

## **Dying to win: Elections, political violence, and institutional decay in Kenya\***

Susanne D. Mueller\*\*

*Visiting Researcher African Studies Center, Boston University, Boston, MA, USA*

This paper examines the lessons learned from Kenya's 2007 post election violence and what has happened since then. It notes that the root causes of the violence still persist, have not been addressed, and easily could be reignited. Faced with a situation where institutions and the rule of law have been weakened deliberately and where diffused violence is widespread, both Kenya's transition to democracy and the fate of the nation remain vulnerable. The argument here is that the problems faced in holding and managing elections in conflict situations often are not simply technical. Instead, in Kenya and elsewhere, many difficulties are symptomatic of larger political and institutional questions related to democratic change that are more difficult to analyze in causal terms or to address.

**Keywords:** Kenya; elections; political violence; ethnic politics

### **Introduction**

They must be taught to accept defeat and look forward to other good things for if no one was a loser then what would happen?

Njogu 2009

Democratic theorists, including Robert Dahl (1971) and others,<sup>1</sup> have long understood that democracy consists of considerably more than multi-party elections. At the heart of the democratic experiment are two underlying caveats bordering on truisms. First, there must be a willingness to lose elections and not to win them by any means and at all costs, including killing one's opponents. In established democracies, both politicians and the public generally accept that tomorrow is another day to get their person elected. Second, and central to democracy and the democratic process, is a belief in the integrity of the rule of law and institutions that must be matched by the way in which laws and institutions operate in practice. Where this does not occur, democracy is vulnerable. However, there is little by way of agreement about the underlying causes or events that give rise to these two factors or trigger the incentives for elite consensus necessary for their emergence.

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\*\*Email: [susannedmueller@gmail.com](mailto:susannedmueller@gmail.com)

Clearly, the acceptance of loss and institutions bound by the rule of law do not emerge as a result of altruism, but are instead the product of other factors.<sup>2</sup> Nevertheless, in these situations, a vicious circle ensues. As Acemoglu and Robinson note, where political elites are not constrained by checks and balances and are not forced to be accountable, (Acemoglu et al. 2008) they will use their *de facto* power to undermine *de jure* changes and ‘avoid democratic institutions which are more costly for them’ in terms of power and rents (Acemoglu and Robinson 2008). One such cost is an undesirable shorter time in office. To avoid this outcome, Collier and Hoefler find that incumbents in new democracies more than doubled their time in office, from 6.4 to 15.8 years, by using ‘dirty [electoral] tactics’ such as rigging (Collier and Hoefler 2009). This suggests that politicians have powerful incentives to subvert laws and institutions that keep them from gaining or retaining power. Politicians don’t want to lose and will do whatever is necessary to stay in power. When they are successful, this creates dangerous incentives and possibilities for even further deinstitutionalization and even greater dissipation of the rule of law. A vicious circle then ensues with institutional decay and lawlessness begetting more of the same as well as inviting further recourse to violence once institutional constraints are removed.

Boone’s research finds that the less constrained elites are in terms of laws and institutions, the greater the likelihood is that they also will resort to other means to gain or retain power, including using violence. In her discussion of electoral populism in the Côte d’Ivoire, Boone shows how land was expropriated and rules concerning citizenship were changed as both were mobilized as forms of electoral patronage. This meant that existing institutions, laws and rules were all irrelevant and up for grabs with the introduction of multi-partyism. The only thing that mattered was ‘who was in control of the central government’, not what was on the books. In short, once sacrosanct rights concerning land and citizenship suddenly became malleable, nothing was ‘fixed’ or ‘neutral’. This paved the way for the possibility of expropriation, violence and ‘politics in which losers h[ad] few incentives to abide by outcomes generated through elections’ (Boone 2009).

In situations comparable to those in Kenya, institutional checks and balances and rules concerning accountability may exist on paper. Often, however, they are overridden personally by politicians, civil servants and others operating under an entirely different set of informal incentives, sanctions and enforcement mechanisms. Public trust in institutions and the rule of law then dissipates. This increases the propensity for electoral and other contests to be resolved in the streets through violence rather than around tables or in courts. This may induce a vicious circle-like syndrome with violence rather than the law or institutions becoming the likely arbiter. Violence undermines democracy. Furthermore, in circumstances where violence is a cost effective way of competing for power and there is no consequence in using it, it is difficult both to ensure non-violent political competition or for it to be about much more than ‘who will protect me from harm from the other side’. Also, violence tends then to beget more violence. Politicians are dying to win and freed of institutional and legal constraints are able and willing to use violence to achieve their ends.

In these circumstances, there is every reason for both local and international organizations to try to improve institutions involved in the electoral process. However, in the absence of incentives to adhere to the rule of law and a well founded practical belief in the integrity and legitimacy of institutions, institutional reforms may be bypassed, undermined and not accepted by the political elite or the

public. In situations like these, particularly where violence previously has been used as an arbiter and where the incentives of the political class have not changed, more violence and a further breakdown of order is increasingly likely.

In Kenya, many local and external organizations have been engaged in attempts to improve the electoral process. For the most part, existing efforts to consolidate democracy have focused on changing formal laws and institutions without considering the incentives and enforcement mechanisms that support them. This has involved a variety of technical initiatives: trying to institutionalize a more equitable playing field surrounding the conduct of elections; improving the nomination process and how political parties function before, during and after elections; creating a better, improved and more independent electoral commission, electoral rolls, vote tallying and monitoring procedures; and addressing other issues that surround the electoral process, including constituency delimitation and access to the media. However, these efforts are not self-enforcing as they do not necessarily affect the incentives or ability of actors to arbitrarily change rules or to resort to extra-institutional and violent modes of behavior. Hence, the question arises whether given the intensified political and ethnic divisions and the continued diffusion of violence in Kenya since the 2007 election, the consensus exists to improve institutions in these areas and even if they are changed on paper, whether these improvements will be subverted or undermined in practice in an electoral crunch or for other reasons? In short, formal institutional changes may not inhibit more rounds of violence in the future. An election might or might not be the precipitating factor. Also, as the diffusion of various types of violence proliferates, the catalyst next time also could be something else entirely.

