

A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya

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Cover Photo: Kenyan President Mwai Kibaki (left) and opposition leader Raila Odinga (right) sign documents detailing a power-sharing deal while former UN Secretary-General Kofi Annan and former Tanzanian President Benjamin Mkapa look on. Nairobi, Kenya, February 28, 2008. ©Stephen Morrison/epa/Corbis

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Preface

The International Peace Institute (IPI) is pleased to have the opportunity to publish this detailed narrative account of the efforts to mediate the deadly postelection dispute in Kenya in early 2008. This story remains timely, more than a year after the completion of the able mediation efforts led by former United Nations Secretary-General Kofi Annan, for two primary reasons. One, the parties still have not fulfilled all of the commitments undertaken at that time, and the possibility of a return to violent confrontation remains all too real. As the mediators would be the first to acknowledge, the hard work in Kenya has just begun. Two, it is important to remind the international community that it required the focused engagement of influential regional and global players to push and cajole the parties to make the concessions necessary for a successful mediation effort. As skilled and determined as the mediators were, their work needed the active political support and involvement of key actors in Africa and far beyond at critical junctures. Neighbors, donors, and others helped to shape the perceptions and expectations of the parties and hence their degree of flexibility at the negotiating table.

I am confident, as well, that this account of efforts to resolve the conflict has wider and longer-range lessons that could benefit scholars, policy analysts, and policymakers alike. Though the global-regional partnership did not always unfold with optimal precision, on the whole the mediation effort was an encouraging example of the potential for constructive cooperation between the United Nations and the African Union on an urgent and sensitive matter. As the authors point out, the AU showed some agility in responding in a relatively timely and effective manner. The United Nations, rather than competing for glory or headlines, provided quiet but essential political support and capacity building for the AU-led effort. When UN Secretary-General Ban Ki-moon traveled to the AU Summit in Addis Ababa and then met with the parties in Kenya, his message reinforced that of his predecessor at the UN, who was leading the day-to-day work on the ground. No doubt this was what the founders had in mind when they drafted Chapter VIII of the Charter on regional arrangements. As Article 52(2) emphasizes, “every effort” should be made “to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.”

The Kenya situation was the first instance in which the United Nations employed a responsibility to protect (RtoP) lens in shaping its responses to an ongoing crisis. The Secretary-General decided, following consideration by the Policy Committee, that the world body’s first goal in Kenya should be to prevent the further commission or incitement of RtoP crimes and violations—genocide, war crimes, ethnic cleansing, and crimes against humanity. As Kofi Annan has since related, he adopted the same perspective in his mediation work there. Of particular concern, given the escalating violence, were possible acts of ethnic cleansing or crimes against humanity. Their warnings against further incitement appear to have had a positive effect, and the violence did subside markedly as the mediation gained momentum. In his report on *Implementing the Responsibility to Protect* (UN Doc. A/63/677 of January 12, 2009), Secretary-General Ban Ki-moon has called for the preparation of authoritative lessons-learned, good/best practices studies. As his Special Adviser for these matters, I can personally attest to the value of detailed case studies, such as this one, even though its scope is far broader than RtoP.

Neither the authors nor IPI, however, see the value of this paper primarily in terms of its analytical content. The authors do draw some sensible lessons, but their emphasis is on telling the story of the mediation effort in a straightforward and careful manner. In doing so, they provide a wealth of material on which scholars, policy analysts, and policymakers can draw in the months and years to come.

Dr. Edward C. Luck
Senior Vice President and Director of Studies
International Peace Institute

Acronyms

AU	African Union
DPA/UNDPA	United Nations Department of Political Affairs
ECK	Electoral Commission of Kenya
HD Centre	Centre for Humanitarian Dialogue
IGAD	Intergovernmental Authority on Development
KRC	Kenya Red Cross Society
ODM	Orange Democratic Movement
PNU or GoK/PNU	Government of Kenya's Party of National Unity
RtoP	responsibility to protect
SIPA	Columbia University School of International and Public Affairs
UN	United Nations
UNDP	United Nations Development Programme
UNON	United Nations Office in Nairobi
UNSP	United Nations Studies Program

Executive Summary¹

The postelection violence that erupted in Kenya in December 2007 resulted in the deaths of over one thousand people and left three hundred thousand people displaced. While catastrophic, the scale of the social and economic destruction, not to mention the loss of life, could have been much greater were it not for the peace mediation mandated by the African Union in January 2008. The Panel of Eminent African Personalities, chaired by former UN Secretary-General Kofi Annan, led the forty-one-day peace process, culminating in the *Agreement on the Principles of Partnership of the Coalition Government*, which was signed by President Mwai Kibaki and the Honorable Raila Odinga on February 28th, putting an end to the crisis which engulfed the nation and took the world by surprise.

This paper gives a detailed account of the events which led up to this agreement. It pays particular attention to the factors that made Kenya accept international mediation, and it concentrates on the role and comparative advantages of the African Union, as well as the unique and undivided support of the many stakeholders, including the international community. More specifically, the paper discusses the inclusion of a prime minister in the coalition government, as well as the role and responsibilities that the government should assume. The paper also describes the series of conflict-resolution strategies and tools used by the Panel, and it provides a set of conclusions and recommendations that reflect what kinds of lessons can be learned from this case of successful mediation. These include the benefits of a single mediation fully supported by the international community; strong engagement by civil society; a division of issues to be negotiated into short- and long-term categories; a carefully orchestrated media strategy; a strong emphasis on pragmatism over politics; an understanding of peace as a process, rather than an event; and a high level of creativity and flexibility on the part of the mediators. Above all, the agreement which was negotiated reflected the desire of the Kenyan people

to achieve peace in their country; its sustainability, however, will depend on their ability to address the root causes of the conflict and to tackle the underlying and deep-seated issues which triggered the crisis in the first place.

Introduction

At the heart of the successful forty-one-day mediation process in Kenya was the realization that this was a crisis that the world could not afford to ignore. For chief mediator Kofi Annan, however—making reference to the Chinese characters which make up the word—a crisis presents us with both danger and opportunity. On the one hand, the danger was that this East African nation, previously perceived as an island of political and economic stability and an essential hub for international activity, would allow the election crisis of 2007 to deteriorate into a catastrophic civil war along ethnic lines; as messages of hate penetrated the radio waves and a church full of fleeing women and children went up in flames, the echoes of Rwanda and Côte d'Ivoire made this danger a very real one. The opportunity, on the other hand, was that the crisis could be used to actually address deeply rooted problems: the simmering grievances, repeated ethnic migrations, and the cycles of dispossession which have characterized Kenya's colonial and postcolonial years. This was indeed an opportunity to create a political system which could attempt to address the vast disparities in wealth and the endemic sense of marginalization.

The mediation process, which began on January 22, 2008, three weeks after the postelection violence erupted across Kenya, was led by the Panel of Eminent African Personalities,² consisting of former President Benjamin Mkapa of Tanzania, former South African First Lady Graça Machel, and former UN Secretary-General Kofi Annan as Chairperson. The Panel was charged with helping the parties to the conflict ensure that an escalation of the crisis was avoided and that the opportunity to bring about a sustainable peace was seized as soon as possible. The unique team was mandated by the African Union (AU), relied on worldwide

1 This paper forms part of an in-depth academic case study that Kofi Annan requested from Columbia University's United Nations Studies Program (UNSP) at the School of International and Public Affairs (SIPA). To that effect, Elisabeth Lindenmayer, then Acting Director of the UNSP, traveled to Kenya in February 2008 with the logistical and financial support of the Mediation Support Unit (MSU) at the UN Department of Political Affairs (UNDP). Josie Lianna Kaye traveled with her as her Research Assistant.

2 From here onward, the Panel of Eminent African Personalities shall be referred to as "the Panel."

diplomatic support, and had the technical support of the United Nations, including the Department of Political Affairs (DPA), the United Nations Development Programme (UNDP), and United Nations Office in Nairobi (UNON), as well as the Geneva-based Centre for Humanitarian Dialogue (HD Centre).

On February 28, 2008, after six weeks of intense negotiations between the opposition Orange Democratic Movement (ODM) and the Government of Kenya's Party of National Unity (GoK/PNU) and a five-hour "end-game" with the principals, President Mwai Kibaki and the Honorable Raila Odinga, an *Agreement on the Principles of Partnership of the Coalition Government* was signed. For many, this was a triumph of African diplomacy, for some, it was the first realization of the international community's "responsibility to protect" (RtoP), enshrined in the 2005 World Summit Outcome Document,³ while for others, it was the avoidance of another genocide on African soil. It is impossible to know in exact terms what was prevented or what might have been, but all the warning signals indicate that a failure to solve this crisis may have resulted in significantly more violence, bloodshed, and loss of life, with huge implications for the entire region.

The purpose of this case study is to give an account of the mediation in order to attempt to understand its success and extricate lessons learned: why was the forty-one-day peace process brokered by the Annan-led panel successful in bringing an end to the conflict? The constellation of the personalities involved and the way in which events unfolded give the impression that the mediation in Kenya was a unique case; the question must be asked, however, does this mean that the success cannot be replicated elsewhere, that lessons cannot be learned and applied to other peace processes? Dissociating context from strategy in order to extricate useful tools is an essential task for the ever-growing field of peace, mediation studies, and practice. This paper does not seek to analyze

the root causes of the conflict or to analyze the nature of the violence which erupted throughout Kenya in late 2007⁴; the purpose of this paper is rather to give a detailed description of the forty-one-day mediation process with a view to gaining a better understanding of the mediation strategies used, and to what effect.

The Election Crisis

The 2007 elections in Kenya were the fourth since the country's return to multiparty politics in 1992. There were 108 parties vying for 210 seats at the parliamentary level, with three major candidates at the presidential level: Mwai Kibaki representing the PNU, Raila Odinga representing ODM, and former Foreign Minister Kalonzo Musyoka representing ODM-Kenya. When the presidential election results announced by the Electoral Commission of Kenya (ECK) indicated both a rapid disintegration of Odinga's large lead and a 2.5 percent margin between the two leading candidates, Odinga and Kibaki, suspicions of tampering were high—not least because the opposition had won ninety-nine seats at the parliamentary level to the PNU's forty-three. Most international observers noted that there had been definite irregularities in the tabulation of the presidential vote and in reporting the tabulation of the vote, even though the conduct of the ECK during a large portion of the electoral process had not raised serious concerns.⁵ In any event, it is questionable whether either side could have won the majority needed to govern Kenya alone.

While this was not the first time in Kenya's history that elections had been accompanied by violence, it was certainly the first time that the violence had been so severe, widespread, and with such devastating consequences. More than 1,000 people are thought to have died and at least 600,000 were displaced, with disastrous consequences for the economy, especially due to the hard-hit tourist industry.⁶ While initially the perception was that those from Kibaki's Kikuyu ethnic group in the Rift Valley, especially in the town of Kisumu, were the

3 See United Nations, *2005 World Summit Outcome*, UN Doc. A/RES/60/1, October 24, 2005, paras. 138 and 139; Roger Cohen, "How Kofi Annan Rescued Kenya," *The New York Review of Books* 55, no. 3 (August 14, 2008); and United Nations Secretary-General, *Implementing the Responsibility to Protect*, UN Doc. A/63/677, January 12, 2009.

4 This is the subject of a paper currently under preparation by UNSP.

5 Joel D. Barkan, "Hearing on the Immediate and Underlying Causes and Consequences of Flawed Democracy in Kenya," Testimony, Prepared for the Senate Foreign Relations Committee's Subcommittee on African Affairs, February 7, 2008, p. 3.

