

# **Foreign Aid in Africa: Analysing the Role of European Union Political Aid in Political Processes in Kenya, 1990-2013**

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## ABSTRACT

This study investigated contributions as well as limitations of EU political aid in processes of political development in Kenya since the onset of political pluralism in the early 1990s to mid-2016. The study sought to advance extant debates about the role of exogenous versus endogenous factors during Africa's third wave of democracy. Hence, the questions: What have been the contributions as well as limitations of EU political aid toward processes of political development in Kenya since the early 1990s?

The study reveals that initially the EU supported liberalization in Kenya in the aftermath of the cold war. However, this support was of a very superficial kind; it could not sustain the difficult, yet necessary task of institution-building. In the specific Kenyan case EU political aid in the early 1990s focused on bolstering domestic civil society in its struggle against the Moi dictatorship. While this should have been the first phase of a multifaceted undertaking, the EU and others did not then move onto what should have been the next phase in this journey: institutionalization. Whether this would have actually happened, given the fumbling that characterized the 1990s is an open question.

In any case, the emergence of the war on terror on the global agenda after the events of September 2001 completely closed this avenue. Although the international community had quickly ogled institution development as the key international agenda for the 21<sup>st</sup> century in the wake of the attacks, between 2001-2007 there was no serious political aid effort towards institution building in Kenya, save for the construction of institutions keyed to the war on terrorism; how else, to explain the failure to press the Kenya government to effect constitutional and other institutional reforms as promised after the 2002 elections?

This neglect would prove costly; it contributed in no small measure to the post-election crisis of 2007-08; after all, that conflict issued from a failure of institutions both during the contested tallying of votes, and the subsequent eruption of violence. It would require the NARA and then agenda number 4 to begin to address these issues, with the crisis having focused attention on the need for institution building, reminding even those with vested interests in Kenya that the status quo had become untenable.

There is some irony here: in pursuit of self-interest the EU may actually now help erect robust institutions in the wake of the post-election crisis. If so, then it remains to be

seen what type of institutions and structures will emerge under realism—whether as the war on terrorism and the attendant institutional infrastructure suggests these will be repressive institutions, or whether perhaps self-interest and altruism will combine to help create both participative and procedural norms that will underpin a more robust state in Kenya.

One of the main criticisms usually levelled against foreign aid—political aid included—is that it is too narrowly focused on technical aspects to the exclusion of political ones. In other words, the claim is usually made that current foreign aid merely represents a reincarnation of foreign aid of old—that of the 1960s—in the Huntingtonian frame. This study has diverged from that school of thought to argue that currently foreign aid has actually swung in the opposite direction—it is overly focused on political aspects—participation in this case—to the exclusion of technocratic aspects, conceptualized as institutionalization. Yet a better view of development and the role of foreign aid in it would have to reconcile the need for participation, on the one hand, and that of effectiveness, on the other—cognizant of the fact that development is a bi-product of the interaction between structure and agency.

Thus, the study argues against the old Huntingtonian singular focus on institutionalization to the exclusion of participation—the failure of development administration, with its obsession with institutionalization to the exclusion of politics testifies to the short-comings of such an attempt. On the other hand, however, the study also cautions against current critiques, which seem to celebrate agency, while viewing institutionalization—structures—askance—or what such critiques have taken to pejoratively referring to as the “technical approach”. As the events from Kenya illustrate, a singular focus on participation to the neglect of institutions is likely to result in the elevation of process over structure—with dire consequences for political development. Thus to suffice, participation must go hand-in-hand with institution building.

## OPSOMMING

Hierdie studie ondersoek die bydrae sowel as die beperkinge van die Europese Unie (EU) se politieke bystand in prosesse van politieke ontwikkeling in Kenia sedert die aanvang van politieke pluralisme in die vroeë 1990's tot middel 2016. Die studie probeer om bestaande debatte te bevorder oor die rol van eksogene- teenoor endogene faktore gedurende Afrika se derde golf van demokrasie. Daarom die vraag: wat was die bydrae, sowel as die beperkinge van die EU politieke bystand teenoor prosesse in politieke ontwikkeling in Kenia sedert die vroeë 1990's?

Die studie onthul dat die EU aanvanklik liberalisme in Kenia ondersteun het met die nadraai van die Koue Oorlog. Die ondersteuning was baie oppervlakkig van aard; en kon nie die moeilike, tog noodsaaklike taak van institusionele-ontwikkeling volhou nie. In die spesifieke Keniaanse geval fokus die EU politieke bystand in die vroeë 1990's op versterking van binnelandse burgerlike samelewing in sy stryd teen die Moi-diktatorskap. Laasgenoemde moes die eerste fase van 'n veelsydige onderneming wees, maar die EU en andere, het nie aanbeweeg na wat die volgende fase in die reis moes wees nie, naamlik: institusionalisering. Dit bly 'n ope vraag of dit sou realiseer, gegewe die foute wat die 1990's gekenmerk het.

Die begin van die oorlog teen terreur op die globale agenda het, na die September 2001 gebeure, hierdie weg toegemaak. Alhoewel die internasionale gemeenskap institusionalisering as prioriteit op die 21ste eeu se internasionale agenda geplaas het, is geen poging tussen 2001 en 2007 aangewend om ernstige politieke bystand in Kenia te verleen nie. Instansies om terrorisme te beveg, het tot stand gekom. Hoe dan anders om die mislukking om die Kenia regering te druk om grondwetlike en ander institusionele hervormings te affekteer soos belowe na die 2002 verkiesing?

Hierdie nalatingheid kom duur te staan. Dit het grootliks bygedra tot die na-verkiesingskrisis van 2007-2008; toe konflik ontstaan vanuit 'n mislukking van instansies gedurende die betwiste kontrolering van stemme en die daaropvolgende uitbarsting van geweld. Dit sal van *National Accord Reconciliation Act* (NARA) en agenda nommer 4 vereis om die kwessies te adresseer met die fokus op die krisis vir die noodsaaklikheid vir institusionele-ontwikkeling, wat selfs diegene met gevestigde belange in Kenia herinner dat die status quo onhoudbaar geword het.

