

ROYAL NORWEGIAN EMBASSY  
Nairobi Kenya

Civil Society in the  
Post-Amendment Context

Consultant's Report  
Final Draft

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## List of Abbreviations

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4Cs	Citizen Coalition for Constitutional Change
CBO	Community Based Organisation
CDF	Constituency Development Fund
CJ	Criminal Justice System
CSC	Civil Society Congress
CSO	Civil Society Organisation
DG	Democracy and Governance
ECK	Electoral Commission of Kenya
EU	European Union
GEMA	Gikuyu, Embu, Meru Association
GNU	Government of National Unity
IDP	Internally Displaced Persons
KACC	Kenya Anti-corruption Commission
KANU	Kenya African National Union
MPs	Member of Parliament
NARC	National Rainbow Coalition
NCEC	National Constitution Executive Council
NCEP	National Civic Education Programme
NGO	Non-Governmental Organisation
ODM	Orange Democratic Movement
ODM-K	Orange Democratic Movement Kenya
PNU	Party of National Unity
SLDF	Sabaot Land Defence Force
TJRC	Truth Justice and Reconciliation Commission
UNDP	United Nations Development Programme

## Table of Contents

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<b>Part A:</b> <b>The Two Revolts: <i>Understanding the Post-Election Crisis</i></b>	4
<b>Part B:</b> <b>The Peace Architecture and Transitional Justice</b>	16
<b>Part C:</b> <b>Strategic Opportunities and Actors</b>	22
<b>Annexes</b>	28

## Part A

### The Two Revolts: *Understanding the Post-Election Crisis*

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#### A.1 Some Preliminaries<sup>1</sup>

##### A.1.1 Defining Civil Society.

1. This report adopts the Hegelian definition of civil society as that “...political space interposed between the state and the family”. We view it as that assemblage of non-governmental popular institutions operating outside state control but perpetually interacting with the state. In this sense therefore, civil society is a ‘buffer’ against state aggression on the individual. However, it is not a homogeneous space whose actions are collectivised. Civil society, in Kenya in particular, not only operates by the rules set by the state, but its polarized nature also derives from the fact that the state incorporates and disengages its different segments simultaneously (see Victor Azarya 1988:6).
2. This report further admits the Marxian dichotomy between ‘bourgeoisie society’ and ‘lumpen society’<sup>2</sup>. We make it specific to Kenya and argue that there is a civil society operating from ‘below’ and one operating from ‘above’. The one from above is elite driven, and urban based. The one from below is lumpen/peasant-based and operates in the rural areas in the form of Community-Based Organisations (CBOs).

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<sup>1</sup> The methodology through which this study was conducted was trifurcated. The first part comprised of a detailed review of literature in form of reports, and legislation around the peace deal. The second involved in-depth interviews with a selected group of CSOs, and state actors, and the third included a Seminar organised by the Norwegian Embassy. This took place on 3<sup>rd</sup> of June, and the consultant presented his findings to a group of donors. The feedback from the seminar was used to develop the final draft of this report.

<sup>2</sup> Elaborated more by the neo-marxists studying civil society in East Africa including Peter Gibbon (1993) and Mahmood Mamdani (1987)

## A1.2 Separating Civil Society from Political Society

3. Borrowing from the work of Antonio Gramsci (1927), Alfred Stephan (1988) in his works on Latin America argues for the need to differentiate between political and civil society in discourse. While he sees civil society as an ensemble of civic organizations existing outside the state, political society is seen as an arena for political contests. It is the space where institutions that are essentially political in nature are situated, i.e. political parties, the police, judiciary, parliament, etc.
4. In drawing the difference between civil and political societies, Peter Gibbon (1994) has observed that only social pluralities with particularized claims should fall within civil society. When these pluralities assume a general agenda beyond their parochial claims, they transit into political society. Corroborating this view, Lise Rakner (1992) has argued that only those institutions without a political mission are situated in civil society. Any institution actively involved in political bargaining is part of political society. Political conflicts between the “people” and the state are situated in this arena.
5. Because of the contestations around the concept of political society, this report does not delve into its empirical nature in Kenya. However, we adopt the view that political organisations like political parties, constitute part of political as opposed to civil society.

## A.2 Understanding the Post-Election Crisis

6. **The Glasshouse vs. Grassroots.** The immediate post-election revolt was not unified. The ‘glasshouse’ or elite revolt was about power, while the ‘grassroots’ revolt was about material grievances. There was a convergence of interest between the two revolts at first. But as the situation degenerated, the ‘revolt from below’ began to acquire a life of its own. Two significant things happened. One, it developed into a market activity with the revolting mobs collecting illegal taxes<sup>3</sup> through road blocs and other forms of extortion. Two, with the ‘mobs’ becoming financially independent, the ownership of the ‘grassroots’ revolt changed hands. The political elite lost control of the mobs as they got captured by the ‘bandit economy’<sup>4</sup>. In fact, at some point, the ‘glasshouse’ revolt was captured by the ‘grassroots’ mobs<sup>5</sup>.

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<sup>3</sup> Our tabulations reveal that these taxes ( averaging Ksh 300 per person per day) were far more than their daily wages (averaging Ksh 150-200 per person per day).

<sup>4</sup> Concept associated with Mutahi Ngunyi, “ The Militarisation of Politics in Kenya: Of Militia and the Bandit State” (1999: SAREAT, *East African Alternatives*)

<sup>5</sup> On the ODM side for instance, the election of National Assembly Speaker was largely monitored by the ‘mobs’ who had warned that they would burn the homes of traitor MPs who

7. By February 28<sup>th</sup> 2008, when the Kofi Annan mediation arrived at a peace deal, there was a tacit divide between the ‘revolt from above’ led by the political class, and the ‘revolt from below’ now captured by the ‘bandit state’. The truce brokered by Kofi Annan was therefore amongst the political elite: It was a ‘glasshouse project’. The growing divide between the mobs and the political class was never bridged. And this omission is beginning to dog the legitimacy of the Annan Peace Deal<sup>6</sup>, especially with discussions around Agenda 4 of the peace talks becoming slow-punctured.

#### A.2.1 **Revolt from Above: *The Elite Wars***

8. **The Ethnic Grudge.** The Kibaki regime had begrudged two categories of the political elite. The first comprised the LDP group that was fired from government after the November 2005 referendum. The second was made up of the Moi elite, who had been circulated out of power unexpectedly in the 2002 election. After the defeat, this group split into two: the politicians on the one hand and the technocrats<sup>7</sup> on the other. By the time of the 2007 election, the political icons of the Moi regime joined Kibaki, while the technocrats<sup>8</sup> regimented around ODM and used the party to re-launch their political relevance.
9. **Kikuyunisation Project.** This grudge festered as Kibaki ‘Kikuyunised’ the civil service, and other public offices<sup>9</sup>. Using this practice, ODM whipped anti-Kikuyu sentiments to regiment the rest of the country against the regime-in-place. However, they did not have a post-election strategy aimed at arresting the effects of these sentiments should they acquire a life of their own. Introducing the ‘Majimbo’ (federalism) debate<sup>10</sup> as a part of their election agenda further aggravated the ethnic

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had been ‘bought’ by PNU to vote for a government-friendly speaker. Similarly, on the PNU side, evidence we gathered reveals that most leaders were captive to Mungiki or some of its variation.