These issues and observations feed into broader questions that have been raised but have been far from answered fully by political scientists, policy makers and practitioners: whether observers were too quick to put the democratic label on what are mostly 'virtual democracies' or exercises in 'competitive authoritarianism' (Joseph 1998; Carothers 1997; Levitsky and Way 2002), whether certain underlying structural conditions (e.g. levels of economic development, institutionalization of the rule of law, sequencing etc.) are essential prerequisites for genuine multiparty democracy (Fukuyama et al. 2007; Branch and Cheeseman 2009); whether as others argue, the evidence supports the view that engaging in multiparty democracy is in itself a positive practice that facilitates democratic behavior; or whether even if this is sometimes true, the effects of electoral participation still may be heavily diluted by some of the broader political economy factors discussed above (Lindberg 2006; Posner and Young 2007).

While discussing these issues fully in the context of Kenya is outside the scope of this paper, much of what has happened there raises similar questions. Kenya's rising and entrepreneurial middle class and the belief that it would embrace the rule of law and strong institutions to protect its interests intellectually underlay the positive but incorrect spin on Kenya's transition to democracy.<sup>3</sup> Many thought that with its peaceful 2002 election, Kenya had made it, ignoring the fact that the two main contestants for president not only were members of the same ethnic group, but that many underlying generic factors had not changed. The results of the 2002 presidential election, in turn, seemed to buttress the notion of voluntarism: the idea that elections themselves, and later the 2005 referendum on the constitution where Kibaki government did not contest its loss, were positive signs of good

practices that promoted democracy. In fact, as elections in Kenya and the theorizing about them continued, so did the proliferation of non-state violence, the emergence of possible ‘shadow states’,<sup>4</sup> the personalization of power, a zero-sum view of winning infused by ethnicity, and the persistence of unreformed institutions. This was coupled with the hollowing out of institutions, and a hardening of the notion of winning at all costs, with ethnic polarization increasing and the nation becoming more violent and fragile.

The discussion here indirectly grapples with some of the above issues. It is divided into three parts. The first part discusses the roots of Kenya’s 2007 post-election violence, drawing on a previous article (Mueller 2008). The second part examines these same factors one by one. It argues that they still are very much in place and if anything have magnified in their intensity. This increases the likelihood of more and possibly greater violence in the future, something reinforced by the failure of the political class to deal with impunity and to establish a Special Tribunal recommended by the Waki Commission of Inquiry to Investigate the Post Election Violence (CIPEV) (Republic of Kenya 2008). The third part of the paper outlines the challenges of peacefully managing political and electoral conflict in situations like Kenya and suggests possible approaches for the future. Principal among them is the necessity to understand that given the persistence of existing incentives and enforcement mechanisms, formal changes to improve democracy whether by strengthening electoral institutions and practices or by adopting a new constitution, as Kenya recently has done, continue to run the risk of being undermined in practice.

### **The roots of violence and conflict in Kenya’s 2007 election crisis**

In an earlier article (Mueller 2008)<sup>5</sup> I discussed three underlying factors that predisposed Kenya to violence and were ignited by a too close to call contested election. I am reiterating them here. The reason is that they still shape Kenya’s landscape and still predispose it to more violence, whether electoral or non-electoral, something to be discussed in the next section.

The three factors at the root of the 2007 implosion were: a gradual decline in the state’s monopoly of legitimate force and a consequent generalized level of violence not always within its control; deliberately weak institutions, mostly overridden by a highly personalized and centralized presidency, that could and did not exercise the autonomy or checks and balances normally associated with democracies; and political parties that were not programmatic, were driven by ethnic clientism, and had a winner-take-all view of political power and its associated economic rewards. The central point here is that: violence was diffused, could be ignited easily, but not controlled, and was not; that institutions outside the presidency normally associated with vetting a contested election were not viewed as being sufficiently neutral to do so and did not; and that the nature of Kenya party politics predisposed both leaders and followers to see politics as a do or die zero sum game, which is what the 2007 election became. Had the election not been so close, these same factors may have been held in check for a while. Nevertheless, they were and are dangerous and looming problems that put Kenya on a precipice and led to it descending into a spiral of death and destruction along ethnic lines, thereby fracturing the already fragile idea of state and nation.

### ***Diffused violence***

In the case of diffused violence, gang violence, increasingly out of the state's control, had become a larger and larger feature of Kenya's landscape starting with the collapse of the Soviet Union and the decision to allow multiparty elections in 1991. Responding to international financial and local pressure, former President Daniel arap Moi agreed to accept multiparty elections in Kenya, by rescinding the controversial 2(a) clause of the constitution that had institutionalized a one party state. However, in practice, he detested the idea of multiparty democracy and was prepared to win at all costs, including using violence. Moi and his supporters used so called 'Kalenjin warriors' in the Rift Valley and elsewhere to kill and displace opposition voters from other ethnic groups, most of whom were Kikuyu, Luo and Luhya, while civil servants working for the state turned a blind eye or aided and abetted this process. This happened before and during the 1992 and 1997 elections. This violence and these militias spawned other gangs and other militias, including the now famous Mungiki, Sungu Sungu, the Sabaot Land Defense Force (SDLF), and a host of still others with menacing names commensurate with their activities including the Taliban, the Bagdad Boys, and others. Moi's decision to engage extra state militia and to engage in what Katumanga has aptly called the 'privatization of public violence' (Katumanga 2005) had short and long-term consequences.

In the short run, Moi won both the 1992 and 1997 elections by undermining any notion of free and fair elections. The gangs used on his behalf killed and displaced his opponents who themselves were divided. Before and during elections in the 1990s, politicians hired gangs: some to intimidate members of anti-government parties, others to protect themselves against pro-government gangs, and still others to do whatever was necessary to keep their opponents from voting and to win at any cost.

