Consequences of a flawed presidential election

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This paper evaluates the impact of a substandard presidential election. Using Kenya as a case study, it reviews the 2007 vote. The paper contends that there is a link between free and fair elections and the enjoyment of human rights. It argues that in order for states in Africa to walk the (desired) democratic path, sitting governments must comply with internationally recognised standards. While focusing on the violence that rocked the country, the paper analyses the causes and implications of the much-disputed presidential poll. Also evaluated is the role the international community can play in resolving a crisis. The paper concludes by asserting that a rule of law culture must be embraced if human rights and democracy are to flourish in Africa.

O God of all creation,
Bless this our land and nation.
Justice be our shield and defender,
May we dwell in unity,
Peace and liberty.
Plenty be found within our borders.1

INTRODUCTION

In any presidential election, the stakes are usually high. And, for many candidates and their supporters, assuming office means gaining access to power and, ultimately, control over important resources. In some African states, having one of your ‘own’ persons in power can determine the level of development in your region. Where resources are limited, and regions depressed, it makes the contest for political seats particularly important. Elections can, therefore, provide an opportunity to remove lawfully a person or party from government, which the majority believes has not delivered, and replace

* Some of the issues this paper evaluates were explored in a paper that the author presented at a panel discussion on Recent Events in Kenya, which the Global African Studies Program at Seattle University in the USA organised in January 2008. The author would like to thank Femi Taiwo for organising the session. Thanks are also due to the co-presenters and participants in the discussion session for sharing their thoughts as well as two anonymous referees for their helpful comments on earlier drafts. Thanks to Terri Drage for her outstanding editorial assistance. A note of gratitude goes to Anthony Munene, Omollo Gaya and David Majanja for their assistance with some of the sources that are referred in this paper. This paper is dedicated to the Panel of Imminent Persons who rescued Kenya from collapse. The author can be contacted via email: edwinabuya@yahoo.co.uk.

© 2009 The Author. Journal Compilation © 2009 The Society of Legal Scholars. Published by Blackwell Publishing, 9600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA
them with one that voters believe will meet their needs. Generally speaking, individuals participate in elections in order to elect or re-elect into office a government which they believe will improve, in particular, their economic situation. Whether or not a candidate ultimately delivers once he or she is in office is another inquiry.

Against this background, many opposition parties base their campaigns upon a platform of change. This approach is usually aimed at countering the record of achievement that sitting governments put forward to justify seeking re-election. In Zimbabwe, for example, the name of the main opposition party in the 2008 elections – Movement for Democratic Change – makes this point. Likewise, in the USA, Barrack Obama (wuod Alego), the first African-American president of the USA, promised to bring real change if elected into office.

In order to meet internationally acceptable standards, an objective electoral process must meet certain criteria. First, every eligible voter must have the opportunity to participate in the process. Secondly, an independent body should conduct the elections. Thirdly, each vote must carry equal weight. Further, the process must be transparent. Moreover, the results should reflect the number of votes that have been cast. Lastly, dissatisfied candidates must be given an opportunity to challenge the results before independent courts and/or tribunals. Absent these key ingredients, it is difficult for any election to be deemed free and fair.

Considering the ‘fundamental’ magnitude of a presidential election, to borrow the words of Thomas Hobbes and Justice Breyer, it is quite risky to interfere intentionally with this poll. As the post-2007 election events in Kenya demonstrate, flawed presidential elections can have tragic consequences. Following the announcement of the much-disputed election results, the world witnessed an outbreak of riots and violence in parts of the country, particularly in opposition strong-hold areas. Kenya’s reputation, as an oasis of peace in a continent plagued by violence, has since been shattered. The violence caused considerable suffering to thousands of people. Within days of the announcement of the presidential result, close to 500,000 people were forced to flee from their homes. Of these, some 12,000 sought shelter in the neighbouring state of Uganda as refugees. It is estimated that 1100 people lost their lives in the post-election violence. Property worth billions of shillings was also destroyed.

Using Kenya as a case study, this paper reviews the 2007 presidential election. It contends that there is a link between free and fair elections and the protection of human rights. The paper argues that in order for states in Africa to walk the (desired)

democratic path, sitting governments must comply with internationally recognised standards on free and fair elections. Otherwise, as the Kenyan experience shows, the consequences of a flawed presidential election can be tragic and far reaching. To gain an understanding of current events, section two discusses key political events in the lead up to the 2007 presidential election. The cause of the violence that erupted in Kenya is discussed in section three. The remainder of the paper addresses the impact of the election both domestically and internationally. Although there are many issues that could be discussed, the paper focuses on three central issues. In sections four and five, it evaluates the extent to which the flawed presidential poll impacted on the fundamental right to participate in an election, life and personal security. Section six looks at the regional effect of the post-election violence and the international community’s intervention to resolve the crises. In conclusion, the paper asserts that a rule of law culture must be embraced if democracy and human rights are to flourish in Africa.

1. COALITION POLITICS AND BROKEN PROMISES

Kenya, a former British colony, gained independence in 1963. Unlike many constitutions, the post-independent Kenyan Constitution does not expressly provide for the right to vote. Rather, this right is contained in the National Assembly and Presidential Elections Act. The fact that the Constitution does not provide for a right to vote should not be interpreted to mean that it does not recognise this entitlement. On the contrary, s 43 of the Constitution, which deals with eligibility of a voter, provides for this right by reference.

In 1982, the Kenyan Constitution was amended to make the country a one-party state. Thus, in presidential elections, whilst the right to vote existed in theory, in practice the choices were limited because there was only one presidential candidate running for office. Owing to engagement by internal and external players, the Constitution was again amended in 1991 to remove this contentious section. Effectively, Kenya became a multi-party state. From that point onwards the country was in principal walking the democratic path.

According to the Kenyan Constitution, read together with the National Assembly and Presidential Elections Act, elections – civic, parliamentary and presidential – must be held every 5 years. The Electoral Commission of Kenya (ECK) is charged with the responsibility of running elections. In subsequent elections, which were held in 1992 and 1997, the Kenyan African National Union (KANU), under the leadership of Daniel Moi, won the presidential elections. As required under the law, the former president received more than 25% of the votes in five of the eight provinces. The

9. Section 15.
10. Section 2A (‘There shall be in Kenya only one political party, the Kenya African National Union’).
12. Section 1A of the Constitution declares that Kenya is a ‘multiparty democratic state’.
13. See s 9.
15. This is a requirement under s 5(3)(f) of the Constitution.
Constitution permits an individual to hold a maximum of two presidential terms. Accordingly, Mr Moi became ineligible for re-election in 2002. Observers across the board hailed these elections to be free and fair. For example, the European Union Election Observation Mission noted that it was ‘impressed by the conduct’ of these elections. These elections saw the main opposition party, the National Rainbow Coalition (NARC), come into power. NARC was a coalition of parties, which mainly comprised the National Alliance Party of Kenya, to which Mwai Kibaki was aligned, and the Liberal Democratic Party (LDP), which Raila Odinga was associated with. In keeping with a Memorandum of Understanding (MoU), which the parties to the coalition had signed, Mr Kibaki became the third president of Kenya. KANU, the party that came second in the elections, then assumed leadership of the opposition.

During the 2002 presidential campaigns, NARC promised voters that, among others, it would ensure that a new Constitution would be drafted within 100 days of them coming into power. The party also undertook to create the office of Prime Minister. These promises were based on clauses 2 and 3 of the MoU. Because of his immense contribution in the 2002 elections, Mr Odinga was widely believed to be the person who would occupy this position. However, once President Kibaki assumed power, he showed little interest in effecting the legal changes required to constitute the office of Prime Minister. Some of the coalition parties, in particular the LDP, felt that the new dispensation had short-changed them. When it became obvious that the sitting president had little interest in effecting the necessary constitutional amendments, the LDP withdrew its membership from the coalition and joined ranks

16. Section 9(2).
20. Clause 2 of the MOU, which governed the composition of government, provided: Hon Mwai Kibaki shall be nominated as the single Presidential candidate in the forthcoming general elections under the aegis of the National Rainbow Coalition and will serve as the President of the Republic of Kenya.
22. See also ‘The broken MoU dealt the first blow to NARC’ The East African Standard 6 February 2002.
23. Ibid.
27. Ibid.
with the opposition. Henceforth, the LDP constantly challenged the policies of the Kibaki administration. It also disclosed some government scandals. Thus, when the 2007 elections were officially announced, memories of the unfulfilled promises of the 2002 MoU were still fresh in the minds of many. This time, Mr Odinga joined ranks with other politicians to form the Orange Democratic Movement (ODM). ODM comprised mainly of members of the opposition, who Mr Odinga had joined ranks with after President Kibaki failed to effect the necessary constitutional changes. However, some ODM officials had previously been part of Kibaki’s coalition. The main contenders for the 2007 presidential elections were Mr Kibaki, who flew the Party of National Unity (PNU) flag, and Mr Odinga.

2. 2007 PRESIDENTIAL ELECTIONS: WHAT WENT WRONG?

For the purpose of national elections, Kenya is divided into 210 constituencies. Within each constituency, there are several polling stations. Ballot papers are issued blank and voters are required to check the box of their preferred candidate. Eligible voters are required to cast ballots at the polling station on an appointed day. Illiterate and blind voters are normally assisted. To ensure that only qualified voters participate in the process, identity checks are usually conducted to verify a voter’s eligibility and authenticity. There are no provisions under Kenyan law for early voting, or voting by proxy or post. At the close of the poll, the presiding officer, the person in charge of the electoral process in each polling station, counts the votes for that polling station. Agents of political parties are permitted in the polling stations and tallying halls. The assumption is that, if there are any anomalies in the counting or voting process, they will point them out.