<sup>6</sup> We demonstrate this in greater details using ODM attempts at selling the ‘government’ to its supporters.

<sup>7</sup> The Moi technocrats had served him for a long period of time and had amassed tremendous clout and wealth.

<sup>8</sup> This group could not get amnesty or inclusion from the Kibaki regime. Also used the ODM platform to launder their monies and persona. The group includes military and intelligence top-dogs, and strategic civil servants retired ‘unfairly’.

<sup>9</sup> See, Ethnic Audit of the Civil Service (2007:TCH)

<sup>10</sup> This debate predates Independence in 1963. It was about the self governance of different regions and ethnicities. It has been a thorny issue in any transition election and has traditionally been accompanied by a form of ethnic cleansing.

imaginings against the regime. Although unintended by ODM<sup>11</sup>, the voters interpreted this agenda as a call for ethnic cleansing post election<sup>12</sup>.

10. **One-tribe and ‘a bit’.** On its part, the Kibaki regime remained unapologetic about its ethnic project. Its election ideology was rationalised by its ‘tyranny of numbers’<sup>13</sup> and the argument that all it needed was a patchwork of ethnic support from different parts of the country. Its election formula was therefore to go for the “one-tribe (kikuyu) and ‘a bit’ (patchwork of other tribes). This formula meant that president Kibaki did not have to form grand coalitions with entire tribes. To the rest of the country, the idea smacked of Kikuyu arrogance and only fuelled the anti-Kikuyu sentiments
11. **Organising for Politics.** ODM used ethno-regional notables to mobilise support, while PNU used ethnic-based political parties. Although the PNU model was (probably) more advanced<sup>14</sup>, it failed to capture the imagination of the country beyond the GEMA enclave<sup>15</sup>.
12. Post-election, however, there was a reversal. Because his model was personalised, Raila Odinga became captive to the ethnic leaders. To the contrary, Kibaki argued that he did not owe his re-election to any ethnic notable. As such, he was not beholden to his courtiers and had the luxury to negotiate with Raila without extensive consultations. And it is in this context that he was viewed as the ‘hardliner’ in PNU – not his handlers.

### A.2.2 Ending the ‘Glasshouse’ Revolt: *A Forced Unity of Opposites*

13. **The Unity of Opposites.** Since the collapse of NARC in 2003, the Kibaki and Raila elites have been opposites. With the peace deal, the ‘opposites’ have now united. And with this unity, we have a new and more challenging equilibrium. The fundamental challenge here is that this ‘unity of opposites’ was not dialectical. It was not a willy-nilly attraction: It was forced. The issues underlying the post-election crisis were, therefore, buried alive in the interest of peace. As the peace deal consolidates, these issues are likely to kick from underneath and dog the equilibrium. The seething rebellion within ODM is a pointer to this. More

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<sup>11</sup> Some of the evidence we received claimed that ODM used the majimbo debate to whip ethnic animosity with the intention of cleansing. But this mission could not establish the negative intentionality of ODM in the cleansing project.

<sup>12</sup> There were leaflets circulating before the election asking the Kikuyu to vacate certain areas should ODM win. See Amani Forum: [Fact-Finding Mission Report](#) (February 2008)

<sup>13</sup> The Kikuyu comprise of about 24% of the total voting population.

<sup>14</sup> It promoted political party institutionalisation as opposed to the personality cult around the ODM pentagon.

<sup>15</sup> This was also because the PNU model was hatched three months before the election

so given that the rebellion is coming from both the supporters<sup>16</sup> and the leadership who felt excluded during the formation of government.

14. **Challenges to Civil Society.** The forced unity of opposites poses four challenges to civil society.

- a. **Paradigm Paralysis.** Civil society from ‘above’<sup>17</sup> suffers from a paralysis of paradigm. And this is largely because it was constituted as an anti-Moi space during the 1990s. In the absence of Moi and his dictatorship, civil society seems to have lost its object of aggression. After the 2002 election it became a mirror image of the wrangling coalition government: polarised and ethnicised. In this paralysis, it stagnated in its approaches and tools of civic engagement. The third transition cycle<sup>18</sup> (2002-2007) is as a result recorded as one with the least innovations and growth in civil society.

Nevertheless, the post-election crisis seems to have re-invigorated civil society. It gave the CSOs an object of unification: one they could aggress. But because of its paralysis, the post-crisis civil society is divided. One segment is comprised of a ‘careerised’ civil society without a course<sup>19</sup>, while the other is made up of the ‘reform-driven’ civil society with a transformation agenda. Unfortunately, the ‘careerised’ civil society is better organised and has therefore attracted funding in spite of its lack of innovations. The ‘reform-driven’ civil society is less solid in terms of organisational structure, but more focused with respect to ideas and innovations.

*The Challenge.* With the ‘revolt from above’ quelled, elite spaces in government and other institutions are open for civil society influencing – at least in the short run before they close up with regime consolidation. The tragedy, however, is that the funded ‘civil society from above’ is using old tools to engage with a new situation. The moment is ripe for influencing, but civil society is unable to cease it because its tools and methods are incompatible with the emerging opportunities<sup>20</sup>.

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<sup>16</sup> On May 10<sup>th</sup>, Raila was booed by his Kisumu supporters for mentioning his collaboration with Kibaki. During a visit to the IDPs in Eldoret, Kibaki was also booed by the Kikuyus as a sign of displeasure over the new coalition arrangement.

<sup>17</sup> Refers to the national NGOs operating in the policy and advocacy arena.

<sup>18</sup> See Mutahi Ngunyi, *Civil Society and the Transition Cycles in Kenya* (IDS Sussex)

<sup>19</sup> Meaning that the civil society organisations in this category were in it for career advancement and as a livelihood only.

<sup>20</sup> We demonstrate this with examples later.

The reverse is true for ‘civil society from below’. The CBOs, and regional NGOs have the innovations and oomph to influence local spaces. But unlike the elite who are currently ready to be influenced, the ‘revolt owners’ from below are less than open to civil society influence.

- b. **Playing Opposition.** The unity of opposites must attract an anti-thesis. A new system of checking and balancing the grand coalition will have to emerge. This could come from an alliance between civil society and the excluded MPs in the backbench<sup>21</sup>. It could also come from the disgruntled ethnic groups<sup>22</sup> who might feel that their reward is not commensurate with their contribution to this ‘liberation’. The other alternative is for the ‘informal’ opposition to come from the begrudged militia operating in the illiberal spaces.

*The Challenge.* Given the partisan nature of civil society, the challenge is whether they can disengage from their preferred side of the political divide and evolve into an independent ‘checking agent’. More so to ensure that the new anti-thesis is not ‘illiberal’ and is not driven by the ethnic jingoists. But can civil society influence the making of this new force?