Over the longer run, whether between the two elections in the 1990s or before, during, and after the 2002 and 2007 elections, these extra state militias and gangs took on a life of their own in many parts of the country. Gangs moved into the slums of Nairobi, the rural areas of Central Province and into other parts of the country. Gangs such as Mungiki and others acted as well organized shakedown gangs, offering various types of 'you can't say no' protection and services for fees. They moved into areas neglected by government or where officials and police turned a blind eye in exchange for kickbacks for themselves. During this process, extra state violence became institutionalized with gangs like Mungiki infiltrating many businesses much like the Mafia. In addition, the state increasingly began to lose its 'monopoly of legitimate force', (Weber 2002)<sup>6</sup> with gangs increasingly taking over much of the geographic space and functions of government. Hence, what began as an electoral exercise to win the presidency and the majority in parliament at all cost, gradually dissipated government control over its territory threatening the integrity of state and nation. This meant that by the time of the 2007 election, diffused gang violence was lying in wait and could be tapped, which is exactly what happened. One of the legacies of all these years was that using violence to win was acceptable, including in the case of a disputed election.

***Deliberately weak institutions***

A second factor predisposing Kenya to violence following the 2007 election was that institutions outside the presidency had been deliberately weakened over time through a series of constitutional amendments under both President Kenyatta and President Moi. They increased the power of the presidency and reduced that of other arms of government, including the judiciary, parliament and various parts of the civil service. Furthermore, many of the checks and balances normally characteristic of democracies were abandoned both formally and informally. Civil servants and various arms of government understood how their bread was buttered and tended to defer to the president. Political and economic statism ensured that opposition was costly and would be punished.<sup>7</sup> This weakening of autonomous institutions paved the way for gross repression and torture under Moi and the pervasive corruption of the 1980s and 1990s. The latter included setting up nominally private banks that were no more than officially sanctioned money laundering operations and paving the way for huge scandals under President Moi, such as the notorious Goldenberg and Anglo Leasing scandals (with the latter continuing under President Kibaki), as well as many dubious land grabbing exercises. During all these periods, the courts were seen as partisan and under the thumb of the executive: no one was ever prosecuted for torture, for the electoral violence of the 1990s (Republic of Kenya 1999), or for corruption. Over time the state outside the president developed the seemingly contradictory characteristics of being deliberately weak and simultaneously predatory. While state predation lessened after the 2002 election of President Kibaki, it re-emerged after 2005, albeit initially in a more attenuated form (Mueller 2008; Bates 2008). This further decreased the legitimacy of state institutions.

Before the 2007 election, the Electoral Commission of Kenya (ECK) also was deliberately weakened. In 2007, President Kibaki bypassed an agreement to consult with the opposition before appointing new commissioners to the ECK and replaced them all before the election, including making his former lawyer the Vice-Chair of the Commission. He also created a number of new judicial vacancies, including appeals judges before the election.

Because of the above practices, institutions that already had been seriously weakened totally lost their autonomy, independence, integrity and legitimacy over time. Furthermore, even as late as 2007 there was no agreed upon independent institutional arbiter to deal with allegations of rigging and that the election had been stolen. Hence, the dispute over the election took to the streets, even though much of the violence appears to have been organized in anticipation of possible loss.

In short, the combination of diffused violence that could be tapped, the willingness to win at all costs, and the graduation dissipation of the rule of law and strong institutions, all predisposed Kenya to implode.

***Non-programmatic clientist political parties and zero sum ethnic politics***

Kenyan political parties are barely distinguishable in terms of ideology, programs, platforms, or organization. Many are no more than changing sets of ethnic coalitions. Even today's main leaders, including President Kibaki and Prime Minister Odinga, have moved opportunistically from one party to another as necessity has dictated.

Politics is viewed primarily as a winner-takes-all zero-sum ethnic game. The national economic cake is the prize. Various ethnic groups argue that it is their turn to eat. The means to this end is controlling the state and having a fellow co-ethnic become president. As parties are not programmatic and institutions are weak, politicians are seen primarily as personal distributors of private rather than public goods. Even though alliances and cross-ethnic coalitions are necessary to win the presidency, the winner is seen by others as the chief ethnic in charge. Herein lies the importance of winning and not losing, particularly as political losses have meant being excluded from access to state resources.

Given the non-programmatic nature of Kenyan political parties, the lack of institutional checks on the president, his consequent personal power, and the expectations of benefits from clients, ethnicity is seen as critical in determining the distribution of national resources. In part, this explains the length to which leaders and followers are willing to go to get their person in power and the means they are willing to use to achieve their ends. Hence, politically inspired violence has accompanied successive multiparty elections from 1992 until 2007.

Even though many co-ethnics do not appear to gain materially from one of their own being in power, voting in Kenya generally falls along ethnic lines. One reason for this is what one might call the fear factor, or what I have called elsewhere 'exclusionary ethnicity'. In short, voters sometimes vote defensively against non-co-ethnics or coalitions of non-co-ethnics as the least bad alternative. Following the electoral violence since the 1990s when politically organized gangs killed, maimed, or destroyed the property of specific ethnic groups supporting the opposition, this fear increased along with defensive voting. While individual voters might like to gain materially as a client voter of a co-ethnic even if that is not possible, they also vote out of fear that worse things might happen to them if a non-co-ethnic comes to power. This fear is enhanced because of the potential of the state to be arbitrary, predatory, and unpredictable, with laws being adjusted or bypassed to suit those who are in power.

President Kibaki's abnegation of his 2002 election promise to make Raila Odinga his Prime Minister, and the 2005 watering down of a referendum to do so increased distrust between the Kikuyu and the Luo and other marginalized groups. The nature of non-programmatic winner-take-all clientist political parties fed into the polarization of ethnicity for political ends, which could be violently ignited after the contested 2007 election and was. Underlying this was a deep, long seeded distrust about what would happen if another ethnic group or coalition of ethnic groups took over, as well as a willingness by the political elite and its opponents to win at all costs to hold on to or to obtain political power and all the material rewards that come with it.