6 Sheila Mwiandi, "Moving Beyond Relief: The Challenges of Settling Kenya's Internally Displaced," USIP Peace Briefing (Washington, DC: USIP, August 2008), available at www.usip.org/resources/moving-beyond-relief-the-challenges-settling-kenyas-internally-displaced.

main targets of the violence, victims came from at least four other ethnic groups: the Luo (in Nairobi), the Kalenjin (in Nakuru and Naivasha), and the Luhya and Kisii in less concentrated groups across the country.⁷ The violence often took on the appearance of being ethnic in nature, but much of the violence in the slums around Nairobi was also motivated by poverty and unemployment, and some may simply have been undertaken by easily manipulated young people and criminal groups that had nothing to lose from engaging in and sustaining the violence.

VIOLENCE ESCALATES

Reports began emerging early on of killings, widespread looting, and the burning of property.⁸ As time went on, massacres, sexual violence, beatings, intimidation, and threats were also reported.⁹ The violence that broke out following the announcement of election results appeared to be spontaneous and motivated by a sense of injustice at the apparent discrepancies between the expected and actual outcomes of the election, but time and hindsight revealed very different roots and manifestations.¹⁰ The election, however, was certainly the trigger: there was an overwhelming perception that the elections had been rigged and that, combined with a lack of faith in the ethnic neutrality of the government, caused some members of communities around the country to turn to violence. Basic trust in state institutions had been eroded by decades of discontent with disparity and impunity, and heightened by the collapse of the multiethnic National Alliance Rainbow Coalition (NARC), the country's most recent attempt at inclusion and reform which did not stand the test of time. Within minutes of the announcement of the results, incidences of violence were reported, especially in the Rift Valley, where the perception of exclusion was at its strongest. There seemed to be a sense that the system could only produce an ethnically biased outcome, and that the elections

were not going to change the status quo. By December 31, 2007, just three days after the results had been announced, at least fifteen people were already confirmed dead.¹¹

Not all of the violence, however, was a spontaneous reaction to unjust processes. Inquiries undertaken by human-rights bodies such as Human Rights Watch revealed that much of it was organized in nature.¹² Well-known gangs that had been financed and organized by business and political groups in previous elections, such as the Mungiki, were apparently being armed with machetes and other weapons before the elections and later, even as negotiations began.¹³ The Mungiki, drawn from a Kikuyu base, which has a reputation for using brutal methods of instilling terror and a long history of violence dating back to the 1980s,¹⁴ appears to have received support from elite members of Kenyan society and to have been prepared for the violence ahead of time. Non-Kikuyu gangs such as the so-called “Taliban” and “Baghdad Boys”—largely Luo-based—and the Saboat Land Defence Force of generally Kisii origin were also responsible for some of the more organized violence,¹⁵ drawing on the large numbers of unemployed and disenfranchised youths. When the election results were announced, live broadcasts of the inconsistencies between the numbers announced at the central level and those at the local level, accompanied by hate speech on vernacular radio¹⁶ targeting various ethnic groups, helped spread the message and the violence. By January 15th, over 500 people were dead and more than 250,000 displaced.

What might have been small-scale—albeit organized and brutal—gang violence, accompanied by incidences of postelection, public, spontaneous rage revealed itself to run much deeper and resulted in much more pervasive patterns of violence. The scale of the violence reflected long-held grievances combined with severe poverty: according to the

7 Ibid., p. 4.

8 Jeffrey Gettleman, “Disputed Vote Plunges Kenya into Bloodshed,” *New York Times*, December 31, 2007, p. 1.

9 Human Rights Watch, “Ballots to Bullets: Organized Political Violence and Kenya’s Crisis of Governance,” (New York, March 2008).

10 Ibid.

11 Gettleman, “Disputed Vote Plunges Kenya into Bloodshed,” p. 1.

12 Ibid.

13 IRIN News, “Kenya: Armed and Dangerous,” February 22, 2008, available at www.irinnews.org/Report.aspx?ReportId=76896.

14 Ibid.

15 Ibid.

16 BBC News, “Kenya to Probe Hate Speech,” February 14, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7245319.stm>.

2004-2008 UN Development Assistance Framework, 56 percent of the population is living in poverty.¹⁷ Control of resources and control of government are perceived as going hand in hand, and given that government has traditionally been controlled by one ethnic group (to the detriment of others), poverty is often aligned with ethnicity. Resentment runs high over land ownership and land use, and is aggravated further by high levels of unemployment, especially among the youth. Violence was conducted, therefore, primarily along ethnic lines, motivated by the endemic sense of marginalization; retaliatory violence made the numbers of dead and injured rise even more. And lastly, the police were accused of excessive use of violence in response to public demonstrations and looting, resulting in even more deaths. The violence continued until early February 2008, by which time 1,000 people were thought to have died.¹⁸

The violence, therefore, must be understood within the historical framework of exclusion and marginalization that has permeated political life in Kenya, both during and since colonial times. In summary, the elections were a catalyst for an explosion of discontent and resentment due to the politics of dispossession which have left the majority of the youth unemployed, 60 percent of the population living on less than \$1 a day, and the majority of the country's most fertile land in the hands of the families of the political and business elite. The country may have had one of the most thriving economies, largest tourist industries, and most active business circles in Africa, but the benefits were certainly not shared fairly among the population. Odinga launched his electoral campaign promising much-needed change; whether or not this promise would have been fulfilled had he become president, the violence was a response to frustration with what appeared to be an imposition of the unstable and explosive status quo which was sentencing the majority to a life of poverty.

When the Panel arrived in Nairobi the situation on the ground was serious, verging on catastrophic; the country collectively held its breath in suspense,

waiting for peace to return. Violence continued to escalate and, when mourners clashed with police, it became clear that even prayer ceremonies for those already killed did not provide peaceful respite from the mounting instability.¹⁹ Thousands of people were trapped in Kibera without access to medical aid, houses in the Rift Valley continued to be subjected to arson attacks, and gangs which had been operating largely underground reemerged in Nairobi to offer protection to slum-dwellers living in fear. As students and teachers alike fled to safer areas, with many victims forced to live under tents, international airlines cut the number of flights to Nairobi almost by half in response to the sharp drop in tourism, a terrible blow to the Kenyan economy. Furthermore, the region was also severely affected due to road blocks put in place on the major transit routes, thereby causing a huge increase in the price of wheat and other staples.

Kibaki and Odinga, however, continued to refuse to engage in dialogue—the former insisted upon his rightful place as President of Kenya, who would manage this crisis internally, while the latter stated that the election had been rigged and his win stolen away. And yet, forty-one days later, the violence was so scarce it barely made the newspapers, tourists were beginning to trickle back into the country, the two leaders had agreed to share power, and the people of Kenya appeared to breathe easily again. So, what happened in those forty-one days to bring about the peace agreement in Kenya? And what strategies helped move the process forward constructively in spite of the initial divergences and extreme opposition to an internationalization of the conflict?

LAYING THE GROUNDWORK

Though less conclusive, the mediation efforts preceding the Panel's engagement provided essential building blocks for the mediation strategy that followed. On January 2, 2008, just days after violence erupted across the country, Nobel Peace Laureate Archbishop Desmond Tutu became the first senior mediator to arrive on the scene. His efforts were undertaken amid flying accusations of vote rigging on behalf of the PNU and of "ethnic

17 United Nations, "United Nations Development Assistance Framework: Kenya (2004-2008)," (Nairobi: United Nations Country Team, June 2003), available at www.un-kenya.org/UNDAF%202004-2008.pdf.

18 BBC News, "Kenya to Probe Hate Speech."

19 Dave Opiyo and Odhiambo Orlale, "Mourners and Police Fight it Out in the City as ODM Prays for Killed Protesters," *Daily Nation*, January 24, 2008.

cleansing” on behalf of the ODM and its supporters. The scale of the crisis was, at this point, still unclear, and Kibaki was intent on control by force and determination, flooding the streets with security forces, and issuing a ban on media broadcasts. Despite his impressive moral authority, Desmond Tutu’s intervention could not have changed the fact that the moment for engagement was simply “unripe”: seemingly biding his time, Odinga refused to engage in dialogue, while Kibaki was adamant that the only recourse for the opposition was through the courts, a lengthy process involving a system dominated by government allies which, it was perceived, was unlikely to result in any “just” outcome. Desmond Tutu’s brief attempt at mediating was frustrated by two leaders who were yet to accept that their political futures depended on their ability to work together and share power, not least because neither appeared to enjoy support of the majority within the country.

In the face of escalating violence, other mediators also began rushing to the scene. Multiple and parallel mediations, in what appeared to create the possibility of “mediator shopping” for the most favorable outcome, complicated the subsequent attempts to find a diplomatic solution. US Assistant Secretary of State for African Affairs, Jendayi Frazier, arrived shortly after Desmond Tutu on January 4th. She was closely followed on January 8th by four former heads of state, Tanzania’s Benjamin Mkapa, Mozambique’s Joaquim Chissano, Botswana’s Katumile Masire, and Zambia’s Kenneth Kaunda, who immediately traveled with Frazier to Eldoret to meet with residents whose lives had been devastated by the postelection violence. African Union Chairman and Ghanaian President, John Kufuor, also then arrived in Kenya at the invitation of President Kibaki, coinciding with the arrival of the four former heads of state. In his capacity as Chairman of the Heads of State Summit of the East African Community, Uganda’s President Yoweri Museveni arrived on a two-day official visit on January 22nd, the same day the Panel-led mediation began.

While the various attempts at mediation all appeared to contribute to the overall international

efforts, individually their “success” remained limited. Despite numerous indications from international observers that the election fraud was dominated by actions on the GoK/PNU side, Frazier’s apparent apportioning of blame equally to both sides seemed to make her less appealing as a mediator in the eyes of the ODM, who were insistent that the vote had been stolen from them. Her ten-day stay—despite her otherwise commendable efforts—was inconclusive, and she left Kenya shortly thereafter, but not before writing a strongly worded and very personal letter describing her “disappointment” at the parties’ inability to reach anything resembling compromise. Similarly, the intervention of four former heads of state—albeit a very laudable response to the escalating events on the ground—only added to the plethora of options available to the government, thereby multiplying both the channels of communication and the possibilities for stalling any real efforts toward peace. The four former heads of state carried with them their moral authority and respect of both parties, and, as part of an African intervention, were seen as more acceptable in the eyes of a government still intent on resisting “internationalization”; however, it is questionable whether they simply lacked the time and resources to find a meaningful way out of the crisis especially as Kibaki was intent on exploring the multiple options still available to him.

During this time of heightened tension, an advance team comprised of the Commissioner of Peace and Security and the Ghanaian ambassador to the AU, came to prepare the ground for the AU mediation efforts led by Kufuor. While the government seemed to be pursuing potentially more favorable options with the US—who appeared to have more to offer in terms of “carrots and sticks” and, perhaps, more to gain or lose in terms of its “war on terrorism”²⁰—it gave a cold reception to the AU team and insisted that “there was no crisis” to be managed. While failing to bring the parties physically together, Kufuor, following his two-day engagement at Kibaki’s request—which had involved a meeting with Kibaki at the President’s residence, State House, and another with Odinga at

20 Kenya and the US have a long-standing history of cooperation on the “war on terrorism,” dating back to the bombings of the US Embassy in Nairobi in 1998, which were blamed on Osama bin Laden. Following the September 11, 2001, attacks and the attacks on Paradise Hotel in Mombassa—a key target city due to the high numbers of tourists and the very visible presence of US naval vessels—this partnership grew stronger. In light of the instability of surrounding countries, Kenya has remained a stronghold for the US in its fight against al-Qaida.

the Inter-Continental Hotel—left Kenya stating that at least both sides had agreed “there should be an end to the violence, and they also agreed [that] there should be dialogue,”²¹ to be coordinated by a Panel of Eminent African Personalities. President Museveni’s engagement, the last before the Panel was accepted as the only official mediation option, was strongly encouraged by the GoK/PNU and less favored by the ODM. Museveni accompanied Kibaki to State House the very day the Panel began its efforts for official talks. This appeared to be a last attempt on the part of the Kenyan government to resist “internationalization” and coincided with another, less publicized, attempt at mediation in which Kibaki sent Foreign Affairs Minister Raphael Tuju to meet with Rwandan President Paul Kagame.