Die ironie is: in die strewe na selfbelang kan die EU werklik nou help om stewige instansies op te rig in die nadraai van die verkiesingskrisis. Indien wel, dan moet daar nog gekyk word watter tipe instansies en strukture onder realisme sal verskyn—of die oorlog teen terreur en die gepaardgaande institusionele infrastruktuur daarop dui dat dit onderdrukte instansies sal wees, of selfs selfbelang en altruïsme sal kombineer om te help om beide deelnemende en prosessuele norme te skep wat 'n sterker staat in Kenia sal ondersteun.

Een van die belangrikste kritici wat gewoonlik op buitelandse bystand—politieke bystand ingesluit—gelewer word, is dat dit te nougeset gefokus is op tegniese aspekte, met uitsluiting van politieke aspekte. Met ander woorde, die beweging is dat huidige buitelandse bystand bloot 'n reïnkarnasie van buitelandse bystand van ouds bied—dit van die 1960's—in die Huntingtoniaanse raamwerk. Hierdie studie het afgewyk van die denkwysse om te argumenteer dat buitelandse bystand tans eintlik in die teenoorgestelde rigting geswaai het—daar is te veel gefokus op politieke aspekte—deelneming in hierdie geval—tot uitsluiting van tegnokratiese aspekte, gekonseptualiseer as institusionalisering. Nietemin moet 'n beter siening van ontwikkeling en die rol van buitelandse bystand met die behoefte aan deelname aan die een kant en die doeltreffendheid daarvan, versoen—bewus van die feit dat ontwikkeling 'n byproduk is van die interaksie tussen struktuur en agentskap.

Die studie argumenteer dus teen die ou Huntingtoniaanse enkelvoudige fokus op institusionalisering tot die uitsluiting van deelname—die mislukking van ontwikkelingsadministrasie, 'n obsessie met institusionalisering wat politiek uitsluit en getuig van die tekortkominge van so 'n poging. Aan die ander kant waarsku die studie ook teen die huidige kritiek, wat lyk asof die agentskap gevier word, terwyl institusionaliseringstrukture—skepties bejeen word, of wat sulke kritiek verkleinerend na verwys as die "tegniese benadering". Soos die gebeure uit Kenia illustreer, sal 'n enkele fokus op deelname aan die verwaarlosing van instansies waarskynlik lei tot die opheffing van die proses teenoor struktuur—met ernstige gevolge vir politieke ontwikkeling. Om dus te volstaan, moet deelname hand-aan-hand gaan met institusionalisering.

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This is a single case study---Kenya. Serious issues are usually raised about this approach in terms of scientific rigour and potential for generalizability, however. In particular, according to King *et al* (1994: 124), “No issue is so ubiquitous early in the research design phase of a research project as the question: which cases (or more precisely, which observations) should we select for study?” That question, they observe, has potency, especially for qualitative research since it has a bearing on

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## LIST OF ACRONYMS AND ABBREVIATIONS

ACP .....	African, Caribbean and the Pacific
AFRICOM .....	African Command
AG .....	Attorney-General
AMISOM .....	African Union Mission in Somalia
APF .....	African Peace Facility
APSA .....	Africa Peace and Security Architecture
ASBY .....	African Standby Force
ASP .....	Assembly of State Parties
AU .....	African Union
AUC .....	African Union Commission
CAP .....	Common Agricultural Policy
CD .....	Capacity Development
CDF .....	Constituency Development Fund
CFSP .....	Common Foreign and Security Policy
CGM .....	Consultative Group Meeting
CGPCS .....	Contact Group on Piracy off the Coast of Somalia
CIC .....	Constitution Implementation Commission
CJ .....	Chief Justice
CKRC .....	Constitution of Kenya Review Commission
CoE .....	Committee of Experts
CoK .....	Constitution of Kenya

CORD.....	Coalition for Reforms and Democracy
CPA.....	Comprehensive Peace Agreement
CPA.....	Cotonou Partnership Agreement
CSPs .....	Country Strategy Papers
DAC.....	Donor Assistance Committee
DC .....	District Commissioner
DCI .....	Directorate of Criminal Investigations
D-DJ .....	Deputy-Chief Justice
DO .....	District Officer
DP .....	Democratic Party
D-P .....	Deputy-Prime Minister
DPP .....	Director of Public Prosecutions
EAC .....	East African Community
EACC .....	Ethics and Anti-Corruption Commission
EAC .....	East African Community
EAD .....	Electoral Assistance Division
Easbricom.....	Coordination Mechanism of the Eastern Brigade
EBDR .....	European Bank for Reconstruction and Development
ECD.....	European Consensus on Development
ECK.....	Electoral Commission of Kenya
EDF .....	European Development Fund
E-LOG .....	Election Observation Group

EMB.....	Electoral Management Body
EOM .....	European Observer Mission
EPAs .....	Economic Partnership Agreements
ERC.....	Employment and Wealth Creation
ERS.....	Economic Recovery Strategy
ESDG .....	Election Support Donor Group
ESDP.....	European Security and Defence Policy
EU .....	European Union
EUEOM .....	European Union Election Observer Mission
EUEOPR .....	European Union Election Observation Preliminary Report
FORD .....	Forum for the Restoration of Democracy
FORD-A.....	Forum for the Restoration of Democracy-Asili
FORD-K.....	Forum for the Restoration of Democracy-Kenya
FTA.....	Free Trade Agreement
GATT .....	General Agreement on Trade and Tariffs
GCG .....	Grand Coalition Government
GDP.....	Gross Domestic Product
GEMA.....	Gikuyu, Embu and Meru Association
GES.....	Global Enterprise Summit
GJLOS.....	Governance, Justice, Law and Order sector reforms
GoK .....	Government of Kenya
GWOT .....	Global War on Terrorism

H.E.	His Excellency
ICC	International Criminal Court
ICT	Information Communications Technology
ICU	Islamic Courts Union
IEBC	Independent Electoral and Boundaries Commission
IFIs	International Financial Institutions
IfS	Instrument for Stability
IGAD	Inter-Governmental Authority on Development
IIBRC	Interim Independent Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
IMF	International Monetary Fund
IPPG	Inter-Party Parliamentary Group
IPSTC	International Peace Support Training Centre
IREC	Independent Election Review Commission
ISSC	Inter-State Security Committee
JA	Jubilee Alliance
JHA	Justice and Home Affairs
JMVB	Judges and Magistrates Vetting Board
JSC	Judicial Service Commission
JTRC	Justice, Truth and Reconciliation Commission
KADU	Kenya African Democratic Union
KANU	Kenya African National Union