Because of the factors just discussed above, two tenets fundamental to democracy were not accepted: political loss and the rule of law, which was perceived as arbitrary and subject to personal influence rather than legitimate and neutral. This in part is why violence prevailed and could do so again. Everyone was dying to win and to let others die on their behalf so they could.

### **The continued salience of diffused violence, weak institutions and zero-sum politics<sup>8</sup>**

Since the 2007 elections the salience of the above factors not only has continued but has intensified. The demonstration effect of successful gangs has spawned new gangs.

They have taken on a life of their own in the face of deliberately weakened institutions. Community vigilante groups initially organized to protect themselves from militia now have come to resemble them and ordinary citizens increasingly are being extorted on multiple fronts (Kenya National Dialogue and Reconciliation Monitoring Project 2010).

### *Violence*

In terms of violence, neither gang nor state sponsored violence has been checked. Gangs have continued to proliferate, have increased their shakedown operations, and in some areas, such as in Nyeri, Murang'a, Meru and the slums of Nairobi, have become virtual shadow states. Increasingly, the state has lost or abrogated its monopoly of legitimate force and finds it difficult to maintain peace or order. In part this is because politicians having used gangs to gain or maintain power now are themselves beholden to them or afraid of them. This bodes ill, not just for any future elections, but also for the future of Kenya.

There are many different types of gangs: gangs engaged in extortion; freelance gangs that come and go; highly organized ethnic militia such as the Kikuyu Mungiki and to a lesser extent the Luo Taliban, among others; gangs connected to politicians and the police; gangs that over time have become independent of the forces that initially supported them; and new vigilante groups.

A May 2009 report by South Consulting Group (Kenya National Dialogue and Reconciliation Monitoring Project 2009) noted there has been 'no systematic attempt to disband these groups'. As a result, although these gangs are not trying to take over the state or to foment civil war,<sup>9</sup> their existence and activities have led to a dangerous erosion of the state's authority and its monopoly of legitimate force. In some areas such as Nairobi's slums and in parts of Central Province, including in the president's home area of Nyeri, gangs effectively have begun to displace government. They shakedown citizens and politicians, tax them, and demand protection fees to engage in ordinary activities such as building houses and even stopping at intersections. They also ominously mete out justice in informal courts, known in one area as 'The Hague'. Citizens are frightened. They dare not make reports to the police who sometimes demand kickbacks from gang members, and have no place to turn. In some areas, individuals in parts of Nyeri have formed retaliatory vigilante groups to attack Mungiki groups themselves, leading to a further breakdown of law and order, increased extortion, and proliferating crime.

Elsewhere in the Rift Valley, where most of the deaths from the 2007 elections occurred, there are reports of increasing fear, polarization, hostility, rearmament (Lynch 2009) and comments such as 'never again' by the Kikuyu and 'next time we will finish the project' by the Kalenjin.<sup>10</sup> Increasingly, the choice of weaponry now is an AK-47 rather than bows and arrows.

There has been no political leadership on how to address this proliferating violence whether from the political elite or ordinary politicians who either are afraid of the gangs themselves or have supported them in the past. Human rights groups and the UN's Special Rapporteur on Extrajudicial Killings have castigated the police for killing innocent youth in their attempts to wipe out Mungiki.<sup>11</sup> In urban slums such as Kibera, chiefs and other officials are afraid to go after gang members and other thugs as they fear they might be connected to high-level politicians.<sup>12</sup>



The combined effect of this is that gangs hold sway in many parts of the country, with the state having become impotent, indifferent, or having colluded with gangs to gain power to begin with, thereby making them untouchable. Increasingly, there is a powder keg like quality to the situation. New gangs have formed in the past year and there is a growing lack of trust between ethnic groups and classes (KNDR 2009). More and more individuals report having experienced violence in their lives and feeling unsafe,<sup>13</sup> something that bodes ill not just for Kenya's political, but for its economic future as well. One result of the 2007 post-election violence was that two of Kenya's key sources of revenue, tourism and horticulture exports, declined by approximately 35% and 40%, respectively (Ksoll, Macchiavello and Morjaria 2009). Even now, in many areas, gangs effectively have become government in terms of perversely having taken over much of its physical space and functions, leaving citizens trapped.

A recent survey by Synovate reports that in areas affected by the 2007 election, 40% of its respondents predict more violence in 2012 (Mathenge 2010). In another survey commissioned for the Fourth Review Report of The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, 77% of those surveyed blame politicians for inciting violence between different groups. This finding dovetails with others done in February 2008 by a group from Oxford (KNDR 2008; Dercon et al. 2008).

### *Institutions and zero sum politics*

Since the February 2008 agreement to form a 'grand coalition', government has adhered to parts of the Annan agenda. It has set up commissions to investigate the election, the post-election violence, disbanded the former Electoral Commission of Kenya (ECK) and established a new Interim Independent Electoral Commission (IIEC), as well as a constituency delimitation commission, a Truth Justice and Reconciliation Commission (TJRC), and other entities. In April 2010, after contentious discussions and negotiations, Parliament also passed a new draft constitution prepared by a special Committee of Experts (COE) that was ratified by 67% of the public in a referendum held on 4 August 2010.<sup>14</sup> Just as in 2005, the referendum was peaceful and the passage of the constitution was heralded as evidence of Kenya having discarded violence and embraced a new era of peace. However, a peaceful referendum may not be a portent of peaceful elections in the future. The most important point is that the 2010 referendum was not an election; it was not about who gained and lost power or wealth. Also, it was not close and the state deployed 18,000 security forces in the Rift Valley alone.

