Police Officer (PPO), advised by the District and Provincial Security Committees, chaired by the District Commissioner and Provincial Commissioner respectively.<sup>60</sup>

The Kibaki government reacted to the public outrage that greeted its declaration of victory in the presidential poll by imposing a blanket ban on public demonstrations. The ban was illegal under Kenyan law and contrary to international standards.<sup>61</sup> The government tried to defend the ban as necessary to prevent violence in the wake of the polls.<sup>62</sup> As it turned out, however, heavy-handed police enforcement of the protest ban, including the use of excessive force, claimed hundreds of Kenyan lives, often in circumstances where the police's use of lethal force was unjustified.

In late December police in Nairobi and many towns were confronted by demonstrations that rapidly turned into riots involving looting. During the course of breaking up demonstrations and riots, police used live ammunition, leading in many instances to deaths.<sup>63</sup> The majority of police killings investigated by Human Rights Watch, however, took place as police subsequently tried to contain in the slums persons they believed might try and join demonstrations. Police action included the shooting of unarmed

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<sup>60</sup> Human Rights Watch interviews with District Commissioner J.C. Baregu, Kisumu, January 15, 2008; Provincial Commissioner, Paul Olando, Kisumu, January 15, 2008; and Grace Kaindi, Provincial Police Officer, Kisumu, January 15, 2008.

<sup>61</sup> Kenyan and international law prohibits a general ban on demonstrations. Under Kenyan law, (section 5 of the Public Order Act, 1950, as amended 1997) those wishing to demonstrate must notify the police and the police can reject the request on the grounds of public order, but no law permits the authorities to impose a blanket ban on public assembly. Under the International Covenant on Civil and Political Rights, which Kenya ratified in 1972, a state may only impose restrictions on the right to peaceful assembly that are strictly necessary to maintain public order. This rules out widespread, nationwide bans on demonstrations.

<sup>62</sup> Human Rights Watch interviews with police officials, Kisumu and Nairobi, January 2008.

<sup>63</sup> The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials call upon law enforcement officials in the dispersal of violent assemblies to use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Lethal force may only be used when strictly unavoidable to protect life and only when less extreme means are insufficient to achieve these objectives.

protesters and bystanders, including women and children, without any initial attempt to use non-lethal force, and in situations where there was no apparent imminent threat to life or property.

Shootings by police in Kisumu in late December are described below. Similar patterns were seen in Nairobi, and again in mid-January in Kisumu, where Human Rights Watch witnessed firsthand the use of live ammunition to disperse protesters during the second round of protests on January 16 and 17.

Some policemen interviewed by Human Rights Watch spoke of an unofficial ‘shoot-to-kill’ policy, although commanders told researchers that police officers are supposed to exercise their own judgement in the use of firearms.<sup>64</sup> The Provincial Police Officer in Kisumu told Human Rights Watch that she ordered her officers to use live ammunition. One officer in Nairobi explained:

Some of the things we are asked to do. As a human being, we have brothers, sisters. It is difficult to obey illegal orders. The shoot to kill policy is illegal. It is wrong. Only if things get out of your hands should that be necessary.<sup>65</sup>

Across the country, it is clear the police were overwhelmed. But officers in different parts of the country responded to their difficult circumstances in starkly different fashion. Inevitably in the political and polarized context of events, this raises questions about political interference in policing, or the politicized nature of police commands, as well as about police competence and capacity. For example, officers were quick to resort to lethal force in opposition areas such as the slums of Nairobi, Kisumu, and elsewhere when lives were not obviously at risk. And yet when faced with pro-government mobs killing and burning in Naivasha and Nakuru, the police made little attempt to intervene at all. In other areas such as Eldoret and Molo/Kuresoi, victims alleged that the police sided with Kalenjin militias.<sup>66</sup> In Nakuru and Naivasha, eventually, the Kenyan army was deployed to disperse violent gangs,

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<sup>64</sup> Ibid.

<sup>65</sup> Human Rights Watch interview, policeman (name withheld), Nairobi, January 9, 2008.

<sup>66</sup> Human Rights Watch interviews with victims and unnamed policeman, Eldoret, January 17 and 18, 2008 and victims in Molo, February 18, 2008.

and did so with relatively little loss of further life. This uneven police response requires further investigation. Issues of partiality are discussed in the ‘Response of the Kenyan Government’ section.

## The Scale and Impact of Police Shooting

Spontaneous protests erupted all over the country following the announcement of Kibaki as president on December 30, 2007. Media and human rights groups reported scores of deaths as protests turned violent in confrontation with the police. In Mombasa, local human rights investigators counted 20 people shot dead by police in the first few days following the announcement of Kibaki’s victory.<sup>67</sup> In Nairobi, each day of the crisis brought fresh reports of shootings by police.<sup>68</sup> In towns across the West of the country—Kisumu, Kericho, Homa Bay, Kakamega, and Molo—reports came in of people killed by the police.<sup>69</sup> In Eldoret, journalists and human rights activists told Human Rights Watch that many of the bodies arriving at the morgue of the Moi Teaching and Referral Hospital during the first week of January were shot by police.<sup>70</sup>

This initial wave of police killings provoked outrage in the media and among the human rights community but did not lead to a change of police tactics. The opposition called three days of protests for January 16, 17, and 18. This brought on more clashes with the police and more deaths.<sup>71</sup> As of January 21, the police confirmed to Human Rights Watch that police officers had shot dead 81 people nationwide, and injured many others although they had no record of the total number of wounded. The police claim that in many of these cases the use of force was justified.<sup>72</sup>

The total number of people killed by police during January and February 2008 is almost certainly higher than 81. According to the incidents reported in *The Standard*

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<sup>67</sup> Human Rights Watch interview with Muslims for Human Rights officials, Mombasa, by phone, January 10, 2008. See also, BBC, “Scores dead in Kenya poll clashes,” *BBC Online*, December 31, 2008, <http://news.bbc.co.uk/1/hi/world/africa/7165602.stm> (accessed, March 5, 2008).

<sup>68</sup> Human Rights Watch interviews, January 2008.

<sup>69</sup> *Ibid.*

<sup>70</sup> Human Rights Watch interview with ‘The Standard’ journalist, Eldoret, January 11, 2008, and Human Rights Watch interview with human rights activists, Eldoret, January 19, 2008.

<sup>71</sup> For a good summary of deaths involving the police, see *The Sunday Standard*, February 17, 2008.

<sup>72</sup> Human Rights Watch interview with police spokesman, Nairobi, January 23, 2008.

newspaper in only a few districts in Nyanza and Rift Valley provinces, police shot dead over 205 people up to the middle of February.<sup>73</sup> The Law Society of Kenya's South Rift branch estimates that over 100 people may have been shot dead by police in the Southern Rift alone, not including many places where scores of people shot by police were reported, such as Kisumu, Eldoret, and Nairobi.<sup>74</sup> Among the most damning facts is that in nearly every location there are reports of police shooting unarmed children.<sup>75</sup> In Kisumu Human Rights Watch spoke to three girls shot and wounded by police near their homes.<sup>76</sup>

As of February 4, the police were investigating their own use of force (including cases where there were no fatalities) in 142 cases nationwide. However, as of February 21, only two policemen had been charged with excessive use of force.<sup>77</sup> Even a cursory tally of the incidents shows that many more investigations are warranted.

## Massacre in Kisumu

The most egregious example of excessive use of force by police was in the city of Kisumu on the eastern edge of Lake Victoria. On Saturday, December 29 and Sunday, December 30 protests in Kisumu town degenerated into violence and looting before and after the announcement of Kibaki's victory.

Kisumu is a stronghold of ODM presidential candidate Raila Odinga, whose family has its roots in the area and where nearly all young Luo men are opposition supporters. The police said they believed they were dealing with a population on the verge of insurrection and indeed, many young men expressed revolutionary sentiments to Human Rights Watch.<sup>78</sup> The poor parts of the city have a reputation of being the most militant, including the slum areas of Manyatta, Kondele, and Western Junction, and it

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<sup>73</sup> *The Sunday Standard*, February 17, 2008.

<sup>74</sup> Gideon Mutai, LSK branch chair for South Rift told *The Standard*: 'The number of those gunned down could be more than 100 as most of them are not documented.' See Vitalis Kimutai, "Quiet burial for victims of police brutality," *The Sunday Standard*, February 17, 2008.

<sup>75</sup> *The Sunday Standard*, February 17, 2008.

<sup>76</sup> Human Rights Watch interviews, Nyanza General Hospital, Kisumu, January 14, 2008.

<sup>77</sup> Human Rights Watch interview with the police spokesperson, Nairobi, February 21, 2008.

<sup>78</sup> Human Rights Watch interviews, Kisumu, January 2008.

is in these particular parts of town where the police were deployed on Saturday and Sunday after looting took place in the center of the city on Saturday morning.

According to eyewitnesses, on December 29 protests took place in all neighborhoods of Kisumu as local youths set tires on fire and erected roadblocks. Some protesters managed to reach the city center and immediately began looting and burning shops, but others were contained in the slums by police.<sup>79</sup> According to the police and provincial and district authorities, they tried but failed to disperse looters through non-lethal means.<sup>80</sup> The Provincial Police Officer for Nyanza Province, which includes Kisumu, acknowledged to Human Rights Watch that she ordered her officers to use live ammunition to disperse the looters because the police were “overwhelmed” and “caught off guard” by the ferocity and size of the violent crowds: “I gave that order to shoot, things were getting out of hand.”<sup>81</sup> The PPO and the district commissioner acknowledged that the crowds did not have guns, but claimed that the police shooting was justified to control the looting in the center of town.<sup>82</sup>

However, Human Rights Watch investigations found that the majority of people shot in Kisumu died in the residential slum areas far from the shops in the commercial center. According to records kept by officials of the opposition ODM party who counted the bodies arriving at the morgue in Kisumu, around 10 people were shot dead by police in the city center, all the other bodies were delivered from slum areas.<sup>83</sup> While looters were present in the city center on Saturday, December 29, the police succeeded in pushing the protesters back into the slums. The district commissioner told Human Rights Watch that the strategy was to, “get them out of town, push them into the slums and then prevent them from returning.”<sup>84</sup> Long after the crowds in the city center dissipated, police drove into the slums on the evening

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<sup>79</sup> Human Rights Watch interviews, Kisumu, January 2008.

<sup>80</sup> Human Rights Watch interviews with District Commissioner J.C. Baregu, Kisumu, January 15, 2008; Provincial Commissioner, Paul Olando, Kisumu, January 15, 2008; and Grace Kaindi, Provincial Police Officer, Kisumu, January 15, 2008.

<sup>81</sup> Human Rights Watch interview, Grace Kaindi, Kisumu, January 15, 2008.

<sup>82</sup> Human Rights Watch interview with District Commissioner J.C. Baregu, Kisumu, January 15, 2008 and Grace Kaindi, Provincial Police Officer, Kisumu, January 15, 2008.

<sup>83</sup> Human Rights Watch interviews with ODM official and ODM elected councillor, Kisumu, January 14, 2008, and ODM records, on file with Human Rights Watch.

<sup>84</sup> Human Rights Watch interview with J.C. Baregu, Kisumu, January 15, 2008.

of December 29, and throughout the day of December 30 and opened fire directly and without warning on any group of people they deemed suspicious.

Human Rights Watch interviewed several victims who did not flee from advancing police in the slums because they did not imagine that the officers would open fire on them. For example, on the evening of December 29, a group of boys gathered in Manyatta to protect their employer's hardware store from potential looters. According to the boys, the police did not stop to ask what they were doing, they simply started shooting. One of them was shot in the leg and had to have it amputated. According to another who was present at the scene:

There were two people shot on the other side of the road, shot dead. They were lying on the side of the road, bleeding from the head. People thought they [the police] were firing in the air, that's why we were not running away. But when we realised that they were firing live that's when I said, 'hey, let's run away from here.'<sup>85</sup>

A local priest and a bus driver both described to Human Rights Watch the killing of an 11-year old boy and a young woman shot in the afternoon of December 29 when police dispersed the crowd in Manyatta with live rounds. According to the bus driver:

On [December] 29 there was a disturbance so I went to park my bus. I saw a police car coming. Some of them inside were shooting from the windows. Three were shooting in the air, one was shooting directly at people... I saw a mother falling down, the bullet had hit her in the head. I also saw a child fall down. The child had turned and was hit in the stomach. The crowd ran away and left the injured there.<sup>86</sup>

Residents of Manyatta, Kondele, and Western Junction, the three main residential areas of Kisumu where police were deployed to prevent crowds assembling,

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<sup>85</sup> Human Rights Watch interview (name withheld), Kisumu, January 16, 2008.