KDF .....	Kenya Defence Forces
K-DICE .....	Kenya Donor Information Centre
KEAP .....	Kenya Election Assistance Programme
KICOMI.....	Kisumu Cotton Mills
KJAS .....	Kenya Joint Assistance Strategy
KNDR .....	Kenya National Dialogue and Reconciliation
KPU .....	Kenya People's Union
Kshs .....	Kenya Shillings
LATF.....	Local Authority Transfer Fund
LDCs .....	Local Developed Countries
LDP .....	Liberal Democratic Party
LTO's.....	Long-Term Observers
MDBF .....	Multiple Donor Basket Fund
MDG .....	Millenium Development Goals
MFN.....	Most Favoured Nation
Mol.....	Ministry of Lands
MoLG/MDNP...	Ministry of Local Government/Ministry of Devolution and National Planning
MoU .....	Memorandum of Understanding
MPs .....	Members of Parliament
MTP .....	Medium Term Plan
NAIC.....	National Accord Implementation Committee
NAK .....	National Alliance of Kenya

NARA .....	National Accord Reconciliation Act
NARC .....	National Alliance Rainbow Coalition
NCA.....	National Convention Assembly
NCIC.....	National Cohesion and Integration Commission
NDP .....	National Development Party
NEC .....	National Executive Committee
NEP .....	North Eastern Province
NEPAD .....	New Partnership for Africa's Development
NFD .....	Northern Frontier District
NGOs .....	Non-Governmental Organizations
NICs .....	Newly Industrialized Countries
NIEO.....	New International Economic Order
NLC .....	National Land Commission
NPK.....	National Party of Kenya
NPM .....	New Public Management
NPSC .....	National Police Service Commission
NYS .....	National Youth Service
OCTs .....	Overseas Countries and Territories
ODM.....	Orange Democratic Movement
OECD.....	Organisation for Economic Cooperation and Development
PA.....	Provincial Administration
PC .....	Provincial Commissioner

PCK	People's Commission of Kenya
PEAP	Panel of Eminent African Personalities
PEV	Post-Election Violence
PM	Prime-Minister
PNU	Party of National Unity
PRM	Peer Review Mechanism
PSC	Parliamentary Select Committee
PSCU	.. Presidential Strategic Communications unit
RDU	Rapid Deployment Unit
RSD	Refugee Status Determination
RTAs	Regional Trading Arrangements
SAL	Structural Adjustment Loans
SAPs	Structural Adjustment Programmes
SCCD	Sectoral Committee on Cooperation in Defence
SFHA	Strategic Framework for the Horn in Africa
SPLA	Sudanese People's Liberation Army
STOs	Short Term Observers
SWAPs	Sector Wide Assistance Programmes
TFG	Transitional Federal Government
TNA	The National Alliance
UK	United Kingdom
UN	United Nations

UNDP .....	United Nation's Development Programme
UNDP-K.....	United Nation's Development Programme-Kenya
UNEP .....	United National's Environmental Programme
UNHCR.....	United Nations High Commissioner for Refugees
UNISOM .....	United Nations Operation in Somalia
UNSC .....	United Nation's Security Council
UNSG .....	United Nation's Secretary General
UNTAF.....	United Nations Task Force
URP .....	United Republican Party
US .....	United States (of America)
USAID .....	United States Agency for International Development
USSR .....	Union of Soviet Socialist Republics
WB.....	World Bank
WMD .....	Weapons of Mass Destruction
WOT .....	War on Terrorism
WTO .....	World Trade Organization

## CHAPTER 1: Introduction

### 1.1 Background

The demise of the Cold War generated widespread optimism (Kupchan *et al* 1995) that the world would finally focus on pending problems (Oudraat 1996). For instance, amidst intensifying chaos in Somalia in 1992, the United Nations' Security Council (UNSC) authorized, and the United States (US) agreed to lead what, in the words of then-UN Secretary General (UNSG) Dr Boutros Boutros-Ghali, represented "a precedent-setting peace-enforcement operation to provide a secure environment for humanitarian relief" (UN Publication 1996: 11)<sup>1</sup>. However, no sooner had the international community articulated this new posture than "in a matter of months" (de Soto 1994: 151), laments one prominent analyst, "the background scenery seemed to cloud over, changing from uniform hope and justified expectation to crisis and danger" (*ibid*).

Take Unified Task Force's (UNITAF's) involvement in Somalia, for instance. Successful in its humanitarian disaster effort, the mission did come unstuck<sup>2</sup>, however, when the UN sought to reconfigure it into the United Nations' Operation in Somalia II (UNISOM II)<sup>3</sup> (Hussein 2002). Indeed, repeated attempts to re-establish the Somali state have come to naught (Menkhaus 2008). The country appears to have reverted to a la—Hobbesian state of nature, with all that that portends—for the Somali—state and the region. Hence, as the Somalia case illustrates, the post-cold war era has witnessed "crises and regional conflicts, which are occurring all over the world" (Toure 1992: 22).

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<sup>1</sup> Created under Chapter VII of the UN Charter, the mission had the mandate to use force. Prior to the intervention, Chapter 7 had traditionally been interpreted as a mechanism intended to deter or repel acts of aggression directed against other sovereign, UN-Member States (Bratt 1996).

<sup>2</sup> The UN did not, for one thing, have any prior experience in this type of state building exercise; also the US ran what amounted to a parallel organizational structure (Adibe 1998: 67-90).

<sup>3</sup> UNISOM II grew out of UNISOM I, established by the UN Security Council on the 24<sup>th</sup> of April 1992, as a Peace-keeping mission, to counter Somali factional leaders' opposition to the deployment of a small contingent of cease-fire observers (Bensahel 2003: 21-56).