These mediation efforts were met with unilateral actions on behalf of both leaders at different moments, actions that proved they were yet to agree on the need for mediation at all, let alone on who that mediator would be. While appearing to offer hope for a government of national unity with one hand, Kibaki seemed to be working to prevent it with the other: on the day Kufuor arrived, he appointed Kalonzo Musyoka as his Vice President—Musyoka, according to the ECK results, came in third in the presidential election—and filled sixteen other ministerial positions in his cabinet. This provocative move left very little room for ODM positions in the proposed “Government of National Unity” and created a central-eastern alliance which excluded everyone else.²² This action further fueled violence in the Rift Valley, which erupted again in protest at these exclusionary moves. As the death toll rose, the ODM called for more protests against the government as well as international sanctions, thereby amplifying its double-edged strategy of using protests and international attention to give weight to its cause and strength to its position before going to the negotiating table. The government, however, continued to play down the need for international mediation, most likely realizing that mediation meant compromise, and compromise meant relinquishing power.

These interventions may appear to some to have been failures, but in fact they provided the Panel led

by Kofi Annan with important ground on which to build the strategy and insights that proved essential for the way ahead. First, Annan would insist that there would be one mediation and one mediation only; there could be no possibility for alternatives if the compromise being proposed did not suit the parties to the conflict. The previous absence of coordination in the first few weeks of crisis, even among African actors who rushed to the scene with noble intentions but not enough tools or resources at their disposal, could not be repeated; there should be no interference in the mediation and the mediator would decide whom to ask for support and when. This point was stated clearly by Annan on multiple occasions. Secondly, certainly never explicitly stated, but implied by the previous mediation attempts, was the understanding that the mediator had to be someone who could not only bring enough moral authority to be respected, but also enough political “carrots and sticks” to be of interest to the parties. The initial appearance of a preference for a US mediation over an AU one seemed to be informed by the reality of power politics and the desire for a mediator who could bring economic incentives to the table. Even if too much US influence risked being dismissed by governments too quick to jump on the anti-imperialist bandwagon, US influence was going to be an essential part of the puzzle. According to the DPA team, the ODM had a very clear preference for UN-led mediation, so finding the balance between these preferences would be paramount. Lastly, the overwhelming interest and engagement of the African continent in coming to the aid of Kenya indicated there was enough will and skill to find an African solution to an African problem.

THE ROLE OF THE AFRICAN UNION

Moves by the AU to engage in the crisis were undertaken just days after it erupted. When Kufuor’s own efforts and those of the preparatory team he had sent to Nairobi proved to be inconclusive, he personally wrote a letter to Kofi Annan, asking him to take on the role of AU Special Adviser and Chief Mediator of the Panel for the forthcoming mediation process. The decisive nature of this engagement was a crucial factor in avoiding further deterioration of the situation.

21 BBC News, “Kenya Crisis Talks End in Failure,” January 10, 2008, available at <http://news.bbc.co.uk/1/hi/world/africa/7181184.stm>.

22 Joel D. Barkan, “Breaking the Stalemate in Kenya,” Online Africa Policy Forum, January 8, 2008, available at <http://forums.csis.org/africa/?cat=7>.

Given the situation on the ground, time was clearly of the essence.

While within the Charter of the United Nations there is an explicit provision against interference in the domestic affairs of member states—except in the case of enforcement measures under Chapter VII—the Constitutive Act of the African Union has adopted a wider field of engagement options, from mediation to using force to intervene in specific circumstances. Article 4(h) of the Constitutive Act specifies “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”

One of the principal objectives of the AU, stated in Article 3(e) of the Constitutive Act, is to “encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights.” While Article 53(1) of the UN Charter requires that any enforcement action by regional arrangements be authorized by the Security Council, Article 52(2) encourages regional organizations to “make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.” Given that Kenya was not an “enforcement action,” the AU was well-placed to act quickly and with the implicit support of the UN Charter. Due to the regional impact that the crisis was having already, and the catastrophic consequences that would have followed its spiraling out of control, there was undoubtedly a need for speedy action.

Seizing Opportunities for Peace

THE MEDIATION BEGINS

Kufuor’s²³ selection of Annan to lead the AU-mandated mediation process, which was announced publicly on January 10th, was nothing less than an “inspired choice.”²⁴ With years of mediation experience, an internationally renowned figure with moral authority and a strong political reputation, Annan combines extensive political experience and unique negotiating skills with the

ability to bring a wide pool of contacts to the negotiating table. There was a strong personal motivation for Annan also; given that he played a large role in the formulation of the concept of RtoP, launched at the World Summit of 2005, he had many reasons to prove that the promise of “never again” was more than an empty phrase spoken by the international community. Furthermore, having witnessed a number of tragedies in his UN career both as Under-Secretary General for Peacekeeping Operations and as Secretary-General, he was well aware of the implications another crisis would have for East Africa and the continent as a whole. He felt a moral obligation to do whatever he could to prevent the country from spiraling out of control. Combined with Graça Machel and President Mkapa, the composition of the Panel of Eminent African Personalities certainly did not fall short of expectations.

While the country and those watching held their breath as Annan was rushed to hospital with a fever on January 16th—the very day he was due to fly to Kenya—the week-long delay may actually have proved to be a three-fold blessing in disguise. From his hospital bed, the week provided an opportunity for Annan to lay a solid foundation for what would become one of the central components of his strategy: a single mediation, as well as the full, undivided support of the international community. He would only begin work once a unified support base had been formed, relying especially on prominent African figures, the US, and key European actors. This time in the hospital allowed him to speak extensively with leaders and key political actors around the world to bolster support for the process he was about to embark upon.

Part of his strategy was also to have an inclusive and transparent process, involving civil society—including religious leaders, women’s groups, and representatives from the world of business—and to that end the week’s delay also provided an opportunity to organize meetings with these groups for his arrival and to keep them engaged until the very end. Civil society was pivotal in creating an environment that was favorable for negotiations. The media, led by the Kenya Editors Guild, for example, apart from keeping the public well

²³ John Kufuor was Chairperson of the African Union at the beginning of the mediation process.

²⁴ Personal interview with Margaret Vogt, Deputy Director of Africa I Division, UN Department of Political Affairs, New York, March 13, 2008.

informed at every stage of developments within the peace process, also reacted forcefully against the media ban on live broadcasts, giving the government twenty-four hours to lift the ban,²⁵ and chose to defy the ban when their demands were not met. On December 31st, just days after the violence had erupted, a group of prominent members of civil society launched Concerned Citizens for Peace, a multilevel peace initiative which became a rallying point for peace activists and an interlocutor within the peace process. Similarly, religious groups and business leaders rallied for a halt to the violence, condemning the polarization of Kenyan society and calling on the leaders to work together for peace. While the Panel was active in approaching members of civil society for their support, the National Council of Churches of Kenya actually approached the mediation team to plead for a negotiated solution, and was vocal in urging Kibaki and Odinga to enter into direct talks. The Panel would draw upon these efforts to move the parties closer to negotiation and to ensure that when they said they were speaking with one voice, it included not only members of the international community, but also grassroots voices from Kenyan society.

The week-long delay also allowed more time for the formation of the secretariat in Nairobi which would give technical support to the Panel during its work, ensuring that all necessary resources were in place for Annan's arrival; the secretariat was able, however, to fully solidify its working methods only upon the arrival of Annan and the rest of the Panel. Furthermore, ever-changing dynamics on the ground contributed to the perception of a "hurting stalemate" whereby it was increasingly accepted by both parties that dialogue was the only way forward. On the ODM side, the nomination in Parliament of ODM candidate Kenneth Marende over PNU candidate Francis Kaparo as speaker, and ODM candidate Farah Maalim over PNU candidate Gitobu Imamyara as deputy speaker, helped Odinga go to the negotiating table in a stronger position. On the GoK/PNU side, the rising number of deaths and increasing numbers of accusations of police brutality made it impossible to continue insisting that the country was not in crisis. Dialogue would be necessary in order to avoid the

ever-growing possibility of an outbreak of civil war.

While the need for dialogue was accepted by both sides, there were stark differences over the conditions of entry and the expectations of outcome. Upon Annan's arrival on January 22nd and in separate meetings with both leaders, it became clear that many efforts would be needed to bridge the gulf between the parties' respective positions. Odinga, on one hand, insisted that the election had been rigged and the presidency "stolen" from him, and maintained that his preconditions for even entering into dialogue would begin with Kibaki's resignation, a rerun of the presidential election, the formation of a transitional government, and an agreement to undertake comprehensive, legal constitutional reforms, especially concerning the contentious "land issue." Odinga seemed determined to use the international mediation to his full advantage and wanted to secure as many concessions as possible before going to the table, not least because he was persuaded by Annan to call off the mass protests that were planned for that week, protests which would have given him leverage and heightened the impression of crisis but which risked seriously undermining the mediation effort still in its fragile first phase.

Kibaki, on the other hand, actually delayed his first meeting with Annan, set for January 22nd, in order to meet privately with close friend and ally President Museveni, who was proposing his own peace plan. Publicly, Kibaki made clear that he was ready and willing to negotiate only when Odinga and the ODM accepted his presidency as legitimate—thereby dropping all references to the election having been "stolen," and as long as Odinga came to the table with no preconditions. Kibaki was insistent that his presidency was nonnegotiable and certainly not an issue to be brought to international mediation: for Kibaki, his election could only be challenged in a court of law and the ODM's failure to do this was testimony to the shaky ground upon which their contestation stood. Conscious that each day the parties stalled more lives were being lost, Annan brought the two leaders together in a closed meeting two days later on January 24th. He pressed upon them the need for genuine dialogue and the absolute imperative of putting an end to the

25 African Press, "Editors Have Given the Government a 24-hour Ultimatum to Lift the Ban on Live TV and Radio Coverage," January 25, 2008, available at <http://africanpress.wordpress.com/2008/01/25/editors-have-given-the-government-a-24-hour-ultimatum-to-lift-the-ban-on-live-tv-and-radio-coverage/>.

violence. Using terminology that would, over the coming weeks, become familiar, Annan insisted that this was an extraordinary situation which needed an extraordinary solution, starting with a commitment from the leaders to work together.