Furthermore, behind these new recent formal entities and legal changes, the incentives that guide political life are much the same. Politicians are still mostly concerned with positioning themselves and their ethnically rooted parties for the 2012 election, are amassing wealth, are reluctant to pay taxes and seem more intent on building expensive mansions for the Vice President and the Prime Minister (PM) and refurbishing various rural state houses than dealing with famine and hunger in the countryside. There also has been much political wrangling between President Kenyatta's largely Kikuyu dominated Party of National Unity (PNU) and Prime Minister Raila Odinga's Orange Democratic Movement (ODM), supported by but increasingly fractured between the PM and its Rift Valley supporters, led by Member

of Parliament (MP) William Ruto, who campaigned against the new constitution and increasingly has been sidelined by both Kibaki and Odinga who united in favour of its passage in what may be no more than a temporary<sup>15</sup> display of Kikuyu Luo unity harking back to the 1960s pre-independence Kenya African National Union (KANU) alliance against Kenya African Democratic Union (KADU). Furthermore, nothing has changed in terms of the idea that it is necessary and important for particular ethnic groups and coalitions to control the state, at the very least to keep other groups from doing so. This underlying trajectory has led to continued standoffs between various factions in parliament and between the executive and the prime minister.<sup>16</sup>

As this continues, it is not clear that the political elite and their supporters are any more prepared to lose elections than they were before, or that there is much interest in establishing viable neutral institutions that will uphold the rule of law. Instead, every appointment or construction of a new institution is perceived to be part of someone's political agenda, which it often is, and is fought. This occurs because every political act has the potential to tilt the balance of power permanently away from one's own ethnic group. In a winner-take-all setting, this is a fearful event.

This continuation of politics as usual has been no more apparent than in the failed attempt to establish a Special Tribunal, recommended by the Waki Commission, to investigate and prosecute high-level perpetrators of the 2007 post-election violence (Commission of Inquiry into the 2007 Post-Election Violence 2007). Initially, parliament, which was supposed to pass laws anchoring the tribunal in the constitution and insulating it from the local courts, failed to muster the majority to do so. It missed its deadlines. For both good and bad reasons, different MPs voted for and against the bill in February 2009. Some voted against having a Special Tribunal because they felt it could not operate on Kenyan soil without being subverted even if there was an international presence. Other MPs felt it was important for the country for justice to take place locally and that it was possible. Still other MPs wanted the case to go to the International Criminal Court (ICC) in The Hague. Some MPs preferred the ICC alternative because they thought this was the only way to avoid political interference and seek justice. Others opted for The Hague because they thought it would take longer to pursue perpetrators and the ICC would go after fewer of them than a Special Tribunal. Under the rules of complementarity in the Rome Statute, cases can be taken up by the ICC only if a country itself is unable or unwilling to prosecute high level perpetrators for genocide, crimes against humanity, or war crimes.

When it concluded its work, the Waki Commission of Inquiry into the Post Election Violence (CIPEV) passed over an envelope with a list of high level organizers and financiers of the 2007 violence to the former Secretary General of the UN, Kofi Annan. Once Kenya's parliament voted down the bill to establish a Special Tribunal in February 2009, Annan then gave the Kenyans a number of additional extensions that were missed. Later, he met a government delegation in July 2009 when it came to Geneva and The Hague to discuss the situation and to plead for more time. At that point, Annan finally had had enough of Kenyan attempts at procrastination and passed on the envelope to the ICC's Chief Prosecutor, Luis Moreno Ocampo. Thereafter, the Kenyan delegation signed minutes with Ocampo agreeing to take steps to establish a Special Tribunal or an 'alternative judicial

mechanism' after which it would report back to Ocampo on their progress at the end of September 2009.

As of August 2009, Kenya's Cabinet had failed to agree on the proposed law to establish a Special Tribunal, splitting among other matters over clauses that would deny the President immunity and would keep the Attorney General from interfering in cases so as to make the law consistent with the Rome Statute. Instead, Kenya's Cabinet decided it would like to try all cases in its own courts, having promised to reform the judiciary, or expand the Truth and Reconciliation Commission (TJRC) for this purpose. These proposals were roundly criticized by the Kenya public and human rights groups. Afterwards, some MPs led by Gitobu Imanyara put together a new private member's bill to establish a Special Tribunal. At the time, it was not expected to garner enough votes to pass. However, even before this point was reached, the bill failed to obtain a quorum in parliament and thus could not even be debated. In their earlier agreed upon minutes with Ocampo, the Kenyan delegation had promised to 'self refer' to the ICC if it failed to implement its agreement, something that never happened. After that, in November 2009, the Chief Prosecutor of the ICC, Luis Moreno-Ocampo requested permission from the ICC's pre-trial chamber of three judges to begin a formal investigation of those most responsible for Kenya's post-election violence. On 31 March 2010, he received authorization to do so in a two to one majority opinion (Pre-Trial Chamber II 2010)<sup>17</sup>. Since then, the ICC has been investigating the Kenya case. In mid-December 2010, the ICC's Chief Prosecutor submitted evidence to the Court's Pre Trial Chamber (PTC) to seek its approval to prosecute six publicly named high level perpetrators of Kenya's 2007–8 post-election violence. The list includes top level political figures: three cabinet ministers, Kenya's most senior civil servant, the former chief of police, and one radio broadcaster.<sup>18</sup> Following the announcement, parts of the political elite have gone on a rampage against the ICC while the majority of citizens surveyed in opinion polls continue to support it. The counter attack has included embracing accused co-ethnics and passing a motion in parliament to pull Kenya out of the Rome Statute by repealing the International Crimes Act of 2009.<sup>19</sup> Some argue the motion flies in the face of Kenya's new constitution which incorporates all international treaties signed before its passage. From the standpoint of this article, it is simply one more example of the ongoing malleability of the rule of law in Kenya and continued political attempts to subvert it, notwithstanding its recent new constitution.

Part of the reason for the Waki Commission's recommendations for a Special Tribunal was to pursue justice for the victims of the 2007 post-election violence and to deal with the issue of impunity. No high level figures in Kenya have ever been prosecuted for the increasingly deadly violence surrounding elections since the early 1990s. Much of it stems from the continued refusal to lose elections and the willingness to use violence to win. The failure of the Waki Commission's recommendations to set up a Special Tribunal and the stasis that followed them showed that there continues to be no political stomach for high level political figures to shed some of their own and to pursue justice. More recently, the sudden about face by Kenyan parliamentarians to swiftly reform the judiciary and to set up a tribunal to try perpetrators of the post election violence is not indicative of any new found commitment to the rule of law. Instead, it is a cynical and unlikely attempt to wrest the cases currently before the ICC away from it and back to Kenya to ensure that business as usual rather than justice prevails.