In addition, post-cold war conflicts have witnessed a concomitant shift in locus, from ones of inter-state, now to hinge on conflict within<sup>4</sup> states (Laremont 2000: 3). Thus with respect to Africa<sup>5</sup>, for example, post-cold war democratisation has spawned “extremely intense internal conflicts<sup>6</sup>, which have resulted in thousands of deaths and the exodus and abandonment of millions of civilians” (Toure 1999: 22).

Since it launches plural politics in 1991 Kenya has witnessed repeated<sup>7</sup> episodes of violence (Chege 1994). However, the violence that erupted following a disputed presidential election in 2007 was “by far the most deadly and . . . destructive” (The Waki Commission Report 2009, vii). Of course, those sympathetic to President Mwai Kibaki—now former—would take strong exception to the claim that the 2007 violence stemmed from “derailment of the people’s right to vote” (Okia 2009: 259); specifically, a rigged presidential election (Brown 2010). They, instead, posit the violence as connoting a recondite scheme to extirpate members of one lager (Okia 2009: 267). It is possible, however, that the two competing accounts are correct simultaneously. The post-election violence was “both pre-planned and spontaneous” (ibid). After all, the country’s elite has traditionally fomented<sup>8</sup> and then benefitted from such violence, secure that it was immune from prosecution.

Read alone, though, the competing accounts do not provide a complete vignette as to how Kenya came to coquette with disaster. Read in conjunction with a series of policy miscalculations over the years, however, it quickly becomes clear that the elections served merely as the proximate cause of the violence. Rather with an understanding of “the contradictions embedded in the country’s political economy”

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<sup>4</sup> For the emergence of intrastate conflicts in the post-cold war era, see, among others Duffey (2000: 142-168). As for theoretical attempts to comprehend the factors at play, see, for instance Brown (1996: 1-31) and Jack (2001: 3-27).

<sup>5</sup> For Africa’s conflicts, see Adebajo (2002), Bangura (2002: 143-169), Conteh *et al* (1999: 104-140), Ofuately-Kodjoe (2002: 117-142).

<sup>6</sup> However, for the role of colonial legacy in current African conflicts, see, for instance Kasfir (1989: 363-387), and Stedman (1996: 235-242). As for similar claims from elsewhere—the role of British colonial policy in current conflicts on the Indian sub-continent—see Ganguly (1996: 141-172).

<sup>7</sup> For Kenya’s conflictual political development, see, for instance the Law Society of Kenya (2010: 1-107).

<sup>8</sup> For a position that traces such conflicts to proximate factors—leaders in this case—see, among others Brown (1996: 571-601). As for the role that stereotyping plays in these conflicts, with elites using such tactics to mobilise; yet to resolve such conflicts, such negative stereotypes must give way to positive ones (Stein 2005: 189-215).

(Kagwanja *et al* 2009: 261), it becomes clear that the root causes to the conflict were “complex, multiple and interrelated” (Kagwanja *et al* 2009: 263).

This study examines the role of European Union (EU) political aid in Kenya’s political development since the early 1990s. I contextualize the disputed 2007 elections and their aftermath—including the National Accord—in terms of historical tendencies in Kenya’s political economy. Drawing on foreign aid literature and democracy support literature, I seek to assess some of the claims usually made in the literature for and against foreign aid as a precipitate for Third World political development, conceptualized as “institutionalization of political organization and procedure” (Huntington 1965: 388)<sup>9</sup>, and participation, with the main problem<sup>10</sup> being “the necessity of developing simultaneously social support for the maintenance of different and even contradictory aspects of modern institutional frameworks” (Eisenstadt 1957: 302). Indeed, the need to address long-term problems—the nurturing of democratic states and institutions in this case—on the one hand, and amid limited resources, on the other, has brought foreign aid as a conduit for capacity building to the fore. In particular, in the wake of recurrent democratization challenges, funding to promote democracy has emerged as a major aspect of development aid (Siegle 2009: 409).

The focus on capacity development draws on the view that institutional weaknesses constitute the main obstacle to structural change. This implies that development activities must promote local ownership, participation and institutional strengthening and respect for local values for sustainability (Riddell 2007). The ogling of capacity development represents a critique of earlier economic theories of development that neglected the impact of context as well as the role of ownership by local players (Chambers 1993: 82). Contextually, Kenya-EU interactions unfold within the EU-ACP framework—an arrangement between the EU and 79 former European colonies in Africa, the Caribbean and the Pacific—the ACP countries—and the Joint Africa-EU Strategy 2007. ACP-EU relations are now governed by a revised arrangement: the Cotonou Partnership Agreement (CPA)

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<sup>9</sup> For political development as institutionalization, see, also Maniruzzaman (1971: 221-238). However, for critiques of political development as institutionalization—especially the inherent bias against mass mobilisation/participation, see, for example Oberschall (1970: 5-22).

<sup>10</sup> On the challenges inherent to political development more generally, see, for example Palmer (1989).

signed in 2000. The revised CPA arrangement enunciates a number of agenda items for the parties'<sup>11</sup> continued engagement, key among them “political dialogue and governance conditionality as the core strategies for promoting democracy and anchoring the rule of law in developing countries” (Sentyiso 2003: 148). Under the revised arrangement, moreover, the non-reciprocal aspects of Lome were to lapse in 2007; future ACP-EU relations would have as their goal integration of the former into the global economy.

The change in ACP-EU relations derived from a changed international environment. When Lome II was negotiated, not much happened, especially given that the south was beginning to lose its strong bargaining position in the global economy. This became patently clear at the time of Lome III, which happened at a time when the ACP had been seriously weakened by the world Recession. This saw the north introduce aid conditionality, with a greater focus on rural development (Brown 2002). It was Lome IV, however, that marked a watershed in ACP-EU relations, with aid conditionality, in the form of Structural Adjustment Programmes (SAPs), taking centre stage. The EU rebuffed ACP states' plea for such conditionality outside the purview of International Financial Institutions (IFIs). Lome IV negotiations unfolded in the context of the Third World debt crisis of the 1980s<sup>12</sup>.