When Raila Odinga and Mwai Kibaki shook hands publicly on January 24th for the first time since the beginning of the crisis, the sigh of relief that swept across the country was short-lived. While Kofi Annan had, in two days, managed to accomplish what no one else had—i.e., convince the parties to agree to a face-to-face meeting, thereby recognizing each other formally, no longer as an enemy but as a negotiating partner—the parties were still not fully committed to the process. On the very same day the parties shook hands and agreed to engage in dialogue, they also took steps which increased the gap that existed between them. Kibaki used the high-profile handshake to highlight the legitimacy of his presidency, using his speech to emphasize that he was the “duly-elected president” and that the crisis could be resolved internally. Odinga, reacting to these comments, warned of the possibility of mass action once more. What should have been a unifying event swiftly became a divisive one. Kibaki restated that the government could not share power with those whom it had accused of engaging in mass killings, and Odinga insisted once more that the only way to restore confidence would be through a rerun of the presidential elections, ruling out any possibility of forming a government of national unity with President Kibaki. As positions solidified and tensions rose, violence erupted again on the streets: mourners and police clashed in Nairobi, fifty more houses were burned in the Rift Valley, and people in Nakuru were forced to dodge bullets and use cardboard to protect themselves from flying poisoned arrows.²⁶

It became clear that an appropriate strategy needed to be devised. In the same way the parties took one step forward, they could just as easily take two steps back; as easily as concessions were made with one hand, conditions would be put forward with the other. This process was, to a certain extent, driven by the conflicting dynamics and tools that the parties were using: Odinga appeared determined to use the international community and the momentum built up by violence to pressure

Kibaki into making significant concessions; Kibaki, however, seemed to be using his position as head of state, no matter how contested that was, to wave the banner of sovereignty as justification for an internal resolution of the conflict. There was no doubt that the diverging and entrenched positions on both sides would make any prospect of immediate progress difficult to achieve.

Consequently, some broad guidelines slowly emerged. Given the fragility of the process and the fears of the people on the ground, a careful media strategy would have to be put in place; after all, the constant obstacles and conflicts within the negotiating room would do nothing to ease the tensions in a country desperately waiting for news of peace; but, equally, a people that was kept at arm's length from the high-level negotiations was likely to feel excluded from a process that concerned them deeply. With the vital aid of President Mkapa, Kofi Annan would take it upon himself to include the people in the process as much as possible through media transparency. While downplaying the harsh realities behind closed doors when the process seemed to go off track, he would reassure the nation with his steady optimism.

He also undertook to shield the public from the constant stalling, the quarrels over details, and the revisiting of issues, not wishing to sow the seed of failure within the process itself. He made a point of building on what had been achieved, always looking to the road already walked. Furthermore, the specific language used in interactions with the media was going to take on huge significance, both inside and outside the negotiating room. Annan reminded both parties that there was a need to “watch the words we say and how we use them.” This was advice to the parties, but also advice that he would heed, and use to his advantage when necessary in order to push the parties in the right direction, using words to turn hopes and ideas into reality. This strategy would not have been as effective in reassuring the nation and keeping faith in the process without the help of President Mkapa who made a point of translating all of the press conferences into Swahili; this prominent figure ensured that the message was heard and understood by the Kenyan people, and delivered by someone they could trust.

26 Daily Nation, “Nakuru Under Curfew as Gangs Kill Six—Soldiers Sent to Assist Police Quell Fighting Between Two Communities,” *Daily Nation*, January 26, 2008.

RAPID PROGRESS ON THE “ROAD MAP”

By the end of the Panel’s first week in Kenya, the principals had agreed to enter into dialogue and had also agreed to appoint team members²⁷ to represent them in the negotiations; the fact that the principals themselves would not be around the negotiating table meant that a vast amount of power lay outside the negotiating room, a dynamic that would prove to be both a challenge and an opportunity within the peace process. The secretariat of the Panel worked intensely behind the scenes during this week to produce the agenda—or what has commonly been referred to as the “Road Map” for the talks—the modalities for the negotiation, the structure and terms of reference of the Panel, and the Rules of Procedure. These documents were produced in close consultation with these newly forming negotiating teams even before the formal negotiations were opened. Vital adjustments were made to the texts so that by the time the talks were formally opened at the National Assembly on January 29th the teams already had a common basis to work from, were able to adopt all the above documents immediately, and could begin working on addressing some of the essential items thanks to the preparatory groundwork that had been carried out by the secretariat. After the public “handshake,” rapid acceptance of the Road Map was the second success.

The Road Map included four items²⁸: (1) to undertake immediate action to stop violence and restore fundamental human rights and liberties; (2) to take immediate measures to address the humanitarian crisis, promote reconciliation, healing, and restoration; (3) to overcome the political crisis; and (4) to work on long-term issues and solutions, such as poverty, inequality, and unemployment (especially among the youth), as well as the need to confront impunity, tackle land reform, and consolidate national cohesion and transparency. The Road Map was to provide structure and stimulus

throughout the peace talks. Annan announced his timeline publicly: violence could be stopped in seven days, the short-term issues dealt with in four weeks, and the longer-term issues within one year.

The negotiations, therefore, got off to a swift and positive start with the mediation team having made the important decision to separate the short- and long-term issues at hand. The aim was to stop the violence so that the negotiations could take place within a constructive framework and a peaceful environment. It also gave the peace talks momentum by providing the parties with issues they could agree on with relative ease first, before moving on to the more contentious issues. Events on the ground called for an urgent end to the violence: on January 29th and 31st, two Members of Parliament from the ODM party, the Honorable Mugabe Were and the Honorable Kimutai Too, were assassinated and, while at the time it was unclear whether the motivation was related to the election crisis in both cases,²⁹ these deaths sparked more violence across the country, concentrated in Kericho and Eldoret, with more deaths and casualties.

The arrival of UN Secretary-General Ban Ki-moon on February 1st was further proof of the undivided support of the international community.³⁰ The Secretary-General made several clear and unconditional statements of support for the work of Kofi Annan and the mediating team, while also making it clear that responsibility for peace lay with the leaders themselves. In his address to the Summit of the African Union in Addis Ababa on January 31st, Ban emphasized the need for Kibaki and Odinga to “do everything possible to resolve the sources of the crisis peacefully,”³¹ while also calling upon all African leaders present at the summit “to urge and encourage the leaders and people of Kenya to calm the violence and resolve their differences through dialogue and respect for the democratic process.”³²

The following day in Nairobi, Ban held consulta-

27 The PNU side was represented by Martha Karua, Minister of Justice and Constitutional affairs; Sam Ongero, Minister of Education; Mutula Kilonzo, a lawyer and ODM-K’s MP (the party of Vice President Musyoka); and Moses Wetang’ula, Minister for Foreign Affairs. The ODM side was represented by MPs including Musalia Mudavadi, William Ruto, Sally Kosgei, and James Orengo, who is a lawyer.

28 These were referred to as agenda items one, two, three, and four respectively throughout the mediation.

29 It appears that these assassinations were not related to the election crisis.

30 United Nations Secretary-General, *Activities of Secretary-General in Kenya, February 1*, UN Doc. SG/T/2589 (February 29, 2008).

31 United Nations Secretary-General, *Secretary-General, Addressing African Union Summit, Underlines Kenyan Leaders’ Responsibility to Resolve Sources of Conflict Peacefully*, UN Doc. SG/SM11396 (January 31, 2008).

32 Ibid.

tions with Annan and the mediating team, as well as with Kibaki and Odinga; when both leaders continued to reiterate their positions, Ban urged them to think beyond their personal interest for the people of Kenya.³³ In what was an important show of support for the staff involved, the Secretary-General also took part in a town hall meeting with some of the 5,000 UN Staff based in Kenya in various UN agencies; to these staff and to the media, he made it clear that the UN was ready to increase its support for the process as needed. Ending his trip in a media conference that evening, he described the violence and suffering as “unacceptable”³⁴ and stressed the need for the negotiating teams “to persevere and show the courage, vision and leadership to expeditiously find a just and peaceful solution.”³⁵

Furthermore, in the shadows were the warnings and perceived threats of possible alternative action on behalf of the United States, which issued an ambiguous statement on the need for an “external solution,” without giving any details of what such a solution would entail.³⁶ The pressure for a negotiated solution was mounting.

The Kenyan government insisted that the statement from the US was unnecessarily threatening. However, this, combined with the international pressure from other sources as well as the pressing need for a solution to end the violence, led to two major agreements on agenda items one and two, to end the violence and address the humanitarian situation on the ground. These agreements, made on February 1st and 4th respectively, involved concrete measures to hold joint meetings to promote peace, ensure freedom of expression and the right to peaceful assembly; investigations into crime and police brutality; assisting the safe return of internally displaced persons; and the establishment of a truth-and-reconciliation commission. Within just ten days, the Panel and the parties had made substantial progress.

As negotiations got underway in the windowless, well-guarded room in the basement of Nairobi’s Serena Hotel, the impression was that the parties

were moving steadily toward a peaceful solution. Discussions inside the room appeared constructive and focused on practicalities, such as the need to create transport corridors to ensure aid could travel rapidly, and on the need to mobilize local leaders to bring communities together. The parties also underlined the fact that while the Kikuyus were the largest group to be affected by the violence and the subsequent internal displacement, all people of Kenya had been touched in one way or another, especially the poor. In order to keep the discussions focused on the most urgent aspect of the crisis—the violence—which, according to Annan, posed the biggest threat to the success of the talks, representatives from the Kenya Red Cross Society (KRC) and the United Nations Development Program (UNDP) were invited to give a briefing on the situation on the ground during the fourth session, on February 4th. It was reported that 923 people had been killed and 250,000 displaced, with genuine protests rapidly shifting to activities by gangs and criminal groups that predated the election violence; across the country, people were still being forced to leave their homes. Both sides expressed the need for cross-party action for peace and reconciliation on a community level to address these issues, while also accepting that, on a national level, the mediation being led by the Panel was the only form of mediation that the parties would consent to engage in.

Increasingly, however, the mood around the negotiating table was less than constructive. The teams disagreed fundamentally over the name of the negotiation process, with ODM insisting that it should be called an “international mediation effort,” or at least include the word “mediation,” while GoK/PNU wanted to play down external involvement and call it a “national dialogue.” The teams engaged in what seemed to be bitter exchanges of accusations when the GoK/PNU team insisted that the high levels of violence were a direct result of political incitement on behalf of the ODM, while the ODM team insisted that political violence of that level could only be organized by a government with the structures in place to make this

33 United Nations Secretary-General, UN Doc. SG/T/2589.

34 Ibid.

35 Ibid.

36 US Assistant Secretary of State for African Affairs Jendayi Frazier, quoted in Evans Wafula, “Kenya: Prime Ministry Jeopardizes Talks,” AfricaNews, February 27, 2008, available at http://voicesofafrica.africanews.com/site/list_messages/16058.

possible. Furthermore, the parties demonstrated an inability to look beyond the 2007 elections toward the root causes of the crisis, and were unable to begin moving toward possible solutions. The ODM still clung to their belief that victory belonged to them, while the GoK/PNU put emphasis on the high levels of violence across the country—and who might be to blame—as a means of refocusing attention away from the flawed electoral process.

At this early stage in the negotiations, Annan's interventions were brief and to the point, seeking to give as much ownership of the process to the parties as possible while also keeping the talks focused and forward-looking. He ruled in favor of the GoK/PNU side and agreed that the process should be called a "Kenya National Dialogue and Reconciliation," no doubt building on the fact that an international mediation had been accepted, downplaying the importance of its appellation; such a concession to the government side at this early stage would keep them on board and make the process more about the parties involved, rather than the mediators who were guiding the process.