<sup>86</sup> Human Rights Watch interview (name withheld), Kisumu, January 16, 2008 and Human Rights Watch interview with Reverend Joe Asilia, Kisumu, January 15, 2008.

described to Human Rights Watch how the police fired indiscriminately.<sup>87</sup> Another man who had gone shopping was returning home when he was shot by police without warning, sustaining injuries to the back of his head:

On [December] 29, I went to the market at 8 a.m. to get food. We heard the noise of rifles shooting. I was by Magadi Catholic Centre. I saw a police saloon car with 'highway patrol' written on it. Two policemen came out and started shooting in every direction. As people were running, the police were shooting at those who were running away. The policeman came and looked at me lying down.<sup>88</sup>

In Kondele, a fifteen-year-old boy was shot from behind on the evening of December 30 while fleeing in terror from policemen who had opened fire without warning at a crowd of ODM supporters. He told Human Rights Watch:

It was evening. There was a group of boys, celebrating and carrying pictures of Raila – they thought he had been announced as the winner. As they were going up the road, I joined them, celebrating also.... We heard gunshots, so everybody was running for his life. I was ahead of my cousin so I went back to look for him. I found myself near the police Land Rover. They had put off the headlights of the car. I realised that I was near because I heard a gunshot. I started running. Then I heard a second one. When I tried to step forward my leg had no power, I fell down.<sup>89</sup>

He spent the night bleeding in the dirt near the side of a road. A week later he remained in constant pain because his family could not afford to see a doctor, buy pain medication, or even find a pair of crutches to help him move around.

According to the Nyanza PPO, on December 29 and 30 the police recovered 33 bodies of people who had been shot or burned alive on those days.<sup>90</sup> At Nyanza General

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<sup>87</sup> Human Rights Watch interview (name withheld), Kisumu, January 16, 2008.

<sup>88</sup> Human Rights Watch interview (name withheld), Kisumu, January 16, 2008.

<sup>89</sup> Human Rights Watch interview (name withheld), Kisumu, January 16, 2008.

<sup>90</sup> Human Rights Watch interview with Grace Kaindi, Kisumu, January 15, 2008.



Provincial Hospital, the medical superintendent confirmed that 44 people brought to the morgue between December 28 and January 11, as a result of the violence, had died from gunshot wounds. From the pattern of the gunshots, it appears that the police were shooting to kill males but that the female and child victims were caught by stray bullets. The medical superintendent at the hospital reported that most of the males who had been shot (whether dead or injured) were shot in the body or the head: “Direct hits,” she said, whereas wounds of the few women and children were more random, “all over the body.”<sup>91</sup> Three girls in Nyanza General Hospital who were shot and wounded were all hit by stray bullets, one in the arm, one in the leg and one in the foot.<sup>92</sup> The two men in the Intensive Care Unit visited by Human Rights Watch on January 14 were, by contrast, both shot in the body, one in the neck and one in the chest. As of January 14, 59 inpatients in Nyanza Hospital had gunshot wounds and 138 outpatients had been treated for gunshot wounds.<sup>93</sup> The police acknowledged that all of those shot were likely shot by the police.<sup>94</sup>

Despite outrage in the press, investigations by the Kenya National Commission on Human Rights on January 14, and a pledge by the PPO to Human Rights Watch that there would be no more deaths,<sup>95</sup> on January 16 the police used the same tactics when faced with fresh protests. The sound of police gunfire rang through the streets throughout the day on January 16 as Human Rights Watch interviewed victims from the previous rounds of violence in residential areas of Kondele and Manyatta. That afternoon Kenyan television showed a police officer in Kisumu shooting a man who had been making faces at him—a clearly deliberate act of brutality compounded further by the police officer then walking over to kick the man as he fell to the ground and died.

On January 16 no protests took place in the city center and those that took place in the residential slum areas observed by Human Rights Watch were minimal, mostly

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<sup>91</sup> Human Rights Watch interview with Julianna Otieno, Medical Superintendent, Nyanza General Provincial Hospital, Kisumu, January 14, 2008.

<sup>92</sup> Human Rights Watch interviews (names withheld), January 15, 2008.

<sup>93</sup> Ibid.

<sup>94</sup> Human Rights Watch interview with Provincial Police Officer Grace Kaindi, Kisumu, January 15, 2008.

<sup>95</sup> On January 15 Grace Kaindi, the Nyanza PPO, told Human Rights Watch, “We are not *preparing* we are *prepared*. We will just restrain them [the protesters].”

consisting of a dozen or so youth burning tires, shouting and singing, unable to advance to town beyond the line of police. And yet eight people were shot dead by police in Kisumu on January 16, including a ten-year-old boy playing outside his home.<sup>96</sup>

## **Police Shootings in Nairobi Slums**

While events in Kisumu present one of the clearest examples of excessive use of force by police, what happened there was not unique. Police in Nairobi also shot demonstrators under circumstances that were clearly unjustified.

From the beginning of the disturbances on December 28 and 29 when it became clear that the announcement of Kibaki as president had sparked trouble, the police strategy seemed to be, as in Kisumu, to contain the protesters in the slum areas of Mathare, Kibera, Dandora, Kariobangi, and others. Witnesses and victims alike confirmed to Human Rights Watch that the protestors were unable to leave the slums because of police interventions, often brutal and fatal.<sup>97</sup> Kenyan television stations carried scenes of police firing tear gas and live ammunition to disperse protesters in the narrow twisting alleyways of the slums day after day throughout January.

Local human rights workers in one area of Kibera slum recorded nine people shot dead by police and 19 injured between December 27 and January 10.<sup>98</sup> In Mathare, residents reported people shot dead and bodies dumped in the Nairobi river.<sup>99</sup> The Independent Medical and Legal Unit, a respected Kenyan human rights NGO comprising doctors and lawyers, reported around 50 bodies in Nairobi mortuaries in the first half of January, dead from gunshot wounds, most likely killed by the police.<sup>100</sup>

One young man, a resident of Mathare who was caught up in demonstrations on December 31 and shot by police described his experience to Human Rights Watch:

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<sup>96</sup> Human Rights Watch interview with hospital staff, Nyanza General Provincial Hospital, Kisumu, by phone, January 17, 2008.

<sup>97</sup> Human Rights Interviews, Nairobi, January 2008.

<sup>98</sup> Human Rights Watch interview with human rights activists (names withheld), Nairobi, January 14, 2008, list on file with Human Rights Watch.

<sup>99</sup> Human Rights Watch interview (name withheld), Nairobi, January 9, 2008.

<sup>100</sup> Human Rights Watch interview with IMLU officers, Nairobi, January 9, 2008.

In the afternoon I went to Gateway to see my brother. At Gateway, I stopped, I saw the GSU [riot police]. There was a fracas with some youth. GSU were advancing. I saw them about 10 metres away. Then I fell down, there was a bullet in my leg, they shot me. I saw one of them aim at me....<sup>101</sup>

The use of live rounds in Kibera and Mathare slums, some of the most densely populated areas in the world, was highly irresponsible and caused death and injury to many innocent bystanders. Slum dwellings are made of wood, sacking, and tin sheets, easily pierced by bullets. One woman was hit in the chest at 8 a.m. in the morning on December 31 as bullets came through the wall of her home.<sup>102</sup> Another man was shot and killed the same day when he opened the door of his home to see what was going on in Kibera, as a worker at the local mosque told Human Rights Watch:

On [December] 31 at 9 a.m. on Karanja Road, I was carrying wounded people who had been shot by police. A young man opened the door of his house to see what was going on. Police aimed at him and shot at him three times. The first two missed, but the third bullet got him.<sup>103</sup>

The policeman responsible for the latter killing, which was clearly deliberate given the repeated shooting, should be held accountable for his actions.

Human Rights Watch also documented cases of policemen hurling canisters of tear gas into families' homes in Nairobi slums; a strategy clearly unconnected to the controlling of crowds or protecting life and property. As one witness told Human Rights Watch:

I saw two men shot in the leg by policemen around 9 a.m. on January 1.... the policemen were threatening people to get out of the way and firing tear gas,

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<sup>101</sup> Human Rights Watch interview (name withheld), Nairobi, January 10, 2008.

<sup>102</sup> Human Rights Watch interview (name withheld), Nairobi, January 9, 2008.

<sup>103</sup> Human Rights Watch interview (name withheld), Nairobi, January 10, 2008.

they were also firing tear gas into houses, many children were affected, coughing and so on.<sup>104</sup>

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<sup>104</sup> Human Rights Watch interview (name withheld), Nairobi, January 10, 2008.

## Organized Violence in the Rift Valley

Even before Mwai Kibaki was officially declared the winner of Kenya's presidential vote, parts of Kenya's Rift Valley erupted into widespread inter-ethnic violence. The delays in the counting of votes and rampant rumors about the imminent rigging of the election sparked attacks primarily directed at members of Kibaki's Kikuyu ethnic group. That violence in turn spawned a series of ethnic-based reprisal attacks in other parts of the country, with Kikuyu militias attacking other ethnic communities seen as broadly supportive of the opposition. Up to 500,000 people have been displaced in this violence and over 1,000 killed.<sup>105</sup>

Human Rights Watch did not interview any victims of sexual violence, in part because victims may have been reluctant to report cases of sexual violence. Indeed, during January, according to medical staff in the hospitals of Nyanza, Eldoret, and clinics in the slums in Nairobi, reported rape cases were far lower than average.<sup>106</sup> During February however, the true scale of sexual violence in the context of the ongoing instability began to emerge, with Nairobi women's hospital reporting 324 cases examined in its mobile clinics across the country up to February 24.<sup>107</sup>

### Post-Election Violence around Eldoret

The inter-ethnic violence that swept across many communities in the aftermath of the December polls began in the Rift Valley. The epicenter of the first wave of Rift Valley violence was in and around the town of Eldoret, a highland town 125 kilometers east of Kenya's border with Uganda.

As discussed above, tensions over land ownership and other issues have long been a source of mistrust and violence between the majority Kalenjin population around Eldoret and the area's Kikuyu minority. Those tensions were exacerbated by the sharp ethnic lines drawn between opposing camps during the 2007 electoral

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<sup>105</sup> United Nations Office for the Coordination of Humanitarian Affairs (OCHA), "Kenya, Humanitarian Update," Vol. 7, February 23-27, 2008.

<sup>106</sup> Human Rights Watch interviews Kisumu, Eldoret, and Nairobi, January 2008.

<sup>107</sup> Human Rights Watch correspondence via email with Nairobi Women's Hospital officials, February 22, 2008.

campaign. Locally, support for the ODM was overwhelming among the Kalenjin while support for Kibaki's PNU was equally prevalent among the Kikuyu population.

### *Political Manipulation of Ethnic Tensions During the Campaign*

Around Eldoret many Kalenjin politicians stoked ethnic tensions to mobilize political support among their ethnic kinsmen, a tactic familiar to Kenyan politics. To cite just one of many typical examples, a Kalenjin councillor reportedly told a rally in the town of Soi that, if elected, the ODM would "remove the roots" of local Kikuyu communities "so there would be only one tribe there."<sup>108</sup> One locally-prominent Kalenjin politician acknowledged to Human Rights Watch that, "Some ODM politicians would say, 'we have a snake we have to get rid of.' It was a clear metaphor for the Kikuyu. They did not see the repercussions of this."<sup>109</sup>

Largely as a result of this ethnic rhetoric, many Kalenjin supporters believed that once elected, the ODM would find a way to redistribute most or all land owned by Kikuyu to them.<sup>110</sup> Human Rights Watch interviewed several Kalenjin involved in anti-Kikuyu violence who said they were merely doing by force what they had been denied a chance to do through the ballot box.<sup>111</sup>

KASS FM, Eldoret's popular Kalenjin-language radio station, was on several occasions used as another platform for inflammatory ethnic rhetoric.<sup>112</sup> There is no clear evidence that the station actively sought to disseminate hate speech but it did not prevent guests from using the airwaves to do so. As one local Kalenjin politician explained, "What was on the radio depended on who was in the studio at any given moment."<sup>113</sup> Language was usually highly idiomatic but its meaning was clear to the audience. One report says that KASS broadcast an appeal for "people of the milk"

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<sup>108</sup> Human Rights Watch interview, Eldoret, January 18, 2008.

<sup>109</sup> Human Rights Watch interview, Eldoret, January 18, 2008.

<sup>110</sup> Human Rights Watch interviews with Kalenjin residents in and around Eldoret, January 2008.

<sup>111</sup> Human Rights Watch interviews, several communities near Eldoret, January 2008.

<sup>112</sup> Human Rights Watch interviews with activists and local residents, Eldoret, January 2008.

<sup>113</sup> Human Rights Watch interview, Eldoret, January 19, 2008.