Once all the votes have been counted, the presiding officer openly announces to those at the polling station the results of the parliamentary, civic and presidential elections. He or she then transmits this result to the returning officer, the person in charge of the electoral process in each constituency, whose job is to tally the results for each constituency. Depending on the size of the constituency, vote tallying can take anywhere from one to a couple of days. Once all the results have been tallied, the returning officer openly announces to those at the tallying hall the results of the parliamentary, civic and presidential elections. These results are then sent to the ECK office in Nairobi for the formal announcement. The declaration of the results at

28. Constitution, s 42.
29. Regulation 2 of the Presidential and Parliamentary Elections Regulations define polling station as ‘any room, place, vehicle or vessel set apart and equipped for the casting of votes by electors at an election’.
32. Ibid, reg 33.
33. Ibid, regs 35(1) and 35A.
34. Ibid.
35. Ibid, reg 40(3)(d).
37. Ibid.
38. Ibid, reg 40.
39. Ibid.
40. Ibid, regs 40(1)(g)(ii) and 41(i).
the national level is also made in public. Overall, the voting process was open and fair. Figure one is a diagrammatical representation of the procedures Kenya uses to elect a president.

Where then did the problem arise? Initially, the announcement of results by ECK officials in Nairobi did not cause concern. However, doubts started emerging after approximately 70% of the votes had been counted. Up to this point, Mr Odinga had

Figure 1

been ahead of the other presidential contenders.\textsuperscript{42} It was the delays in communicating results, from areas considered to be Mr Kibaki’s strongholds, that started to create anxiety.\textsuperscript{43} In the first place, many, including the ECK chairperson, questioned why these results had not been turned in when voting had closed several hours earlier. During a press conference held 2 days after the elections, Mr Kivuitu expressed his concerns regarding the delay in results coming from the constituencies:

‘As I told you previously, I am not happy to see results coming the way they are coming because there’s no reason why results should be delayed. There cannot be any excuse and I don’t find any excuse at all. Because the sole purpose of introducing counting . . . at the polling station was to hurry up the process. And, although I agree there was a challenge because this time there were more voters, the turnout was higher than ever before. That is no excuse for us not to be here on a Saturday for elections we held on a Thursday.’\textsuperscript{44}

This, combined with the fact that results from areas where voting had ended much later and yet results had already been announced, made some people uneasy. Moreover, because the ECK had released parliamentary and civic election results from these areas, many questioned the delay in communicating the results of the presidential polls, particularly considering that the tallying for all results is done at the same time. Several international election observers expressed reservations regarding the legitimacy of the result of the presidential vote. The Commonwealth Observer Group, for instance, argued that, because the ECK had failed to maintain the ‘integrity of the tallying process’, this brought the ‘validity of the [presidential] election result into question’.\textsuperscript{45} The announcement by the ECK chairperson, Samuel Kivuitu, that he was unable to contact the returning officers in these regions on their mobile phones, worsened the situation: ‘And we can’t get our officers . . . I don’t know where they are. And so, no, we have asked, listen, we have asked the police to assist us to trace’\textsuperscript{46} them.\textsuperscript{47}

There was further cause for concern in Nairobi when the opposition challenged the results from a number of constituencies. In its report on the 2007 General Elections in Kenya, the European Union Election Observation Mission noted serious inconsistencies and anomalies in the tabulation and announcement of results.\textsuperscript{48} Thus, as the Commonwealth Observer Group highlights, this state of affairs raised ‘suspicion and caused widespread mistrust’\textsuperscript{49} on the electoral process. One result in particular showed a difference of approximately 20,000 votes between the tally that election-observers

\textsuperscript{42} ‘Raila takes early lead’ \textit{The Standard} 29 December 2007.
\textsuperscript{43} See also International Republican Institute, \text supra n 41, p 29 (‘delays in announcing results from certain parts of the country, namely President Kibaki’s strongholds in Central and upper Eastern Provinces’ caused anxiety).
\textsuperscript{44} ‘Kivuitu: I do not know where the returning officers are’, footage available at http://www.youtube.com/watch?v=JRiEiyjZYFs.
\textsuperscript{46} Above n 44.
\textsuperscript{48} Above n 17, pp 33–35.
\textsuperscript{49} Above n 45, p 28.
had noted on the ground and the result announced by the ECK at the main tallying centre in Nairobi. According to the returning officer who had presided over elections in Molo, Mr Kibaki had actually received 55,755 votes, not 75,261 as announced by the ECK. Unfortunately, the ECK announced the faulty results despite an earlier promise to investigate the inconsistencies. In another area, there were claims that the results were more than the actual number of registered voters. Indeed, Mr Kivuitu had earlier made this claim:

‘I have received [a] file [from Maragua] where the turnout is bigger than the registered voters. We can’t accept that. And we will not announce those results until we . . . reconcile our figures. There is no way a turnout can be bigger than . . . the registered voters.’

Some contestants also raised doubts about the tallying process. For example, Mr William Kabogo, a candidate vying for the Juja parliamentary seat, asserted that the counting of votes in this constituency was interfered with:

‘[A]t about 10 o’clock on the 27th [December 2007] information came to me from our intelligence saying that ballot papers were being stuffed into the ballot boxes for the benefit of my competitor, one George Thuo, the PNU candidate. And I went round to those polling centres and I raised this issue with the Returning Officers and they seemed surprised that I knew they were stuffing boxes. And we wrote a letter to them and said, if they do not respond to that matter and tell us what they would do then we have no need to participate any further in the process of the elections because they were flawed to start with. And I sent my agents in the evening to countercheck what was happening at the polling centre . . . I sent my lawyer, too . . . And to my surprise they did not release results for the next two days. And what is it that they were trying to do? They were trying to match because my argument was, even if they stuffed the ballot boxes with one candidate for the [Member of Parliament (MP)], they would have to do the same for the boxes for councillors and the boxes of the president. Because it doesn’t make sense at this time and age that one would elect an MP and leave without electing a councillor or electing a president . . . So in my mind I want to tell you that I believe truly . . . that the Honourable Mwai Kibaki did not get more than 52,000 [votes] in Juja constituency.’

On 30 December 2007, based on the ECK’s final tally, Mr Kibaki was declared the winner of the presidential elections and, within an hour of the ECK announcement, he was hurriedly sworn in at the Nairobi State House by the Chief Justice, Evan Gicheru, as president of Kenya. As table 1 shows, Kibaki beat Odinga by a thin margin. This was Kenya’s closest ever vote.

51. Ibid. n 44.
52. Ibid.
53. Ibid.
55. Vide Gazette Notice No 12612 of 30 December 2007, according to s 5 of the Constitution.
56. See also EU EOM, above n 17, p 35 (‘At around 17:30 hours the ECK Chairman announced, behind closed doors . . ., the final presidential results and declared . . . Mwai Kibaki elected President. Less than half an hour later at around 18:00 hours [he] was sworn in’).
Questions regarding the validity of the elections did not end with the official declaration of the results. At a press conference, which was held immediately after the president was sworn in, an ECK official, Sammy Kirui, affirmed that there were many irregularities in the tallying process. Mr Kirui, who had been seconded by the Kenyan Parliament, claimed that a number of figures had been inflated to increase the number of votes in favour of Mr Kibaki:

‘Because of shameless, blatant, open alteration of documents presented by Returning Officers, I would like to say right here that my conscience will not allow me to sit and keep quite. I am putting my life on the line because what I have seen should never have happened.’58

Three days after announcing the presidential results, in response to a question from the media asking if he ‘believe[d] that Mwai Kibaki fairly won the election’, Mr Kivuitu said ‘I don’t know’.59

The final tally was also suspicious. As noted earlier, in genuine elections the official results reflect the number of votes that have been cast. The commission of inquiry that was established in 2008 to investigate Kenya’s electoral process – the Independent Review Commission (Kriegler Commission) – also made this point.60 Table 2 below shows the ODM won more than twice the number of parliamentary seats than the PNU. Owing to the fact that many Kenyans vote along ethnic lines,61 as table 3 shows,

<table>
<thead>
<tr>
<th>Candidate</th>
<th>Party</th>
<th>Number of votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mwai Kibaki</td>
<td>Party of National Unity</td>
<td>4,578,034</td>
</tr>
<tr>
<td>Raila Odinga</td>
<td>Orange Democratic Movement</td>
<td>4,352,860</td>
</tr>
<tr>
<td>Kalonzo Musyoka</td>
<td>Orange Democratic Movement – Kenya</td>
<td>879,899</td>
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<tr>
<td>Ngach Karani</td>
<td>Kenya Patriotic Trust Party</td>
<td>21,168</td>
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<tr>
<td>Pius Muiru</td>
<td>Kenya People’s Party</td>
<td>9,665</td>
</tr>
<tr>
<td>Nazlin Omar</td>
<td>Workers Congress Party</td>
<td>8,624</td>
</tr>
<tr>
<td>Kenneth Matiba</td>
<td>Saba Saba Asili</td>
<td>8,049</td>
</tr>
<tr>
<td>David Waweru</td>
<td>Chama Cha Uma Party</td>
<td>5,976</td>
</tr>
<tr>
<td>Nixon Kukubo</td>
<td>Republican Party of Kenya</td>
<td>5,926</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>9,870,201</strong></td>
</tr>
</tbody>
</table>