- c. **Elite Conspiracy on Corruption.** The Grand Coalition brings together laundered politicians from the Moi state and politicians accused of corruption under Kibaki. The Moi politicians had unfinished corruption business when they lost the election in 2002<sup>23</sup>. The Kibaki politicians have on-going ‘business’, some of which remains invisible to the anti-corruption activists<sup>24</sup>.

*The challenge* here is: between these two sets of politicians, who will watchdog the other? Is it possible for them to enter into a tacit agreement aimed at protecting the other’s corruption enterprises? And what about civil society: does it have the capacity and tools to engage in the new situation? The view of this paper is that combining the re-cycled Moi enterprise under ODM, and the Kibaki corruption enterprise might be a handful for civil society to handle. A multi-pronged approach that partners up civil society with strategic institutions<sup>25</sup> and players<sup>26</sup> should be adopted.

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<sup>21</sup> For instance the alliance between 1993-97 leading to the formation of the NCEC.

<sup>22</sup> For instance the Kalenjin, or even the Kikuyu who were not convinced about the power sharing arrangement.

<sup>23</sup> Some of them are actually charged in the courts of law.

<sup>24</sup> My reading of the [Auditor General’s Reports \(2003-7\)](#)

<sup>25</sup> Like the Grand Opposition in its formal or informal formulation

<sup>26</sup> For instance, the progressive, anti-corruption elements within the grand coalition

### A.2.3 **The Revolt from Below:** *The Mobs, the Marketeers and the Militia*

15. The typology of the ‘revolt from below’ has been limited in the view of this report. Most accounts seem to suggest that the revolt was carried out by criminal mobs and the underwriters were the politicians. While this is partly true, it trivialises the gravity of this revolt and its explosive character. Similarly, it glorifies an otherwise limited role by the politicians. In the view of this report, there were three ‘theatres of play’ in the ‘revolt from below’ and each was managed by a different group of actors, although there was an interlocation between them. For the most part, each theatre of revolt had an element of self motivation and financing. Although the mobs have left the streets, evidence collected in this report reveals that some of the theatres in this revolt are still active. Let us examine the theatres now.

#### A.2.3.1 **‘Cat-Walk’ Revolt:** *The Rioting Mobs*

16. This was the visible part of the ‘revolt from below’ and comprised of the first frontier. It was a ‘spontaneous response to an election gone bad’. In the early days of this revolt, the role of politicians was minimal. But as the crisis degenerated, the political elite had to underwrite its activities as a way of keeping the pressure up. At this point, the revolt was more of a ‘protest show’, a political cat-walk. Similarly, the actors changed from the aggrieved and *bona fide* voter to the ‘soft-core’ militia hired by the politicians<sup>27</sup>. Some of these militia included the Taliban, Baghdad Boys, Kosovo and Kamjesh.
17. The entry of the ‘soft-core’ militia gave the revolt a new character. Fundamental here was its organised nature, including the uprooting of railways, blocking transit routes with demobilised trucks and burning down buildings. At this point, the ethnic cleaning was just at the rhetorical level.

#### A.2.3.2 **Marketised Revolt:** *The Bandit Formations*

18. Other than the rioting mobs, the revolt-from-below was driven by another set of actors we must distinguish: the *militarised* groups and the *militant* groups. The militarised groups<sup>28</sup> have a grievance and a definite course; the militant groups are marketeers driven by opportunity. These were the owners of the marketised aspect of the revolt. They may be organised, but they have no course or ideology beyond plunder and crime. They mounted road blocs to collect illegal taxes, and preyed on

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<sup>27</sup> Interviews with organised CBOs from Kibera and Huruma in Nairobi.

<sup>28</sup> Like Sabaot Land Defence Force or Mungiki

victims in exchange for protection<sup>29</sup>. In order to preserve this enterprise, these bandit formations kept the skirmishes alive. What appeared like a genuine revolt from the outside was actually motivated by crude ‘market’ interests on the inside. It has actually been argued that this group of ‘conflict marketeers’ was largely responsible for the massive killings in Nakuru, Naivasha<sup>30</sup> and other parts of the Rift Valley<sup>31</sup>.

19. Similarly, as the peace deal was being negotiated, this group motivated for more arms from neighbouring countries. Evidence in the north rift for instance reveals that the price of an AK 47 increased four-fold as the Annan Talks were in progress in Nairobi. Apparently, then, it would appear like communities armed themselves for a ‘war’ that never took place. The arms collected during this period have now been channelled into crime and plunder through this group of militants.

#### A.2.3.3 **Militarised Revolt:** *The Land and Poverty Resistance*

20. This theatre of the revolt was rooted in a political grievance and found expression in an armed struggle. Of the armed groups involved in the revolt, two are foremost. The first is the Sabaot Land Defence Force (SLDF) operating in the western part of Kenya, but with tentacles in Nyanza and Rift Valley. This force incorporates, *inter alia*, the Kenya Land Defence Force, which is a mutation of Mooreland Forces<sup>32</sup>, and the Political Revenge Movement. Its grievances are both historical and land-based, and its sympathies have been with ODM given its locality. Currently, there is a military offensive against this group known as “*Operation Okoa Maisha*”<sup>33</sup>.
21. The second is Mungiki. This is a Kikuyu militia which started as the *Kikuyu Land Defence Force*, a re-incarnation of the *Mau Mau* military wing. Mungiki has its roots in the land clashes of 1991 and its grievances are generational, land-based and economic justice. During the violent crisis, SLDP was used to organise for ODM revolts, while Mungiki was used by PNU to counter the offensive from ODM strong-holds. Adduced

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<sup>29</sup> For instance, the protection fee in slum areas of Nairobi rose from Ksh 150 to 2000 during the period.

<sup>30</sup> The Mungiki leadership has for instance denied carrying out the executions in Nakuru and Naivasha arguing that this was done by a Franchise Group. The BBC, further argued that the so called ‘Mungiki Group’ had strong connections with Statehouse and had actually been hired to do a counter attack

<sup>31</sup> See, Great Lakes Parliamentary Forum (AMANI) Fact Finding Mission Report (February 2008)

<sup>32</sup> This force was originally constituted by the Ogiek community to fight the SLDF

<sup>33</sup> This Operation has been accused of gross human rights abuses and civil society is seeking to expand the TJRC period to cover the post-amendment phase. The idea here is to ensure that the SLDP violations are brought to public attention through the TJRC and reparations are warded ( Interview with IMLU)

evidence from this study, however, shows that the two formations have been in consultation<sup>34</sup>. The intention is to wage a ‘class war’ against the political elite<sup>35</sup>.