The mid-term review undertaken in 1995-2000 introduced political conditionality; specifically the requirement that ACP countries “observe the rules of democracy and respect for human rights” (Olsen 2004: 429)<sup>13</sup>. Then in 1996 the EU Commission published a “Green Paper discussing further relations with the ACP” calling, in the main, for ACP states to be split along sub regional lines to create Economic Partnership Agreements (EPAs). This would then culminate with the signing of the CPA in 2000.

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<sup>11</sup> On individual EU MS policy stances towards Africa, see, for instance Engel (2012: 471-476). In the main, Germany—and by extension the EU—views Africa as the springboard for self-definition in the world.

<sup>12</sup> One scholar traces the debt to what he calls “indebted development”; that is, an active policy of borrowing to industrialize rather than holding back, tracing the phenomenon to a reaction in the Third World to the perceived corrupting influence of FDI-led development (Frieden 1987: 298-318).

<sup>13</sup> The continent had signalled its desire to embrace these shifts even before the EU effected this policy shift (Sunmonu 2004: 63-71).

In addition, in the late 1980s the General Agreement on Trade and Tariffs (GATT)—predecessor of the World Trade Organization (WTO)—had ruled that Lome violated multilateral trade rules. GATT had specifically ruled that Lome, by extending trade preferences to ACP countries while excluding other equally poor, but non-ACP developing countries, especially in Latin America, breached the multilateral trading system's "MFN Principle and a 1979 enabling clause designed to support developing countries" (Gibb 2003: 890).

The Most Favoured Nation (MFN) principle requires that a member country extend the same tariff preferences to all other members. Thus, in the face of the GATT adverse ruling, to continue with Lome, the two sides had had to obtain a waiver with respect to these principles and issues. However, the EU saw the waiver as a short-term measure only: it argued that for the long-term, Lome needed major revisions to bring it into compliance with GATT rules; hence the shift to reciprocal trade relationship, by way of the 2000 CPA.

However, some critics opine, albeit in a slightly different context, that the EU overly elevated WTO rules for its own selfish ends that had nothing to do with multilateral trade rules. According to this line:

The WTO was placed at the centre of the negotiations because the EU specifically wanted it there. And it wanted it there because it was in its best interests. The WTO is after all a political construct designed to support a regulatory system created and maintained by the world's principal economic powers, in particular the USA and the EU. The EU is not a powerless spectator and the prioritization of the neo-liberal agenda is not a natural state of affairs. [Rather], the negotiations reflect a re-ordering of development policy away from interventionism towards liberalization. (900)<sup>14</sup>

Another critic, in an escalation, retorts:

This obsession with WTO rules obviously is based on the dominant paradigm that the free market and the ACP countries "full participation in it will create conditions necessary for the eradication of poverty. This is a lie for the simple reason that trade liberalization—which is an offshoot of globalization—is not the route to economic salvation in ACP States, in particular Africa. Trade liberalization is not an end; it is not even an effective means to global prosperity, given that an essential ingredient—Social Justice—is lacking in its execution. (Udombana 2004: 91)

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<sup>14</sup> In fact, others see this insistence on transmuting ACP-EU relations as an adroit manoeuvre by the giant to reconfigure its attention so as to focus on Eastern Europe (Lightfoot 2008: 128-142).

The CPA fortifies an emergent commitment to human rights and democracy through regular political dialogue. The political aspects of CPA focus on the three issues as stipulated in Article 8 of Title II of the Agreement. If flagrant violations of the essential elements occur, Articles 96 and 97 of the Cotonou Agreement call for consultations aimed at finding a common solution. The same articles call for “aid suspension if serious breaches of human rights and democratic principles occur” (Zimelis 2011: 390). The agreement does also acknowledge the role of civil society in development (Olsen 2004).

Nevertheless, assertions of partnership aside, only one side—the EU—has the wherewithal to compel the other to hue to the demands of CPA. Indeed, the concept of good governance itself is a potent tool in EU hands. The EU uses this concept, contrary to what it claims, to forward its own normative preferences in ACP states. Specifically, the construction of a specific type of state there—a conservative state architecture—thereby eliding the distinction<sup>15</sup> needed between good governance—an administrative concept—and democratic government—form of state. Through this normative posture, the EU “attempts to establish a particular set of social norms and conventions to guide the decisions and actions of its development partners” (Slocum-Bradley *et al* 2010: 39), thereby seeking to dictate<sup>16</sup> development, a direct contradiction of the partnership mantra.

On development, the bloc claims that it is focused on combating poverty with the aim of achieving the Millennium Development Goals<sup>17</sup> (MDGs (Feeny *et al* 2008)<sup>18</sup>. The EU has enthusiastically taken on board the various global enunciations on development—including MDGs. This is bolstered by the power that has accrued to the Commission following the coming into effect in 1993 of the Treaty of Maastricht. The Treaty of Maastricht gave development legal standing (Pere 2009: 264).

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<sup>15</sup> For precisely this line of critique, see, among others, Jenkins (2001).

<sup>16</sup> On how core states have allegedly historically dictated development in the periphery, see, for instance, Kriekhaus (2006).

<sup>17</sup>[http://europa.eu/legislation\\_summaries/development/general\\_development\\_framework/r12533\\_en.htm](http://europa.eu/legislation_summaries/development/general_development_framework/r12533_en.htm)

<sup>18</sup> This refers to a set of eight developmental goals adopted at the Millennium Summit of the UN in 2000, to be achieved by the year 2015: eradication of extreme poverty and hunger; the achievement of universal primary education; the promotion of gender equality and the empowerment of women; reducing child mortality; improving maternal health; combating HIV/AIDs, malaria, and other diseases, achieving environmental sustainability; and developing a global partnership for development.

The European Consensus on Development of 2005—the document that gives expression to EU understanding of development—cognisant of the multifaceted nature that poverty takes, views the undertaking as a holistic process. In the new understanding of development, the EU and other actors claim to favour partnership with their southern counterparts. The European Consensus on Development makes a clear commitment towards delivering more and better aid through increased use of sector-based approaches, now integrated into EDF activities. As part of the European Consensus on Development, “in all activities, the Community will apply a strengthened approach to mainstreaming the following cross-cutting issues: human rights, gender equality, democracy, good governance” (Europe Aid Guidelines No. 2: Tools and Methods Serie: 2007. Support to Sector Programmes: European Commission, 32).