The incentives guiding the above decisions to date indicate there is still no desire among the political class for strong autonomous independent institutions, applying the rule of law or accepting political loss. Given the continued diffusion of violence, its escalation, and the lack of countervailing institutional forces, the next presidential election in 2012 could be as, if not more, challenging as the last one, notwithstanding provisions in the new constitution to hedge against that possibility. Violence may once again be the arbiter, before, during or after the next election if Kenya does not reignite before then. Politicians still are dying to win and violence or the threat of violence continues to be the order of the day.<sup>20</sup>

Following the submission of the Waki Report to the Government of Kenya (GOK) in October 2008, potential witnesses who might be called upon either by a Special Tribunal or by the ICC increasingly have been hunted down, intimidated, run out of the country and even killed. They include ordinary citizens, possible witnesses, human rights workers attempting to protect witnesses, MPs, priests, civil servants and others.<sup>21</sup> Various forms of harassment have escalated further since the ICC referred the Kenya case to its pre-trial chamber. The message being sent to victims of the post-election violence, witnesses and their human rights defenders who want justice and would like to see the rule of law prevail is clear: keep quiet or watch out and suffer. The disincentives for not doing so are very costly. This reinforces the existing status quo, further weakens institutions, and increases the propensity for violence still further.

### **Lessons learned and challenges in managing electoral conflict**

The report of Kenya's Independent Electoral Review Commission (IREC) in September 2008 recommended a number of technical and institutional changes that needed to be implemented to improve the quality of elections in Kenya. Among them were a new electoral commission, a new voter register, changes in a number of electoral procedures including tallying, demarcating more equally sized constituencies and developing sound dispute settlement mechanisms, among others.

To date some of these suggested changes have taken place or are being considered. However, Justice Kriegler also noted in his Independent Review Commission Report that in assessing the 2007 election it was important distinguish between 'anomalies, failures, and malpractices traceable to gaps or provisions in the constitution and laws of Kenya from those that can be attributed to a bad culture encompassing impunity, disrespect for the rule of law and institutional incompetence'. He went on to argue that in Kenya in 2007, 'nominally democratic elections' took place 'within [the] old practices of a one party state'. He noted that relevant laws were on the books, but were not adhered to (2007 Elections in Kenya Independent Review Commission 2008). Kriegler also maintained that the incentives to apply relevant laws were non-existent, and insisted that 'nobody would have dreamt of seriously acting against people in high places or even highish places' (*ibid*, 24).

This correct observation by Kriegler supports numerous other commission reports. This includes the Akiwumi report on the so called 'ethnic clashes' of the 1990s, which noted that civil servants, lawyers and others who tried to follow the law and report infringements were punished where as those who turned a blind eye or undermined the law were rewarded.<sup>22</sup>

These observations also were reiterated and confirmed throughout the Waki Commission's report into the post election violence in its discussion of the role of civil servants, the police, politicians, and the public and in its chapter on impunity (Commission of Inquiry into the 2007 Post Election Violence 2008). The Waki report argued that 'impunity is especially common in countries that lack traditions of the rule of law, suffer from corruption, or that have entrenched systems of patronage, or where the judiciary is weak or members of the security forces are protected by special jurisdictional immunities' (ibid, 445). Furthermore, the report also noted 'there is of course, a symbiotic relationship between the politicians and their supporters which continues to fuel impunity. Politicians rely on their supporters to enforce impunity while their supporters, who are the handmaidens of the violence, get protection from their political godfathers. This interference normally comes in the form of *'orders from above'*' (ibid, 459). In short, laws and institutions in these situations mostly are extensions of personal power; they are not autonomous from each other or guided by checks and balances.

In a recent article, Gyimah-Boadi has argued that '[e]lections are now widely accepted as central to the project of democratization, and ... are invested with unrealistic expectations and powers to resolve all sorts of problems' (Gyimah-Boadi 2007). This is particularly so where one of the main problems is that elections are taking place, but in situations that are not democratic. For those interested in 'promoting good practice in electoral conflict management'<sup>23</sup>, the first challenge is to admit, diagnose, and understand the situation on the ground differentiating between what can and cannot be accomplished in different circumstances. Burnell notes there is little discussion in the literature about why countries that seem to share some of the same predisposing characteristics do not all have the same outcomes when in terms of civil strife or electoral violence (Burnell 2007). This is an avenue of research worth pursuing.

Clearly, it is worthwhile for practitioners to develop early warning systems and to understand the possible triggers of electoral violence in specific places; to put in place mechanisms to protect vulnerable groups; to improve institutions involved in the electoral process; to engage in efforts to educate those involved in elections, monitors, and the public; and to develop acceptable electoral dispute mechanisms.

However, in political systems where political power is highly centralized and personalized, designed to skirt the law, and to undermine the integrity of institutions, the above changes while necessary are not sufficient, may not work, and may not even be used. Ultimately, one needs to change the norms and incentives of both politicians and the public. As Justice Kriegler noted with respect to Kenya, 'The solution is not merely in constitutional and legislative changes'. It is tempting to concur with Justice Kriegler that '[t]he culture of impunity needs a fix too' (2007 Elections in Kenya Independent Review Commission 2008). However, this is easier said than done as the absence of enforcement is symptomatic of, not the cause of underlying political disincentives to change. Clearly, not all places are amenable to change nor do they necessarily have the incentives to make the difficult choices necessary to embrace the rule of law and the move away from violence.