22. Also important to note is that, while SLDP is being decimated by the armed forces, Mungiki is entering into discussions with the coalition government. This ‘unequal’ treatment of outlawed groups has raised a fundamental issue regarding motive. Our hypothesis is that the push for a military option to resolve the SLDP problem is driven by what appears to be a **rear-guard action** aimed at trapping the ODM in the political settlement while at the same time sorting out what is perceived as the ODM linked armed group.
23. Back to the election crisis: The resultant violence gave a platform for the armed groups to bring their issues to the fore. These issues were admitted by the Annan group and set aside at Agenda 4 of the peace deal. In the process, however, the militia began to claim their space, distancing themselves from the political elite and sometimes hijacking them to their course. Given their financial base through the ‘bandit economy’, the militia captured the ‘revolt from below’<sup>36</sup> and gave it an agenda akin to theirs. If the violence had continued, we hypothesise that they would have wrestled total control of the revolt from the political elite. More so because, contrary to conventional wisdom, they do not rely on the political class to survive<sup>37</sup>.
24. But there is another dynamic: The Kenya armed forces are currently in crisis. Due to the political problem in the country, promotions in the military have not taken place for about two years<sup>38</sup>. Because of the rules in the military, this has driven competent/high level, young soldiers out of the forces. These be-grudged soldiers have in turn found relevance in the emerging armed groups. Evidence reveals that each of the notable armed formations has a set of experienced armed personnel training them.

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<sup>34</sup> AMANI forum, Fact Finding Mission., Op Cit

<sup>35</sup> Although not conceived as a militarised struggle, this ‘class war’ is part of public discourse in FM station and other public fora.

<sup>36</sup> At least in their areas of operation.

<sup>37</sup> Mungiki for instance raises over 80% of its operating resources from predation and illegal taxation. The balance is from legitimate business and occasional ‘contracts’ from the political class.

<sup>38</sup> These promotions are done by the National Defence Council, which meets twice a year. But because of the situation in flux, the council has not held three consecutive meetings. The formular in the forces is such that if you have reached the age of 39 as a captain and you do not get promoted to the position of Major, you have to retire. Similar rules apply for each of the officer positions, although the age limit differs. And as a result, the failure of the Council to meet as a result of the political crisis has resulted in the involuntary retirement of young and competent soldiers. These are the soldiers being used to train the armed groups as the case of Republican Defence Force and the Mulungunipa Forest Group revealed.

25. Unlike the other two revolts, which seem to be ‘spiriting away’, the militarised revolt has intensified in the post-amendment period<sup>39</sup>. Apart from the Mungiki exploits during April 2008<sup>40</sup>, and the SLDP military fiasco, in March 2008, more than 19 people were killed in Laikipia alone and scores of houses burnt prompting thousands of displacements in the district. This was done by an armed group that claimed to bring attention to the historical issue of land access in the area. Such group, and similar pseudo-military forces based in the tribe have regimented. Amongst the Kalenjin for instance, there is the People’s Defence Army and Group of 41. The Group of 41 denotes the 41 tribes of Kenya against the one tribe in power – the Kikuyu. These two formations have links with SLDF. Others include the Republican Force and the Mulungunipa Forest Group in Kwale at the coast, and the Pokot Ponchons in the North Rift.

#### A.2.3.2 **The Trigger Effects:** *Of Media, and the Church*

26. It is noteworthy that, the revolt from below was partly incited by vernacular radio stations<sup>41</sup>. These stations passed messages that saw communities seethe with hate against each other. The mainstream media was also partisan in the process. Depending on the ethnicity of the top ‘dogs’ in the media houses and the ownership of the media, reporting was tilted in favour of one side or the other<sup>42</sup>. And when the crisis reached fever-pitch, the church became polarised as well. The bishops provided guidance depending on their ethnicity. In fact, the church leadership split into ethnic constituencies just before and immediately after the crisis. This ethnicisation of the church has corroded its legitimacy as a neutral arbiter and rational voice in society.

#### A 2.4 **Ending the Revolt from Below:** *A Natural Unity of Forces*

27. The Annan Deal assumed a number of things regarding this revolt. One, that once the power sharing deal is cut between the warring elite, the revolt would automatically fizzle away. Two, that in the event it does not, the elite would have the political will to implement Agenda 4 of the peace talks as a way of addressing poverty and inequality. The two assumptions were faulty, in the view of this report.
28. Once the power sharing accord was signed, the Annan Initiative (currently chaired by a proxy) became slow-punctured. As a result, deliberations on Agenda 4 have been abandoned. The new government has actually suggested the disbanding of the initiative now that the

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<sup>39</sup> For instance the Mungiki on-slaught and the Ponchon activities in the North Rift.

<sup>40</sup> These exploits continue to date. The group has called for a protest prayer meeting at Uhuru Park in Nairobi to register displeasure with government’s unwillingness to engage them.

<sup>41</sup> See Amani Forum Fact Finding Report on the Kenya Crisis (March 2008)

<sup>42</sup> Evidence provided by a series of journalists to the Kriegler Commission (June 25-26 2008)

country has returned to normalcy<sup>43</sup>. This means that modalities of dealing with historical grievances, economic inequalities and impunity are not all included in the peace architecture. This omission has given the quelling ‘revolt from below’ a new oomph! The argument is that the elite took care of their concerns only, abandoning the pro-poor agenda. From this realisation, coupled with increased economic hardships, a solidarity of the aggrieved is emerging<sup>44</sup>. The melting point is the issue of land and economic justice. And in the absence of a political platform, the organising point is the militia groups. (A group like Mungiki has actually acknowledged that it has a political wing: the Kenya Youth Alliance.) Failure to systematically acknowledge and deal with the grievances from below could have far reaching implications at municipal society level. This provides both opportunities and challenges to civil society.

#### A.2.4.1 The ‘Gap’ Hypothesis

29. Given the post-amendment gap between the revolt from above and the one from below, our hypothesis is that the emerging solidarity from below could translate into the ‘Second Rebellion’. This hypothesis has three limbs:
  - a. **The Motive.** While the first rebellion<sup>45</sup> was occasioned by the political disagreements from above, a second rebellion is likely to be driven by grievances from below. The first rebellion was about power relations, but the second will be about distributive justice. Although the issue of equity was addressed at Agenda 4 of the peace agreement, there is the fear that the agenda will get ‘frozen’ once the power sharing solidifies.
  - b. **The Frozen Grievances.** If the revolt from below will be about distributive justice, it will be because important issues were frozen at independence and the period before, in the hope that they would go away. The post-election crisis has unfrozen these issues and a demand to their resolve is being made. The response of government however is to deal with them administratively, and not politically<sup>46</sup>. And this is where a conflict between the aggrieved and the new coalition will stem from in our view.

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<sup>43</sup> Foreign Minister, Moses Wetangula holds this view and has expressed it numerous to the press.

<sup>44</sup> Discussion with a group of civil society actors from ‘below’ convened by MS-Kenya to review the dynamics of the post-election crisis.

<sup>45</sup> Bringing together forces from above and below.

<sup>46</sup> This was the argument at independence. The administrative attempt to deal with grievances is what led to their being ‘frozen’.