The European Consensus on Development was really a response to The Paris Declaration on aid effectiveness. The Declaration “established international guidelines and targets for raising the quality of aid” (9-118). Adopted in March 2005, the Paris Declaration strongly engages partner governments and donors “around the principles of ownership, alignment and harmonisation” (16). As a result of this focus on aid effectiveness, the EU has increasingly ogled sectoral budgetary support, (SWAPs). A response to the failure of SAPs (Barkan 2007: 72), SWAPs purportedly focus on achieving synergies among the various actors involved in development to achieve “coherent sector policies and strategies” (*ibid*). SWAPs seek to broaden government and national ownership over public sector policy and resource allocation decisions within the sector; increasing the coherence between policy, spending and results and reducing transaction costs (*ibid*).

It took the launch of A Single European Act in 1986 for the liniments of a Common European Foreign Policy to begin to emerge. Maastricht Treaty of 1986<sup>19</sup> divided EU policy areas into 3: the 1st Pillar—this is where the European Community had full competence, and it focused on trade and agricultural policies. The EU Commission has full implementing powers for the 1<sup>st</sup> pillar. The 2<sup>nd</sup> and 3<sup>rd</sup> pillars—intergovernmental in nature, they focused on Justice and Home Affairs (JHA) and

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<sup>19</sup> The treaty that transformed the bloc into a single internal market (Jovanovic 1992; Mckibbin 1992: 422-453).

Common Foreign and Security Policy (CFSP)<sup>20</sup> (Mackie 2008: 144). Maastricht Treaty established a legal basis for development cooperation by acknowledging existing policies; it also “provided a Title (Title xvii) on development cooperation and specific articles” (1300-1304), setting out the objectives of European Community development cooperation and the principles of implementing them (Reisen 2009: 243-244). According to the same author, the document conceptualised Development cooperation “as a competence of the European Community, but which it qualified as complementary to the Member States” (*ibid*).

The bloc felt compelled to develop a coordinated approach to the emergence of new non-security threats, such as migration to the EU, following the demise of the Cold War (Olsen 2002, 132). This would see the Commission adopt a posture of development cooperation policy that elevated foreign and security policy over development policy. The new posture was confirmed following the 2001 terrorist attacks in the US (Olsen 2004). In the wake of the attacks, international players have increasingly focused on state fragility and its implications for development, attributing such fragility to lack of state capacity. This led to the coupling of security and development, on the grounds that development needed “a secure and democratic environment, conducive to long-term investments” (Bagoyoko *et al* 2009: 789). Major international players have increasingly bought into this agenda; with the EU in particular giving the combination special focus (*ibid*). Thus it was that in 2003 the EU unveiled its security and defence strategy (ESDP)<sup>21</sup> under the aegis of a Common Foreign and Security Policy (CFSP). The ESS identifies major security threats to Europe, especially terrorism, Weapons of Mass Destruction (WMD) and failed states.

The EU called for a redefinition of security, in light of these challenges, from its hitherto state-centric focus. It sought a new approach that entailed a repertoire of policy tools: “military and civil instruments to defuse both political and socio-economic crises” (Faust *et al* 2005: 425), with the aim of achieving stability and good governance (Schroeder 2009). This would see the EU establish its

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<sup>20</sup> A British tactic to prevent a full blown EU foreign policy managed and run from Brussels, as well as a fitting reprieve to post-cold war experiences, especially the wars in the Balkans.

<sup>21</sup> The road to ESDP began in 1992 with the signing of Maastricht Treaty; this first led to the creation of CFSP by the Amsterdam Treaty of 1997; the EU Summit held in Brussels in 2003 further developed ESDP.

Instrument for Stability (IfS). Although the EU had other instruments and devices for addressing issues touching on the security-development nexus—such as the African Peace Facility (APF) “it is the IfS that has become the European Community’s key policy tool and rapidly funding assistance to countries in situations of (emerging) crisis and natural disaster—and thus its flagship to address the nexus at the level of policy instruments” (Ganzle 2012: 117).

Historically EU-Africa relations focused on development cooperation through the EU-ACP arrangement. This vignette began to change in the early 1990s, with security and politics taking centre stage (Gibert 2009: 699). This would see the Community focus on state collapse and conflict prevention as a key priority area in the 1990s. This was the context within which the first EU-Africa summit unfolded in Cairo in 2000 (Cox *et al* 1997: 40; Crawford 2001: 237, qtd in Olsen 2004: 434). The relationship is currently framed by the Joint Africa-EU Strategy 2007, which focuses on matters of mutual concern; specifically, peace and security, migration, trade, regional integration, amongst others (Pere 2009). The new EU-Africa relationship “put the African Union at the centre of EU engagement with the continent” (Khadiagala 2009: 218). Initially, the EU had sought to re-evaluate its relations with the continent; the process would then see the EU Commission issue—EU Strategy for Africa: Towards a Euro-African Pact to Accelerate African Development, in 2005.

The 2007 Lisbon EU-Africa joint partnership committed both sides to enhanced cooperation “based on Euro-African consensus on values, common interests and strategic objectives for the Future” (232). The unveiling of the Joint EU-Africa partnership in 2007 unfolded in the context of some recent positive developments on the African continent, including greater respect for democracy, the enunciation of The New Partnership for Africa’s Development (NEPAD), among others. Take adherence to democracy, respect for good governance and observance of human rights, for instance. In a radical departure from the OAU’s hitherto reactive *modus operandi*, “The AU’s Constitutive Act of 2000 allowed for interference in the internal affairs of its members in cases of unconstitutional changes of governments, egregious human rights abuses and genocide, and conflicts that threaten regional stability” (Adebajo 2009: 53).