Ever aware that time was of the essence and that the more urgency was impressed upon the parties, the more quickly an agreement would be reached, Annan insisted that he and the rest of the Panel would not be able to stay long, and that a deputy chair should be appointed to negotiate on behalf of the Panel in their absence. He suggested Cyril Ramaphosa of South Africa as a deputy chair who has much mediating experience in South Africa and Northern Ireland. But the GoK/PNU side rejected Ramaphosa on the basis of his perceived links with the opposition, forcing Annan to issue a statement on the withdrawal of his name for chair on February 4th. Nevertheless, it was made clear early on that Kofi Annan would not be available forever and that an alternative had to be found. Secondly, the use of "outsiders" in the mediating room, this time in the form of KRC and UNDP representatives, also set a powerful precedent for future discussions. The ability to reach out to "experts" and "informed voices" was a modality used throughout the negotiations, at times to depoliticize discussions, to simply keep them focused, or to prove that what felt like uncharted territory had actually been tried and tested, successfully, elsewhere.

DELAYS ON AGENDA ITEM THREE: HOW TO RESOLVE THE POLITICAL CRISIS

After the rapid progress on the less contentious agenda items one and two, the obstacles and challenges that arose with respect to agenda item three, "How to Resolve the Political Crisis," were bound to feel more frustrating for both the parties at the negotiating table, and for the people of Kenya for whom peace had suddenly seemed within reach. The progress toward resolving the political crisis ironically coincided with another political event unfolding in the nation's capital: the proposed Intergovernmental Authority on Development (IGAD) talks in Nairobi, to be held the week of February 4th. For GoK/PNU, this was simply another opportunity for the East African nations to engage in helping their neighbor at this moment of crisis, not least because of the impact it was having on the surrounding nations; it also seemed to be a move to further consolidate the legitimacy of the president in a meeting that could only be convened by heads of state.

ODM swiftly raised the red flag, accusing the government of renegeing on its commitment to the mediation process under the auspices of the African Union, and of trying to derail the peace process itself. ODM called upon the people of Kenya to unite in peaceful protests against the IGAD talks across the country. This new development equally threatened the mediation process because any mass gathering in such a heightened moment of tension risked turning fatally violent. However, the IGAD talks went ahead at a ministerial level and ministers met with the Panel to inform them that they came to Nairobi to express their support to the people of Kenya and for the mediation efforts of the Panel. Annan was quick to intervene publicly, insisting, on the one hand, that there was, and there would continue to be, only one mediation process, and that it was unwise to call for protests at this moment. The Panel successfully persuaded ODM to cancel the planned protests, aided by reports from the US and Canada that they would impose travel bans on those who were accused of being involved in the postelection violence, or on those who obstructed the talks. Once again, the international community spoke with one voice and applied extra pressure when needed.

On February 6th, the Panel was once again complete: Graça Machel and President Mkapa—who had been obliged to temporarily leave the negotiations due to prior pressing commitments in their respective countries—having returned to Nairobi to participate in this crucial phase of the negotiation. Agenda item three can be divided into two phases, which are intrinsically linked under the banner of the political crisis. The first dealt with the flawed election process and what could be done to address this, while the second was linked to the nature of power sharing to form a transitional government. As such, the first looked at the past, the second looked to the future, but only if they were undertaken together would they constitute a peaceful solution that would ease tensions in the present.

Behind closed doors, discussions were stalled on the most fair and efficient way to deal with the issue of the recent election. The parties, however, continued to accuse each other of malpractice. ODM insisted that they had actually raised the alarm six months to a year prior to the elections following flawed registration practices and what they called a questionable recomposition of the ECK in favor of the GoK/PNU. They also maintained that the refusal on the part of the ECK to establish a national retallying center was suspicious and part of a wider organized plan to sabotage the election process to benefit the GoK/PNU. In what amounted to not much more than a self-described “blame game,” the GoK/PNU, maintained that accusations of electoral fraud were without foundation given that, according to them, international observers only visited 3 percent of polling stations and the discrepancies found were minor. Furthermore, restating their initial position, they said there needed to be inquiries into the postelection violence in order to ensure that those who were responsible for inciting it and carrying it out were brought to justice. According to the GoK/PNU, the ODM was unlawfully using threats, intimidation, and violence as weapons of mediation. Both Graça Machel and President Mkapa made many attempts at moving the parties forward: Machel insisted that the parties should be willing to risk their personal or political interests where necessary given that the fate of the whole

country was at stake; Mkapa reminded them that they had worked together before and that common ground should not be so hard to find.

One way of attempting to bring the parties out of these destructive patterns of mutual accusations was to once again draw on the knowledge of experts in the field, thereby attempting to turn a political question into a technical one. As one member of the Department of Political Affairs (DPA) remarked, experts were strategically asked to intervene at certain points to provide clarification within and around the formal negotiations.³⁷ Annan decided relatively early on in the discussion to bring in two experts from the Electoral Division at DPA to brief the parties on the technicalities and the pros and cons of all the options that lay before them. The experts produced documents which clarified the issues around the choices of rerun, recount, and fresh elections: a recount would require opening all 27,500 ballot boxes, a phenomenal task that would not give any results fast and could not be guaranteed to be any fairer than the elections themselves; a rerun implied that the former election was flawed and would therefore be divisive and politically dangerous; new elections could take a year and so did not offer a solution to the current crisis. There was no fast way to get at the “truth” concerning the elections; the Panel suggested that an Independent Review Committee be set up to look into what happened during the elections; the committee could then recommend a recount if it was deemed that this would still give an accurate result. While a certain amount of understanding was reached regarding these issues—and this intervention proved to be fundamental for the agreement on the committee that emerged later—the issue was still a political one and backtracking on progress made continued for this reason.

Backtracking on previous commitments was actually becoming a pattern. Having agreed to address the political crisis—which entailed implicitly and explicitly creating some form of transitional arrangement which would ultimately have to involve power sharing—the GoK/PNU side began suggesting that power sharing would mean the de facto end of the multiparty system in Kenya, something that they could not agree to. They were, it seems, reacting to the continued insistence by

37 Personal interview with Deryck Fritz, Electoral Division, UN Department of Political Affairs, Nairobi, February 19, 2008.

ODM that the elections had been stolen, thereby entrenching their initial status quo position even more. It became obvious that, for progress to be made, the ODM would have to drop its accusation of electoral robbery and GoK/PNU would need to go back to its previous position of being willing to consider transitional arrangements. At this moment, Annan began to show more firmness and to step up the pressure on the parties. Despite the clear setbacks in the talks, he sent a message to the people of Kenya which emphasized that the teams had been working hard, thereby increasing pressure on the parties to meet public expectations. He urged the parties to be careful in their use of words by avoiding terms that antagonized the other side, insisted that the time for questioning the legitimacy of Kibaki was over, and that there was a need to move on: as such, the revisiting of issues in the future would be ruled “out of order.”

In this same vein, and in response to leaks to the press, which in conveying the impression of disagreement could prove detrimental to the talks, on February 11th Annan decided that there would be a two-day retreat at an undisclosed location. It was hoped that, away from the press and in a more neutral environment, the negotiations would advance at a steadier pace, with the prospect of an imminent agreement on agenda item three. The parties had been asked explicitly not to relate delicate issues being discussed at the negotiating table to the press, but the detailed nature of reports that appeared in *The Daily Nation* and *The Standard* made it obvious that these instructions were not being adhered to. The impression of stalemate risked sowing the seeds of doubt in Annan’s ability to get an agreement.

Before leaving for the retreat, two fundamental steps were taken. First, on February 11th, the parties agreed to establish an Independent Review Committee mandated to “investigate all aspects of the 2007 presidential election and make recommendations to improve future electoral processes.” This was Annan’s preferred option from the beginning as it was nondivisive and forward-looking. An agreement for a report to be delivered in three to six months would hopefully forestall definitive clarification on what happened during the 2007 elections to a moment when the country was more stable and less likely to react violently. Secondly, the Panel responded positively to a

request to brief parliament on progress in the talks in an informal session, or a *kamukunji*, on February 12th, just hours before leaving for “the retreat.”

THE KAMUKUNJI

The *kamukunji* was an important moment for parliamentarians who had, up until that moment, been largely excluded from the otherwise “elite”-level discussions, which had taken place between either Odinga and Kibaki or the appointed negotiating parties, and the Panel. As such, it was the first time they were able to express their frustrations and fears. There was a heavy media presence at the opening session; journalists stood en masse in the upper galleries, the interminable flashing of cameras a backdrop to the otherwise somber, traditional British-style chamber. Annan used the occasion to advocate both patience—through his insistence that change is not an event, but a process—and some degree of speed, emphasizing the fact that there were many urgent things to be done. Graça Machel made a more emotional appeal to the MPs through her emphasis on the humanitarian aspects of the crisis; the suffering Kenyans, she said, should be the focus of the talks. After the press had reluctantly left upon request by the Speaker of the house, tensions in the chamber began to rise, with flying accusations mirroring, on a much larger scale, the nature of the discussions which were taking place in the Serena Hotel negotiating room, themselves a microcosm of the tensions tearing the country apart.

Concerns on the GoK/PNU side were raised about the continuing lack of clarity around the elections and instability that would be caused by changes to the constitution. When one MP insisted upon the absolute need for a pronouncement on who had won elections he was shouted down by fellow MPs for undermining the whole point of the peace process and for offending Kofi Annan. Over and above the partisan lines of argument which the Panel was becoming accustomed to hearing, there were also many new and refreshing perspectives: various MPs spoke of the need to focus on what united rather than what divided the parties; many women stood up to speak about their suffering communities and the grassroots mechanisms needed to deal with the crisis, and the cross-partisan activities that could be undertaken in response to the aftermath of the violence.

For Annan, however, this was also a chance to use the press to plant the seeds of his expectations both in the minds of parliamentarians and in the minds of Kenyans across the country. The reaction of the PNU to his comments, which could have easily been ignored, dismissed, or played down, actually helped raise the profile of the carefully chosen words he had used, thereby adding to the pressure that was put on the parties. In what could only be perceived as an attempt to accelerate the process, Annan spoke of the reforms under discussion, including the “possible constitution of a *grand coalition* which could oversee reforms within two years.” Those words, “grand coalition” implied a level of agreement which had not yet been reached. Yet, while in press statements issued the following day, he insisted that a grand coalition was an option often chosen when a country was in deadlock and that this represented “his perspective on the discussions,” rather than any formal agreement, the comment could be erased neither from the minds of Kenyans nor from the minds of those in the international community attentively watching the process.

Negotiations in Crisis

THE RETREAT: MEDIA BLACKOUT

On February 12th, as the convoys carrying the Panel and members of the secretariat sped from Parliament through midday traffic to Wilson International Airport on the other side of the city where air-force planes were waiting, the media scrambled to find out exactly where this “undisclosed” location could be. The members of the secretariat were already waiting for take-off on the Kenya Air Force plane when Kofi Annan boarded and sat alone, no doubt needing time to reflect on the steps ahead. As the plane crossed over the Kenyan savannah and landed on red dust in the middle of a field, it was clear that this would be a very different working environment to the one the team and the parties had become accustomed to in Nairobi. With a media blackout and no-fly zone over this “undisclosed” location it may well have seemed dramatic, but it was a move carefully designed to help the parties focus on reaching an agreement on the second, most politically contentious part of agenda item three: transitional arrangements for “governance,” another term being

used to refer to power-sharing structures. As Annan repeatedly mentioned, these were exceptional times, and exceptional times call for exceptional measures.