One difficulty in Kenya is that political power has continued to be very attractive even in the post-Moi era. This increases the likelihood that in an increasingly ethnically polarized situation already imbued with violence and underwritten by clientism, where the state is losing both its legitimacy and its monopoly of legitimate force and diffused

violence is the order of the day, and where institutions are deliberately kept weak, contenders are increasingly likely to resort to violence again to win elections or for other reasons. Furthermore, the financial incentives to become an MP are huge (Kenyan MPs earn some of the highest salaries in the world, around \$189,000 *per annum* and mostly untaxed) and hard to change.<sup>24</sup> Parliament itself decides on its salaries and all attempts to reduce them or to tax them have been shot down.

When it comes to the general public, many of those who participated in the post election violence in Kenya were also some of those who suffered and died. However, we know little about the ordinary perpetrators and the specific incentives that led them to use machetes against citizens from other ethnic groups. This clearly is an area in need of more investigation by practitioners and scholars. To manage electoral conflict, it is also necessary to understand the motives of those who engage in violence as well as how much of the gang labour that kills is impressed into service by politicians and others rather than voluntarily performing it.

In the end, much that results in electoral violence or an inability to contain it stems from factors and incentives outside the electoral process itself, something obvious to many but in need of further thought in terms of its practical implications for managing conflict. This is certainly the case in Kenya as noted in the earlier parts of this paper. The failure to appreciate the gravity of these factors, the incentives exogenous to elections and the technical factors related to them, as well as the implications of the mounting severity and diffusion of past violence are some of the reasons policy makers, practitioners, and most scholars did not anticipate the 2007 post election violence in Kenya.

Much of the literature on managing elections in conflict prone situations is devoted to questions of whether new electoral institutions, different administrative arrangements (centralization versus decentralization or federalism, more or fewer checks and balances among institutions) or different types of electoral systems (various genres of proportional representation) can be used to change incentive systems so as to diffuse the potential for violence, particularly in developing countries<sup>25</sup>. Apart from the lack of consensus among analysts, it is worth reiterating here that the history of institutional change in Kenya has been the hollowing out of formal changes to preserve the *status quo* and the hegemony of the political elite (See Mueller 2008). This would suggest examining Keefer's finding that different types of formal political and electoral systems are not significant predictors of political conflict (Keefer 2008) before assuming that implementing similar changes in Kenya would work. Also, as Andrew Reynolds has noted 'like medications, institutional remedies themselves are seldom if ever sufficient' and 'constitutional therapists often get it wrong'. (Reynolds 2005). Even scholars like Roger Southall who believe that proportional representation deserves more consideration in Kenya admit there 'is a marked circularity about Kenyan politics' that has 'negated reform and left politicians unaccountable' (Southall 2009).

Furthermore, the answers to two great unknowns continue to haunt policy makers and others: first, under what conditions do political competitors abjure violence and how can outsiders accelerate this process, if at all? Even if it is an inherent good, it is not clear how much promoting the usual types of electoral assistance provided by donors actually helps, in situations such as those in Kenya, even though it is far better than doing nothing, nor is it obvious what would help.

What one does know is that countries that have experienced conflict are at a higher risk of more conflict (Keefer 2008).

## **Conclusions**

The above discussion raises a number of issues and questions that pertain to Kenya, but go beyond it. They deserve to be explored, even if not fully in this article.

The mask of elections amidst the deliberate weakening of institutions to personalize and maintain power and the simultaneous diffusion of violence to win power is dangerous. In contrast to the past, in Kenya the integrity of the state itself still may be threatened increasingly by simultaneous but different violent pressures from militia and other groups controlled by competing ethnic factions in a nominal coalition government as the fabric of nationhood disintegrates. The question arises not only if it is possible to hold democratic elections in this environment, but if diffused violence can be contained when a state not only has lost its monopoly of legitimate force but also its legitimacy. The increasing groundswell of disgust from below could turn ugly, including the possibility of inciting a reversion to authoritarianism or worse. Furthermore, the use of coalitions may be the beginning of a retreat away from a multi-party situation and back to a one party state in another form.

The broader question of the causes and consequences of the above syndrome is of interest to both policy makers and scholars concerned with democratic transitions. Moi's aim in using extra state militia to eliminate his electoral opposition in the 1990s had the unintended side effect of chipping away at the state's monopoly of legitimate force. This was not its goal. Almost 20 years later, violence is diffused and out of the state's control. Pandora's Box is open. A collective action question arises here: under what circumstances do political elites, who themselves theoretically need peace and order to further many of their own political and economic interests, not have the incentives, power, or ability to take back the state's monopoly, instead of participating in destroying it, and why?

The further question of why the increasingly prominent private sector has not acted as a bulwark against institutional decay and rising violence rather than being a part of it, a point raised in the introduction, is another important question. What factors prevent it from assuming its historic role, why is it still so wrapped up with the state rather than autonomous from it, and what are the implications of this situation for the transition to democracy, if any?

The discussion of the causes and legacies of Kenya's 2007 post election violence and the more general observations above suggest that those engaged in electoral conflict management face genuine difficulties about how to proceed. One major problem is that well-known good electoral management practices, which certainly should not be abandoned, are often undermined deliberately by forces exogenous to elections themselves and may not be subject to quick fixes. In Kenya, the political class continues to revert to stasis. Their response to the ICC's evidence against high level perpetrators makes it clear they still are prepared to dismantle laws and institutions in pursuit of political power even if it entails embracing impunity and undermining their own much heralded new constitution.