- c. **The Localised Revolt.** The second revolt from below is likely to be localised and low-voltage – at least during the early stages. Region-specific militia have fortified and are now placing demands on the system. This is inspired by the fact that the first revolt bore some fruit and placed the issues from below on the table as Agenda 4. The low-voltage revolt is therefore likely to be issue-based and militarised. It is the theatre where demands on historical injustices<sup>47</sup> are likely to be placed. More so if the transitional justice mechanisms are deemed to be ineffective.

#### A.2.4.2 Opportunities and Challenges to Civil Society.

30. Two opportunities and challenges for civil society from below present themselves.
  - a. **Availing Civic Platforms.** The energy and expectations generated by the crisis needs to be channelled into democracy-compliant activities. While this is an opportunity for CBOs on the ground, it is also a challenge. How for instance does civil society get communities to put their grievances on the peace agenda using civil society platforms as opposed to the alternative militarised platforms? More so as the rural spaces become high on militarization and low on politics?
  - b. **Monitoring Agenda 4.** Civil society from below has the opportunity to monitor government compliance to the tenets of Agenda 4 of the peace deal. The challenge however is that it is not unified and elite conflicts around the deal are likely to be mirrored in civil society. This notwithstanding, civil society can piggy-back on the emerging solidarity of the aggrieved communities to monitor compliance to Agenda 4.
  - c. **Transitional Justice.** This process might implicate the militarised groups from below. The TJRC process is also likely to raise expectations around the issue of reparations. The opportunity for civil society is that of preparing communities for this process. The challenge however is the possible ‘capture’ of the CBOs by political actors in aid of certain political agendas. For instance, if some ethnic notable is implicated by the TJRC, they could rally such groups to their aid. The lessons from Sierra Leone, and Rwanda can attest to this.

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<sup>47</sup> For instance, the massacres in the north and the insecurity in the cattle-rustling zones.

## Part B

### Peace Architecture and Transitional Justice

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#### B.1 The Zero-Sum Game

1. **The Kibaki Motive.** A fundamental question that the Kibaki surrender begs is this: was he forced into the peace deal or did he do it willingly? If he was arm-twisted into it, then we are likely to go through an ‘implementation yo-yo’ in which meaning would be attached to different aspects of the amendments depending on the politics of the moment.
2. **The Spirit *vs.* the Letter of the Deal.** To ODM, the important thing about the amendments was not the letter of the law, but the spirit of it. With this position informing its actions, it did not exercise due diligence in the drafting<sup>48</sup> As a result, some things were not written into law, yet they are critical planks of the agreement. And if Kibaki was arm-twisted into accepting the deal, he could decide to interpret the amendments using the letter as opposed to the spirit. So far, the sharing of portfolios has favoured him because the Accord does not talk about a 50:50 power sharing. It only alludes to this at Section 3 where it states: “...(t)he composition of the coalition government shall...reflect the relative parliamentary strengths of respective parties...” Similarly, power sharing in the civil service is unstated and this is why it has not happened.
3. **Politics of Interpretation.** Other areas of the amendments requiring interpretation include the Prime Minister’s role of ‘supervision and co-ordination’. According to PNU, ODM interprets this to mean that executive power rests (in part) with the prime minister. Like the other parts of the amendments, this part can be interpreted to mean many things. As the coalition consolidates, this is an area likely to breed

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<sup>48</sup> In fact, a textual analysis of the amendments reveals some creative political engineering on the part of PNU. Overall, the amendments favour the party over ODM.

contentions. More so if Raila decides to creatively interpret his constitutional mandate.

4. **Reversing the Peace Deal.** At section 8, the Accord states that “ *(t)his Act shall cease to apply...if the coalition is dissolved*” among other reasons. And the coalition shall be dissolved if *inter alia*, one partner withdraws (Section 6(c)). If Kibaki was forced into a deal, PNU can decide to withdraw from the coalition once things settle. And if this happens, the Act that created the current PM post would be annulled. As a result, ODM would be kicked out of government, including the PM and his deputies. This would present two zero-sum scenarios.
5. One, PNU would occupy all the cabinet and civil service jobs. In fact, Kibaki would have the added advantage of appointing a PNU PM and two deputies as provided for in the amended constitution at 15(A) i and ii. Contrary to conventional thinking, the clause (in the Accord) requiring the country to go into an election if the coalition collapses was removed. Should the collapse happen, therefore, Kibaki would be the winner and he would take it all. The question to pose here then is this: Did he agree to the peace deal as a way of ‘ducking’ international pressure with the intention of botching it when things normalise? Given the history of the first coalition government under NARC, this is a possibility to be anticipated. And civil society should flag out the possible indicators of this as they unfold.
6. Two, should the coalition collapse and Kibaki ‘takes it all’, ODM has the option of forcing a snap election<sup>49</sup>. More so, if ODM is confident that they will win in a re-run. To motivate for the snap election, ODM can pass a vote-of-no-confidence in the Kibaki administration using Section 59(3) of the constitution. According to this section, only a 51% majority is required<sup>50</sup> and once the vote is cast, the president must resign in 3 days. If he does not, parliament would stand dissolved on the 4<sup>th</sup> day. And this would force an election at zero option.
7. The only problem with this is that it would lead to the dissolution of parliament and a fresh general election involving ODM MPs. But given the seething rebellion by the ODM back bench, this possibility is slim. Nevertheless, should ODM win such an election, Raila would appoint the Vice-president, PM and their deputies. This, like in the first scenario, is still a zero-sum option in which the winner takes it all.

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<sup>49</sup> This is the logical way out of such a fix, given that mass action and violence are only likely to demonise ODM locally and internationally

<sup>50</sup> ODM has more than 50% control of parliament.

## B.2 Opportunities and Challenges for Civil Society

8. **Monitoring Compliance with the Deal.** Because of its polarised nature, the co-habitation between ODM and PNU has left civil society flat footed. The opportunity for the CSOs is that of emancipating itself from the political class and monitoring government compliance with tenets of the Peace Accord. As argued earlier, this can be done in partnership with the back-bench in parliament.
9. **Constitutional Review.** If indeed the architecture of the amendments is flawed and could lead to a zero-sum situation, a comprehensive constitutional review process should be embarked on. Civil society should reclaim<sup>51</sup> this initiative from the politicians and kick-start the process from where it was stopped at Bomas II.

## B.4 Civil Society and Transitional Justice

### B.4.1 Truth Justice and Reconciliation Commission (TJRC)

10. **The National Grievances.** As part of Agenda 4, a Bill to establish a TJRC has been published. If established, this commission is meant to operate for 2 years and to handle grievances from December 12<sup>th</sup> 1963 and February 28<sup>th</sup> 2008. A menu that confines the nature of the grievances is contained at Section 4 of the Bill. And one of the major critiques of this Bill is that there are far too many grievances to be dealt with in a span of only two years. Similarly, the time limit excludes important violations like those related to the *Mau Mau* war (1950s) and the recent military assault on SLDF<sup>52</sup> (March 2008).
11. **Actualising the TJRC.** Most of the crimes to be investigated by this commission have been scrutinised by one commission or another<sup>53</sup>. The value proposition of this commission will therefore be determined by a number of things, *inter alia*,
  - a. **The Push Factor.** The drivers of this commission are important to its success. Will it be perpetrator or victim driven? If it is victim driven, its success could be dogged by the battery of lawyers defending the accused perpetrators. The other problem here will be the financing of reparations. On the other hand, if it is perpetrator-driven, the risk of laundering criminals is high.