Table 1

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60. Above n 47, p 115.
it is difficult to reconcile the presidential result to the parliamentary result. Some
election observers expressed similar comments. In its report, the International Repub-
lican Institute, for instance, asserted that the ‘parliamentary results seemed to confirm
that rigging had taken place’.63 One would assume that if Mr Kibaki won the majority
of presidential votes, then his party (PNU) would also have won the majority of
parliamentary seats. However, this was not the case. Eventually, there was broad-
based consensus that the 2007 Kenyan presidential election fell short of acceptable
minimum standards for democratic elections.64

As soon as Mr Kibaki was sworn in as president, hell broke loose. Earlier, among
others, retired Justice Richard Kwach had implored the ECK to have another look at

<table>
<thead>
<tr>
<th>Party</th>
<th>Number of parliamentary seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Orange Democratic Movement</td>
<td>99</td>
</tr>
<tr>
<td>Party of National Unity</td>
<td>43</td>
</tr>
<tr>
<td>Orange Democratic Movement – Kenya</td>
<td>16</td>
</tr>
<tr>
<td>Kenya African National Union</td>
<td>14</td>
</tr>
<tr>
<td>Safina Party</td>
<td>5</td>
</tr>
<tr>
<td>NARC Kenya</td>
<td>4</td>
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<tr>
<td>National Rainbow Coalition</td>
<td>3</td>
</tr>
<tr>
<td>Forum for the Restoration of Democracy for the People</td>
<td>3</td>
</tr>
<tr>
<td>Chama Cha Uzalendo</td>
<td>2</td>
</tr>
<tr>
<td>Sisi Kwa Sisi Party of Kenya</td>
<td>2</td>
</tr>
<tr>
<td>Democratic Party of Kenya</td>
<td>2</td>
</tr>
<tr>
<td>New Ford Kenya</td>
<td>2</td>
</tr>
<tr>
<td>Party of Independent Candidates of Kenya</td>
<td>2</td>
</tr>
<tr>
<td>Kenya National Democratic Alliance</td>
<td>1</td>
</tr>
<tr>
<td>Kenya African Democratic Union Asili</td>
<td>1</td>
</tr>
<tr>
<td>Forum for the Restoration of Democracy – Kenya</td>
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</tr>
<tr>
<td>United Democratic Movement</td>
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</tr>
<tr>
<td>Forum for the Restoration of Democracy – Asili</td>
<td>1</td>
</tr>
<tr>
<td>Peoples Democratic Party</td>
<td>1</td>
</tr>
<tr>
<td>Mazingira Greens Party of Kenya</td>
<td>1</td>
</tr>
<tr>
<td>Peoples Party of Kenya</td>
<td>1</td>
</tr>
<tr>
<td>National Labour Party</td>
<td>1</td>
</tr>
<tr>
<td>Kenya African Democratic Development Union</td>
<td>1</td>
</tr>
<tr>
<td>Total number of parliamentary seats</td>
<td>210</td>
</tr>
</tbody>
</table>

www.communication.go.ke/elections/default.asp.
63. Above n 41, p 33.
64. Commonwealth Observer Group, above n 45, p 28; EU EOM, above n 17, p 1; Kenya
Elections Domestic Observation Forum, above n 41, p 5; International Republican Institute,
above n 41, p 34. See also Statement of the Pan African Parliament Election Observer Mission
wordpress.com/2008/01/24/statement-of-the-pan-african-parliament-election-observer-
mission-to-kenya%e2%80%99s-general-election-held-on-the-27th-december-2007/ ('the dis-
puted election fell short of matching the democratic election process and the expression and
the will of the people of Kenya').

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the disputed results. Mr Kwach predicted that, if the commission failed to address these anomalies, tragic consequences would result:

‘We are asking for the verification from a number of constituencies, which we have verified, and that verification, Mr Chairman, can only be undertaken if you have in your possession and custody for purposes of compilation [the proper documentation]. We are not questioning, we are not looking for, we know what the law is. You know the law. You are the master in this one. What we are looking for is justice, and this process is so critically important, Mr Chairman, that even if Kenya was to wait for an hour or so I think it would be worth it because, if I may put it this way, it is a matter of life and death. It is important. So I think I would appeal to your sense of justice to sit with your commissioners and consider our application for verification [of these results].’

Largely, calls to remedy the election anomalies were ignored. In genuine elections one would expect the loser to concede, albeit reluctantly. According to Staffan Lindberg, the loser should accept ‘defeat’, as he or she will have lost ‘a fair combat’. KC Sunny also notes that ‘the success of democracy depends on the due conduct of elections so as to ensure the reflection of the true popular will’.

Table 3

<table>
<thead>
<tr>
<th>Constituency</th>
<th>Candidate</th>
<th>Number of votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nairobi</td>
<td>Kibaki</td>
<td>313,478</td>
</tr>
<tr>
<td></td>
<td>Raila</td>
<td>288,922</td>
</tr>
<tr>
<td>Coast</td>
<td>Kibaki</td>
<td>197,354</td>
</tr>
<tr>
<td></td>
<td>Raila</td>
<td>353,773</td>
</tr>
<tr>
<td>North Eastern</td>
<td>Kibaki</td>
<td>97,263</td>
</tr>
<tr>
<td></td>
<td>Raila</td>
<td>91,440</td>
</tr>
<tr>
<td>Eastern</td>
<td>Kibaki</td>
<td>853,481</td>
</tr>
<tr>
<td></td>
<td>Raila</td>
<td>83,575</td>
</tr>
<tr>
<td>Central</td>
<td>Kibaki</td>
<td>1,741,086</td>
</tr>
<tr>
<td></td>
<td>Raila</td>
<td>34,046</td>
</tr>
<tr>
<td>Rift Valley</td>
<td>Kibaki</td>
<td>818,445</td>
</tr>
<tr>
<td></td>
<td>Raila</td>
<td>1,580,880</td>
</tr>
<tr>
<td>Western</td>
<td>Kibaki</td>
<td>312,300</td>
</tr>
<tr>
<td></td>
<td>Raila</td>
<td>639,300</td>
</tr>
<tr>
<td>Nyanza</td>
<td>Kibaki</td>
<td>262,627</td>
</tr>
<tr>
<td></td>
<td>Raila</td>
<td>1,280,978</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>9,870,201</strong></td>
</tr>
</tbody>
</table>

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presidential poll failed to accord with internationally recognised standards. Not unsurprisingly, the ODM rejected the ECK’s final tally. The flawed presidential poll ‘set the stage’, to use Timothy Sisk’s words, for post election ‘conflict’.69

And thus, sadly, Mr Kwach’s and these predictions of tragic consequences came to pass. Within hours of the announcement of the disputed presidential results, the country plunged into bloodshed. It was viewed that the electoral process had betrayed Kenya in particular and Africa in general. Moreover, expectations that an ODM president would improve the lives of its supporters were by the ECK’s pronouncement of Mr Kibaki’s re-election dashed. As a result, those believed to have voted for Mr Kibaki, because they came from his Kikuyu tribe, became targets of violence.70 Many people were attacked and forced to flee their homes, particularly in opposition stronghold areas and parts of Nairobi.71 The violence spread rapidly. In retaliation, non-Kikuyus were also forced to flee from areas considered to be the president’s strongholds.72 Efforts by the police to quell the spread of violence saw mixed results. Ultimately, the army was called upon to break the cycle of violence and brutality.73

In January and February of 2008, intense negotiations to prevent Kenya from becoming a failed state took place. Divine intervention was also sought by many.74 The talks, which occurred in Nairobi, were brokered by a Panel of Eminent African Personalities under the chairpersonship of the former United Nations Secretary General, Dr Kofi Annan.75 These talks received broad-based support both within Africa and overseas and, collectively, these initiatives ultimately bore fruit. After several difficulties, President Kibaki and Mr Odinga signed a power-sharing agreement on 28 February 2008. Unlike the pre-2002 situation, this agreement, entitled Agreement on the Principles of Partnership of the Coalition Government76, was entrenched in the 2008 National Accord and Reconciliation Act. Section 3 of the Act created the position of Prime Minister and this position was subsequently entrenched into the Kenyan Constitution.77 Pursuant to the agreement, two commissions of inquiry were established to investigate the electoral process – the Kriegler

70. See also International Republican Institute, above n 41, p 33 (‘In parts of Nairobi, Nyanza, Rift Valley, Coast and Western provinces the main victims were people from Kikuyu, Embu and Meru tribes, and to a lesser extent Kisii communities, who were being targeted because of their perceived support for President Kibaki’).
73. Ibid.
75. Ms Graca Mandela, a former first lady of Mozambique and South Africa, and Mr Benjamin Mkapa, a former president of Tanzania, assisted Dr Annan in the negotiation process.
76. On file with the author.
77. Section 15A(1).
Commission⁷⁸ – and the human rights violations that occurred – the Commission of Inquiry into the Post-Election Violence (the Waki Commission).⁷⁹ Both commissions have reported their findings.⁸⁰ The challenge lies in implementing their recommendations. The consequences of the fixed presidential vote will now be considered.

3. THREATS TO FREE AND FAIR POLLS

Unlike genuine elections, flawed presidential polls affect the right of citizens to participate in regular elections, which is a fundamental guarantee in states that are governed by the rule of law. Courts in many jurisdictions have underlined the value of the ballot. The supreme courts of India and the USA, two of the world’s largest democracies, have emphasised the value of voting rights.⁸¹ In order to meet internationally accepted election standards, which are mentioned above, the election of a president must be free and fair. Fixed presidential elections, as the introduction highlighted, are a threat to democracy in any political community. This section focuses on the right to vote and some of the disadvantages that accrue from biased presidential elections.