Enunciation of NEPAD connoted an acknowledgement by Africans of their stygian situation and a concomitant commitment to transmute<sup>22</sup> it through “a new and cooperative approach” (Steeves 2007: 495). Africans committed themselves through NEPAD to fight poverty and achieve sustainable development, thus launching the continent on the path to reclaiming<sup>23</sup> its rightful place in world affairs. In this regard, NEPAD takes cognisance of the fact that to develop, Africans must look “inwards, redefine their priorities, empower their people and communities, promote new strategies of politics and development, and articulate new holistic transformative agendas” (Udombana 2004: 62). As part of this new commitment, Africans advanced a number of mechanisms, such as a Peer Review Mechanism (PRM), to assess NEPAD’s implementation, with a commitment to human rights, democracy and good governance, as well as achieving continental growth rates of 7 per cent annually and halving poverty on the continent by 2015 (Chiroro 2010).

EU-Kenya cooperation commenced in 1976, when Kenya became the first country to sign a National Indicative Programme for co-operation with the European Community under the first Lomé Convention. Currently, Kenya’s second largest development partner after the World Bank, the EU provides grants to the country from the European Development Fund (EDF) and from the development instruments of the General Budget of the EU. The EU posits itself as a major player in the country’s socio-economic transformation as well a major partner in the country’s integration into the global marketplace. The strategic relationship casts Kenya as a trusted partner within a troubled region, who supports peace processes and contributes to stability.

Kenya’s development strategy as enunciated in documents such as Vision 2030<sup>24</sup>, among others, has four legs: increased economic growth, development of the physical infrastructure, creating a democratic state responsive to the rule of law, human rights and good governance, and increased human capital. Consistent therefore with this posture, according to the Commission, the main thrust of Kenya-

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<sup>22</sup> For some of the strategies Africa is allegedly deploying to pull itself out of poverty, see, for example Ngara (2011: 60-77). As for the origin of NEPAD, see, for instance Sunmonu (2004: 63-71).

<sup>23</sup> For continuing Afro-pessimism, though—one that rejects these attempts as futile and with a concomitant invitation to the international community to come to the rescue, see, for instance Gilley (2010: 87-101).

<sup>24</sup> A blue-print for Kenya’s transformation into a mid-income country by 2030.

EU cooperation is designed to complement the Kenyan government's efforts to eradicate poverty and improve the living standards of the population. EU development cooperation with Kenya has two focal points: transport infrastructure, especially as this relates to regional integration, and agriculture & rural development. Other areas in which EU funds are used are macroeconomic support, trade and private sector development as well as good governance and support for non-state actors.

Special attention is given to improving livelihoods in the arid and semi-arid areas of the country. Concrete activities include the development and marketing of crops and fodder that can resist drought as well as the improvement of post-harvest storage. The programme also helps the government in developing better policies for drought management. The EU is signatory to the Kenya Joint Assistance Strategy in support of Vision 2030, as well as the National Accord. Signed by donors, the Kenya government and civil society in late 2010, the joint Assistance Strategy seeks to promote aid effectiveness, consistent with the Paris Declaration on donor aid harmonization and coordination. In the financial year 2009/10, the EU Member States and the European Commission disbursed more than EUR 400 million (approximately Kshs. 39 billion) in official development assistance to Kenya.

Most African countries experienced the Third Wave of democracy. Whereas the reforms have "helped to generate real political openings and eroded the ability of... authoritarian regimes to perpetuate themselves in power free of scrutiny" (Harbeson *et al* 1995: 259), as the 2007 events from Kenya suggest, Africa's transition to democracy has faced some dolorous moments. However that students of comparative politics have continued to focus solely on the role of endogenous factors in these processes and developments, and "at best neglect<sup>25</sup> the importance of international factors and in the extreme argue that they exert little, if any influence" (Schraeder 2002: 7), while remaining oblivious to other findings which, although acknowledging the "complexities and difficulties" (Prikic 1999:

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<sup>25</sup> For rejection, though, of any attempt to blur the traditional line between foreign and domestic politics, see Hill (2000: 154).

107) attendant external<sup>26</sup> support, also note that even under such circumstances, “opportunities can sometimes be created for democratization through external intervention” (109), is baffling<sup>27</sup>. An examination of EU’s involvement in Kenya’s political development since the early 1990s provides an excellent opportunity to analyse the role that that aid has played; after all, democracy support—in Africa has emerged as a major theme (Adedeji 1999).

## 1.2 Statement of purpose and focus

A major debate has erupted concerning the role of exogenous versus endogenous factors in post-cold war democratization in Africa. To advance this debate, drawing on foreign aid literature, on the one hand, and democracy support literature, on the other, I examine the role of EU political aid in processes of political development in Kenya. The EU has, after all, increasingly ogled governance-based approaches to international development on the grounds that human rights violations and lack of democracy constitute the main obstacles to development. It consequently has increasingly cast its activities largely in terms of the creation of “participatory governance structures, the development of new social norms, and the establishment of the rule of law and democracy” (Hampson 2005: 3). Hence, the question: What has been the role of EU political aid to in Kenya since the early 1990s? I focus on the EU as one and, at present, the largest provider of democracy assistance to Kenya. For the purpose of analysis, the focus falls on *multilateral, political aid* provided by the EU through the European Development Fund (EDF).

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<sup>26</sup> For a literature review of the factors responsible for this transition and also variations based on different regional authoritarian modal types, see Geddes (1999: 115-144), Gibson (2000: 201-221) and Prean (1990: 79-85).

<sup>27</sup> For potential threats, mostly structural, to the world-wide sweep of democracy, consult, for example Kis (1990: 75-78) and Kolakowski (1990: 47-50). For similar challenges in mature democracies, see, for instance Soudriette (2001: 133-138). Others counsel a disaggregated approach to understanding democratization; in this formulation, the process would have two parts: transition and consolidation phases. For what is considered a classic in this respect, see Dankwart (1970: 98-109).

### **1.3 Rationale for the study**

The rationale for the study thus, is informed by the relative paucity in research on the dynamics of political change in Kenya since the 1990s and the role that one external actor—the EU—has played in that process, and the ways such aid links with political processes in the country.

### **1.4 Research question**

Question #1: What role has EU political aid played in Kenya's political development since 1990?

### **1.5 Goals of the study**

The study aims to accomplish a number of complementary objectives:

- a. To trace the dynamics of Kenya's recent political development;
- b. To describe and assess the role of EU aid; and
- c. To draw broader conclusions on the role of foreign aid in processes of political development in Kenya and, by extension, about the role of exogenous factors in post-Cold War political processes in Africa.