[the Kalenjin] to “cut grass” [clear the land, i.e. of Kikuyu], and called for the Kalenjin to “reclaim our land.”<sup>114</sup>

### *Direct Incitement and Organization*

Divisive campaigning did not by itself cause existing ethnic tensions to boil over into violence. But in the days prior to the election, local elders and ODM organizers in many communities around Eldoret called meetings where they declared that electoral victory for Kibaki would be the signal for “war” against local Kikuyu. They told community members a PNU victory should be seen as conclusive proof of electoral fraud and that all Kikuyu were complicit in it.<sup>115</sup>

Human Rights Watch interviewed Kalenjin residents of several rural communities who attended such meetings. The term “war” was widely used in urging a violent reaction to disappointment at the polls. One man from a rural community near Turbo told Human Rights Watch that a few days before the election he attended a community meeting chaired by a local ODM campaigner where:

He [and local elders] said that if there is any sign that Kibaki is winning, then the war should break...They said the first step is to burn the Kikuyu homes in the village, then we will go to Turbo town, [and] after finishing Turbo then we organize to go to Eldoret...They were coaching the young people how to go on the war[sic].<sup>116</sup>

Human Rights Watch gathered similar testimonies from other communities around Turbo.<sup>117</sup> On two occasions witnesses described police interventions that prevented militias from reaching Turbo town and Eldoret town, but in those communities, and

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<sup>114</sup> IRIN, “Kenya: spreading the word of hate,” *IRIN News*, January 22, 2008, <http://www.irinnews.org/Report.aspx?ReportId=76346> (accessed January 22, 2008).

<sup>115</sup> Human Rights Watch interviews, Eldoret, January 2008.

<sup>116</sup> Human Rights Watch interview, Eldoret, January 21, 2008.

<sup>117</sup> Human Rights Watch interviews, Eldoret, January 2008.

in Turbo town itself, almost all Kikuyu homes and business were ultimately destroyed. One local Kalenjin resident said this had all gone “according to plan.”<sup>118</sup>

One man from a village called Kiplombe told Human Rights Watch that he was forced to pay 1,000 Kenyan shillings (US\$15) and a bag of maize to elders in his community to help cover the costs of anti-Kikuyu violence. “I am old,” he said. “They know I will not go to violence so I should sponsor the youths. Their aim was to clear the area. They say they do not want to see other people, other tribes, in these areas.”<sup>119</sup> In other communities similar levies were raised, in some cases to try and purchase firearms and ammunition.<sup>120</sup>

Many of the people who relayed the details of these meetings to Human Rights Watch said that they did not want to attend them but were coerced into doing so. In several communities people who did not attend the meetings were threatened with the destruction of their own homes.<sup>121</sup> And at the meetings, an atmosphere of intimidation made it very difficult to speak out in opposition to the planned violence. “It is hard to disagree with 300 youths who are advocating violence,” said one elderly Kalenjin man from a village outside Turbo.<sup>122</sup> At least one prominent Kalenjin activist was forced to flee Eldoret after receiving threats because he consistently denounced the violence.<sup>123</sup>

In many cases the chief architects of post-election violence were prominent and well-known individuals. According to many Kalenjin community leaders in Eldoret North, for instance, the organization of violence in communities there was openly spearheaded by a venerable Kalenjin politician, an elected ODM councillor<sup>124</sup> named Jackson

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<sup>118</sup> Human Rights Watch interview, Eldoret, January 19, 2008.

<sup>119</sup> Human Rights Watch interview, Eldoret, January 21, 2008.

<sup>120</sup> Human Rights Watch interview, Eldoret, January 21, 2008. Members of several Kalenjin communities have attempted to procure firearms from Pokot communities around Mount Elgon. The area is relatively saturated with guns and is the most obvious nearby market. Human Rights Watch interviews with Kalenjin community members, Eldoret, January 2008.

<sup>121</sup> Human Rights Watch interviews, Eldoret, January 18 and January 19, 2008.

<sup>122</sup> Human Rights Watch interview, Eldoret, January 19, 2008.

<sup>123</sup> Human Rights Watch interviews and email correspondence, January and February 2008.

<sup>124</sup> A councillor is an elected member of local government. Every Kenyan administrative district has a Council.



Kibor.<sup>125</sup> Kibor advocated the right of Kalenjin to kill Kikuyu in a BBC interview.<sup>126</sup> He was arrested by the Kenyan police in February 2008, charged with incitement, but released on bond.<sup>127</sup> In many communities, however, prominent local leaders who were openly involved in organizing and inciting violence have yet to be held to account in any way.

Human Rights Watch found no evidence directly implicating ODM's national leadership in these events. However, all the Kikuyu victims Human Rights Watch spoke to blamed William Ruto, a member of Parliament, for the attacks because of his strong anti-Kikuyu rhetoric prior to the election,<sup>128</sup> and in mid to late January nearly all the Kalenjin elders and youth that we spoke to said, "if Ruto says stop, it will stop."<sup>129</sup> William Ruto, who represents Eldoret North constituency, is a member of the Pentagon, ODM's governing body. He denied any involvement in the violence, and explained the allegations against him by saying that, "In Western Kenya, all people of status and substance would be ODM by default, the majority of opinion leaders are ODM. Whether it is an ODM agenda or a village agenda those same people would be leading it."<sup>130</sup>

### *The Scale and Impact of Post-Election Violence*

In many areas violence erupted immediately on the heels of the Kenyan government's announcement that Kibaki had won the presidential polls. Elsewhere, it began one or more days later, but within the space of a week dozens of communities, including Eldoret town, had seen most of their Kikuyu population driven away. Hundreds lay dead, many left rotting in the fields of scattered hillside farms, and thousands of homes had been put to the torch.<sup>131</sup>

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<sup>125</sup> Human Rights Watch interviews, Eldoret, January 2008.

<sup>126</sup> Pascale Harter, "Assignment," *BBC World Service*, January 31, 2008.

<sup>127</sup> Nation team, "Kibor released on 200,000Sh bond," *The Daily Nation*, February 29, 2008.

<sup>128</sup> In an interview with Human Rights Watch, Ruto made no apology for his anti-Kikuyu stance, "I accused Kibaki of driving this country on the basis of tribalism and I did not give examples which were remote." Human Rights Watch interview with William Ruto, MP, Nairobi, January 24, 2008.

<sup>129</sup> Human Rights Watch interviews, Eldoret, January, 2008.

<sup>130</sup> Human Rights Watch interview with William Ruto, MP, Nairobi January 24, 2008.

<sup>131</sup> Human Rights Watch interviews with Police, Burnt Forest and Eldoret, January, 2008 and with journalists, Eldoret, January 11, 2008.

Human Rights Watch interviewed Kikuyu and Kisii victims of this violence from more than 20 different communities. Some had warnings of the impending violence. One Kikuyu merchant from a community near Turbo told Human Rights Watch that on December 30, “My children came home and told me that [they] were told by other [Kalenjin] children that they had to go away from there. They reported this to me. They were not upset—they just wondered why their friends were telling them that.” He reported this to the police in Turbo, who assured him there was nothing to worry about. Hours later a mob burned his home and business to the ground.<sup>132</sup>

The violence that followed Kibaki’s claim of victory followed the same pattern in many areas. Kikuyu residents of several rural communities made up of widely scattered homesteads told Human Rights Watch that on the night of December 30 they saw neighbors’ homes ablaze in the distance. Most immediately fled to larger towns or into nearby forests and returned the next day to find their own homes destroyed and looted.<sup>133</sup>

In several communities witnesses told Human Rights Watch that attackers came in three or four separate groups, each playing different roles. In many cases, children were among the attackers. A Kisii victim, one of over 10,000 chased from the town of Gata near Kitale by Marakwet (Kalenjin) attackers described how hundreds of men swept through the town in different units.<sup>134</sup> A Kalenjin man from a community near Turbo told Human Rights Watch: “We divided into groups, managed by the elders, in groups of not less than 15, and each group went to particular homesteads. They looted maize and belongings. The young people went, the old remained...the majority [of young people] went along.”<sup>135</sup>

A Kalenjin man recounted to Human Rights Watch his participation in a mob that murdered several Kikuyu people in Eldoret town the evening after the election result was announced. The mob had emerged from a community meeting in the Kapsoya

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<sup>132</sup> Human Rights Watch interview, Turbo, January 22, 2008.

<sup>133</sup> Human Rights Watch interviews, January 2008.

<sup>134</sup> Human Rights Watch interview, Kachibora, January 12, 2008.

<sup>135</sup> Human Rights Watch interview, Eldoret, January 21, 2008.

area of Eldoret where speakers urged those present to drive all Kikuyu out of Eldoret town. As the group set off down a road:

If we met a Kikuyu, we just beat him. I saw five people die that day personally. They attacked using all forms [of weapons]—arrows, pangas [machetes] and even beating with any crude tool. It was mob justice. The first killing...they approached him politely and asked him to produce his ID card. The one who got the card announced the name very loudly—it was a Kikuyu name. And the mob just attacked him. Those who produced IDs with Kalenjin or Luo names, they let them go.<sup>136</sup>

The man was remorseful about the killings. “It was an act of brutality,” he said.<sup>137</sup>

One of the most horrifying and well-publicized scenes of post-election bloodshed occurred in rural Kiambaa, a settlement scheme (land made available by the government to encourage settlement in the Rift Valley to relieve pressure on other areas) south of Eldoret. On January 1, a mob set fire to a church where terrified Kikuyu residents were seeking refuge, soaking mattresses the victims had brought with them with petrol and stacking them against the building. At least 30 people were burned alive, including a handicapped woman who died in her wheelchair.

Human Rights Watch interviewed several victims of the church attack at Kiambaa. One man’s five-year-old nephew was killed when a flaming mattress fell on top of him: “I saw my nephew on fire. He said, ‘uncle, uncle!’ but then he fell on his face because the petrol-soaked mattress was on his back and the fire took him.”<sup>138</sup> Many of the survivors said many of the attackers were people they knew well. “They are our neighbors,” one man said, adding that he recognized “a young boy who sells milk, and the son of the man who owns the farm that borders mine.”<sup>139</sup>

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<sup>136</sup> Human Rights Watch interview, Eldoret, January 19, 2008.

<sup>137</sup> Ibid.

<sup>138</sup> Human Rights Watch interview, Eldoret, January 18, 2008.

<sup>139</sup> Human Rights Watch interview, Eldoret, January 11, 2008.

In several communities anti-Kikuyu violence was expanded to also include known Kalenjin supporters of Kibaki's Party of National Unity. In several communities such as Turbo, Kurinet, and Soy, Kalenjin PNU supporters were forced to flee in fear for their lives alongside local Kikuyu.<sup>140</sup> In other communities mobs threatened to torch the homes of local Kalenjin PNU supporters unless they agreed to provide a goat or cow as compensation for failing to support the ODM.<sup>141</sup>

### *Attempts at Self-Defense and Reprisal Attacks*

In most of the communities surveyed by Human Rights Watch around Eldoret, Kikuyu residents fled without a fight from the mobs arrayed against them. But in some areas residents attempted to make a stand and defend their homes. These attempts were mostly unsuccessful. In most cases, groups of Kalenjin attackers were large and organized and easily overwhelmed the small number of Kikuyu farmers who sought to resist them. One Kikuyu farmer from a community called Kilao told Human Rights Watch,

We were about ten, we threw stones at them but they had bows and arrows, pangas. We realized we could not beat them. They shot one old man called Mwangi with an arrow. When he fell they cut him and opened his stomach. I was running away and I watched him being cut.<sup>142</sup>

A Kalenjin pastor from a community outside of Turbo told Human Rights Watch that in the area around his home he knew of 20 Kikuyu men who were killed trying to defend their homes, along with ten of the Kalenjin attackers, during three days of fighting.<sup>143</sup>

In at least one case, groups of Kikuyu men carried out brutal reprisal attacks during the initial bout of post-election chaos. On the evening of December 31 in Langas, an Eldoret

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<sup>140</sup> Human Rights Watch interviews, Eldoret, January 2008.

<sup>141</sup> Human Rights Watch interviews, Eldoret, January 2008.

<sup>142</sup> Human Rights Watch interview, Eldoret, January 11, 2008.

<sup>143</sup> Human Rights Watch interview, Eldoret, January 21, 2008.

neighborhood populated primarily by Kikuyu, Kikuyu mobs killed and beheaded several ethnic Luo residents and left their severed heads lying on the road.<sup>144</sup>

## Kikuyu Reprisals and Mungiki

As displaced people fled south from Eldoret towards the towns of Molo, Nakuru, and Naivasha in the Southern Rift Valley and into Central Province, the traditional territory of the Kikuyu, they brought with them brutal stories of burning, looting, rape and murder. Their stories helped to stoke tensions among Kikuyu residents in these other towns. Local leaders and Kikuyu elite there and in Nairobi reacted by organizing to contribute money for 'self-defence' forces.<sup>145</sup>

From January 23 to 30 Kikuyu militias in the Rift Valley towns of Molo, Naivasha and Nakuru led pogroms targeting local communities of Luo, Luhya, Kalenjin, and other minority groups seen as being associated with the ODM and, by extension, with violence against Kikuyu elsewhere in the country.<sup>146</sup> During that week, hundreds more died, thousands were displaced and the army was called in to disperse violent gangs in Naivasha and Nakuru.<sup>147</sup> Several serious atrocities were committed such as the burning of 19 people, including at least two babies, locked in a house in the Kabati area of Naivasha.<sup>148</sup>

There have been many reports that the feared criminal gang, Mungiki, is behind the reprisal attacks and even allegations that it has infiltrated the Kenya police.<sup>149</sup> The

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<sup>144</sup> Human Rights Watch interviews with Langas residents and police witness, Eldoret, January 2008.