The right to vote is well known. It can be traced back to the Universal Declaration of Human Rights 1948 (UDHR). Subsequent international human rights treaties, such as the International Covenant on Civil and Political Rights 1966 (ICCPR),⁸² the International Convention on the Elimination of All Forms of Racial Discrimination 1969 (CEFRD),⁸³ the Convention on the Elimination of All Forms of Discrimination Against Women 1981 (CEDAW)⁸⁴ and, more recently, the Convention on the Rights of Persons with Disabilities 2006 (CRPD)⁸⁵ have recognised this right. These treaties contain both a positive and negative obligation. In the context of the former, they guarantee every citizen the right and opportunity to vote. With regard to the latter, the ICCPR in particular prohibits the imposition of ‘unreasonable restrictions’⁸⁶ on the enjoyment of voting rights. As to eligibility, the treaties underscore that voting shall be by universal and equal suffrage. In terms of process, they highlight that elections should not only be held periodically, but they should also be genuine and free. In order to protect the free expression of the will of eligible voters, elections are required to be conducted by secret ballot. Regional treaties, such as the Banjul Charter⁸⁷ and the

⁸⁰. Kriegler Commission, above n 47; Waki Commission, above n 7.
⁸¹. See Mohinder Gill v The Chief Election Commissioner (1978) I SCR 405 at 419 where the Indian Supreme Court (Iyer J) termed this right as ‘basic’. See also Wesberry v Sanders 376 US 1 (1964) at 17 where Justice Black of the US Supreme Court argued that the right to vote is ‘precious’.
⁸². Article 25.
⁸⁴. GA Res 34/180, 34 UN GAOR Supp No 46 at 193, UN Doc A/34/46 (entered into force 3 September 1981), Art 7(a).
⁸⁶. Article 25.
American Convention on Human Rights,\textsuperscript{88} contain similar guarantees. At the domestic level the constitutions of many world states have also paid significant attention to this right.\textsuperscript{89}

Fixed presidential polls deny the inhabitants of any country the advantages that accrue from a free and fair election. Five of these benefits, which apply to Kenya, are identified in this paper. First, in keeping with international law, genuine elections give citizens a real chance to choose a leader of their choice. In its comment on voting rights, the UN Human Rights Committee underlined that international law guarantees citizens the right to ‘choose their form of their government’.\textsuperscript{90} By contrast, when votes are manipulated there is the risk that a political system will be governed by autocratic principles rather than the will of the people. Joel Barkan and John Okumu assert that in states with a single-presidential system the leadership, not the voters, is able to determine the ‘outcome’ of the process.\textsuperscript{91}

The second benefit that arises from a free and fair election lies in the relationship between democracy and other fundamental human rights that promote the rule of law. As the International Commission for Jurists notes, free and fair presidential elections are an ‘integral part’ to the ‘full enjoyment of a wide range of fundamental rights’,\textsuperscript{92} such as the freedom of expression. Owing to its importance, many world constitutions\textsuperscript{93} and international law\textsuperscript{94} have undertaken to guard this freedom. Objective, unlike flawed presidential elections, promote this guarantee. Through participating in a presidential election, citizens express an opinion about the candidates, their political parties and policies. Thus, any interference with the democratic process infringes upon this basic freedom.

Third, genuine elections enable citizens to participate in the running of the country. International human rights law recognises this.\textsuperscript{95} The conduct of public affairs is broad. It covers all aspects of public administration, and the formulation and implementation of policy at all levels.\textsuperscript{96} The principle of representative government acknowledges the fact that not every person can be directly involved in the governance of his or her country. However, in the agent/principal relationship that develops following an election, voters become indirectly involved in the management of the affairs of their government. A presidential election, to borrow the words of Henry Mayo, is the route by which an individual voter assumes his or her ‘share in political power’.\textsuperscript{97} Aristotle, a well-known Greek philosopher, writes that the

\textsuperscript{88} OAS Treaty Series No 36, 1144 UNTS 123 (entered into force 18 July 1978), Art 23.
\textsuperscript{89} Above n 8.
\textsuperscript{94} CRPD, Art 21; ICCPR, Art 19; UDHR, Art 19.
\textsuperscript{95} UDHR, Art 21(1); ICCPR, Art 25(a); CRPD, Art 29(a); CERFRD, Art 5(c).
\textsuperscript{96} UN Human Rights Committee, above n 90, para 6.
\textsuperscript{97} H Mayo An Introduction to Democratic Theory (New York: Oxford University Press, 1960) p 66.
principle in democratic states ‘is for all to rule and be ruled in turn’. Jean-Jacques Rousseau, prominent political philosopher, describes the process in the following words:

‘Each of us puts his will, his goods, his force and his person in common, under the direction of the general will, and in a body we all receive each member as an inalienable part of the whole.’

Notably, those who are elected to represent the citizens must discharge of their mandate in compliance with the law.

Moreover, the election of a president can promote accountability, if the office-holder acts in the best interests of citizens in general and the nation as a whole. As some have argued, a poll serves as a ‘retrospective’ check on the immediate president. This argument is based on the presumption that objective voters will use primarily a candidate’s past record in office (not other considerations like colour, race, tribe, religion, and/or sex) to decide whether or not to vote for a person or his or her party in future elections. It is thus in the best interest of the leader to improve the overall economy of a country if he or she wants to be re-elected in free and fair polls. The 2008 long-drawn presidential elections in the USA show that voters place a lot of emphasis on the economy. In a survey conducted in September 2008, over half (58%) of people polled ($N = 697$) said that the economy was the most important issue when determining which candidate to vote for. A survey of party manifestos in Britain also suggests that the economy is the foremost campaign issue. Presidential elections serve as a ‘principal means’ by which ‘citizens can influence their leaders’. That leaders should be responsible cannot be overemphasised. In addition to spurring economic growth nationally and regionally, research in China suggests that accountable leadership can encourage other sectors to embrace ‘accountability and rule of law’ principles.

Finally, the fact that citizens can chose the head of government in free and fair elections gives legality to a state. International law, which recognises the link between a presidential poll and government authority, supports this position. Soft law, as reflected in Principle II (1) of the African Union’s Principles Governing Democratic Elections (AU Democratic Principles), underscores that ‘democratic elections are the basis of the authority of any representative Government’.

105. See Art 21 of the *UDHR*.
106. AHG/Decl 1 (XXXVIII) 2002 (Adopted at the 38th Ordinary Session held in Durban), principle II(1).
are wide. At the international level, the legitimacy of a state is quite crucial as it
determines whether (or not) the international community will transact with a country.
Aristotle asserts that one of the primary reasons why states exist is to guarantee ‘a
good life’ for its citizens, not life per se. Refusal by the international community to
engage with any country can have a serious impact on the growth of its economy and,
thus, the prosperity of its members. In the wake of Kenya’s flawed presidential
election, the USA, EU and other Westernised states declared that it would not be
‘business as usual’ with the government unless Mr Kibaki and Mr Odinga entered into
a power-sharing deal. Although some critics may argue that this position interfered
with Kenya’s sovereignty, overall, signing the peace deal was of great benefit to the
country as it opened the way for the international community as well as the World
Bank and International Monetary Fund to re-engage with Kenya, and, thereby, gave
the national and regional economies the much needed boost.

Kenya’s experience reminds us of the challenges that African states face, and
continue to face, in the quest for democracy. Although the right to vote exists in theory,
the reality is quite different. Some African leaders are yet to embrace fully the idea of
government by the people. In many ways, the situation in Kenya demonstrates that not
every leader will follow the path that former President Nelson Mandela of South
Africa took when he agreed to relinquish power in 1999, despite the overwhelming
chances he had of winning a second term in office. Mr Mandela is one of the few
African leaders who left office and retired in his home state. The 2007 Kenyan
situation highlights the reluctance of some leaders in Africa to leave leadership
positions gracefully. Eventually, this state of affairs denies citizens the direct benefits
of an impartial electoral process, which are evaluated above.

Until 1992 Kenya was a single-party state. Consequently, voters did not have a
choice choosing their president. Rather they had to accept the individual that the ruling
party had selected, or at least approved. Continuous engagement with the then gov-
ernment finally lead to the repeal of s 2A of the Constitution. This paved way for
multi-party elections in the country. This marked the second liberation. The third
liberation, which many states in Africa are currently experiencing, is concerned with
ensuring that post-independent leaders respect the outcome of the ballot. Indeed,
as with independence and the second liberation, the third step towards democracy
will not come easily. Rather, achieving the desired outcome involves engaging with
governments constantly to ensure they conform to the rule of law and democratic
principles.

Mere passage of law does not guarantee that citizens will enjoy their democratic
democratic rights. BC Chikulo makes this point in his work that examines the 1991 presidential
and parliamentary polls in Zambia. He argues that the adoption of the multi-party
system of government per se is insufficient. Rather, states such as Kenya must take

107. Above n 98, p 73.
108. Section 1 of the Kenyan Constitution declares that it is a ‘sovereign Republic’. See also
Charter of the United Nations, signed at San Francisco on 26 June 1945 (entry into force
24 October 1945), Art 2(7) (‘Nothing contained in the present Charter shall authorize the
United Nations to intervene in matters which are essentially within the domestic jurisdiction
of any state’).
109. BC Chikulo ‘End of an era: an analysis of the 1991 Zambian presidential and parliamen-
110. Ibid, at 102.
‘practical steps’ that will translate democratic ideals into ‘real rights’.\footnote{E Odhiambo-Abuya ‘Reinforcing refugee protection in the wake of the war on terror’ (2007) 30 Boston College International and Comparative Law Review 277 at 327.} For countries such as Kenya, part of the solution lies in the mode of appointment of Electoral Commissioners, as this has a direct bearing on how the commission is seen to discharge its functions. At present, the president appoints all commissioners.\footnote{Kenyan Constitution, s 41.} In the case of the 2007 elections, unlike its 2002 counterpart, the sitting president was also a candidate in the elections. It could be argued, therefore, that this somewhat compromises the electoral commission’s processes and procedures. For the commission to be seen to be free and fair, as its constitutional mandate requires,\footnote{Section 42A.} it should be composed of members that are seen to be unbiased. This would call for a broad-based commission whose membership was appointed by a panel, not an individual.