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<sup>51</sup> The process of constitutional review in Kenya was driven by civil society from 1995 to when NARC came to power in 2003. The initiative has since been lost to progressive politicians and clever state operatives.

<sup>52</sup> According to IMLU, this assault has recorded a very high level of torture and rights abuses.

<sup>53</sup> For instance, the Kiliku Parliamentary Select Committee on Ethnic Clashes, the Akiwumi Commission, the Golden Berg Commission etc.

Success will therefore depend on a reasonable balance of interest between the perpetrators and victims. This cannot be assured.

- b. **Independence and Immunity.** The Bill gives nominal independence to the commission in the sense that its financing is dependent on the Minister for Justice. At Article 40, the Bill gives the Minister authority to scrutinise and approve its expenses. Similarly, the commission is a legal body that can sue and be sued. And as the case of TRC in South Africa shows, this endangers the independence of such a body<sup>54</sup>. The commission's work can be deliberately delayed through a 'nuisance' suit by an interested party.
  - c. **Witness Protection.** This aspect of the Bill is weak and could reduce the desirability of the process. Another issue here is the conflict between the Bill and the Official Secrets Act, which prohibits disclosure of information by public servants. This might be sited to protect those implicated in economic crimes.
  - d. **Relationship with the Criminal Justice System.** A tension between the commission and the CJ system is likely due to role overlaps. Matters before the court for instance, might be considered *sub judice* if discussed in the commission. This is one possible avenue the perpetrators might use to avoid mention in the commission.
  - e. **Implementation of Recommendations.** The Commission is only empowered to *recommend* and *not to grant* amnesty, reparations or prosecutions<sup>55</sup>. At Article 48 of the Bill, the Minister for Justice is to appoint a body that will implement the recommendations. In our view, this could be manipulated by either side of the political divide. More so, given that the minister is to approve its budget and operational dynamics.
12. **The TJRC End Result.** The purpose for which this commission is established is cumulative, starting with the truth, then justice and finally reconciliation. The uncritical assumption is that the three are desirable, achievable and related. Available studies call for an in-depth interrogation of this assumption. In the case of Kenya, questions about the end result of the TJRC abound.
- a. **Truth.** The assumption that truth leads to justice and reconciliation is unproven. In some instance, like in the Rwandese

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<sup>54</sup> This commission was sued by the Steve Biko family.

<sup>55</sup> A textual reading of the bill shows ambiguity with regards to the granting/recommending of amnesty, reparations etc.

*Gacaca* process, it has led to revenge. A fundamental concern here has to do with the construction of truth: Who constructs<sup>56</sup> it, and what is its ‘value-in-use’? Similarly, the older the grievance, the more prepared the country is to deal with the truth. In a situation where the grievances are still fresh, communities might find it difficult to handle the truth. More so in a situation where the matters under contestation have not been brought to closure. And this is the case with the post-election clashes. Until the underlying issues are resolved, the truth about the killings might open up a can of warms! The role of civil society in this case will be to anticipate the turns and twists in the process and provide interventions in the form of safety valves.

- b. **Justice.** The argument for a TJRC is that transitional moments call for a different kind of justice. One that is less retributive and more restorative. In the cases of Rwanda and Sierra Leone, they began with the retributive route in which a war tribunal was set up to try the perpetrators. With time, however, they realised that retributive justice is backward-looking and ignores the victim/survivor. This is how their TRC processes were born<sup>57</sup>.

The TJRC Bill embraces both forms of justice. However, it is generous with respect to amnesty, a fact that is inconsistent with the constitution and Kenya’s obligations under international law<sup>58</sup>. Similarly, it is stingy with respect to reparations. In particular, the fact that evidence adduced in the commission cannot be used to sue for compensation by victims.

13. **Opportunities for Civil Society.** Under the auspices of the International Centre for Peace and Conflict<sup>59</sup> (ICPC), civil society has convened a multi-sectoral taskforce<sup>60</sup> to watchdog this process. They have held numerous stakeholder consultations to critique the Bill and provide recommendations for amendments. The taskforce is also working with progressive MPs to lobby for the amendments. Similarly, it has constituted the Transitional Justice Network aimed at creating grassroots platforms for people to engage with the TJRC process. Given the importance of transitional justice post-conflict, the opportunity for civil society is therefore to lobby for the amendment of the Bill, monitor the TJRC process to ensure conformity with international law and rights

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<sup>56</sup> In Rwanda, the state has been known to facilitate an institutional construction of truth.

<sup>57</sup> The need to de-congest penal institutions also necessitated the formation of Gacaca in Rwanda.

<sup>58</sup> For instance, impunity for serious crimes like genocide, war crimes, torture and crimes against humanity.

<sup>59</sup> This is a Kenyan CSO linked to peace networks in the Great Lakes Region.

<sup>60</sup> This includes 10 of the leading human rights CSOs and state based actors like the KNCHRs.

instruments, and by empowering the demand side (victim side) of the process.

#### B.4.2 The Kriegler Commission

14. This commission was appointed through the Annan team to investigate the anomalies in the 2007 elections and to make recommendations regarding changes in the electoral systems and laws. The commission faces a number of challenges.
  - a. **The verdict.** Whatever verdict the commission returns<sup>61</sup> with regards to the elections, there will be a crisis. If it indicates that Kibaki won the election, PNU might question the necessity of power sharing. On this account, PNU could pull out of the coalition and occupy all the cabinet positions legitimately. And if it indicates that Raila won, ODM might place even greater demands in Kibaki, arguing he is in office illegally. Like in the TJRC process, the opportunity for civil society is to provide innovative ways of ensuring that the political divide in government does not play out in the commission. But more fundamentally, and through its awareness platforms, it should prepare the public for whatever verdict the commission will return.
  - b. **The Constitutive Instrument.** This commission is constituted under the Commissions of Inquiries Act. Under this act, the president has the powers to appoint and disband the commission or dismiss any of its commissioners. In the past, commissions of a similar nature have been disbanded by the sitting president without explanation<sup>62</sup>. Should this commission gravitate towards implicating the PNU side of government in rigging the 2007 election, the danger of its de-registration is real.

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<sup>61</sup> There is a misconception arising from Kriegler's own interpretation of his TOR that he is not mandated to pass a verdict on the election results. But at page 1, TOR(e) of the Independent Review Commission (IREC), which is also the Kriegler Commission, the team is supposed to pass verdict on the 'integrity' of the presidential result and the basis of this will be an examination of the tallying process at KICC. This in itself is likely to tell us who won.