<sup>145</sup> Human Rights Watch spoke to several professionals of Kikuyu ethnicity in Nairobi who had been asked to attend meetings to contribute money for such self-defense forces, Human Rights Watch interviews with three professional Kikuyus, (names withheld), Nairobi, February 2008. See also, Nation Team, "Raising funds to arm gangs for revenge poison delicate peace," *The Daily Nation*, February 27, 2008 and Katharine Houreld, "The Return of Mungiki," *Associated Press*, January 31, 2008. Houreld describes a government minister offering money to buy weapons.

<sup>146</sup> See for example, Tim Cocks, "Tribal gangs clash in Kenyan town, 27 killed," *Reuters*, January 26, 2008, <http://www.reuters.com/article/latestCrisis/idUSL26608784> (accessed February 29, 2008) and Andrew Cawthorne, "Kenya vows tougher action to stop killings," *Reuters*, January 30, 2008, <http://www.reuters.com/article/africaCrisis/idUSL30737452> (accessed February 29, 2008).

<sup>147</sup> *Ibid.*

<sup>148</sup> Human Rights Watch interviews (names withheld), Naivasha, February 15, 2008 and Tim Cocks and David Lewis, "Kenya's rift valley burns, death toll soars," *Reuters*, January 28, 2008, <http://www.reuters.com/article/latestCrisis/idUSL28458948> (accessed February 29, 2008).

<sup>149</sup> Juma Kwayera, "Mungiki infiltrates Kenya police," *Mail and Guardian*, February 7, 2008; see also, Thilo Thielke, "Bloodshed in Kenya: We will kill everyone!," *Der Spiegel*, February 5, 2008; Patrick Muriungi, "Panic over alleged Mungiki

Mungiki are a brutal criminal gang that promotes a violent brand of Kikuyu chauvinism. They emerged in the late eighties as a principally cultural and spiritual movement promoting Kikuyu heritage and culture, but increasingly became involved in organized crime in the slums of Nairobi in the 1990s. By 2002 they were a well-established group with large numbers of followers and alleged ties to leading politicians. Since then the government has cracked down on them.<sup>150</sup> In 2007 the group was driven underground and badly weakened through a violent government campaign aimed at its suppression. The Kenyan National Commission on Human Rights alleges that Kenya's police summarily executed at least five hundred suspected Mungiki members in the process.<sup>151</sup>

There are many rumors that individuals close to the Kibaki government have been involved in re-activating the Mungiki. But some leaders of the gang told Human Rights Watch that they remain opposed to the government and would not work with the Kibaki administration.<sup>152</sup> The police apparently also believe that, "Mungiki high command are not involved," in recent attacks, but that the violence has, "all the hallmarks of Mungiki operations".<sup>153</sup> The leadership claims that former Mungiki leader Ndura Wariunge is recruiting "defectors" to a "fake Mungiki" and mobilizing youth to order for politicians and businessmen in the Rift Valley.<sup>154</sup>

The distinction between the various Mungiki factions will be an important one for a court to determine when identifying those behind the recent violence, but as far as the victims are concerned, it makes little difference who wielded the machete or threw the match. Victims commonly refer to any group of marauding Kikuyu youth as 'Mungiki'. In fact the over-use and mis-use of the label serves the attackers well since the very name instills terror.

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presence," *The Standard*, January 31, 2008; "Kenya at risk of new wave of violence," *IRIN*, January 22, 2008; Star team, "Militias prepare for war," *Nairobi Star*, February 20, 2008.

<sup>150</sup> For a brief history see David M. Anderson, "Vigilantes, Violence and the Politics of Public Order in Kenya," *African Affairs* (2002), pp. 101, 531-555.

<sup>151</sup> See Kenya National Commission on Human Rights, *Preliminary Report on Alleged Execution and Disappearance of Persons between June and October 2007*, November 2007.

<sup>152</sup> Human Rights Watch interview [names withheld], Nairobi, February (date withheld), 2008.

<sup>153</sup> Human Rights Watch interview with police spokesman, Nairobi, February 20, 2008.

<sup>154</sup> Human Rights Watch interview (names withheld), Nairobi, February (date withheld), 2008.

Whether or not the young men involved were genuine members of Mungiki or not, the Kikuyu militias who struck in late January were organized, paid, and directed by local leaders, businessmen, and, in some cases, PNU councillors and mobilizers. The extent to which the local organizers were in touch with senior PNU politicians or members of the government is unclear. But circumstantial evidence suggests that senior members of the government may have been aware of what was going on. Mungiki leaders told Human Rights Watch that they had described the activities of their renegade colleague, Wariunge, in detail to the police and the government. We were unable to corroborate this claim. Other reports cited by the BBC describe contacts between the renegade Mungiki leader and State House, and police complicity in the ferrying of Mungiki fighters to Naivasha and Nakuru. Several newspaper articles also describe the involvement of unnamed government ministers in raising funds for self-defense units.<sup>155</sup>

## Revenge in Naivasha

Revenge attacks for the killing and chasing of Kikuyus from Western, Nyanza, and Northern Rift Valley provinces began in Nakuru and Molo on January 24 and reached Naivasha on January 27.<sup>156</sup> In Naivasha, Kikuyu militias met little resistance, but in Nakuru the attacks sparked a succession of Kalenjin counter-attacks. In Molo, clashes have been ongoing for many months even before the elections.<sup>157</sup>

Non-Kikuyu residents in different parts of Naivasha town were targeted in the attacks. According to some of the young men that took part, several who were self-proclaimed Mungiki members and several who were not, there had been a meeting earlier in the week, on Wednesday, January 23, in a local hotel:<sup>158</sup>

This was not done by ordinary citizens, it was arranged by people with money, they bought the jobless like me. We need something to eat each day. The big

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<sup>155</sup> *BBC Newsnight*, March 5, 2008, Nation Team, "Raising funds to arm gangs for revenge poison delicate peace," *The Daily Nation*, February 27, 2008 and Katharine Houreld, "The Return of Mungiki," *Associated Press*, January 31, 2008.

<sup>156</sup> Tim Cocks and David Lewis, "Kenya's rift valley burns, death toll soars," *Reuters*, January 28, 2008, <http://www.reuters.com/article/latestCrisis/idUSL28458948> (accessed February 29, 2008).

<sup>157</sup> Human Rights Watch interviews Naivasha and Nairobi, February 2008.

<sup>158</sup> Human Rights Watch interviews with Mungiki members (names withheld), Naivasha, February 13, 2008 and interviews with Kikuyu youth, non-Mungiki members, Naivasha, February 15, 2008.

people at the [bus] stage, the ones who run the matatu [minibus] business, they called us [the jobless who hang around there] to a meeting around 2 p.m. They said there was a plan to push out the Luos because they were planning to attack us. They said we should be ready on Saturday. I recognised the leaders, they are the owners of businesses in town, they did not hide their faces. We were paid 200 shillings for going to the meeting, and we were told we would get the rest after the job, it was like a business.<sup>159</sup>

According to the youth, there was then another meeting on Saturday, January 26 in the afternoon. The organizers present at the meeting were well known local businessmen who had campaigned for a PNU candidate and former MP during the election. The youth who attended the meeting recalled: “We were told that only Luo houses should be burnt and that the mission starts in the morning. Every person was given 100 or 200 shillings.”<sup>160</sup>

Luo victims in Kedong IDP camp claimed that Kikuyu friends of theirs had told them of similar plans.<sup>161</sup> One man described seeing three trucks with armed men arriving on the night of Saturday, January 26 in the Merera/Karacta area in the company of a local businessman: “My Kikuyu friends told me what was planned,” he said. “It was not a secret.”<sup>162</sup>

Violence started across the town on Sunday morning, January 27. One of the young men who participated in the attacks said, “On Sunday morning the mob went up to Kabati [an area of Naivasha town]. They split into groups. Some of them I recognised, some of them not. They blocked all the roads, even cars were not getting in or out.” He claimed he joined in to avoid discrimination, but nevertheless witnessed the burning and killing of Luo residents:

I went along just to pretend that I was with them. I saw a man cut, and a house burned, the one with all the people in. It was around twelve in

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<sup>159</sup> Human Rights Watch interview (name withheld), Naivasha, February 15, 2008.

<sup>160</sup> Human Rights Watch interview Mungiki members (names withheld), Naivasha, February 13, 2008.

<sup>161</sup> Human Rights Watch interviews (names withheld), Naivasha, February 14, 2008.

<sup>162</sup> Human Rights Watch interview (name withheld), Naivasha, February 14, 2008.



the afternoon. The house was surrounded by a mob. You can't tell who lit the fire, there were too many people surrounding the place and watching. But I saw boys go in and take the kids out of the house before the place was set on fire with the man left in there. But they did not know that in the back room were hiding more people.<sup>163</sup>

In fact 19 people were hiding in the back room including women and children and two infants under two years old. They all burned to death.

Other young boys living in Kabati also claimed that when the mob came they were forced to join in. A witness told Human Rights Watch, "On that day when the Kikuyu boys came, it was war. They forced us to go with them, I did not know them."<sup>164</sup> Another resident, a Kisii boy in secondary school whose home was burned by mistake, added, "Their plan was to destroy, they were looking for Luo houses, only Luo. They just asked people who was living in each house, they had some local boys who knew which houses to burn."<sup>165</sup>

Some Kikuyu residents of Kabati estate tried to claim that the Luo set their own houses on fire because they were afraid of the Mungiki.<sup>166</sup> But a woman who had been chased by Kalenjin fighters away from her home in Kitale, in Northern Rift Valley, and had come to stay with relatives in Kabati said, "I'd rather be in Kitale being attacked by Kalenjin than have to witness again what they did to the Luos here; rather Kitale."<sup>167</sup> Another female resident said she had received several threats to keep quiet because of what she had seen and because she knew some of those responsible:

I know them, these jobless boys. I saw two or three people being cut and killed. One old man, Luo, was beaten, but he refused to die like that so they

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<sup>163</sup> Human Rights Watch interview (name withheld), Naivasha, February 15, 2008, see also, BBC, "Kenyans 'forcibly recruited to fight'," *BBC Online*, January 29, 2008, <http://news.bbc.co.uk/1/hi/world/africa/7215107.stm> (accessed March 4, 2008).

<sup>164</sup> Human Rights Watch interview (name withheld), February 15, 2008.

<sup>165</sup> Human Rights Watch interview (name withheld), February 15, 2008.

<sup>166</sup> Human Rights Watch interviews, Naivasha, February 15, 2008.

<sup>167</sup> Human Rights Watch interview, unidentified woman, Naivasha, February 15, 2008.

took turns chopping. Then the one who finished him off licked the blood from the blade, then they moved to the next plot.<sup>168</sup>

In the center of town, a Kikuyu resident who was sheltering Luo children in her home described watching local businessmen and PNU mobilizers, the same individuals mentioned by the youth at the meeting, directing militias on the street in blocking roads, telling them “good job” and arguing with policemen on Sunday afternoon.<sup>169</sup> Later, she said, a Kikuyu mob led by one well-dressed man whom she did not recognize came to her building with a list of three Luo names. They wanted to know which apartments belonged to the Luos.<sup>170</sup>

Out of town, in the settlements where Luo migrant workers from the large commercial flower farms reside, the pattern was distressingly familiar with mobs burning houses, killing men, and, in one case, throwing an old man into a burning house.<sup>171</sup>

Young men interviewed by Human Rights Watch claimed that they were offered 7,000 shillings (\$100) for taking part and 10-15,000 (\$200) for each Luo man beheaded.<sup>172</sup> Luo victims and local human rights activists also mention similar figures.<sup>173</sup>

The official total killed as a result of the clashes in Naivasha was 41. Twenty-three were burned, including 13 children, seven were shot dead by police and the rest killed with machetes. There were four victims of forced male circumcision treated at the hospital, all of whom survived.<sup>174</sup>

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<sup>168</sup> Human Rights Watch interview (name withheld), Naivasha, February 15, 2008.

<sup>169</sup> Human Rights Watch interview (name withheld), Naivasha, February 14, 2008.

<sup>170</sup> Ibid.

<sup>171</sup> Human Rights Watch interviews with Luo victims, Kedong IDP camp, Naivasha, February 14, 2008.

<sup>172</sup> Human Rights Watch interview (name withheld), Naivasha, February 15, 2008.

<sup>173</sup> Human Rights Watch interviews (names withheld), February 14, 2008.

<sup>174</sup> Human Rights Watch interviews with Morgue officials and Chief Doctor, Naivasha Hospital, February 14, 2008.