The new negotiating room was a light, airy space down a cobbled path behind the lodge, heavily guarded by camouflaged military personnel who sat and watched the parties come and go from the grass around the buildings. Kilaguni lodge is a stunningly situated hotel in Tsavo West National Park, southeast Kenya, not far from the border with Tanzania. On clear days the peak of Mount Kilimanjaro is visible. Situated in one of the best safari parks in the country, Kilaguni had not seen any tourists for more than a month. It was both a world away from Nairobi, and a shocking reminder of the far and devastating reach of the political events happening there. For Annan this was also a chance to prove to tourists that the country was a safe place to visit. The parties were hardly there to enjoy the park, but it did provide much-needed space for dialogue. Back in the capital, it seemed, the undisclosed location was not a secret anymore but there was an understanding and acceptance that Annan had asked for the parties to be left alone for a reason, aided no doubt by the no-fly zone over the game park.

When talks resumed the following day, the parties appeared, outwardly at least, to be less tense: Annan was no longer wearing a suit, but an open shirt more fitting for the safari surroundings. Without the benefits of air conditioning, the parties were also dressed in a more casual manner and breakfast together overlooking the vast Kenyan countryside seemed to have set a more relaxed tone. This appearance, however, betrayed the difficult reality: these talks were only the beginning of a long journey to reach an agreement on transitional arrangements for power sharing. Much of the time at Tsavo was spent in separate caucuses with technical experts the parties had brought with them; the time the parties spent together at the table with Annan was fraught with underlying tensions, tensions telling of the vast obstacles ahead.

Drawing once more on expert political advice to help the parties reach pragmatic solutions, on February 13th Annan invited Gernot Erler, Minister of State of the Federal Republic of

Germany, to share his experience of coalition government.³⁸ The intervention by Erler was pertinent and clear: coalitions are an exceptional form of democracy for the specific purpose of dealing with a crisis; the principle of proportionality is applied in terms of personages and allocation of responsibilities; there is a need for trust and readiness to cooperate; while this effectively temporarily suspends a clear opposition, the public normally provides an adequate level of scrutiny. Most importantly, a grand coalition is less about popularity than it is about pragmatism. This intervention would no doubt play a role in contributing to the substance of the agreement to follow.

The initial response from the GoK/PNU side was one of concern. They were keen to demonstrate the fundamental differences between Germany and Kenya. One country's political system is based on a representative form of democracy, the other a more direct form: in Germany the head of government is proclaimed by the parliament, whereas in Kenya he or she is elected by the people; Kenya also has a more fragmented party system, the government already being a coalition of twenty-five different parties and a grand coalition would simply wipe out any semblance of opposition altogether. Furthermore, their understanding of the discussion was that a power-sharing agreement necessitated some level of trust, and that in none of the situations described by the German minister was the legitimacy of the head of state directly called into question. Any coalition government in Kenya therefore would be built on incredibly fragile grounds. This negative reaction to the intervention raised fears on the ODM side and the discussions degenerated once more into accusations that the other side was more concerned about political positions in the next government than about the plight of ordinary Kenyans.

As the discussion continued and time passed, little progress seemed to be made. While violence

on the ground had diminished dramatically since the arrival of the Panel, reports continued to emerge of community elders and gang leaders arming groups of young men in preparation for large scale "contingency plans" should the talks fail. Many newspapers were reporting that the sense of ominous calm in the country was anything but a good sign. The nation had pinned its hopes on Annan but the parties were dragging their feet and his optimism alone would not hold the country together forever. A code of conduct would, Annan said, be imposed if necessary to prevent the parties from obstructing the talks with their negative interjections and references to past actions. The parties responded with a reiteration of their positions: GoK/PNU held that it could only envisage changes that could be accommodated within the current constitution under Article 16,³⁹ as a shared executive would need to be subject to the will of the people in a referendum, something that would be impossible given the current tensions. The ODM believed that Article 16 left too much room for interpretation (and misinterpretation) and that structural changes, even if only for a transitional period, would need to be anchored in the constitution. Annan suggested that the lawyers get together to discuss the legal issues. That afternoon and the morning of February 14th were spent in caucus.

The tactic of extracting parties from their usual environments and enclosing them somewhere neutral where they are forced to spend time together is not an unusual one: Jimmy Carter used it in the Camp David Accords and many other negotiators have used it across the world. It is most useful in highly intractable conflicts where the parties to the discussion do not know each other personally, and the time can be used to build up trust and a certain level of understanding of the other party's position and perspective. In Kenya, however, the parties already knew each other incredibly well. On a personal level, these parties

38 See Spiegel Online, "A Grand Coalition For Kenya? 'The Most Neutral Solution Possible,'" February 18, 2008, available at www.spiegel.de/international/world/0,1518,536031,00.html.

39 The Constitution of Kenya, Revised Edition (2001) (1998), Chapter 2, Part 2, Article 16, (1) There shall be such offices of Minister of Government of Kenya as may be established by Parliament or, subject to any provisions made by Parliament, the President. (2) The President shall, subject to the provisions of any written law, appoint the Ministers from among the members of the National Assembly: Provided that, if occasion arises for making an appointment to the office of any Minister while Parliament stands dissolved, a person who was a member of the National Assembly immediately before the dissolution may be appointed to that office. (3) The office of a Minister shall become vacant – (a) if the president so directs; or (b) if the holder of the office ceases to be a member of the National Assembly otherwise than by reason of the dissolution of Parliament; or (c) in the case of a Minister who, immediately before the dissolution of Parliament, was a member of the National Assembly, when the Assembly first meets after that dissolution, he is not then a member thereof. (4) Whenever a person is elected to the office of the President, the offices of all Ministers then holding office shall become vacant upon the occasion of the President first making one or more appointments to the office of Minister.

were able to sit together and have dinner; this, however, was a political issue in which trust was fundamentally absent. Some important progress had been made, but time and tactics, rather than simply surroundings, would play a definitive role in moving the parties in the right direction in the coming weeks. The retreat, however, had added momentum to the talks and impressed the sense of urgency upon the parties. The parties also seemed to have made some progress in caucus on governance arrangements. It was recognized, however, that no more progress could be made before the parties had an opportunity to discuss issues of governance and structure with the principals, so the next meeting was scheduled for the following week, on February 19th.

Annan knew that it would be awkward to go back to Nairobi empty handed; not least because public confidence was at stake along with the vital need to keep calm. A document was prepared detailing the positions of agreement to date around the disputed presidential electoral results. After forty-eight hours of negotiations at the lodge, the parties had failed to make any substantial progress on the heart of the matter; however, the agreement reached on February 14th was hardly insignificant. The Agreement “towards resolving the political crisis arising from the disputed presidential electoral results,” which details the problems around the recount, retally, rerun, and audit, makes it clear that the issue of the 2007 election result would not be revisited. The Independent Review Committee was the sole route forward on this issue and, until the report was released three to six months’ later, the issue would be closed. Furthermore, the parties agreed to comprehensive reforms and mechanisms including comprehensive constitutional reforms, comprehensive electoral reforms, a truth-and-reconciliation commission, and legal and judicial reforms, among many others. As soon as the parties had signed on the dotted line and were given strict instructions not to speak to the press, they wasted no time in rushing back to Nairobi for meetings with their respective principals.

The press conference held in Nairobi immediately upon return from Kilaguni Lodge was a tense moment for some members of the team, who were

concerned about what Annan could say to maintain the feeling of optimism and faith in the process. Annan, however, was more aware than ever that he had to act while he still had everyone’s support and attention. He emphasized the agreement that had been reached around the election and the reforms, reiterating the need to move on from the divisive issue of the election results; more significantly, he mentioned that discussions were now underway concerning the details of a “new government.” Much like the words “grand coalition,” the words “new government” would ring in the ears of the GoK/PNU negotiating team, increasingly aware that compromise could no longer be avoided.

Most importantly, however, in a reversal of his previous position, Annan announced that he was prepared to stay as long as it took to reach an agreement. To the parties this was a message that he was not in transit like the mediators who preceded him; an agreement had to be reached because this was the end of the road, and his solution was the only one available short of more drastic measures. To the people of Kenya for whom he had come to epitomize hope, this was a message that he was as invested in the future of Kenya as they were and had no intention of abandoning the process. To the principals, however, this message meant that the responsibility for peace rested with them, not with him: after all, “the mediator cannot fail as long as the mediator stays put, only the protagonists can.”⁴⁰

STALEMATE IN NAIROBI

Those close to Kofi Annan have described him as a careful choreographer with a masterful, intuitive understanding, and control, of events around him. Just before the talks recommenced in Nairobi, then US Secretary of State Condoleezza Rice was sent by President George W. Bush on February 18th to support the mediation efforts being led by the Panel. President Bush began his Africa tour the Saturday before her visit, insisting that a deal on power sharing be agreed upon. Following a closed-door meeting with Annan and key members of the team, in a press statement that was completely in line with Annan’s sentiment, Rice made it clear that the world was waiting for an agreement. According to Rice, the “time for political settlement was yesterday,” and it was now up to the principals to

40 Thomas Princen, *Intermediaries in International Conflict* (Princeton, NJ: Princeton University Press, 1992), p. 98.

take the last step. She insisted that as long as the crisis remained unresolved, Kenya could never enjoy “business as usual” with the United States. With a visit of support just a few days later from Chairperson-elect of the African Union Commission, Jean Ping, there could be no doubt that the Panel worked with the support of the international community.

Back in the negotiating room at the Nairobi Serena Hotel on February 19th, having agreed that reforms should be undertaken, it was time—in the words of Annan—to work on “the how”: the necessary transitional arrangements to undertake the implementation of the reforms. The PNU team arrived at the first session armed with numerous examples of other crises that had been successfully resolved without recourse to constitutional amendment. This marked a transition from talking about “power sharing” to the idea of “accommodation”; this was indeed far from the equal partnership that ODM was looking for. The PNU position was rooted in the principle of nonfragmentation of power in order to prevent the creation of two centers of power. In the Kenyan Constitution, they insisted, the President was the head of state and head of government at the same time, so the creation of a prime-ministerial position, as was increasingly being suggested, was not a solution for Kenya. When the talks turned once again to the need to identify perpetrators of the violence in the Rift Valley, the ODM side became exasperated at the lack of progress, the stalling, and apparent revision of positions.

For Annan, however, a level of agreement had already been reached on a governance structure that would involve a prime-ministerial position. At some moments the idea of having a Prime Minister appeared to evolve organically throughout the negotiations; at other times, it appeared as if it had been the only solution all along, one toward which the Panel attempted to steer the parties. It clearly had its roots in the decision to pass on the issue of the electoral crisis to a review process in order to focus on finding a political solution whereby the two parties would come together in order to implement a package of social and economic reforms. The emphasis was on the pragmatic rather

than political nature of this necessity. Following the *kamukunji* where Annan mentioned the words “grand coalition” provoking what he called a “storm in a teacup” among the GoK/PNU side, it became evident in the negotiating room that a power-sharing deal was inevitable, and what remained was only the question of working out the details, which initially revolved around the issue of equality within the government.

For the PNU side, powers remained with the President and could be divested to another party but only within the framework of the current constitution, because to fail to do so could amount to a “civilian coup.” For ODM, drawing on historical examples, to not enshrine the powers of a new government position within the constitution would allow for the removal of those powers at the President’s whim. Annan insisted that this was a major crisis requiring an extraordinary response, and that the focus should be solutions, not problems. So when the Panel asked both the ODM and PNU sides to prepare papers outlining their respective stances on solutions to the political crisis, the ODM side came up with a radical proposition: a Prime Minister with executive powers, substantial responsibilities, and two Deputy Prime Ministers.