<sup>62</sup> For instance, the Ouko Commission, Njonjo Commission, and the original Goldenberg Commission.

## Part C

### Strategic Opportunities and Actors

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#### C.1 Emerging Opportunities And Actors

##### C.1.1 The Democracy and Governance (DG) Sector

1. **Constitutional Review.** Given the shaky peace architecture, anchoring a power-sharing formula between competing ethnicities in the constitution is a *sine qua non* for democracy. But this process will not start in the absence of a crisis<sup>63</sup>. To reclaim the constitutional moment experienced during the post-election crisis therefore, civil society should precipitate a ‘crisis’ of sorts akin to the one created by NCEC in 1997. The opportunity to do so is critical if the review agenda is to find space in the coalition politics. Like in the NCEC ‘moment’, partnership between civil society and organised MP formations should be sought.
2. The specific opportunities for civil society in constitutional review are two. One, to set a ‘shadow’ agenda<sup>64</sup> for the review, with emphasis on popular participation and issues related to Agenda 4 of the Annan Initiative<sup>65</sup>. Two, to secure the popular gains made from the last review process to ensure that they do not get overrun by the new agenda. In this case therefore, their role would be to push for consensus on the contentious issues only.

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<sup>63</sup> Our thesis here is that constitutions are only made in times of crisis as historical evidence shows.

<sup>64</sup> The actual agenda is bound to be driven by the coalition, and in particular the Ministry of Justice.

<sup>65</sup> For instance, distributive justice and economic empowerment.

3. **Potential Actors.** Support in this area should target a coalition of CSOs as a way of tapping into a collectivised effort. In the view of this report, two coalitions fit the bill.
4. *The Civil Society Congress (CSC).* This is an umbrella organisation whose origins date back to January 2003. It was constituted after the NGO Council became slow-punctured and unable to act as a platform for CSO collective action. CSC brings together CSOs, networks and CBOs across the country. It has a leadership structure, a constitutive charter and a *modus operandi*. Its strength is in its legitimacy as an umbrella organisation accepted by most CSOs, and its collective platform that brings together all manner of competencies. Its ability to link the ‘glasshouse’ processes with the ‘grassroots’ through its membership is also noted. The weakness of the CSC is that its secretariat has not been established yet.
5. With respect to constitutional review, this Congress and its constituent members is the depository of experiences on previous efforts at constitutional review. They are best suited to provide the ‘shadow’ agenda for the review and to consolidate previous gains for use in the new process. Support to the congress should go through the Citizen Coalition for Constitutional Change (4Cs).
6. *FIDA.* This organisation was involved in a campaign that aimed at securing women’s gains in the Bomas constitutional review process. It monitored women’s issues from the time of submission to the CKRC Commission, to the drafting stage to ensure they were not watered down. If the review process is to be jump-started, FIDA can provide a fairly legitimate ‘irreducible minimum’ on women issues from the Bomas process. Support to FIDA should also benefit the coalition of women organisations it worked with to monitor and influence the Bomas process.
7. **Transitional Justice.** The opportunity here is to wrong past injustices and to provide voice and compensation to the indigent. If well executed, the TJRC will to some extent ‘heal’ the national psyche with regards to access to justice. This is a critical plank in democratic development if we are to avoid the militarization of peasant expressions. Similarly, the opportunity is strategic for civil society because it will check the politicians bent on laundering their actions through the TJRC mechanisms. Civil society is also the best suited<sup>66</sup> to mobilise popular participation in a process like this.
8. Specifically, civil society should play a number of roles in the periods before and after the adoption of the TJRC Bill. One, it has the

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<sup>66</sup> Compared to the provincial administration for instance.

opportunity to lobby for amendments to the Bill. A forensic critique of the Bill has already been done by the Multi-sectoral Task Force on TJRC. The next step is to organise for the lobbying of MPs to adopt these amendments. Two, and in the post-adoption period, civil society should keep the TJRC in check, including the selection and conduct of its Commissioners. Three, and advancing from ‘below’, civil society can organise victim associations, similar to the South African Khulumani Support Groups.<sup>67</sup>

9. **Potential Actors.** The International Centre for Peace and Conflict (ICPC) has convened the Multi-sectoral Taskforce on TJRC comprising 7 CSOs<sup>68</sup> and 3 non-CSO groups<sup>69</sup>. With this task force, the centre is able to access the comparative advantages of different CSOs and their platforms. The centre has also activated a community-based network linked to CBOs country-wide. This is the network through which the victim associations can be formed. Funding should go to this task force and its members. And ICPC should be the implementing agencies
10. The strengths of ICPC include an in-depth knowledge of transitional justice issues, international connection with ‘think-tanks’ that have benchmarked similar processes in the continent, and an ability to bring together and manage different competencies under the task force. The weakness of ICPC is that it is not institutionalised, and is currently running as a project of KHRC. Funding to the centre and the taskforce should therefore be handled by KHRC. Support to this initiative should, as *a conditio sine qua non*, be linked to the work at MOJCA and UNDP. The taskforce has worked very closely with the Law Reforms Task Force<sup>70</sup>.
11. **Parliamentary and Political Party Activism.** With the grand coalition, parliament is likely to be reduced into a rubber stamp for the ‘big’ government. This is inconsistent with democratic politics and is likely to degenerate into a ‘one-party-and-abit’ system<sup>71</sup>. The opportunity here is therefore to *secure* and *deepen* gains made in parliamentary democracy and multi-partism. This should be done by supporting the strengthening of parliament and political party engagements. Support to parliamentary activism in transitional moments like the one faced by Kenya is an advantage.
12. **Potential Actors.** Three potential actors can be singled out here.

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<sup>67</sup> This group acted as a pressure group, informed public opinion, provided fora for victims to mobilise, strategise, co-ordinate their engagement and ensure their voices are heard.

<sup>68</sup> Including ICPC, KHRC, ICJ, FIDA, CREW, COVAW, and Mazingira Institute,

<sup>69</sup> Including Urgent Action, Open Society and the Kenya National Commission on Human Rights

<sup>70</sup> During the initial conceptualisation of the TJRC early in the year.