4. ASSURING LIFE AND PERSONAL SECURITY IN THE AFTERMATH OF A FIXED ELECTION: A TOUGH CALL

Influenced presidential elections also have an impact on the fundamental right to life and personal security. Few can deny that these are the most important human rights. The right to life in particular is important in many ways. First, without it, it would not be possible for an individual to enjoy any other guarantee. Moreover, it is through this right that new members are introduced into a political community, thereby ensuring its survival by being able to protect itself from external aggression. Aristotle writes that ‘for the sake of mere life’ human beings ‘meet together and maintain the political community’.\footnote{Above n 98, p 70.} The supremacy of the right to life is underscored by the fact that international human rights law, as reflected in the ICCPR, prohibits states from derogating from this right.\footnote{ICCPR, Art 6.} In other words, states cannot take measures that are contrary to their treaty obligations.\footnote{Abuya, above n 111, a 295.} There is no derogation even on grounds of national security.\footnote{ICCPR, Art 4.} Courts in many jurisdictions have underpinned the value of the right to life and, by extension, security.\footnote{Chris Murungaru v Kenya Anti-Corruption Commission High Court of Kenya at Nairobi, Civil Application Number 54 of 2006 (delivered 1 December 2006) (Lesiit, Wendoh, Emukule JJ) (unreported) at 66; United States v Paul Villano 816 F.2d 1448 (10th Cir 1987) at 1452.} This section evaluates international and domestic provisions that seek to protect the right to life and personal security. As underlined in the introduction, flawed elections threaten both of these rights. Also analysed are remedies that are available to those who have been aggrieved.

(a) International and domestic legal framework

International human rights laws underpin the right to life. Commencing with the UDHR,\footnote{UDHR, Art 3.} key international human rights treaties like the ICCPR,\footnote{Article 6.} the Convention
on the Rights of the Child 1990 (CRC)\[^{121}\] and the CRPD\[^{122}\] formally recognise an individual’s right to life. Regional treaties\[^{123}\] and several national constitutions\[^{124}\] also contain provisions that seek to protect this right. Complimenting the right to life is the right to security. Traditionally, the right to security of the person was interpreted to mean freedom from arbitrary arrest and detention.\[^{125}\] Today, however, it has been interpreted widely to include the protection of both the physical security and livelihood of a person.\[^{126}\] Like life, this right has been widely recognised by international\[^{127}\] and regional treaties\[^{128}\] as well as national laws.\[^{129}\]

The sanctity of life can be traced back to biblical times. God gave Moses the Ten Commandments on Mt Sinai and the sixth commandment declares that: ‘Thou shalt not kill’.\[^{130}\] This tenet is widely recognised. In the USA, for example, the Declaration of Independence, which the Continental Congress adopted on 4 July 1776, reads as follows:

> ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.’\[^{131}\]

Early English philosophers also form this opinion. In his evaluation of the right to life, John Locke asserts that every individual has a duty to God ‘to preserve himself’ and to preserve the ‘rest of mankind’.\[^{132}\] Accordingly, an individual is prohibited from taking ‘away’ the life of ‘another’,\[^{133}\] unless under circumstances that the law sanctions. Similarly, in African traditional society, life was held in utmost respect.\[^{134}\]

\[^{122}\]Article 10.
\[^{125}\]See, for instance, Massera v Uruguay Human Rights Committee, UN Doc A/34/40 (15 August 1979), paras 9 and 10; Luyeye v Zaire Human Rights Committee, UN Doc A/38/40 (21 July 1983), para 8.
\[^{128}\]Banjul Charter, Arts 6 and 23.
\[^{129}\]Kenyan Constitution, s 70.
\[^{130}\]Exodus 20:13 (King James).
\[^{131}\]Available at http://upload.wikimedia.org/wikipedia/commons/0/07/Us_declaration_independence.jpg.
\[^{133}\]Ibid.
Two obligations are imposed on states with respect to the right to life and personal security. First, a positive duty is placed on states to respect and promote these rights. The ICCPR in particular imposes a general obligation on states to ensure that all individuals in their territory and subject to their jurisdiction enjoy the rights set out in the treaty. The Vienna Convention on the Law of Treaties, which requires states to perform their obligations under a treaty ‘in good faith’, reinforces this position. Towards this end, governments are required to undertake measures that will ensure that all human beings within their territory enjoy the right to life and personal security. Further, a negative obligation is placed on states to refrain from engaging in acts that will threaten the life or personal security of any individual.

Generally speaking, the task of maintaining law and order in any politically community is placed upon the police. In Kenya, under the terms of the Police Act, law enforcement officials are required, among other functions, to preserve ‘peace’, to protect ‘life and property’, and to enforce national laws and regulations. Let us now look at how the state discharged its mandate following the announcement of the imperfect presidential poll.

(b) Threats to life and personal security rights in the wake of a flawed election

Free and fair polls are hardly characterised by any violence as several examples in Africa and elsewhere demonstrate. In his review of the 1991 Presidential election in Zambia, Keith Panter-Brick states that the results were ‘uncontested’ because the election was unprejudiced. Similarly, the 2002 Kenyan elections, which were overall fair, did not cause any violent behaviour. In his commentary on the 1996 Palestinian election, Jimmy Carter writes that the fact that the polls were free and fair contributed significantly in maintaining peace and stability in the region. The 2008 US elections also lend credence to this position.

By contrast, fixed presidential elections pose serious threats to life and property. Failure to protect an electoral process from manipulation leaves it open to a ‘great natural and historical’ enemy ‘of all republics, open violence’. In Kenya, the post-election events tested the government’s ability to guarantee the enjoyment of the right to life and security. The fact that more than 1100 people lost their lives in the events following the announcement of the flawed presidential results, casts serious doubts on Kenya’s ability to promote and protect these basic rights. Whilst there are several examples that highlight the state’s failure to meet its obligations, two events in particular left many horrified.

The first incident concerns a church located in the Rift Valley town of Eldoret where more than 80 people, mostly women and children, sought refuge from the

135. Article 2(1).
137. Article 26.
138. CRPD, Art 10; ICCPR, Art 2(1). See also Stewart v United Kingdom (1985) 7 EHRR 453 at 457 (European states are required ‘not only to refrain from taking life “intentionally” but, further, to take appropriate steps to safeguard’ this right).
139. Section 14.
142. Justice Miller in Ex Parte Yarbrough (The Ku-Klux Cases) 110 US 651 (1884) at 658.
post-election violence. Places of worship have long provided a haven for those in need. In biblical times, cities of refuge were created to offer sanctuary to those who feared for their lives. Additionally, the history of refugee protection in the USA shows the important role that places of worship have played in the protection of people fleeing for their lives. International law also recognises the sanctity of churches. The law of armed conflict, for instance, prohibits parties from ‘committing any acts of hostility’ against places of worship.

The individuals who fled to the Eldoret church at the beginning of January 2008 expected to be protected from harm. Sadly, they were wrong. Reports indicate that they were burnt alive. According to one journalist:

‘The attackers [came] in with huge mattresses that they dragged in. They put paraffin on them and then they set them alight . . . I [spoke] to one woman who described how she was trying to make an escape out of a window . . . She had three children with her. She had her three year-old in her arm. As she tried to come through the window, the attackers were on the other side. They grabbed her baby from her and they threw the three-year old back in. The child died in the inferno.’

According to the report of the Waki Commission, 17 people were burned alive in the church and 11 died in or on the way to hospital. As previously noted, retaliation attacks were carried out against alleged ODM supporters. At the end of January 2008, as part of these retaliation attacks, a horrific incident occurred in the town of Naivasha. In a similar manner to the Eldoret church victims, a group of people in Naivasha also sought refuge from the disputed election violence that rocked the country. However, unlike the Eldoret incident, the victims in Naivasha sought shelter in a house. As Robert Nangila, a Nairobi-based journalist notes, ‘it was a fatal mistake’. Like the church in Eldoret, the house was torched and 19 men, women and children who had sought protection were deliberately burnt to death. Bernard, a survivor, describes what transpired in, what later came to be known as, the ‘House that Nobody Wants to see’:

‘[On 27 January 2008] we had reports that a gang of armed people was coming to attack us because we were supporters of the opposition [ODM]. At about 9 [a.m.] the group struck. We suspect they were members of the feared Mungiki sect. They were ruthless. They hacked men when they found them on their way, and we could not fight them. So we retreated to our homestead and locked the gate from the inside to deny them entry. But that was a mistake. We had them calling for petrol, and were convinced that they would not burn the house. [W]e were wrong. Within minutes the whole place was on fire. We tried to escape but they had locked the door from the outside. However, by God’s grace I struggled and managed to

143. The Holy Bible Numbers 35:6–34.
144. I Bau This is Holy Ground: Church Sanctuary and Central American Refugees (New York: Paulist Press, 1985).
147. Above n 7, p 46.
148. ‘15 burnt as Naivasha erupts’, footage available at http://www.youtube.com/watch?v=H4iCaVq9iLs.
free myself from the now burning house. Unfortunately, the rest of the people could not make it. In total 19 people were burnt alive. I lost nine children and two wives.’149

An important question is: did the stolen election justify these callous attacks? These savage acts are a reminder of the 1994 Rwanda genocide. They affirm Rousseau’s assertion that in a ‘state of war’ the ‘image’ one sees everywhere is ‘death and dying’.150 The Eldoret and Naivasha incidents underscore the fact that the maintenance of law and order in any society cannot be left entirely to the state. Rather, if real results are to be achieved, law enforcement officials must work together with members of the public.151 Absent this partnership, it will be difficult for the security and/or life of any individual to be guaranteed, even in times of peace.