## *Official Response*

The police, with a woefully inadequate 60 officers in Naivasha,<sup>175</sup> were not able to control the violence. Indeed, by their own admission they were only able to rescue those threatened with attack.<sup>176</sup> The Officer Commanding Police District (OCPD), Naivasha, told Human Rights Watch, “We went to rescue people, that was our priority, so we didn’t chase the perpetrators.”<sup>177</sup>

For reasons which are unclear, the police did not request assistance from the army or the prison service (which had 1,000 armed prison guards stationed in the town and available to help).<sup>178</sup> Instead, the prison commander took the decision to deploy his men himself, as he explained to Human Rights Watch, “My people came on Sunday, but the public started protesting, saying they didn’t want us there. So we withdrew, and that’s when all the mayhem started.”<sup>179</sup> Worse than that, the police actually fought their prison service colleagues. According to prison guards, there was a “misunderstanding” with the police resulting in one of their colleagues being shot in the leg by police.<sup>180</sup>

## **Tit for Tat in Nakuru**

Before the revenge attacks by Kikuyu militia, the town of Nakuru had escaped the violence that had engulfed much of the Rift Valley. Although the surrounding countryside was deeply affected, especially by the long-running conflicts in Kuresoi and around Molo, Nakuru town had been quiet. That changed on January 24.

Mungiki leaders told how local businessmen and politicians met at a local hotel on January 24 to organize themselves.<sup>181</sup> A businessman who was present confirmed to

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<sup>175</sup> Human Rights Watch interview with unidentified police officer, Naivasha, February 15, 2008.

<sup>176</sup> Human Rights Watch interview with Officer Commanding Police District (OCPD), Naivasha, February 15, 2008.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> Human Rights Watch interview with Benson Makuru, Naivasha Prison, February 14, 2008.

<sup>180</sup> Human Rights Watch interview with prison guards, Naivasha Hospital, February 14, 2008.

<sup>181</sup> Human Rights Watch interviews (names withheld), Nairobi, February (date withheld), 2008.

a local journalist that the meeting, one of several, did take place.<sup>182</sup> Many rumors exist in Nakuru town about who was at the meetings and who was actually behind the co-ordinated attacks of January 24-26. The testimony provided to Human Rights Watch does not substantiate allegations against specific individuals, but from the pattern of attacks it was clearly an organized operation and sympathetic Kikuyus warned their non-Kikuyu friends and neighbors to leave ahead of time. For example, a journalist was told by someone present at the organizing meetings: “get as far away as you can.”<sup>183</sup> Non-Kikuyu residents of ‘Free Area’, a suburb of Nakuru, described being warned by Kikuyu friends, “there’s going to be an operation.”<sup>184</sup>

On January 25, large numbers of armed Kikuyu men carrying pangas, knives, and petrol bombs attacked non-Kikuyu homes in several different areas of Nakuru town.<sup>185</sup>

In the ‘Free Area’ suburb, many Kalenjin and Luos sought safety in the compound of a local leader. Here, at least, the police, in the face of large crowds, appear to have done what they could to fulfil their responsibility to protect members of the public. One man described seeing police chasing groups of armed men coming out of a neighboring house belonging to a former MP. “They came out from [his place] and they all had new pangas, shining in the sun.”<sup>186</sup> That same morning a woman who attempted to leave the compound where police were protecting non-Kikuyu, was hacked to death by the mob in front of those sheltering there. “We watched through the fence,” explained one witness.<sup>187</sup>

The Kikuyu militias were also forcibly circumcising Luo men. One Luhya witness was spared because he was already circumcised but he was forced to accompany the group:

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<sup>182</sup> Human Rights Watch interview (name withheld), Nakuru, February 16, 2008.

<sup>183</sup> Ibid.

<sup>184</sup> Human Rights Watch interviews (names withheld), Nakuru, February 16, 2008.

<sup>185</sup> Ibid.

<sup>186</sup> Human Rights Watch interview, (name withheld), Nakuru, February 16, 2008.

<sup>187</sup> Ibid.

Our group was about 50 people—spread along the road. The Kikuyus then started checking everybody, and circumcising Luos right there. I saw two of these. They grabbed one man, about 30 years old, and told him to remove his pants. He just kept saying, ‘What?! What?’ Then they forcibly removed his pants. One was holding his penis, and another one was cutting his foreskin with a piece of a broken Fanta bottle. Others were cheering, chanting ‘Ohe, ohe’ and saying, ‘Kill him.’ They were saying all Luos should go back to Nyanza... The other man was 50 or 60 years old. They saw him on the road, and started yelling, ‘Luo, Luo.’ They seized him, and first removed all his clothes. Then several people lifted him up, and one man grabbed his penis, and another one circumcised him with his panga. They then dropped the old man on the ground and started hacking him, and then cut his head off. Nobody dared to help him.<sup>188</sup>

### *Kalenjin Reprisals*

Most of the displaced Luos interviewed by Human Rights Watch were temporarily living in the Furaha Stadium, waiting to leave to their “ancestral areas” of Nyanza and Western province.<sup>189</sup> However, the Kalenjin communities within and around Nakuru town struck back on subsequent days. They attacked and burnt Githima estate, a majority Kikuyu area.<sup>190</sup> They also attacked the Mwareke area on the southern side of the town.

According to one Kikuyu youth who was called to help defend against the Kalenjin in Mwareke, the Kalenjin men and boys were also organized and paid to fight, echoing earlier reports<sup>191</sup>:

We cornered one of them. He confessed and said, ‘Actually I was just pushed and paid to fight.’ He was asking for forgiveness, although in fact we just

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<sup>188</sup> Human Rights Watch interview, (name withheld), Nakuru, February 16, 2008.

<sup>189</sup> Human Rights Watch interviews, Nakuru, February 16 2008.

<sup>190</sup> Human Rights Watch interview, Nakuru, February 16, 2008.

<sup>191</sup> Jeffrey Gettleman, “Signs in Kenya that killings were planned,” *The New York Times*, January 21, 2008.

killed him anyway. He said he was a Standard Eight pupil, this year he was supposed to go to Form One [first year of secondary school].<sup>192</sup>

The Nakuru Provincial hospital confirmed that the victims of the clashes were from all ethnic groups. A medical official at the hospital told Human Rights Watch, “The majority were men, no children. Kikuyus, Kalenjin, Luos, and Luhyas. At the beginning, mostly Kikuyus, then others. Those from Nakuru town were mostly Luos; those from the district – Kalenjins and Kikuyus.”<sup>193</sup>

The hospital morgue reported 56 deaths, while the municipal morgue recorded 105 separate deaths since the beginning of the revenge attacks on January 25, an official total of 161 for Nakuru district alone.<sup>194</sup> In addition, hundreds of houses belonging to people on all sides were burned and thousands of people were displaced.

### *Police Response*

Several witnesses describe the police protecting the house of the local leader in ‘Free Area’ and firing in the air to disperse mobs in various areas in Nakuru town and Phodamali in Nakuru district.<sup>195</sup> From the witness descriptions it appears that the police were hopelessly outnumbered. Numerous people describe the compound being surrounded by hundreds, if not thousands of armed Kikuyu men, shaking the fence and threatening those inside while GSU police struggled to scare them away.<sup>196</sup>

The senior police officer for Nakuru, the Officer Commanding Police District, was transferred immediately after the clashes. His successor, who began work on February 3, claimed no knowledge of arrests prior to that date, nor when meeting Human Rights Watch did he know if any investigations were underway in connection with the organization of the attacks. Between February 3 and 18 he had made approximately 30 arrests in connection with the attacks, but all of those suspects

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<sup>192</sup> Human Rights Watch interview, (name withheld), Nakuru, February 16, 2008.

<sup>193</sup> Human Rights Watch interview, medical superintendent, Nakuru Hospital, February 18, 2008.

<sup>194</sup> Human Rights Watch interviews with unnamed officials, Nakuru Municipal Mortuary, February 16, 2008.

<sup>195</sup> Human Rights Watch interviews (names withheld), Nakuru, February 16, 2008.

<sup>196</sup> Ibid.

were released on bail.<sup>197</sup> The police spokesman in Nairobi claims that vigorous investigations into the organization of the attacks in Nakuru are underway.<sup>198</sup> However, this is not the view from the ground.

## **An Endless Cycle of Violence in Molo**

Molo town and district have been the site of ethnic clashes for many years, dating back to the last wave of state-sponsored violence in the early 1990s.<sup>199</sup> Violence flared again in 2003, 2005, and 2006. In the run up to the election of December 2007 politicians incited militias to attack supporters of rivals and populations unlikely to vote for them.<sup>200</sup> In nearly all of these incidents, the Kikuyu population were the victims of violence and not the perpetrators. Immediately following the announcement of the presidential election result, attacks against Kikuyus and their property began again.<sup>201</sup> But now Kikuyu are also beginning to perpetrate revenge attacks.

In previous bouts of violence in Molo, including prior to the 2007 election, MPs and former MPs have been implicated.<sup>202</sup> Human Rights Watch heard testimony describing the organization or facilitation of violence since the December 2007 election by both opposition ODM and ruling party PNU representatives.

A former councillor in Sirikwa, where an ODM MP has a house, described how, beginning on December 31 armed Kalenjin fighters gathered in the MP's property and launched attacks on neighboring Kikuyu houses from there.<sup>203</sup> A Kikuyu neighbor of the MP described a similar scene: "[The MP] was away but a local Kalenjin leader who I know had boys there under orders, he told me to get out of my house and they looted everything....Three days later more fighters came from Bomet, they were all

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<sup>197</sup> Human Rights Watch interview with OCPD Nakuru, February 18, 2008.

<sup>198</sup> Human Rights Watch interview with police spokesman, Nairobi, February 21, 2008.

<sup>199</sup> See for example, Africa Watch, *Divide and Rule*.

<sup>200</sup> See IDP Network of Kenya, 'Internal Displacement Alert and Analysis: Kuresoi constituency,' December 2007.

<sup>201</sup> Ibid, postscript to IDP Network, Internal Displacement Alert, January 6, 2008 and Human Rights Watch interviews, Molo, February 2008.

<sup>202</sup> See Africa Watch, *Divide and Rule*. The Akiwumi report (1999) names local MP Kipkalaya Kones and the IDP Network of Kenya report, above, mentions former Kuresoi MP Moses Chebiot.

<sup>203</sup> Human Rights Watch interview with former Molo Town Councillor (2002-2007), Sirikwa, February 18, 2008. . . He also claimed that the fighters were paid between 500-1,000 shillings each by local businessmen.

staying at [his] place.”<sup>204</sup> Many houses were burnt and most Kikuyu residents fled to Molo town.<sup>205</sup> Killings and arson took place in many other villages in Kuresoi and Molo districts.<sup>206</sup>

Later in January, Kikuyu leaders organized a counterattack at a farm, the home of a Kalenjin businessmen alleged to be involved in funding Kalenjin militia. One of the Kikuyu youth who went along to the meeting and took part in the subsequent attack explained what happened:

On January 22, we were called to a meeting by one of our elected [PNU] councillors at a school—word went around to all the youth. We were told they have work for us, just go and follow orders, everyone should bring their weapon. They said there would be food and, if we did a good job, money. At that time war was all around the town, there was no secret about the meeting. We went to get our weapons and then immediately went to [the] farm, we thought we would be able to keep whatever there was at the farm to loot, sheep, cattle etc. Someone had tipped off the Kalenjin, we met warriors waiting for us. We did nothing, they killed those who were unable to run away, mostly the older ones. Thirteen were killed. Then the Kalenjin started burning houses on the edge of town. I went home to sleep. I said I’ll never try it again!<sup>207</sup>

Other youth who took part together with local human rights activists confirmed the numbers of dead and the account of the incident, including naming those who had organized it.<sup>208</sup> The episode seems not to have deterred other groups of Kikuyu from attacking Kalenjin communities and burning Kalenjin businesses in neighboring towns. In Mau Summit, 15 kilometers from Molo, Kalenjin men showed Human Rights Watch where Kikuyu militias had burned Kalenjin businesses and homes and explained that, “they burned ours so we burned theirs.” They proceeded to show us

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<sup>204</sup> Human Rights Watch interview (name withheld), Molo, February 18, 2008.

<sup>205</sup> Human Rights Watch interviews (names and locations of interview withheld), February 18, 2008.

<sup>206</sup> Human Rights Watch interviews with IDPs in Molo, (names withheld), February 17 and 18, 2008.

<sup>207</sup> Human Rights Watch interview (name and location of interview withheld), February 17, 2008.

<sup>208</sup> Human Rights Watch interview, Human Rights activists (names withheld), February 17, 2008.



the many more Kikuyu properties that had been razed to the ground.<sup>209</sup> As of March 1, further attacks were continuing.<sup>210</sup>

## Chased from Central Province

Following the rigged election, there was tension in Central Province, a traditional Kikuyu area, among people from different ethnic groups, but few incidents of violence. As displaced people returned from the Rift Valley and news spread of the killings in Eldoret and elsewhere, the temperature rose and animosity against non-Kikuyu populations associated with the opposition grew. By mid to late January those feelings were beginning to boil over.

Verbal warnings and leaflets started circulating giving non-Kikuyu residents in Thika, Juja, Nyeri, and other towns in Central Province a deadline for leaving. Some said a week, others, like this eerily poetic leaflet seen by Human Rights Watch, said, “No more clashes but war. Luo, Luya and Nandi we give you 24 hrs you pack and go – failure to that we need 200 heads b4 peace hold once more.”<sup>211</sup>

Those on the receiving end of such threats said that they reported the matter to the police. Nevertheless, they did not feel safe and on January 31 many people from those communities moved to police stations for protection.<sup>212</sup> Those who did not leave or move to the police stations received a visit from masked men who threatened to behead them if they did not move. According to one man who fled, the masked men said: “Are you Luos? So what are you still doing here?! Get out or tonight we’ll come for your heads.”<sup>213</sup>

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<sup>209</sup> Human Rights Watch interviews, unidentified warriors, Mau Summit, February 17, 2008.