<sup>71</sup> Concept borrowed from Lionel Cliffe, Aid and Democratic Development in Africa

13. *AMANI Forum*. In terms of parliamentary activism, one critical actor is The Great Lakes Parliamentary Forum on Peace, organised as AMANI Forum<sup>72</sup>. This is a parliamentary group with chapters in 7 countries and is partly involved in ensuring that opposition politics is alive in parliament. The advantages of AMANI are that it is owned by MPs and has connections to other parliaments in the Great Lakes Region. This increases its leverage in terms of legislative activism and getting the executive to account for its actions. Its weakness is to get MPs to commit to a course, especially given the diversified interests. Funding to AMANI should go to strengthening of parliamentary associations as a way of preserving parliamentary democracy under the coalition government.
14. *Centre for Governance and Democracy (CGD)*. The other critical actor is CGD, and its work with parliamentary committees. CGD is also strategic because of its ability to link parliamentary committees with critical interest groups in rural settings. The only weakness in CGD is its top-heavy board<sup>73</sup>, and slow institutional development.
15. *Centre for Multi-Party Development (CMD)*. CMD is an independent CSO that is ‘owned’ by the mainstream political parties. Its mandate is to strengthen political parties as a way of building the culture of multi-partism. CMD has cut out a niche in political party development and currently enjoys the support of mainstream parties.
16. **Economic Rights**. This is an issue that became buoyant during the crisis. It speaks to the question of land rights, equity and ethnic balance. Agenda 4 of the Annan Initiative covered these issues, but the monitoring of compliance is the challenge. The opportunity therefore is to support the monitoring of this agenda and its implementation. The motivation is to avert a resource-driven and militarised revolt from below.
17. **Potential Actors**. Actors in this area should be organisations with strong vertical relationships with civil society from below. The Human Rights Communities organised under KHRC, are the best suited actors here. But for these communities to be effective economic change agents, their other work on monitoring CDF and other constituency funds should be strengthened. More specifically, attention should be paid to the way KHRC has organised these communities and their linkages with players at the national levels. Funding should therefore be tied to KHRC

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<sup>72</sup> The regional leadership of this Forum visited with the Norwegian Ambassador during February of 2008.

<sup>73</sup> Comprises of re-known political and rights activists. This has in some instances been sited as a source of slow growth, more so in light of the political divide in the country.

implementation of re-engineering recommendations made in an Evaluation of its work in March 2007<sup>74</sup>

18. **Gender.** Transitional periods tend to favour the male gender over the female, most times treating the woman as a post-crisis ‘camp follower’. This has been a challenge associated with re-settlement of IDPs and situating women priorities on the agenda of the new coalition government. The opportunity here is to give the woman a new voice in the reformulated state. Similarly, there is the opportunity to continue reducing the distance between the poor woman and the law.
19. **Potential Actors.** There are numerous actors in the area of women’s rights, but FIDA is a market leader here. Its strengths are in its ability to lobby state agencies for the indigent woman, and to chain-link the demand side of justice (the poor) with the supply side (administrators of justice). Its legal aid programme<sup>75</sup> for the indigent woman who cannot afford representation is a good case in point.

### C.1.2 The Anti-Corruption Sector

20. **Above-the-Line Corruption.** The grand coalition introduces a dynamic that is likely to challenge existing anti-corruption activists. And this is so because at the parliamentary level, the coalition cannot check itself because of its dominance. The opportunity is therefore to strengthen the checking systems within civil society.
21. **Potential Actors.** The African Centre for Governance (Africog), is a new CSO registered as a Company Limited by Guarantee. Its strength is in its leadership, and research-based anti-corruption campaigns. In terms of checking the coalition and the public sector, Africog and its network of collaborating CSOs is best-suited. This is so because of its evidence-based approach<sup>76</sup>, visibility and voice. The weakness of the organisation is in its forming structures. But with support for institutional strengthening, it should be able to overcome this.
22. **Below-the-line Corruption.** The dynamics involving petty corruption and budget monitoring at municipal level have not changed. However, the ‘revolt from below’ could affect the way community-based funds like CDF and LATF are spent. The opportunity here is to strengthen the community civic spaces as alternatives to the militarised ones in the fight for economic justice and against corruption.

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<sup>74</sup> See Mutahi Ngunyi, Mid-Term Evaluation of KHRC. The findings of this evaluation were discussed with the Embassy during the first part of this study.

<sup>75</sup> The head of this programme at FIDA was appointed to head the National Legal Aid Scheme under the Ministry of Justice. This was a recognition of FIDA’s expertise in the area.

<sup>76</sup> For instance, the issues it raised regarding Mobiletea during the Safaricom IPO

23. **Potential Actors.** Two of these stand out. The first is the KHRC and its Human Rights Communities – more specifically, the Social Audit Teams. The second is the Social Development Network (SODNET)<sup>77</sup>, a network of CSOs working in the areas of social responsibility and economic justice. It is also the host of the Kenya chapter of the Social Watch, a unit of the World Social Forum. SODNET has the upward and downward linkages with policy platforms locally and internationally and with networks of anti-corruption CBOs on the ground. Support should focus on strengthening its CBO networks known as “Operation Futa-Magendo Action Networks”. Using advanced ICT approaches, these networks of retired civil servants and unemployed university graduates monitor government expenditure at municipal level. Focus is on all constituency funds, and local government expenditure. The main weakness of SODNET is its institutional capacity. Support to capacity building should be able to fix that

## C.2 Some Conclusions

24. The post-amendment Kenya requires a multi-faceted approach to issues of governance, democracy and anti-corruption. Support to civil society should therefore target CSO coalitions (and member organisations) that bring together different competencies and platforms.
25. Most of the institutionalised CSOs lack in innovations. For the most part their programmes have lost the oomph! Yet donor support continues to flow to these institutions because they are safe to invest in. To the contrary, some of the organisations struggling with institutional issues have the most innovative initiatives. A balance between the two should be sought during funding. The institutionally weak organisations should be funded in the area of capacity building, while the strong ones should be encouraged to re-engineer their approaches and methods of engagement.
26. In order to contain the simmering ‘revolt from below’, there is need to avail civic platforms for aggrieved communities/individuals to express themselves. To build civil society from below therefore, support should go to organisations with strong linkages with CBOs on the one hand, and government on the other. In this way, dialogue between communities and government on issues related to Agenda 4 can be facilitated by such CSOs. KHRC, ICJ and FIDA are cases in point here.

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<sup>77</sup> Organised the World Social Forum in Kenya during 2007.

## ANNEX I: List of Consulted Organisations

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1. AMANI Forum, Regional and Kenya Office
2. Africa Centre for Governance (Africog)
3. Arid Lands Information Network (ALIN)
4. CDF project, Africog<sup>78</sup>
5. Centre for Multi-party Democracy (CMD)
6. Civil Society Congress
7. FIDA
8. Independent Medico-Legal Unit (IMLU)
9. International Centre on Peace and Conflict (ICPC)
10. International Development Law Organisation<sup>79</sup>
11. Kenya Human Rights Commission (KHRC)
12. Kenya Human Rights Institute<sup>80</sup>
13. Multi-Sectoral Taskforce on TJRC
14. Open Society<sup>81</sup>
15. Pamoja Trust
16. SODNET
17. 4 Cs
18. Grand opposition MPs organised by AMANI forum<sup>82</sup>

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<sup>78</sup> An independent project from Africog, and originated by Open Society

<sup>79</sup> Charged with the responsibility of providing legal assistance to the post-crisis situation by the Annan Initiative. Met the group after the first draft had been generated.

<sup>80</sup> Met the former Director, before he resigned

<sup>81</sup> Also linked to discussions around a project on Kikuyu Isolatism managed by Mugambi Kiai.

<sup>82</sup> Piggy-backed on an activity they had at Serena Hotel Mombasa.

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