However, the right to life is not absolute. Exceptional circumstances exist whereby states can lawfully deprive an individual of his or her enjoyment of this right. The national constitution of countries like Kenya152 and regional treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR)153 allow law enforcement officials to use force in the discharge of their duties. Therefore, force can be used to quell a riot, defend a person or property, or prevent a criminal act.154 Soft law, in particular the UN Code of Conduct for Law Enforcement Officials155 and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,156 contain a similar list. In these circumstances, if death results from the use of force then it will not be considered to have arisen from an unlawful purpose.157 Rather, it will be deemed to have occurred from a situation justifiable under the law.158

The fact that the police are allowed to use force should not be interpreted to mean that they have complete freedom or authority to use it. On the contrary, a limit is placed on the amount of force that should be used. Thus, for a state to escape liability, it must show that the amount of force used in a particular circumstance is commensurate to the danger that was posed. As the Kenyan Court of Appeal (Kwach, Omolo, Pall JJ) argued in *Stephen Njuguna v The Attorney General*:

‘The police do not have an unqualified licence to resort to shooting. They are authorised to shoot only when it is necessary to do so and it is upon them to demonstrate that the shooting was necessary.’159

150. Above n 99, p 162.
152. Section 71.
153. Article 2(2).
154. Kenyan Constitution, s 71(2).
157. Kenyan Constitution, s 71(2).
158. Ibid.
This view was also underlined during the debates over whether to ratify or reject the American Federal Constitution. Notably, force should be used as a last resort. The test of whether or not reasonable force was used is objective. In other words, how should a reasonable police officer have reacted in those circumstances? Kenyan law recognises this test. Section 14 of the Public Order Act provides that the degree of force should ‘not be greater than is reasonably necessary’. In the context of the use of fire arms, s 28 of the Police Act limits their use to circumstances where an officer ‘has reasonable ground to believe that he or any person is in danger of grievous bodily harm’. In short, as an English adage advises: you should not use a rifle to kill a fly.

Following the announcement of the presidential election, riots broke out in many parts of Kenya. There was also wide-spread destruction of property. Calls for the restoration of order from both sides of the political divide went largely unheard. Instead, there was mass looting and destruction of property. In keeping with their mandate, the police were called in to restore order to the country. However, the extent to which the Kenyan police complied with the law must be questioned. In other words, was the amount of force used by the police appropriate to restore law and order? It is apparent that it was not. Rather, in many instances, the police went too far. In some situations, they fired live bullets directly into crowds. Esau, who participated in a protest march in Kisumu in mid-January, claimed:

‘I saw Odunga being shot. There were six police officers. Three were firing shots from the road [in the opposite direction from where we were]. The other three then faced us firing shots. We were very far from the road. Then we started running. As we ran, they kept firing wildly. One bullet hit Odunga. He told me: “Oh, Esau I am gone”. I could not wait. I continued running.’

Although the police are permitted to use force, including deadly force, they must cautiously and duly consider their actions. In Stewart, the European Commission on Human Rights exonerated the British army from any wrong-doing for the death of Brian Stewart who had been killed by a plastic bullet fired by a soldier serving in Northern Ireland, in the course of a riot. The following findings of fact were made:

‘[T]hat the group of soldiers were confronted with a hostile and violent crowd of 150 persons who were attacking them with stones and other missiles, and, further, that the soldier’s aim was disturbed at the moment of discharge when he was struck by several missiles.’

The fact that the officer in question did not intend to fire directly at the deceased was an important consideration. So, too, was the fact that the rioters were charging at the soldiers. There was also evidence that the army had fired a warning shot, but ‘this had

161. UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principal 2; ECHR, Art 2(2).
162. ‘Outrage over police killings in Kisumu’, footage available at http://www.youtube.com/watch?v=TfeD5mnLbBI.
163. At p 460.
no effect’. Taking these factors into consideration the commission concluded that the Mr Stewart’s death did result from the use of force that was necessary in the circumstances.

The UK practice, as demonstrated in Stewart, is miles apart from its Kenyan counterpart. It is doubtful whether the legal requirements regarding the use of force were met in the Kisumu example. More disturbing is the claim that law enforcement officials fired directly, as well as recklessly and negligently, into the fleeing crowd, without any warning. Several witnesses who appeared before the Waki Commission expressed similar sentiments. This evidence affirms that law enforcement officials did not comply with their mandate. Medical evidence adduced before the Waki Commission suggested that, of the 50 people shot by police in Kisumu, 60% (30) were shot from behind. The society, as Justice Onyancha of the Kenyan High Court argues, expects the police force to ‘preserve life’. From these examples, arguments could be made that the force used by the police at the protest march was disproportionate to the actual risk posed. Police could have explored other alternatives such as firing into the air to scare the protesters. There is also no evidence that the law enforcement officials in the Esau example in particular complied with the requirement that firearms should be used as a last resort. These incidents question the appropriateness of the training Kenyan police receive, as well as the orders they were given on that day. They also cast doubt on whether the police respected the right to life of individuals such as Esau. Simply put, the loss of life was random, contrary to the requirements of international law and the Kenyan Constitution.

Unfortunately, the experience in Kisumu was not an isolated case. Civil rights organisations have documented the widespread nature of the use of excessive force by the police. For instance, an empirical study by Human Rights Watch cites several instances of unlawful use of force by Kenyan law enforcement officials:

> ‘In Mombasa, local human rights investigators counted 20 people shot dead by police in the first few days following the announcement of Kibaki’s victory. In Nairobi, each day of the crisis brought fresh reports of shootings by police. In towns across the West of the country – Kericho, Homa Bay, Kakamega, and Molo – reports came in of people killed by the police.’

The Waki Commission also received ‘evidence of numerous instances of police brutality’. Actions such as these sit uncomfortably with the obligations and duties of the Kenyan police: Utumishi kwa Wote [Service to All]. These data also suggest that, of the people who lost their lives in the post-election violence, some were at the hands of law enforcement officials. Reports from hospitals around the country bolster this

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164. At p 453.
165. At p 460.
166. Above n 7, p 157.
167. Ibid, p 387.
169. ICCPR, Art 6.
170. Section 71.
172. Above n 7, p 56.
173. Translation by author.
argument. For instance, hospital authorities in Kisumu stated that 90% of deaths were from gunshot wounds caused by police. Similar findings were reported in Eldoret. According to Human Rights Watch, ‘bodies arriving at the morgue of the Moi Teaching and Referral Hospital during the first week of January were shot by police’. The Waki Commission found that over one-third (36%) of the total deaths were caused by gunshot wounds. This state of affairs lends support to previous research, which has established a strong connection between national elections and repression, especially in instances where the polling process is not transparent. In an article that reports the results of a survey of 49 countries from 1948 to 1982, Christian Davenport found that, if presidential polls are deemed as ‘being “threatening” to [a] government’, which wishes to remain in power, ‘then the use of political repression [will] increase’. In such instances, a state will use force to stem any threat and/or acts of violence.

(c) Available relief

Justice is the basis of a democratic state. The positive and negative obligation implies that states must provide an effective remedy to those whose rights are violated. To use a common saying: for every legal right there must be a lawful remedy. Consistent with this viewpoint, international human rights law requires states to ensure that those individuals whose treaty rights are infringed shall be entitled to effective legal redress. Similar provisions are found at the regional context. In his commentary on legal duties and liabilities, Hans Kelsen, a famous philosopher, writes that any person is ‘obligated to lawful behaviour’, and is ‘liable for unlawful’ acts. Absent provisions for compensation, a right would make very little sense.

Individuals who were shot by the police must be able to seek relief in courts. Under the provisions of the Government Proceedings Act, those who survived or the families that lost loved ones can sue the government for damages. Jurisprudence from courts in Kenya and elsewhere offer guidance on issues surrounding monetary compensation in situations where a court finds that the death or injury of an individual resulted from unlawful use of force by law enforcement officials. For example, the plaintiffs in the Kenyan cases of Njuguna and Peter Gichii v Bernard Thimangu and The Attorney General suffered death and bodily injuries, respectively, owing to gun shots fired by the police. In both of these cases, it was alleged that deadly force was used unlawfully. Counsel advanced similar arguments in the European Court of Human Rights.

175. Above n 171.
176. Above n 7, pp 311 and 312–313.
178. ICCPR, Art 2(3); CRPD, Art 13.
179. Banjul Charter, Art 1; ECHR, Art 6(1).
181. See especially ss 3 and 4.
182. Above n 159.
184. Njuguna, above n 159, at 1–2; Gichii, above n 183, at 1–3.
in *Andronicou and Constantinou v Cyprus*\(^{185}\) and in *McCann v UK*\(^{186}\) where the applicants suffered death at the hands of Cypriot and British police, respectively. The Kenyan courts found in favour of the plaintiffs in both cases and awarded damages.\(^{187}\) By contrast, both of the cases before the European court failed on the basis that the applicants had failed to adduce sufficient evidence to show that the use of lethal force was unlawful.\(^{188}\) These precedents could provide useful guides for those who intend to lodge claims for unlawful use of deadly force against law enforcement officials such as the family of Mr Odunga.