A prime-ministerial position with executive powers, however, could raise serious political and constitutional issues, whereas a Prime Minister with no formal position or power would constitute a meaningless level of bureaucracy. What was needed, the Panel said, was agreement on the details of how to achieve a compromise. Annan decided to give Hans Corell—former UN Legal Counsel, the fourth expert to be brought into the negotiating room—a larger role to play in the negotiations.⁴¹ His task was probably the most ambitious: to turn the most politically contentious issue—governance—into a technical one, to be undertaken with a Legal Working Group on Governance. After three days of extensive closed working-group sessions, the group returned to the session with a *Draft National Accord and Reconciliation Act 2008* containing provisions on the appointment and functions of a Prime Minister and two Deputy Prime Ministers, the formation of

41 Martin Griffiths, “The Prisoner of Peace: An Interview with Kofi Annan,” (Geneva: Kofi Annan Foundation and the Centre for Humanitarian Dialogue, May 9, 2008), p. 12.

a coalition government, and details on how the coalition could be dissolved. Substantial disagreement, however, remained. There was no agreement on the power and responsibilities of the Prime Minister, the process for nominating ministers, the security of tenure, what would happen upon dissolution of the coalition, nor whether the changes should be brought into being by an act of parliament or through changes to the Kenyan Constitution.

When the parties began doubting their achievements and the amount of progress made, Annan reminded them of how far they had come by listing their achievements to date. When they went off track on tangential issues, he tried to refocus the process through a reminder of the extraordinary responsibility that lay on their shoulders. When the discussion stalled on the issue of what name should be given to the new arrangements, he suggested that substance should come first, and that a name would come later. When no compromise seemed possible between the divergent positions of the parties on the position of a Prime Minister (with or without executive powers), he used his creativity to suggest a midway position with “substantial powers and *special responsibilities* delegated from the powers of the president.” When the working group returned after three days of negotiations with huge gaps between the positions of the parties, he suggested—to protests—that the parties outline their views and that he would “bridge the gap” between the majority and minority positions. And when the red flag of the constitution was continually waved as an obstacle to any change or progress, he insisted that it was not necessary that the changes be in the constitution, rather that they be “constitutional.” For Annan, the task was to preserve the essence of the constitution, a legally enshrined document intended to protect the Kenyan nation.

But when the parties returned to the negotiating table after a weekend of consultation with the principals and little progress made, Annan was running out of options, or at least that is how it seemed. On the last session before the weekend, discussions had become fragmented and had lost direction. At some points it seemed that the PNU side was becoming divided internally between more extreme positions and more pragmatic ones; furthermore, with members of both teams leaving

at different times for prior engagements, the perception was that the urgency of the situation was fading, and the talks were becoming secondary to the various members’ obligations outside the room. The PNU was increasingly insistent upon the need for meetings with Kibaki, raising fears among the ODM that this was a procrastination tactic in order to buy more time. Tensions were also rising both on the ground and in the international community: the ODM had once again threatened mass action if parliament was not summoned in a week to enact necessary constitutional changes and President Bush had indicated that Kenya displayed “warning signs that the international community should pay attention to.” It was hoped that following the meetings over the weekend and Annan’s advice to both Kibaki and Odinga to take definitive decisions and to give their negotiating teams “clear instructions,” that there would be swift progress on the conclusion of agenda item three. Indeed, Annan insisted that “The Panel of Eminent African Personalities had done [its] work,” and now he was asking “the parties to do theirs.” When the parties returned to the negotiating table, however, things, if anything, seemed worse.

While the negotiations began constructively, during the session of February 25th and 26th, no progress was made on essential issues. Working from the document produced by the Legal Working Group on Governance, the parties were tasked with going through each item under the guidance of Annan in order to resolve the outstanding differences. Many of the items, however, produced more disputes, with the parties concluding each time that it was an issue only the principals could deal with, while the very purpose of the session was to narrow down the areas of dispute as much as possible so as to then present the principals with only the essential elements that still needed to be resolved. The PNU continued to insist upon the “holy” sanctity of the constitution, whereas ODM insisted that historically both the *Inter-Parties Parliamentary Group Package of 1997* and the *Memorandum of Understanding of 2002* had failed precisely because they had no legal force. They continued to disagree on the fundamental questions related to the powers and responsibilities of the Prime Minister, the representation of each party in the coalition government, the process for nominating ministers, and the course of action to

be taken should the coalition dissolve. With ODM claiming that it had already compromised given that the election had been “stolen” from them in the first place, and PNU maintaining that the issues could have been resolved without the involvement of the international community, the atmosphere in the negotiating room was becoming increasingly hostile. It was clear that more drastic action was needed to avoid the peace talks breaking down altogether.

PEACE TALKS “SUSPENDED”

On February 26th, in consultation with former President Mkapa, Annan decided to temporarily suspend the talks with the negotiating teams in order to engage directly with Kibaki and Odinga. The gap between the positions of the parties, and the desires of their leaders, as well as the lag between the speed of progress in the room and the crisis happening on the ground, could no longer be tolerated. Behind closed doors, Annan expressed his extreme disappointment at the parties’ lack of progress, and at the fact that talks were no longer contributing to the resolution of the crisis. The parties, he implied, had given him no other choice. While this was news that took the world by surprise, he could neither afford for this to raise fears on the ground, nor—with the gangs forming in the wings—could he afford for this to be perceived as a “failure.” In his press statement on February 26th, Annan insisted that this was not “an act of desperation” but a move in order to engage directly with the principals given that there was “a need for urgency and speed”; most importantly of all, he emphasized to the people of Kenya that “the talks had not broken down.” In his most hard-hitting statement to date he chided the parties: “if there had been goodwill and determination we should have been able to resolve the issues we’re discussing today two weeks ago.” This failure was not his. This failure was entirely theirs. And if those who had been mandated with the power to negotiate could not be flexible in their positions due to the instructions they had been given then he would go straight to the top, to those who could. Annan was not only talking about the parties when

he asked: “what is the point of being described as a good negotiator who can never make a deal?”⁴²

This was a masterful move of brinkmanship. It was also a clear statement: peace lay on the shoulders of the two most powerful leaders in the country, Kibaki and Odinga, and no one else’s. The price of their failure, in Kenya, the East African region, and in the international community, would be immeasurable. But the reward for their success would be priceless. To the nation, it was obvious that Annan, who had worked longer on this mission than any during his entire term as Secretary-General, had done everything within his power to bring peace to Kenya. In his own words, it was obvious that he had become a “prisoner of peace,” unable to leave and unable to broker a deal; action needed to be taken to break out of this pattern if peace was to prevail.

For the international community, voiced through statements by Condoleezza Rice, failure was not an option; the future of the relationship of the US with both sides and their legitimacy depended on “their cooperation to achieve this political solution.”⁴³ More importantly, less appealing alternatives—UN Security Council sanctions or US unilateral action, for example—were still on the table, and the US was “exploring a wide range of options.”⁴⁴ Originally Annan had been pleased that he had perceived “hardliners” at the negotiating table, as the agreement taken to the principals at the end would be sold much more easily if such an agreement could even be made by them. However, he had also come to realize that one of the parties at the negotiating table—whose posts included the ministries of education, foreign affairs, and justice—had personal stakes in the outcome of the agreement as these positions could be affected in the subsequent cabinet reshuffle: they were actually much less likely to reach an agreement than the principles themselves.

Protests from the GoK/PNU side were loud and clear. They resented attempts by the US to impose a solution, and insisted that the talks had been suspended just as the group was making progress; they resented being pressured on items they were

42 The Kenya National Dialogue and Reconciliation, “Transcript of Elements of a Press Encounter by H.E. Kofi Annan in Front of the Nairobi Serena Hotel, February 26, 2008,” available at www.dialoguekenya.org/docs/26FebKAPressEncounter.pdf.

43 D. Lucas Barasa and Bernard Namunane, “Talks Suspended as US Threatens to Act,” *Daily Nation*, February 27, 2008.

44 Stephanie McCrummen, “Annan Suspends Talks in Kenya, Pressure Rising on Rivals to Reach Power Sharing Deal,” *Washington Post*, February 27, 2008, available at www.washingtonpost.com/wp-dyn/content/article/2008/02/26/AR2008022600738.html.

not ready to agree to. They also emphasized what they saw as a contradiction between what they, the parties, were being told and what Kibaki was saying to Annan, creating the misperception that they were stalling unnecessarily. Furthermore, they blamed the media for printing false stories about what was happening in the negotiating room and, most of all, for raising expectations about what was coming and when. The ODM side, however, commended the chair and claimed that it had been committed to the process from the beginning and that it, like the Kenyan people, also felt frustrated at the lack of progress and the reversal of positions. More skilled at using the press to their advantage, the ODM had made it clear that the stalling was on the GoK/PNU side, not theirs. Combined with Kofi Annan's statements and actions, President Kibaki seemed increasingly cornered: the prevailing perception was that the impasse lay directly on the shoulders of the GoK/PNU; but, if failure lay on their shoulders, the possibility for success was in their hands. Annan was handing the possibility to create peace in the country over to Kibaki: it was up to him to rise to the challenge. He could no longer hide behind his representatives.

An Agreement is Reached⁴⁵

In a crescendo of well-orchestrated pressure as the forty-first day drew near, Kofi Annan asked that President Jakaya Kikwete of Tanzania⁴⁶ join him, along with former President Mkapa, for the final stage of negotiations with President Kibaki and Mr. Odinga. Having suspended the talks so abruptly, the leaders were most probably not only in shock but also absorbing the very clear message that the moment for agreement could no longer be postponed. The decision to bring in President Kikwete at this point was double-edged: a respected figure on the continent and at the time chairperson of the African Union, he brought with him both knowledge and power. Firstly, Kikwete could emphasize the success of the Tanzanian example, where power had been shared between the President and Prime Minister in such a way as to not create two centers of power; in fact, the Tanzanian Prime Minister actually has much more

power than what was being proposed for Kenya. Kikwete's power had indeed not been diminished as the result of a strong Prime Minister.⁴⁷ Secondly, as an AU-mandated mission, its chairperson, Kikwete, could make clear that the whole continent was behind the effort and that there could be no alternative platform for negotiations. This was, indeed, the end of the road.

The negotiations with the leaders took place at Harembee House behind closed doors. In the room were five key members only: despite attempts by both sides to bring in more party members, Mwai Kibaki, Raila Odinga, Kofi Annan, Benjamin Mkapa, and Jakaya Kikwete were the only people party to the entire discussion. Annan was determined to leave the room only once agreement had been reached; furthermore, the parties were requested to not only reach an agreement, but also to draft, sign, and make it public, in order to ensure that promises would not be broken, commitments would not waiver, and, most importantly, that there would be accountability for the agreements made.⁴⁸

The draft text, which the negotiating teams had struggled with for weeks and which the Panel secretariat had developed as far as possible on the basis of the discussions, was scrutinized by the principals; many parts were cleaned up and others were simply dropped. When the leaders, Kibaki and Odinga, came to the question of Constitutional Amendment both insisted on bringing in their lawyers. The leaders went through the draft agreement point by point, with new members from each side now in the room. At each stage they asked their lawyers—thereby building on Annan's own strategy of turning a political question into a technical one—if the item in question necessitated a constitutional amendment. On each point, both lawyers agreed that constitutional amendment was not needed—until they reached the question of creating a prime-ministerial position. If the prime-ministerial post was going to be one which could not be withdrawn by the President, the lawyers from both the PNU and ODM sides agreed that a constitutional amendment was needed. It seemed almost *too* simple; all the principals had to do now was to sign the agreement and go public.

⁴⁵ The information in this section is based on a personal interview with Kofi Annan, New York, March 23, 2008.