<sup>210</sup> Human Rights Watch interview with journalist, Molo, by phone, March 3, 2008.

<sup>211</sup> Photocopied notice shown to Human Rights Watch in an interview with IDPs in Jamhuri Gardens, Nairobi (names withheld), February 12, 2008.

<sup>212</sup> Ibid.

<sup>213</sup> Human Rights Watch interview with IDP in Jamhuri Gardens, Nairobi, (name withheld), February 12, 2008.

### *Police Response*

The police did in fact arrest some of the perpetrators and brought them to Thika police station where displaced persons were gathered on Friday, February 1. According to witnesses at the police station, an angry Kikuyu mob surrounded the police station on the following morning and the local MP, George Thuo, persuaded the police to release the arrested persons “for the sake of peace.”<sup>214</sup>

### **The Potential Long-Term Impact of Violence: Ethnic Engineering**

The events of the first months of 2008 have dramatically altered the ethnic makeup of many parts of Kenya. Scores of communities across the Rift Valley, including most of Eldoret itself, are no longer home to any Kikuyu residents. The rural areas outside of Naivasha, Nakuru, and Molo are similarly emptying of Kikuyu while Kalenjin and Luo are leaving the urban areas. In Central Province, few non-Kikuyu remain. The slums of Mathare, Kibera and others in Nairobi have been carved into enclaves where vigilantes from one ethnic group or another patrol ‘their’ areas.

Many have moved to different parts of the country where their ethnic group is in the majority, sometimes referred to as ‘ancestral’ areas. But displaced persons’ camps all over the country are still full of people who have nowhere to go. Some displaced residents would like to return home. As one farmer forced to seek shelter at the displaced persons camp in Eldoret put it, “My house has been burnt three times: in 1992, 1997 and now. I return each time because I have nowhere else to go.”<sup>215</sup> But others are stuck between a rock and a hard place, with nowhere to move to and yet unwilling to risk return to their property.

All the displaced Luo from Central Province interviewed by Human Rights Watch said that they would not go back there. And a large majority of the displaced Kikuyu interviewed said that they would not consider returning home because they could not feel safe either.

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<sup>214</sup> Human Rights Watch interviews with IDPs Jamhuri Gardens, Nairobi (names withheld), February 12, 2008.

<sup>215</sup> Human Rights Watch interview, Eldoret, January 18, 2008.

Human Rights Watch interviewed many Kalenjin residents of affected communities who either participated in or supported the violence against local Kikuyu. Most were emphatic in declaring that they would never allow their former neighbors to return.<sup>216</sup> Young men in several different communities said that they had not originally sought to kill Kikuyu residents but would do so if they tried to reclaim their land.<sup>217</sup> As one Kalenjin elder near Burnt Forest put it, “if they come back, it will be war again.” Then he drew his index finger across his throat.<sup>218</sup> Kikuyu elders in Naivasha meanwhile explained that the Luos chased from there should never return.<sup>219</sup>

As displaced people move to communities where their ethnic group is in the majority, there is a real risk that ethnic jingoism will increase and tensions rise as victims share their stories. For a country with 42 ethnic groups, such a situation is a social, economic, and moral disaster. Essential health and education services are already under strain as staff from the ‘wrong’ ethnic group seek transfers or simply desert their posts.<sup>220</sup>

In order to forestall further deleterious effect of this social re-engineering, a national plan should be agreed by the parties to the coalition government and civil society for the safe return or re-location of displaced populations. Both the ODM and PNU mediation teams have discussed the formation of joint teams to assist re-settlement of displaced populations,<sup>221</sup> but rushing to provide transport for destitute people to go to ancestral areas that they may not even recognize, risks encouraging the ethnic fragmentation of the country.

Options for safe and voluntary return and local reconciliation must be a part of such discussions. The government’s approach to resolving the many questions around the rights of IDPs should be informed by the United Nations Guiding Principles on

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<sup>216</sup> Human Rights Watch interviews, January 2008.

<sup>217</sup> Human Rights Watch interviews, January 2008.

<sup>218</sup> Human Rights Watch interview, Burnt Forest, January 19, 2008.

<sup>219</sup> Human Rights Watch interviews, Naivasha, January 15, 2008.

<sup>220</sup> Human Rights Watch interview with hospital staff in Kisumu, January 14, 2008, Eldoret January 19, 2008, and in Nakuru, February 19, 2008.

<sup>221</sup> “Chief Adeniji to release talks road map,” *East Africa Standard*, March 4, 2008, <http://allafrica.com/stories/200803032037.html> (accessed, March 4, 2008).

internally displaced persons. Article 12 of the Pact for Security, Stability, and Development in the Great Lakes Region, which Kenya has ratified, commits states to implementation of national legislation for the protection of internally displaced persons.<sup>222</sup>

Given the history of displacement in Kenya, both due to previous political violence and the arbitrary seizure of land, there must be a comprehensive solution guaranteeing the rights of all internally displaced persons.

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<sup>222</sup> See 'International Conference on the Great Lakes Region: Pact on Security, Stability and Development in the Great Lakes Region' 14-15 December 2006 at: [http://www.internaldisplacement.org/8025708F004BE3B1/\(httpInfoFiles\)/60ECE277A8EDA2DDC12572FB002BBDA7/\\$file/Great%20Lakes%20pact\\_en.pdf](http://www.internaldisplacement.org/8025708F004BE3B1/(httpInfoFiles)/60ECE277A8EDA2DDC12572FB002BBDA7/$file/Great%20Lakes%20pact_en.pdf)

## The Response of the Kenyan Government

For several weeks, the Kibaki administration appeared unperturbed by the controversy and violence that followed the December polls, insisting on the legitimacy of its re-election. Negotiators dragged their feet for more than nine weeks before a power-sharing arrangement was finally reached, a delay that cost hundreds of Kenyan lives.

The Kibaki government initially reacted to mediation efforts with cynicism and intransigence, refusing to agree to any compromise. Instead of working to resolve substantive issues, the Kibaki government used the violence as an opportunity to taint the ODM leadership with as-yet unsubstantiated accusations of sponsoring ethnic cleansing and other international crimes. When a settlement was finally brokered, it was only after a host of Kenya's international partners had done everything possible to pressure Kibaki into compromise.

Now that a political agreement on power-sharing has been reached and all political parties appear committed to a coalition government, politicians from all sides have a shared responsibility to uphold the state's duty to protect and safeguard the rights of its citizens. They also have a shared duty to make sure that their written commitment to end impunity and identify perpetrators is made a reality through the actions of the police and the Commissions of Inquiry and Truth, Justice and Reconciliation established through the mediation process.

### The Role of the Police

#### *Allegations of Partiality*

In the circumstances, the police can reasonably claim to have been overwhelmed by the scale of the violence.<sup>223</sup> They have a considerable task simply protecting those displaced by the violence and maintaining ordinary security where law and order has broken down. However, the police response to the protests and the violence varied significantly from place to place. The degree to which the police response was selective or partial is an issue that must be further investigated in relation to both

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<sup>223</sup> See for example, Douglas Mpuga, "Kenya Crisis: Police Overstretched," *Voice of America*, January 28, 2008.

the criminal investigation of individual responsibility for human rights violations and the inquiries into the overall policing response to the demonstrations and riots and to the incidents of spontaneous and organized violence.

The police responded in an uneven fashion to the political, ethnic-based violence. While willing to shoot to kill without justification in Kisumu, when lives were not at stake, police officers in other areas markedly did not use lethal force in circumstances when they might have been justified in doing so to protect lives. In Eldoret on the other hand, police were often slow to respond, but nevertheless Human Rights Watch documented several cases where officers intervened to prevent gangs from attacking.<sup>224</sup> The army was deployed in response to the chaos in Naivasha and Nakuru but not during the serious violence in Kisumu or Eldoret.<sup>225</sup> Meanwhile, in Molo, the coordinator of the IDP Network, an NGO, was reportedly beaten by police who had sided with Kalenjin militias.<sup>226</sup> The decisions and the actions of police commanders on the ground need to be investigated to understand what orders were given and what actions were taken or not taken in response to similar threats.

In this highly polarized and volatile political environment, the spotlight is on the police to ensure that all acts of violence against persons from any community are investigated with equal rigor. Many communities are quick to allege that they are not being fairly treated because of political bias.

In Eldoret Human Rights Watch met senior officers from the Criminal Investigations Department (CID) who had been dispatched from Nairobi to take statements from displaced persons and investigate the organization of violence by Kalenjin leaders. To date, these investigations have led to at least six arrests of local leaders, including Jackson Kibor, a prominent Kalenjin chief previously named in the Akiwumi report for organizing violence.<sup>227</sup> However, no Kikuyu leaders have been apprehended for their part in the reprisals in Nakuru and Naivasha. Despite

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<sup>224</sup> Human Rights Watch interviews, Eldoret, January 2008.

<sup>225</sup> “Des hélicoptères tirent au-dessus de la foule à Naivasha,” *Reuters*, January 29, 2008.

<sup>226</sup> Human Rights Watch email correspondence with Jacqueline Klopp, March 9, 2008.

<sup>227</sup> Human Rights Watch interview with police spokesman, Nairobi, February 20, 2008, and The Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya (The Akiwumi report) 1999 available at [http://marskenya.org/pages/stories/Akiwumi\\_Report/](http://marskenya.org/pages/stories/Akiwumi_Report/) (accessed February 21, 2008).

assurances from police headquarters in Nairobi that investigations into the violence in Nakuru and Naivasha are ongoing,<sup>228</sup> the non-Kikuyu victims of clashes in displaced camps in Naivasha and Nakuru say the police have not come to take their statements.<sup>229</sup> Thirty-seven suspected members of the Mungiki sect were arrested in February and 20 of them charged with membership of a proscribed society, but not for involvement in recent violence, according to the police.<sup>230</sup>

With a coalition government in place, the spotlight will be on the police to demonstrate the utmost impartiality in its work and especially in the equitable deployment of officers and resources to investigate all allegations of incitement and organization of violence, on all sides.

### **Police Overstretch**

Both major political parties committed themselves at the mediation process to the “identification and prosecution of the perpetrators” of the recent violence.<sup>231</sup> However, the police face clear limitations in their capacity to carry out investigations.

Even the police themselves acknowledge that investigations and prosecutions for past and recent crimes have not received the attention they require.<sup>232</sup> As noted by the Independent Medical and Legal Unit, the police have not been opening cases for every unnatural death as required by law.<sup>233</sup> The Oscar Foundation, a human rights watchdog, also faulted the government for not even recording deaths, let alone investigating them.<sup>234</sup>

The police reported that as of February 20 they had opened 5,600 case files where an offence had been committed and there is a recognized need to investigate and

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<sup>228</sup> Human Rights Watch interviews (names withheld) Naivasha, Nakuru, February 14-17, 2008.

<sup>229</sup> Human Rights Watch interview with police spokesman, Nairobi, February 20, 2008.

<sup>230</sup> Ibid.

<sup>231</sup> Kofi Annan, “Press Statement,” Nairobi, February 15, 2008, on file with Human Rights Watch.

<sup>232</sup> Human Rights Watch interview with police spokesman, Nairobi, February 19, 2008.

<sup>233</sup> Fred Mukinda, “Group faults probe into deaths,” *The Daily Nation*, February 25, 2008.

<sup>234</sup> Standard Reporters, “Government faulted on post-poll violence,” *The Standard*, February 19, 2008.

identify the perpetrator.<sup>235</sup> However, they have barely made a dent in that case load. As of February 20 they had arrested 232 people against whom the police have “a serious case,” and of these, 100 are pending before court.<sup>236</sup>

Human Rights Watch examined court records in Naivasha where 156 persons were arrested on charges of ‘preparing to commit a felony’. All were released on bail because the police had insufficient evidence for the court to deny bail. The charge was later downgraded to ‘possession of an offensive weapon’, a misdemeanor in Kenya, to which many pleaded guilty and, after a small fine, were released.<sup>237</sup> Eighteen others absconded whilst on bail.<sup>238</sup>

The police say they have opened 142 investigations into the conduct of some of their officers. Twenty have been fired for demanding bribes for providing escorts and five police officers have been charged including a murder charge for the officer filmed shooting unarmed protesters in Kisumu.<sup>239</sup> But 142 individual cases of police shooting, not all of them fatal, does not begin to capture the scale of those killed and injured by the excessive actions of police officers. Larger, more far-reaching inquiries are needed if the Kenya police is to truly address the use of excessive force and arbitrary killing, and undertake much-needed reform. Moreover, any investigation run solely by the police without independent oversight and control or real transparency will lack credibility.