## Notes

1. Also see note 2.
2. It is beyond the scope of this paper to discuss fully theories concerning democracy and the transition to democracy.
3. As John Githongo has noted, 'Indeed, in a cruel irony the much vaunted middle class, supposed to be the driver of modernity, became and remains the most vociferous of Kenya's new ethnic nationalists'. See <http://www.marsgroupkenya.org/multimedia/?StoryID=269341>.
4. William Reno's work is most closely associated with the term 'shadow states'. He defines a shadow state 'as one that is constructed behind the face of laws and government institutions' and 'is a form of personal rule', 'based on the decisions and interests of an individual, not a set of written laws and procedures' (Reno 2000, 434).
5. The first part of this paper, encompassing the three subsections, summarizes the main points of the article. The original article includes more theory, analysis, and attention to empirical detail. In some places I have used direct quotes from the paper, but being the author, I have not used quotation marks.
6. For a further discussion of this in the Kenyan context, see Mueller, 'The Political Economy of Kenya's Crisis.' For a discussion of the emergence of 'shadow states' elsewhere in Africa, see Reno (2002, 837–58; 2000, 432–59).
7. For a discussion of how repression in Kenya worked and its continuity with the colonial state, see Mueller (1984, 399–427). The biggest crackdown was after the 1982 failed attempted coup.
8. Much of the discussion in this section is drawn from newspaper articles in the *Nation* and the *Standard* from February 2008 to the present.
9. For a discussion about why Kenya had not experienced civil war up to 2005 (see Kimenyi and Ndung'u 2005). For a related discussion about rebel groups in the post cold war situation that are able to challenge the state but not confront it directly (see Kalyvas and Balcells 2010).
10. Quotes from private interviews with Kenyans and researchers, 2008–9.
11. For discussions and information collected by human rights groups, see <http://blog.marsgroupkenya.org/?p=623>; For the United Nations, General Assembly, Human Rights Council (2009), see <http://www2.ohchr.org/english/bodies/hrcouncil/11session/reports.htm>.
12. Private discussions. Also see De Smedt (2009, 581–98).
13. Reports over the past year in Kenya's dailies, *The Nation* and *The Standard*, report an increase in crime. This is supported by surveys in which only half of the respondents feel safer than they did six months ago, and with 27% feeling less safe and another 20% feeling about the same. See Kenya National Dialogue and Reconciliation Monitoring Project (2009, 3), <http://www.dialoguekenya.org>.
14. As of April 2010, the TJRC was paralyzed with all of its commissioners demanding that its head Bethwell Kiplagat resign because of questions concerning his credibility when he was an official under former President Moi. The new constitution, which still awaits the passage of laws to implement it, contains greater checks and balances on the president, a new Senate, and some level of devolution to the county level, with each of the above changes still being contested by parts of the political elite as too little or too much change.
15. Already since the ICC announced its list of perpetrators there has been an apparent realignment of forces with William Ruto, Uhuru Kenyatta, and Kilonzo Musyoka teaming up against Raila Odinga in preparation for the 2012 election in spite of the Ruto and Kenyatta having been identified as alleged perpetrators by the ICC.
16. See Branch and Cheeseman (2009), for their discussion of elite fragmentation. For instance, the recent marginalization of William Ruto, who mobilized the Kalenjin vote for Odinga in the 2007 election, by Kibaki and Odinga could either be a precursor to a new Kikuyu Luo alliance in 2012 or a first attempt by key Kibaki stalwarts to strand Odinga in 2012.
17. See <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>; <http://intlwgrrls.blogspot.com/2009/07/seeking-truth-justice-reconciliation-in.html>. Before receiving permission to



begin a formal investigation in Kenya, the ICC's Office of the Prosecutor (OTP) was doing a 'Situation Analysis' of the case. This was the first time the ICC's Chief Prosecutor had taken up a case on his own volition. Previously, all cases before the court had been referred to him either by a country itself (known as self referral) or by the Security Council.

18. Those named as suspects by the ICC are Uhuru Kenyatta, son of Kenya's first president, a Party of National Unity (PNU) Deputy Prime Minister and current Minister of Finance; William Ruto, former deposed Orange Democratic Movement (ODM) Minister of Agriculture, Minister of Higher Education, and acknowledged leader of the Kalenjin; Henry Kosgey, chairman of the ODM, key ally of Raila Odinga, and Minister of Industrialization; Francis Muthaura, the head of the civil service and a close Meru confidant of President Mwai Kibaki; Mohammed Ali, former Police Commissioner and current Postmaster General; and Julius arap Sang, host of the vernacular Kalenjin radio station Kass FM. For the ICC's cases and evidence against these individuals see <http://www.icc-cpi.int/NR/exeres/BA2041D8-3F30-4531-8850-431B5B2F4416.htm>
19. Even if the bill is signed by the president, pulling out of the ICC would not affect the current Kenya cases according to Article 127 of the Rome Statute. Also, to pull out, Kenya would have to notify the United Nations Secretary General, with the whole process taking up to a year.
20. Many Kenyans hope and believe that both the ICC's charges against high level perpetrators of the 2007 post election violence and the possibility of some successful prosecutions might be enough to deter future electoral violence.
21. Numerous reports of witness harassment have appeared in the Kenyan press since the Waki Commission finished its work. For recent examples see Kenya National Dialogue and Reconciliation Monitoring Project (2010, 16–17); *The Standard* (2010b); *Nairobi Star* (2010b); *The Standard* (2010a); *Nairobi Star* (2010a); *Daily Nation* (2009); *Daily Nation* (2010a); *Daily Nation* (2010b); VOA News (2010).
22. This point also is discussed in Mueller, 'The Political Economy of Kenya's Crisis.'
23. This quotation is from the pre-conference flyer for the North South Institute's conference in October 2009 for which this paper was originally prepared.
24. A recent commission suggested increasing MPs salaries and perks to around \$210,000 a year (See *Daily Nation* 2010c).
25. Among others, see articles in *The Journal of Democracy* 13, no. 2, 2002. Also see Southall 1999.

### **Note on contributor**

Susanne D. Mueller received a PhD. in political science from Princeton University and is a Research Fellow at Boston University's African Studies Center. She has conducted research in Kenya and Tanzania, and has worked in most countries in eastern and southern Africa, as well as in the former Soviet Union and South Asia. Previously, she has received postdoctoral research awards from Princeton's Center for International Studies, Harvard's Center for International Affairs, and the Social Science Research Council. She also works as a consultant for international organizations and financial institutions and her email address is [susannedmueller@gmail.com](mailto:susannedmueller@gmail.com)

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