⁴⁶ Jakaya Kikwete replaced then Ghanaian President John Kufuor as Chairman of the African Union, following his election on January 31, 2008, in Addis Ababa.

⁴⁷ In the Tanzanian Constitution, the prime minister "supervises, coordinates and *controls*" (italics added).

⁴⁸ Correspondence between Martin Griffiths and Elisabeth Lindenmayer, May 21, 2008, Centre for Humanitarian Dialogue.

On February 28th, after five-and-a-half hours of intense negotiations with President Kibaki and Mr. Odinga, an agreement was reached on all the issues of contention in the draft act of parliament. Later that same day, at a ceremony at Harambee House, Mwai Kibaki and Raila Odinga signed the *Agreement on the Principles of Partnership of the Coalition Government*. The agreement outlines the position of a Prime Minister charged with coordinating and supervising the execution of the functions and affairs of government; each member of the coalition is to nominate someone from the National Assembly as Deputy Prime Minister; the coalition government will take into account the principle of portfolio balance and reflect their relative parliamentary strength; the removal of any minister will be subject to consultation and concurrence in writing by the leaders. The draft *National and Reconciliation Act* would be quickly submitted to Parliament and written into the constitution. This transitional form of government would be in place for five years when elections, based on the outcomes of the Electoral Review Committee, would take place.

The agreement met neither of the parties' initial demands. Initially, the ODM had insisted upon nothing less than the rightful return of the presidential position "stolen" from them in the December 2007 elections, just as the GoK/PNU had refused to share equal power with those who it had accused of inciting violence and sending the country into chaos. It was nothing less than a compromise. Respecting the GoK/PNU's position that this should not create two centers of power, the prime-ministerial position is not an executive post, but one which derives its powers directly from the President. Respecting the ODM's position that the creation of this position could not be reversed by a presidential decision, it is now enshrined in the Constitution. When Parliament convened on March 6th, the four bills legalizing the grand coalition were passed without amendment.

It certainly was a compromise. But there was something very statesmanlike about being able to make such a compromise. On the one hand, the parties had no choice: to fail to reach an agreement would have meant trying to explain to the nation, the continent, and the international community

how they could justify letting politics get in the way of peace. Furthermore, blood would be on the hands of the two men whose same hands could so easily have picked up a pen to sign an agreement. And yet, the signing of the agreement came across as anything but an act of submission. This was neither dictated to them from above nor the result of coercion from outside forces. Annan had gone to the only two people who could decide the fate of the nation: the process was no longer about the appointed teams at the Serena Hotel, or the Panel of Eminent African Personalities: it was about President Mwai Kibaki and the Honorable Raila Odinga's ability to use dialogue to come to an agreement. The perception—real or imagined—was that the leaders of the country unequivocally *chose* peace. Consequently, when the agreement had been signed and people rushed into the streets to celebrate the new year which had been stolen from them by the tragic crisis two months before, there was no doubt that the agreement had been brokered by Kofi Annan, but that peace itself had been chosen and embraced by the Kenyan people.

Conclusion

When the Chairman of the Panel, Kofi Annan, said farewell to Kenya on March 3rd, six long and difficult weeks had passed. But this was only the beginning of an even longer and more difficult road ahead toward sustainable peace in Kenya. The technical elements of agenda item three were left in the hands of Attorney-General Amos Wako and a team of lawyers whose job it was to draft the necessary bills for the implementation of the power-sharing agreement into law, and 2 billion Kenyan shillings⁴⁹ were pledged by the US in support of the speedy implementation of the agreement, in addition to the Sh1.75 billion already pledged by the US toward reconstruction. The negotiations over the root causes of the crisis, however, were left in the hands of Nigerian Foreign Minister Oluyemi Adeniji, who was tasked with addressing the last item on the agenda: the land issue, historical injustices, the cycles of dispossession, and the steps needed to move toward reconciliation.

There are key lessons to be learned from the crisis in Kenya. The February 28th Agreement was not a

49 \$30 million.

sufficient step, but it certainly was an important one toward peace in Kenya. With memories of Rwanda still in the minds of many, and the specter of Somalia not so far away, one shudders to think what might have been had the African Union not stepped in. Their swift action was a key element of the success in Kenya. This AU engagement highlights the importance of the partnership and the comparative advantages of regional organizations: speed was of the essence. The lives already lost and the families torn apart are irreversible tragedies; but the extent of the violence could have spread so much further, the number of deaths could have spiraled out of control and the crisis might have escalated from Kenya to the rest of the region, with devastating consequences for the entire African continent. All of this could have been had the African Union not acted on the basis of its Principle of Non-Indifference⁵⁰ and Article 4(h) of its Constitutive Act. Few of us can feel indifferent in the face of mass killings and large-scale violence; but acting on that nonindifference, and doing so successfully, takes a great deal of resolve, commitment, and political will.

While the mediation was initiated by the African Union, the Panel realized that to be successful it would need the broader support of the international community, including African nations, the US, the EU, and the United Nations. It became clear that everyone was walking in the same direction and speaking with one voice. The mediation efforts in Kenya prove that when the international community has unity of purpose and stays the course, peace stands the very best chance of success; complex cases such as Darfur and the Democratic Republic of the Congo have proved that unity is not always a sufficient condition, but it certainly is a necessary one.

In addition to these broader lessons, there are also lessons to be learned regarding the specific conflict-resolution tools used in the course of the mediation. First, fostering the conditions for a single mediation process—with international support where possible—is an essential step to begin pursuing solutions meaningfully. In Kenya,

Annan assured that, first and foremost, he had the African leaders behind him and that he also had the support of the international community and in particular the United States—which stepped in at pivotal moments to put pressure on the parties. While the process began with multiple mediator options, the Panel managed to assert authority over the process, and to generate enough worldwide support in order to ask the parties to accept its mediation as the only one they would engage in.

Second, civil-society actors have a vital role to play in the dialogue; even if involving them intimately in the negotiations around the table is not always practical, their consultative involvement early on helps shape the process in a way that ensures that the people have a voice and that the necessary pressure is put on the government during the implementation phase. In Kenya, the active involvement of the media, religious groups, business communities, and peace activists was crucial for creating an atmosphere that was conducive to fruitful negotiations and for generating that vital link between an elite-level process and the grass-roots realities, to avoid disenchantment or dangerous disconnect. Civil-society engagement can be fostered and encouraged actively by mediators willing to take the time to listen to their views and engage them in the process where possible and appropriate.

Third, separating the short-term from the long-term issues when drawing up a Road Map can prove essential in creating the much-needed nonviolent space for dialogue to proceed, as well as getting the parties used to agreement at a time when agreement with “the enemy” can be seen as a weakness. Putting the emphasis on ending the violence, over and above seeking “truth” about the elections, meant that Kenyan lives rather than political power were put at the heart of the peace process. Given that ending the violence and addressing the humanitarian situation also involved apolitical, or at least nonpartisan, discussions, it was easier to encourage the parties to agree, and to generate a sense of teamwork and compromise. Rapid agreement on the shorter-term agenda items,

50 While the AU does not make specific reference to the “responsibility to protect”—the same negation of the principle of nonintervention is articulated by the African Union as the “Principle of Nonindifference.” The same essence but different wording, the Principle of Nonindifference was invoked in the mandate of the African Union as a justification for need to engage rapidly following the unraveling of events in Kenya. Taken from a personal interview with Fiona Lortan, Representative of the African Union to the Secretariat, Nairobi, February 19, 2008.

one and two, of the road map, was without doubt an important building block for the more difficult, long-term agenda items to follow.⁵¹

Fourth, a carefully thought-out media strategy is essential both to ensure that the process within the room is not derailed by political-point scoring outside the room and to keep the people fully on board and correctly informed; it can also prove to be a useful tool in moving the process in the right direction. In Kenya, the Panel asked the parties early on to avoid making inflammatory statements to the press about the details of what was going on behind closed doors; when it seemed that they were not keeping their promises and that press statements risked sowing the seeds of failure, the decision to take the parties to an undisclosed location, where the media could no longer play a role, may have actually prevented the talks from deteriorating into exchanges of accusations and finger-pointing. It certainly helped get things back on track, and created a temporary space where the media was no longer a political tool. On the other hand, the Panel made it their priority to keep dialogue with the people of Kenya as frequent and open as possible, while shielding them when necessary from destructive events behind closed doors which may have made them lose hope; the translation of almost all press conferences into Swahili by a prominent figure, such as President Mkapu, formed a vital part of the media strategy. The media was also a very useful tool to put pressure on the parties when necessary, to add momentum or to plant the seeds of desirable outcomes in the minds of the government, the people of Kenya, and the international community. For the Panel, the media provided a perfect means by which to test terms such as “grand coalition” and “new government,” helping to make compromise seem inevitable.

Fifth, an emphasis on pragmatism can help overcome political differences. Turning political questions into technical ones, postponing divisive debates over appellations, and focusing on practicalities rather than the “big picture” can all be useful strategies in helping negotiators to work as a team and to put peace before political aspirations or concerns. In Kenya, the use of technical experts—be they humanitarian, electoral, legal, or political—

was an essential part of helping the parties to understand which solutions were feasible given the explosive environment in which they were operating; they also helped orient the parties to a problem-solving framework and away from adversarial negotiation strategies.

Sixth, understanding that negotiations are a process, rather than an event—and that the process is owned by the parties themselves—is integral to a holistic approach to peacemaking. Expectations can be managed more fruitfully if dialogue is engaged in as part of a process, rather than simply a political exercise or event; the process has its own inherent worth, and trusting that the process will be constructive also means being patient. The Panel reminded the parties to have patience when they appeared frustrated, and reminded them of progress already made when they were despondent; similarly, the Panel was flexible and open enough to see the talks as a process, one which needed their full engagement if they were going to succeed. Annan’s decision to stay was part of this realization and certainly helped the parties to realize he was certainly not in transit, but as much a part of the process as the parties. That said, while the mediator is a part of the process, the process always belongs to the parties. This was essential in the final stages of the peace process in Kenya: suspending the talks was the mediators’ decision, but it was based on actions by the parties; and the ability to save the talks from collapsing lay with the parties, not the mediator.

Lastly, creativity, flexibility, and awareness of timing are crucial. A mediation process is inherently unpredictable, and the mediator must try to constantly reassess, remain open to ambiguity, and to offer new options when necessary. In Kenya, for example, one of the major obstacles was finding a solution which would create a prime-ministerial position which was nonexecutive but still meaningful; Annan’s proposition to make this a nonexecutive position with substantial powers and *special responsibility* delegated from the powers of the president was a midway, creative solution that satisfied both parties.

Political will and mediation skills, however, would have been useless without the desire for

51 See “Rapid Progress on the ‘Road Map,’” in this paper, pp. 10-15.

peace on the part of Kenyans themselves. The spirit of compromise can only come from the parties. Whether peace will be sustained in Kenya will depend first and foremost on the people of Kenya and on their willingness to implement and keep the agreement they have reached. They must tackle the root causes of the conflict—the issues of land, dispossession, poverty, and injustice—which were the underlying and deep-seated reasons for the explosion of violence during the 2007 elections. They must also continue to enjoy the sustained and

undivided support of the international community, when needed, in consolidating the peace achieved. Kenya may have made some impressive strides toward peace but it has a long way to go before it can affirm that it fully avoided the dangers of civil conflict and entirely embraced the opportunity to address underlying factors which could lead to a more just, equitable, and prosperous society. Above all, peace in Kenya would not have been possible if the people of Kenya had not wanted it; peace cannot be imposed.

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