Going forward, it seems clear that the police are stretched beyond their capacity and will need considerable assistance, possibly from international agencies. The work of any Truth, Justice and Reconciliation Commission or similar body will be undermined without much more effective police action or provision for its own teams of investigators.

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<sup>235</sup> Human Rights Watch interview with police spokesman, Nairobi, February 20, 2008.

<sup>236</sup> *Ibid.*

<sup>237</sup> Naivasha Magistrates Court, Court Record 144 of 2008.

<sup>238</sup> *Ibid.*

<sup>239</sup> Human Rights Watch interview with police spokesman, Nairobi, February 20, 2008. See also BBC, “Murder Charges for Kenya Police,” *BBC Online*, February 7, 2008, <http://news.bbc.co.uk/2/hi/africa/7232372.stm> (accessed February 27, 2008).



## Restrictions on the Media and Freedom of Assembly

Arguably, it was the government's ban on public gatherings that set the stage for violent confrontations between police and angry opposition supporters. Attempts to enforce the illegal ban led to many unnecessary deaths and rampant police abuses. The ban also required considerable police resources that might have been more usefully employed protecting citizens and displaced persons elsewhere in the country. The ban was finally lifted on February 8.<sup>240</sup>

The government also finally lifted its ban on live broadcasts on February 4 after more than a month.<sup>241</sup> Justified by the government as a necessary measure to control hate speech, the ban was widely condemned by international and national human rights organizations as an attempt to control basic information about the crisis.<sup>242</sup>

## Kenya National Dialogue and Reconciliation

The power-sharing agreement signed on February 28 brought relief to all Kenyans. The new coalition government is expected to take shape following the passage of the National Accord and Reconciliation Act in Parliament, the creation of the post of prime minister through a constitutional amendment, and the appointment of deputy prime ministers from both major parties.

There has been significant discussion of the agenda for the new government, building on the list of issues Kofi Annan identified with the parties, and announced on February 15. Annan mentioned:

Reforms and mechanisms... not limited to the following: comprehensive constitutional reforms, comprehensive electoral reform – including of the electoral laws, the electoral commission and dispute resolution mechanisms; a truth, justice and reconciliation commission; identification and prosecution of perpetrators of violence; respect for human rights; parliamentary reform; police

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<sup>240</sup> Eric Firkel, "Kenya ends public assembly ban, citing 'improved' security after unrest", *Jurist*, February 8, 2008, <http://jurist.law.pitt.edu/paperchase/2008/02/done.php> (accessed March 4, 2008).

<sup>241</sup> Human Rights House, "Kenya government lifts ban on live broadcasts," February 5, 2008, also at: <http://www.humanrightshouse.org/dllvis5.asp?id=6267> (accessed February 24, 2008).

<sup>242</sup> *Ibid.*

reform; legal and judicial reforms; commitment to a shared national agenda in parliament for these reforms; other legislative, structural, political and economic reforms as needed.<sup>243</sup>

Former Nigerian foreign minister, Prof. Oluyemi Adeniji, took over as the lead mediator when Annan departed on March 2, and he has announced a road map for the talks to address these many issues.<sup>244</sup> There is a surprising consensus among politicians and civil society on the problems with Kenya's existing institutions and the failures of successive governments to address the shortcomings. The challenge is not in reaching agreement but in the scope of the changes required. Annan's list reflects nothing less than a complete overhaul of Kenya's systems of governance and a U-turn in the culture and practice of government.

Making these changes a reality should be the proper response of the new coalition government to the crisis that has rocked Kenya and left so many dead and homeless. In doing so, the government will need much monitoring from civil society to deliver on its promises and to ensure that it properly confronts difficult choices, especially when it comes to accountability for past and current crimes.

Impunity is at the heart of Kenya's crisis of governance. On the one hand impunity for incumbent politicians suspected of looting public resources, a national tradition in Kenya, creates a situation that raises the stakes for incumbents as they seek to avoid investigation or prosecution if they lose office. And on the other hand, impunity for past episodes of electoral violence has contributed to its continued use as a political strategy. In 2002, politicians who had been publicly named for their role in political violence, notably George Saitoti and William Ole Ntimama, were appointed to Kibaki's cabinet.

One of the first priorities for the coalition government must be to ensure that no one suspected of inciting or organizing political violence is rewarded with cabinet positions. If the new regime is to address impunity it needs to be above suspicion itself. There will

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<sup>243</sup> Kofi Annan, "Press Statement," Serena Hotel, Nairobi, February 15, 2008.

<sup>244</sup> "Chief Adeniji to release talks road map," *East Africa Standard*, March 4, 2008 <http://allafrica.com/stories/200803032037.html> (accessed, March 4, 2008).

be a temptation among some Kenyan politicians to ignore accountability and ‘move on’. Indeed there have already been some suggestions that suspects should be released by the police.<sup>245</sup> Such moves must be resisted.

Some of the reforms described and being discussed by parties in the coalition government are rightly the preserve of the executive and parliament. However, other mechanisms are being established through the mediation process, such as the Independent Review Committee to examine the electoral failures and recommend remedies and election reforms; the Truth, Justice and Reconciliation Commission to examine human rights violations and historical injustices including corruption and land-grabbing dating from independence in 1963; and the Commission of Inquiry into recent violence which will examine, more narrowly, human rights violations including the response of state security forces between December 28, 2007 and February 28, 2008.

On paper, the terms of reference for these initiatives are impressive. There is one obvious omission in that neither the Committee examining the election nor the Commission of Inquiry into the violence is explicitly charged with investigating and recommending prosecutions under the Electoral Offences Act. Those who contributed to the rigging of the election should be held to account.

The challenge for the government will be in ensuring that the recommendations of the Committee and the Commissions actually result in criminal investigations and prosecutions. Previous government reports documented widespread involvement of politicians and state officials in fomenting violence around elections, in some cases less than ten years ago, and yet no action was taken.<sup>246</sup> The Truth, Justice and Reconciliation Commission’s terms of reference say that there will be no “blanket amnesties”.<sup>247</sup> It should be remembered that the clashes of 1991 to 1993, 1997, and 2002 are recent events; they are not historical crimes to be forgiven and forgotten. Some of the perpetrators are still in parliament. The Truth, Justice and Reconciliation

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<sup>245</sup> Luke Kapchanga and Noel Chepleon, “Leaders protest at war arrests,” *The Nation*, March 3, 2008.

<sup>246</sup> See ‘Background’ section which refers to the findings of the Akiwumi and Kiliku Commissions.

<sup>247</sup> The ‘terms of reference’ are included as annexes to this report.

Commission and the Commission of Inquiry must lead to justice, namely prosecutions and convictions, not be a vehicle for delaying or avoiding it.

In addition, long-running land grievances need to be addressed through a comprehensive solution, including passing laws to recognize historic occupation and use (including collective rights) and setting up a dispute resolution system that will investigate, determine, and remedy historic land disputes, including through compensation. This will need adequate financial support from the Kenyan government and donors.

A power-sharing arrangement is only the first step. The next months are a crucial moment of transition. Kenya has an opportunity to become a continent-wide example of a state willing to face historical injustices and guarantee the rights of its citizens. To do so, its leaders must deliver on the reforms and hold firm to the terms of the commissions charged with ending impunity and ensuring the accountability that is essential for the rule of law.

## The Response of International Actors

### An Example of 'The Responsibility to Protect'

The involvement of international actors such as foreign governments, the African Union, and United Nations agencies in the recent crisis has been considerable. They have put significant diplomatic pressure on the Kenyan government and the opposition to control violence, respect the human rights of Kenyans, and reach a political settlement. The swift and co-ordinated intervention of the African Union mediation team, headed by Kofi Annan and backed by the United Nations and select foreign governments, can be seen as a model of diplomatic action under the 'Responsibility to Protect' principles adopted by the UN while Kofi Annan was secretary-general.<sup>248</sup> Indeed both Raila Odinga and Mwai Kibaki have praised the AU, UN, and foreign governments for their role in encouraging and facilitating the power-sharing agreement.<sup>249</sup>

However, while acknowledging this positive role, it is important to remember that foreign governments took little action in the face of consistent and chronic patterns of corruption and impunity that characterized the Moi and Kibaki administrations. They concluded economic agreements through the IMF and World Bank and provided development assistance even while noting the "massive looting" of government funds in Kenya.<sup>250</sup> The US reaction to the resignation of John Githongo, head of Kenya's Anti-Corruption Commission, in February 2005, was simply to suspend aid for that Commission, a total of \$2.5 million; a negligible part of the \$100 million it provides annually.<sup>251</sup>

Having played a key role in bringing the parties to the table and reducing the political uncertainty in the country, international actors must now ensure that the long term

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<sup>248</sup> See for example the report of the Secretary General, 'In Larger Freedom' prepared for the 60th session of the UN general Assembly in 2005 which discusses the 'emerging norm of the responsibility to protect' at: <http://www.responsibilitytoprotect.org/index.php/pages/20> (accessed March 5, 2008).

<sup>249</sup> BBC, "Odinga pledges to rebuild Kenya," *BBC Online*, February 29, 2008, <http://news.bbc.co.uk/2/hi/africa/7270379.stm> (accessed February 2008).

<sup>250</sup> BBC, "US cuts anti-corruption aid," *BBC Online*, February 8, 2005, <http://news.bbc.co.uk/2/low/africa/4245767.stm> (accessed March 5, 2008).

<sup>251</sup> *Ibid.* See also Jeevan Vasagar, "EU freezes £83m aid to 'corrupt' Kenya," *The Guardian*, July 22, 2004 <http://www.guardian.co.uk/world/2004/jul/22/eu.kenya> (accessed March 5, 2008).

causes of instability that lead to human rights violations in Kenya are addressed. Peace and justice will remain elusive unless there is sustained action to address the long-term crisis of governance that has led to rampant corruption, impunity and the denial of Kenyans' democratic, social, and economic rights. To this end, continuing pressure on the coalition government and the parties is essential to ensure accountability for recent violence, and for previous crimes of corruption, political violence and land-grabbing, and to deliver on the promises of institutional reform.

Foreign governments, including Kenya's neighbors among the African Union, have a duty to keep all diplomatic mechanisms on the table and to provide all necessary assistance in order to ensure that the agreement to share power works and delivers on promises to address long-running human rights violations. This will likely involve financial support for compensation funds, including land—something for which the British have a special, historical, responsibility—technical support to the police and to the Independent Review Committee on the elections; the Truth, Justice and Reconciliation Commission; the Commission of Inquiry into the violence; and any other bodies set up as a result of the mediation.

While congratulating themselves on effective diplomatic action in this case, foreign governments should remember that decades of turning a blind eye to corruption, impunity, and mismanagement by Kenya's governments has contributed to the recent crisis. Moreover, it seems that the Kenyan government did not expect the strong reaction of international actors to the electoral fraud. Election fraud rarely carries diplomatic consequences. In part, the audacity of the Kibaki administration in clinging to the result and the status quo, was invited by donor governments' lukewarm defense of democratic principles and human rights in other parts of the continent.

Future development assistance, including World Bank agreements, must adhere more strictly to stated policies benchmarking non-humanitarian aid to principles of human rights and corruption. Failure to do so will only embolden Kenya's government to do the same again. Without much tougher standards demanded from outside, the rewards of corruption and gangsterism in politics will remain financially high and the penalties comparatively few, with tragic consequences for the people of Kenya.

## **Acknowledgments**

This report was written by Ben Rawlence, consultant to the Africa division, and Chris Albin-Lackey, senior researcher in the Africa division, based on research conducted by them and by Anna Neistat, senior researcher in the Emergency Response division.

The report was edited by Leslie Lefkow, senior researcher in the Africa division; Clive Baldwin, senior legal advisor; and Andrew Mawson, deputy director of the Program office of Human Rights Watch.

Production assistance was provided by McKenzie Price, associate in the Africa division. Anna Lopriore coordinated photo preparation and Andrea Holley prepared the report for publication.

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# Annex 1: Kenya National Dialogue and Reconciliation, Agreement establishing a Truth, Justice and Reconciliation Commission

TJRC

## Kenyan National Dialogue and Reconciliation

### TRUTH, JUSTICE AND RECONCILIATION COMMISSION

#### Background

Recalling the 14 February 2008 agreement by the Parties for a Truth, Justice and Reconciliation Commission, and in a spirit of reconciliation and national healing;

The Parties to the Kenyan National Dialogue and Reconciliation agree to the following general parameters and principles for the establishment of such a commission:

#### General Parameters

A Truth, Justice, and Reconciliation Commission ("the Commission") will be created through an Act of Parliament, which will be adopted by the legislature within the next four weeks.

The Commission will inquire into human rights violations, including those committed by the state, groups, or individuals. This includes but is not limited to politically motivated violence, assassinations, community displacements, settlements, and evictions. The Commission will also inquire into major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, especially as these relate to conflict or violence. Other historical injustices shall also be investigated.

The Commission will inquire into such events which took place between December 12, 1963 and February 28, 2008. However, it will as necessary look at antecedents to this date in order to understand the nature, root causes, or context that led to such violations, violence, or crimes.