The reckless use of force by law enforcement officials should also attract criminal liability,\(^{189}\) as the Kenyan Court of Appeal reinforced in *Raymond Rotich v R*.\(^{190}\) John Locke, a respected philosopher, also writes that all criminal offences must be ‘punished’.\(^{191}\) It is notable that at least two police officers have been charged with excessive use of force.\(^{192}\) However, considering the number of deaths the police are claimed to have been responsible for, the need for further investigations is pressing. Allegations of violations must be investigated promptly, thoroughly and effectively by an independent and impartial body. In order to become the ‘good government’ that Rousseau described,\(^{193}\) criminal proceedings must be instituted against trigger-happy members of the police force under the terms of the Kenyan Penal Code.\(^{194}\)

5. REGIONAL CONCERNS AND THE ROLE OF THE INTERNATIONAL COMMUNITY

Some claim that the concern for the electoral process should lie on citizens because essentially the process and outcome are national affairs. The US Supreme Court, for instance, asserts that an election is vital because it has an ‘effect upon the welfare and safety of the whole people’.\(^{195}\) These sentiments have been echoed by the Kenyan Court of Appeal.\(^{196}\) In India, it has been claimed that an election is ‘not a private affair’\(^{197}\) between the candidates. Rather, ‘every citizen has a stake’\(^{198}\) in the result.

Although presidential elections occur essentially at the domestic level, their implications are broad-based as the introduction to this paper emphasised. The interest and

\(^{185}\) (1998) 25 EHRR 491 at 551–552.


\(^{187}\) *Njuguna*, above n 159, at 5–6; *Gichii*, above n 183, at 4–5.


\(^{189}\) Section 26 of the Kenyan Constitution gives the Attorney-General power to institute criminal proceedings in respect of any alleged offence.


\(^{192}\) Human Rights Watch, above n 171, p 27.

\(^{193}\) Above n 99, p 105.

\(^{194}\) Section 241.

\(^{195}\) *Burroughs v US* 290 US 534 (1934) at 545.

\(^{196}\) *Ali Omar v The Electoral Commission of Kenya* HC Election Petition No 1 of 2003 (delivered 27 October 2006) (O’Kubasu, Otieno and Deverell JJ) (unreported) at 5 (‘peace and future of the nation depends to a very large extent on the stability and certainty of its electoral process’).

\(^{197}\) *SMT Indira Ghandi v Shri Narain* (1976) 2 SCR 347 at 658 (per Chandrachud J).

\(^{198}\) Ibid.

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stakes in any election transcend national borders. In other words, presidential elections are not simply domestic or national affairs. The Kenya example provides important lessons on the effect an imperfect election could have on the region. As the Luo of Kenya say: *piny luorore*. To put it in another way, events occurring in one country have an impact in other parts of the world.

Against this background, this section evaluates a third area that an inadequate presidential election affects – the region. Accordingly, part one examines the regional effects of an imperfect vote. Because of their wider consequences, presidential elections must be of concern to regional and international states. Part two discusses the role the international community can play to restore peace and stability in the wake of a biased election.

(a) Regional impact of a defective presidential poll: economic and refugee considerations

International and regional laws recognise the right to economic development. In order to achieve this goal, both domestically and internationally, these laws put emphasis on the value of states cooperating. Kenya, with its strategic sea-port, has over the years been used by landlocked countries in the region to import various goods. Under the terms of the 2004 Protocol on the Establishment of the East African Customs Union, the government undertook to ‘deepen’ and ‘strengthen’ trade between itself and other states in the region. This followed on from an earlier commitment made by Kenya when it signed the Treaty Establishing the East African Community in November 1999. Under this treaty, Nairobi vouched to facilitate trade with Tanzania and Uganda as well as other states that have since joined the regional bloc. Yash Ghai contends that ‘the attitude of the partner-states to the commitments they have made and the institutions they have established... determine the fortunes’ of a treaty of this nature. This argument is limited in the sense that it overlooks a country’s stability as a factor that determines the ability to deliver on its treaty obligations. For any human right to be respected, promoted and protected, ‘order’ is essential, as the UDHR points out. Critics like Charles Montesquieu similarly contend that peace is the natural effect of trade.

Free and fair elections are essential ingredients in the maintenance and promotion of peace, security, stability and development, both at the national and international level. The link between elections and regional stability has been recognised. For example, the African Union (AU) has expressed with concern that undemocratic changes of governments were ‘one of the essential causes of insecurity, instability and
violent conflict\textsuperscript{209} within the continent. The Kenyan experience underlines the wider implications of a presidential election, particularly for countries with neighbouring states, because insecurity in one country is likely to have grave implications for its neighbours in the region. Recently, in August 2008, the United Nations Security Council expressed concern that the violence in Somalia `continues to constitute a threat to international peace and security in the region'.\textsuperscript{210} Although the situation in Kenya did not reach the crisis levels of Somalia or Rwanda, the impact of the post-election violence was nevertheless far-reaching.

In the wake of the post-election violence, it became impossible to move goods across the country, either by road or railway.\textsuperscript{211} This had a drastic impact on the regional economies. Contrary to international law standards,\textsuperscript{212} this state of affairs threatened the lives and livelihoods of residents of neighbouring countries. In Uganda, the Democratic Republic of Congo and Burundi, for instance, the price of fuel rose drastically,\textsuperscript{213} owing to the shortage of this vital commodity. Following a site visit to Uganda, the International Monetary Fund observed on 21 March 2008 that, although the unrest in Kenya was short-lived, it `contributed to a core inflation rate of some 7 percent, somewhat above the authorities’ 5 percent target'.\textsuperscript{214} These outcomes cast doubt on Kenya’s reliability as a transit state. Moreover, Kenya’s failure to meet its economic obligations also questioned its credibility as a trading partner, not only to countries in the East African region but also to the rest of the world. A joint statement that the African Development Bank and the World Bank issued on 18 January 2008 emphasised that the crises in Kenya `undermined . . . business confidence'.\textsuperscript{215} The impact of Kenya’s post-election violence affirms the thesis put forward by Boubacar N’Diaye, Abdoulaye Saine and Marthurin Houngnikpo: unbiased elections ‘cannot be over-emphasized for [their] positive socio-economic benefits’.\textsuperscript{216}

International\textsuperscript{217} and regional\textsuperscript{218} human rights laws declare that ‘everyone’ has a right to seek shelter as a refugee in another country. Since the late 1960s, Kenya has offered sanctuary to hundreds of thousands of victims of persecution and armed conflict from a number of African states.\textsuperscript{219} This was in keeping with its international obligations as

\textsuperscript{209} See Preamble to the African Charter on Democracy, Elections and Good Governance adopted at the Eightieth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia (30 January 2007).
\textsuperscript{211} See also A Oluoch ‘The slow puncture deflating wheels of robust economy’ \textit{The Standard} 6 January 2008.
\textsuperscript{212} UDHR, Art 25.
\textsuperscript{213} F Kwera ‘Fuel shortage starts to bite’ \textit{The Standard} 3 January 2008.
\textsuperscript{217} UDHR, Art 14(1) and ICCPR, Art 12(2).
\textsuperscript{218} Banjul Charter, Art 12(3).
Table 4\textsuperscript{220}

<table>
<thead>
<tr>
<th>Refugees and asylum seekers in Kenya as of January 2008</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Somalia</td>
<td>196,200</td>
</tr>
<tr>
<td>Sudan</td>
<td>46,700</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>31,900</td>
</tr>
<tr>
<td>Rwanda</td>
<td>4,600</td>
</tr>
<tr>
<td>Congo (Kinshasa)</td>
<td>4,100</td>
</tr>
<tr>
<td>Uganda</td>
<td>4,000</td>
</tr>
<tr>
<td>Eritrea</td>
<td>3,300</td>
</tr>
<tr>
<td>Burundi</td>
<td>2,900</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>266,700</td>
</tr>
</tbody>
</table>

contained in the Convention Relating to the Status of Refugees 1951 (the Refugee Convention),\textsuperscript{221} and the Protocol Relating to the Status of Refugees 1967 (the Refugee Protocol)\textsuperscript{222} as well as their African counterpart, the African Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention).\textsuperscript{223} Collectively, this corpus of law calls on states to protect those who cannot find effective protection in their own country. These treaties are consistent with the ICCPR, which imposes an obligation on states to ensure that all individuals, including refugees and asylum seekers, in their territory and subject to their jurisdiction enjoy basic human rights.\textsuperscript{224} The idea of offering surrogate protection to others did not begin with the passage of the Refugee Convention. This principle can be traced back to the religious world.\textsuperscript{225}

To cement its asylum commitments, Kenya passed domestic refugee legislation, the Refugees Act, in December 2006. This was crucial because the country follows the dualist principle with regards to treaties. Accordingly, unless the provisions of a treaty are translated into the domestic legal framework by passage of municipal law, they are not applicable.\textsuperscript{226} Consistent with international and regional asylum laws, the Kenyan Refugees Act aims to protect those who have been uprooted from their homes. Table 4 shows that, as of 1 January 2008, there were some 270,000 individuals in need of surrogate protection in Kenya from eight countries.\textsuperscript{227}

Humanitarian relief to neighbouring states, such as Sudan and the Great Lakes Region, arrives via the port of Mombasa. As Kenya slipped into post-election crisis,
it became impossible to move food and relief items to asylum seekers and refugees who live in camps in Kenya as well as in neighbouring states. Lack of basic commodities can have drastic effects on national and regional peace and security. Lack of fuel and food, for example, can spur riots and demonstrations, as well as cause civil strife. Ultimately, this can lead to injury as well as loss of life and property, as law enforcement officials seek to restore order. In the case of refugees and asylum seekers in particular, the shortage of food and other essential supplies could have a drastic impact on their lives and livelihood, especially considering that current rations are barely sufficient to meet their daily needs. As a consequence, Kenya’s ability to meet its legal obligations to refugees is seriously questioned.