The Commission shall receive statements from victims, witnesses, communities, interest groups, persons directly or indirectly involved in events, or any other group or individual; undertake investigations and research; hold hearings; and engage in activities as it determines to advance national or community reconciliation. The Commission may offer confidentiality to persons upon request, in order to protect individual privacy or security, or for other reasons. The Commission shall solely determine whether its hearings shall be held in public or in camera.

No blanket amnesty will be provided for past crimes. Individual amnesty may be recommended by the Commission in exchange for the full truth, provided that serious international crimes (crimes against humanity, war crimes, or genocide) are not amnestied, nor persons who bear the greatest responsibility for crimes covered by the Commission.

The Commission will complete its work and submit a final report within two years. The final report shall state its findings and recommendations, which will be submitted to the President and will be made public in fourteen days and tabled in Parliament.

#### Guiding Principles

The Commission will reflect the following principles and guidelines, taking into account international standards and best practices:



*Independence:* The Commission shall operate free from political or other influence. It shall determine its own specific working methodologies and work plan, including for investigation and reporting, and will set out its own budget and staff plan.

*Fair and balanced inquiry:* In all of its work, the Commission shall ensure that it seeks the truth without influence from other factors. In representations to the public through hearings, statements, or its final report, the Commission shall ensure that a fair representation of the truth is provided.

*Appropriate powers:* The Commission shall be given powers of investigation, including the right to call persons to speak with the Commission, and powers to make recommendations that shall be considered and implemented by the government or others. These recommendations may include measures to advance community or national reconciliation; institutional or other reforms, or whether any persons should be held to account for past acts.

*Full cooperation:* Government and other State offices shall provide information to the Commission on request, and provide access to archives or other sources of information. It is urged that other Kenyan and international individuals and organizations also provide full cooperation and information to the Commission on request.

*Financial support:* The Parties encourage strong financial support to the Commission. It is expected that the Government of Kenya will provide a significant portion of the Commission's budget. Other funding may be obtained by the Commission from donors, foundations, or other independent sources.

#### **Selection and Composition**

The Commission will consist of seven members, with gender balance taken into account. Three of the members shall be international. The members shall be persons of high moral integrity, well regarded by the Kenyan population, and shall include a range of skills, backgrounds, and professional expertise. As a whole, the Commission shall be perceived as impartial in its collectivity, and no member should be seen to represent a specific political group. At least two but no more than five of the seven commissioners should be lawyers.

In keeping with international best practices, and to ensure broad public trust in and ownership of the process of seeking the truth, the national members of the Commission shall be chosen through a consultative process. The Commissioners shall be named no more than eight weeks after the passage of the Act that establishes the Commission.

The three international members shall be selected by the Panel of Eminent African Personalities, taking into account public input.

Signed on this day, 4 March 2008:

On behalf of Government/PNU:



Hon. Martha Karua



Hon. Sam Onger

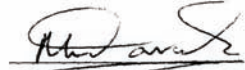


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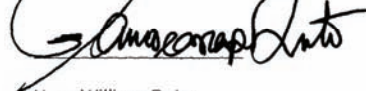


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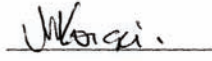
On behalf of ODM:



Hon. Musalia Mudavadi



Hon. William Ruto



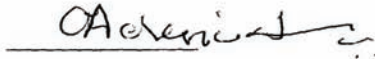
Hon. Sally Kosgei



Hon. James Orengo

Witnessed by:

For the Panel of Eminent African Personalities



H.E. Oluyemi Adeniji

Session Chair

## Annex 2: Kenya National Dialogue and Reconciliation, Agreement establishing a Commission of Inquiry on Post-Election Violence

### Kenyan National Dialogue and Reconciliation

#### COMMISSION OF INQUIRY ON POST-ELECTION VIOLENCE

##### Background

Recalling that the Parties have previously agreed to:

- Identify and agree on the modalities of implementation of immediate measures aimed at:
  - Ensuring the impartial, effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty are brought to justice.

And have expressed a commitment to:

- Identification and prosecution of perpetrators of violence, including State security agents
- Addressing issues of accountability and transparency

The Parties to the National Dialogue and Reconciliation, together with the Panel of Eminent African Personalities (The Panel), agree to the establishment of a *Commission of Inquiry on Post-Election Violence* (Commission of Inquiry).

This Commission of Inquiry will be a non-judicial body mandated (i) to investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 Presidential Election, (ii) investigate the actions or omissions of State security agencies during the course of the violence, and make recommendation as necessary, and (iii) to recommend measures of a legal, political or administrative nature, as appropriate, including measures with regard to bringing to justice those persons responsible for criminal acts. The Commission of Inquiry aims to prevent any repetition of similar deeds and, in general, to eradicate impunity and promote national reconciliation in Kenya.

##### Key Activities

The activities of the Commission shall be:

To investigate the facts and circumstances related to the violence following the 2007 Presidential election, between December 28, 2007 and February 28, 2008.

- To prepare and submit a final report containing its findings and recommendations for redress, any legal action that should be taken, and measures for future prevention.
- To prepare and submit a final report containing its findings and recommendations for redress, any legal action that should be taken, and measures for future prevention.
- To make recommendations, as it deems appropriate, to the Truth, Justice, and Reconciliation Commission.

##### National Cooperation

Kenyan authorities, institutions, parties, and others shall fully cooperate with the Commission of Inquiry in the accomplishment of its mandate, in response to requests for information, security, assistance or access in pursuing investigations, including:

- Adoption by the Government of Kenya of any measures needed for the Commission and its personnel to carry out their functions throughout the national territory with full freedom, independence and security;
- Provision by the Government of Kenya and all Kenyan State institutions of all information in its possession which the commission requests or is otherwise needed to carry out its mandate, with free access provided for the Commission and its staff to any archives related to its mandate;
- Freedom for the Commission to obtain any information it considers relevant and to use all sources of information which it considers useful and reliable;
- Freedom for the Commission to interview, in private, any persons it judges necessary;
- Freedom for the Commission to visit any establishment or place at any time; and
- Guarantee by the Government of Kenya of full respect for the integrity, security and freedom of witnesses, experts and any other persons who help in its work;

The Parties call upon States, relevant UN and AU bodies and, as appropriate, national and international humanitarian or other nongovernmental organizations to provide information to the Commission of Inquiry related to post-election violence, to make such information available as soon as possible and to provide appropriate assistance to the Commission.

#### **Composition**

The Commission of Inquiry will be composed of three impartial, experienced, and internationally respected jurists, or experts in addressing communal conflict or ethnic violence. Two of these shall be international, and one shall be Kenyan. They shall be selected by the Panel following consultation with the Government/PNU and the ODM, and appointed by the President.

A Support Office, based in Nairobi and with adequate expert staff, will be established to provide support to the members of the Commission.

#### **Methodology**

The Commission of Inquiry shall develop its own work plan and procedures. These will be guided in all respects by principles of fairness, impartiality, transparency, and good faith.

#### **Outputs and Timeline**

The Commission of Inquiry will start its work within 30 days following the appointment of its members. It will operate for three months, with an additional month if required. At the conclusion of its work it will submit a final report of its findings and recommendations to the President of Kenya, with a copy to the Panel. Main findings of the report will be made public within 14 days of submission, although certain aspects of the report or annexes may be kept confidential in order to protect the identity of witnesses or persons accused.

#### **Financing/Logistics**

The Commission of Inquiry will be funded by the Kenyan Government and the Trust Fund for National Dialogue and Reconciliation, including support from donor states or foundations. It will receive logistical support from the AU and the UN.



Signed on this day, 4 March 2008:

On behalf of Government/PNU:



Hon. Martha Karua



Hon. Sam Onger

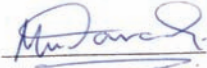


Hon. Mutula Kilonzo

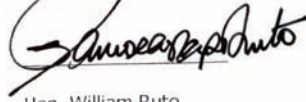


Hon. Moses Wetang'ula

On behalf of ODM:



Hon. Musalia Mudavadi



Hon. William Ruto




Hon. Sally Kosgei



Hon. James Orengo

Witnessed by:

For the Panel of Eminent African Personalities



H.E. Oluyemi Adeniji

Session Chair

## **Annex 3: Terms of Reference for the Independent Review Committee to investigate the General Election of 2007**

### **Kenya National Dialogue and Reconciliation**

#### **INDEPENDENT REVIEW COMMITTEE**

##### **Terms of Reference**

The members of the Panel of Eminent African Personalities (The Panel), together with the Parties to the National Dialogue and Reconciliation:

Recalling the 14 February 2008 agreement by the Parties, witnessed by H.E. Kofi Annan for the Panel of Eminent African Personalities, to establish an *Independent Review Committee*, a non-judicial body, which would be mandated to investigate all aspects of the 2007 Presidential Election and make findings and recommendations to improve the electoral process;

Agreed that the Independent Review Committee (IREC) will be established under the Commissions of Inquiry Act, and will conduct its mandate in accordance with the following Terms of Reference:

##### **Key Activities**

The activities of the IREC shall be:

- a. Analysis of the constitutional and legal framework to establish the basis for the conduct of the 2007 elections and to identify any weaknesses or inconsistencies in the electoral legislation;
- b. Examination of the organizational structure, composition, and management systems of the Electoral Commission of Kenya (ECK) to assess its independence, capacity and functioning during the preparation and conduct of the 2007 elections;
- c. Examination of the public participation in the 2007 electoral process and the electoral environment, including the roles and conduct of the political parties, media, civil society and observers;
- d. Investigation of the organization and conduct of the 2007 electoral operations including: civic and voter education; training; voter registration; logistics and security; polling and counting; vote tabulation and results processing; and dispute resolution;
- e. Investigation into the vote counting and tallying for the entire election with special attention to the presidential elections in order to assess the integrity of the results and make recommendations for improvements, adjustments or overhaul of the system.

- f. Assess the functional efficiency of the ECK and its capacity to discharge its mandate;
- g. Proposal of recommendations on electoral reform including constitutional, legislative, operational and institutional aspects, as well as on accountability mechanisms for ECK Commissioners and staff pertaining to electoral malpractices, in order to improve future electoral processes;
- h. Presentation of its findings on the above activities;
- i. Any other tasks that the IREC may deem necessary in fulfilling its mandate.

### **National Cooperation**

All national authorities whose activities have a substantive relationship to the above activities are requested to extend maximum cooperation to the IREC. The IREC shall be permitted access to all electoral materials

### **Composition**

The IREC will comprise seven members, including a Chair, all of whom having the highest professional standing and personal integrity. The Chair will be an internationally recognized eminent jurist. The other members of the Committee will be experienced electoral experts:

- Four will be Kenyan, two of whom will be nominated by the Government/PNU and two nominated by the ODM.
- The remaining three members will be international experts, nominated by the Panel, following consultation with the Government/PNU and the ODM.

A Support Office will be established to provide substantive and administrative support to the Committee. It will be based in Nairobi and headed by an international electoral expert.

### **Methodology**

In the performance of its functions, the Committee:

- a. Shall hold public hearings in Nairobi and at such other places as it shall deem necessary for the proper discharge of its mandate;
- b. May hold private hearings whenever it becomes necessary to instill confidence in the people appearing before the committee or to allay their fears of adversity or reprisals;
- c. May carry out or cause to be carried out such studies or research as may inform it on its mandate;

- d. May receive written memoranda from individuals and groups on all issues relevant to its mandate;
- e. Shall have access to all the electoral and related documents necessary for the effective discharge of its mandate;
- f. Shall publish its rules of procedure in the Kenya Gazette; and
- g. Subject to the foregoing, the Committee shall develop its own work plan and procedures.

#### **Outputs and Timeline**

The IREC should start its work no later than 15 March, 2008. Within three to six months of the commencement of its work, the IREC will produce a final report of its findings and recommendations that will be submitted to the President, with a copy to the Panel. The report will subsequently be made public, in English and Swahili, within 14 days of submission.

#### **Financing/Logistics**

The Committee will be funded by the Kenyan Government and the Trust Fund for National Dialogue and Reconciliation, and with logistic support from the African Union and the United Nations.

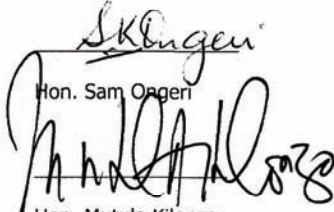


Signed on this day, 4 March 2008:

On behalf of Government/PNU:

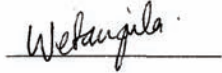


Hon. Martha Karua



Hon. Sam Ogeri

Hon. Mutula Kilonzo



Hon. Moses Wetang'ula

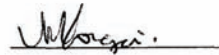
On behalf of ODM:



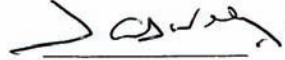
Hon. Musajja Mudavadi



Hon. William Ruto



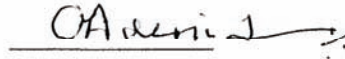
Hon. Sally Kosgei



Hon. James Orengo

Witnessed by:

For the Panel of Eminent African Personalities



H.E. Oluyemi Adeniji

Session Chair