(b) The international community: a crucial ally

The role of international players in conflict resolution and management is well known. Kenya is another example of the function that the international community can have towards the expeditious conflict resolution, particularly in the wake of a fixed presidential election. As noted above, conflict in one country threatens international peace and security, hence, the urgent need for the international community to intercede. The mandate to intervene derives from the provisions of the Charter of the United Nations (the UN Charter). Under Art 1 of the UN Charter, states undertook to ‘maintain international peace and security’. To achieve this objective, they promised to ‘take effective measures’ that would prevent and ‘remove’ threats to peace. The promotion of peace, stability and security within Africa are also key goals of the AU. Article 3 of the Constitutive Act of 2000 recognises these objectives. The reason why a premium is placed on peace is because of its direct correlation with economic development. The preamble of the Constitutive Act recognises this fact:

‘CONSCIOUS of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda.’

In other words, without peace, it is difficult for a country to make any meaningful economic progress. The UN High Commissioner for Human Rights observes that international peace and security is the ‘most important condition and guarantee for safeguarding the right to life’. As such, the commissioner implored states to make ‘every effort’ to ‘strengthen’ global peace and security, as this has a direct bearing

231. Signed at San Francisco on 26 June 1945 (entry into force 24 October 1945).
233. Original emphasis.
235. Ibid.
on the national and global economies. Kenya’s national anthem shows that the association between peace and progress was clear when the country was formed in 1963.\textsuperscript{236}

Initially, when the post-election violence erupted, the former chairperson of the AU, President Kuffor of Ghana, rushed to Kenya to try and resolve the issue. Unfortunately, the Kenyan government did not receive him positively. Despite the position that he held, President Kuffor was given a rather cold reception. The then Minister of Internal Security, John Michuki, plainly stated that the government had not invited him to Kenya:

‘[A]s a government, we have not invited any of those people who have been here [such as, the AU, chairperson, John Kuffor] ... We have no case. We won the elections. The government is functioning. Those [mediators] who have come here have been agitated by international communities (sic).’\textsuperscript{237}

Mr Michuki argued that the situation in Kenya did not warrant intervention by the international community. In other words, the country was able to resolve its own internal challenges, if any. This view was shared by others within government circles. The government spokesperson, Dr Alfred Mutua, also poured cold water on the AU’s initial initiative. Somewhat failing to appreciate the gravity of the situation, he stated rather curiously that Mr Kuffor had ‘come to have a cup of tea\textsuperscript{238} in Kenya. This comment drew sharp criticism,\textsuperscript{239} considering the urgent need for concrete steps to prevent the country from sinking into further anarchy. Not surprisingly, the AU’s initial effort did not bear fruit.\textsuperscript{240} In the meantime, widespread unrest and violence continued. As a result, the death toll and the number of internally displaced persons (IDPs) rose sharply.

There were efforts by several internal players to bring the two sides – the ODM and the PNU – together. The Panel of Imminent Persons eventually achieved this. Indeed, the intervention by the international community was successful. The first aim of the international community was to stop the widespread violence and destruction of property, which arose after the flawed presidential election. The second aim was to restore law and order and ensure there would be no further outbreaks of violence. Relative peace and stability were achieved as a result of political consultation and compromise.

As might have been expected, some issues were easier to agree on than others, such as the importance of IDPs returning home. On the question of power-sharing, it was more difficult to find a solution. However, continuous engagement by the international community ensured that the two sides not only signed a peace agreement at the end of February, but that they also jointly appointed a cabinet in April.\textsuperscript{241} As of May 2008, progress had been made to resettle IDPs.\textsuperscript{242}

\textsuperscript{236.} Above n 1.
\textsuperscript{238.} D Onyango ‘Is Dr. Mutua a man in denial?’ The Standard 13 January 2008.
\textsuperscript{239.} See, for instance, ibid.
\textsuperscript{240.} See also D Ohito ‘Talks collapse as Kuffor jets out’ The Standard 11 January 2008.
\textsuperscript{242.} ‘Tears, anxiety as IDPs arrive home’ The Standard 6 May 2008.
CONCLUSION: CHALLENGE AHEAD – RESTORING THE HAKUNA MATATA

This paper set out to demonstrate the results of a flawed presidential election. The preceding analysis has established that partial presidential elections have serious consequences not only at the national level, but at the international plane as well. Nationally, biased elections violate the fundamental right of citizens to vote. They also threaten the fundamental right to life and personal security that all human beings cherish. Presidential elections that are not free and fair also jeopardise international peace and security.

As its 2002 counterpart, the 2007 Kenyan presidential election was expected to serve as an example for states in Africa and elsewhere. However, it failed to meet the democratic standards. Ultimately, the consequences of the flawed election were both undesirable and far-reaching. In order for Kenya (and the region) to more forward, short- and long-term measures must be undertaken. Currently, the most pressing need in Kenya is to resettle the tens of thousands of people who were displaced from their homes following the elections. This is not an easy task. International human rights recognise the right of return. In the context of refugees and IDPs, international and regional refugee treaties, as well as soft law, provide for the rights of displaced persons to return home. However, it is not enough simply to sign a peace accord and appoint a cabinet. Involuntary repatriation cannot work on its own. Rather, practical steps must be taken to ensure that returnees feel safe enough to return to, and stay in, their pre-conflict homes. As Joseph, an IDP in Kenya, underlines: ‘I am ready to return home, but my safety has to be guaranteed.’ Preconditions for sustainable return of IDPs and refugees must be ensured, otherwise there is a chance of conflict happening again. Building police posts in the conflict-prone zones is one step in the right direction towards restoring and maintaining peace. However, the government must realise that citizens are the eyes and ears of society. Thus, it should tread carefully. If the people who live in these areas are not fully involved in the maintenance of law and order, it will be difficult for these efforts to bear fruit. Like the politicians who were actively involved in the search for votes, so, too, must they, and all other Kenyans, be involved in the search for peace.

Long-term measures must be undertaken if the country is to avoid similar incidents in the future. The root cause(s) of the violence need to be tackled. Indeed, failure to combat these challenges could have serious consequences for the country, the continent, and to the democratic system and human rights regime. In keeping with the rule of the law, concrete steps must be taken to prosecute all perpetrators of the

243. Swahili adage, which means no worries (translation by author).
244. UDHR, Art 13; ICCPR, Art 12(4).
245. Refugee Convention, Art 1; OAU Refugee Convention, Art 5.
248. ‘Picking up the pieces’, footage available at http://www.youtube.com/watch?v=lGmXnmCB4tY.
249. The Preamble to the Agreement on the Principles of Partnership of the Coalition Government also recognises that, if the ‘deep-seated and long-standing divisions within the Kenyan society’ are not addressed, they could ‘threaten the very existence of Kenya’.

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post-election violence. Genuine and transparent investigations must be conducted to identify those who participated directly in criminal activities, such as arson and murder, as well as those who encouraged others to take part in those acts. Perpetrators should not be allowed to go without penalty or punishment. Nor should there be selective prosecutions. If this were to occur, Kenya’s criminal justice system and the government’s commitment to uphold justice, as expressed in its national anthem, would be called into question. Moreover, those responsible for the horrific attacks in Naivasha and Eldoret are also liable for criminal prosecution under the International Criminal Court. In a 177 nation survey, which was released in June 2008, Kenya was ranked the twenty-sixth most unstable state. Although restoring Kenya’s lost glory will take years, the government must take concrete steps to meet this objective. Sufficient resources will need to be committed. Kenya’s return to normalcy should encourage tourists and foreign investors to return to the country and restore the country’s former status, as well as bring in vital resources to help in the peace process.

Granted, there is no election that is ‘absolutely fair’. Even so, Kenya in particular, and Africa in general, cannot take comfort in this position. This paper shows that the consequences of a flawed presidential election are wide and serious. Thus, it should be in the interest of African states and elsewhere to ensure that the entire electoral process is transparent from start to finish. In his dissent in US v Classic, Justice Douglas advised that ‘any attempt to defile the sanctity of the ballot must be viewed with equanimity’. The challenge for many African governments lies in embracing much-cherished human rights ideals. Specifically, paper rights, contained in international treaties and domestic law, need to be turned into real entitlements. To paraphrase AV Dicey: African states must be ruled by the law, and by the law alone.

It is both sad and unfortunate that, after almost half a century since gaining independence, elections do not meet internationally accepted standards. Failing to meet these standards, owing to lack of knowledge and expertise with regard to how to manage an election, is one thing. Intentionally interfering in the election process is quite another. It questions a government’s commitment towards upholding democratic principles. Fortunately, in the case of Kenya, the international community’s involvement was swift and successful. However, can, or should, future elections in Africa count on external intervention?

250. Above n 1.
254. 313 US 299 (1941).
255. Ibid, at 329.