### **1.6 Methodology**

This section discusses methodological and related aspects. I use qualitative methods—mainly secondary documents to analyse the role of EU political aid in political processes in Kenya since the early 1990s.

#### **1.6.1 Research design**

This is a case study—that of Kenya; specifically, the role of EU political aid in political processes in Kenya since the early 1990s to the 2013 elections. A single

case study is used in this investigation. Serious<sup>28</sup> issues are usually raised about this approach in terms of scientific rigour and potential for generalizability, however. Still, the case study method has a number of advantages and strengths that propose it as appropriate for research: for one, it is at times the only method available. In particular, the case study can make a unique contribution to our comprehension of otherwise complex political processes and events; also, it can provide crucial evidence for theory testing. In this respect, an important distinction needs to be made between statistical generalizability on the one hand and analytical generalizability, on the other. The latter implies that the findings and conclusions of single case studies may be generalized and even used in theory construction.

### 1.6.2 Data gathering instruments

As an exploratory study, the research relies on secondary data sources

### 1.6.3 Secondary source of information

This refers to research using already available data sources. This study relies on the following secondary data sources:

#### 1.6.3.1 Document analysis

I conducted archival, thematic analyses of literature on EU political aid in Kenya, and institutional reform more generally. There exist extensive literatures on these topics; I therefore perused official public, archival, mass media and EU documents. At the national level, I examined government reports and records, official reports of public enquiries, among others. As for the EU, I examined publicly accessible agency records, organization documents, and so on. These documents provide more systematic accounts about “the respective assumptions, concerns, and activities of those who produce them” (Taylor *et al* 1998: 129); and, hence, the decisions taken.

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<sup>28</sup> For the controversies attendant the case study approach in general and the single case in particular, see, among others Kriekhaus (2006); Stillman (1999).

## **1.7 Significance of this study**

The significance of the study stems from the need to get a more complete account of the dynamics of political change in Kenya in the post-cold war era and the role of EU political aid in that effort. In this respect, this study is substantially different in that most, if not all, extant studies on Kenya's political development since the early 1990s have tended to focus singularly on one period in that drama, say, the Moi Presidency, and so on. This study covers the entire period from the 1990s to the 2013 elections, by way of periodization of Kenya's political development and then examining the role of EU political aid at each given juncture.

In addition, most extant studies on Africa's democratization have inexplicably tended to focus on only one-side of this equation—the role of endogenous, to the exclusion of exogenous, factors. This study aims to rectify this misnomer. I hope, ultimately, that this study will advance our understanding of the role that political aid has played in Africa's—and by extension the developing world's—current political development more generally.

## **1.8 Research results**

EU political aid has had mixed results: it was initially critical in helping launch plural politics in the early 1990s—animated largely by altruistic intentions attendant the demise of bi-polar rivalries of the cold war. However, with the onset of the so-called —War on Terror and thus the elevation of security considerations over governance, democracy, and human rights, previous commitment to altruistic goals has given way to self-interested concerns there, mostly security-related, such as the fight against Al Shabaab in Somalia, Piracy off the Somali coast, among others. However, in the wake of the 2007-08 post-election crisis altruism and self-interest have appeared to combine, with the EU and others now claiming to actively support political reforms in Kenya.

## 1.9 Limitations

I have had to contend with both time and other resource constraints. Equally, I have to contend with the dynamic nature of Kenya's political development; much scholarly literature has yet to emerge on the theme. This paucity of literature has, however, represented something of an opportunity; it has served as an extra incentive to prosecute the study—and thus contribute to that literature.

### 1.9.1 Delimitations

I will delimit my study to the onset of political pluralism in Kenya, early 1990s to the current Uhuru/Jubilee Administration, although I will transgress this as warranted, especially in my exposition on Kenya's political economy. In addition, I focus on only one external actor, the EU as well as political aid.

### 1.9.2 Key concepts:

#### 1.9.2.1 *Foreign aid*

Foreign aid for Third World development traces its genesis to the immediate post-World War II period (Riddell 2007). With the onset of decolonization after World War II, there emerged a feeling that for them “political independence without steady and broadly based improvement in economic<sup>29</sup> capacities and in material levels of living<sup>30</sup> would be a hollow achievement” (Myint 1980: 5). Buttressed by “the idea that international efforts could, or should, be undertaken to build the economies and societies of the other world” (Weatherby *et al* 2000: 37), political development had its focus on developing countries as “a teleological process” (Hagopian 2000: 881). A number of key theoretical camps have therefore come to the fore (Therien 2002: 449).

Idealism posits foreign aid as springing from altruistic<sup>31</sup> motives by donors (Zeylstra *et al* 1975). Espousing what amounts to “Humane internationalism” (Therien 2002:

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<sup>29</sup> For lucid recapitulations of contending theories of development consult, among others Kindleberger *et al* (1983: 32-53) and Rapley (1996).

<sup>30</sup> Find a sampling in, among others Ward (1967: 88-104).

<sup>31</sup> For this view, albeit with a focus on the U.S., see, for instance Montgomery (1961: 544-560).

461), idealism conceives of aid as an essential ingredient in filling glaring resource gaps (Gounder 1999; Lumsdaine 1993).

Dependency theorists posit foreign aid as the beachhead of a northern grand strategy to maintain its hold on the south by, for example, ameliorating some of the extreme manifestations of suffering there that would otherwise, if left to fester, ignite revolutionary action (Beckman 2001: 27). Seen so, argue they, aid has historically “served as a catalyst for stabilizing imperial rule and facilitating the transfer of riches, with the overall result of what we call reverse aid”—net gain for the imperial country or centre at a cost borne by the colonies (Petras *et al* 2002: 283). Rich country objectives are primarily and overwhelmingly to use poor countries to further their own economic interests<sup>32</sup>. For example, in order to receive aid, Third World countries must usually be in “compliance with [Northern] neo-mercantilist agenda, involving their elimination of subsidies... trade barriers, privatize state enterprises and end state regulations” (*ibid.* 284).

Realists cast foreign aid as having a corrosive influence on development. Instead, viewing it as one part of the broader arsenal of national foreign policy, and therefore self-interested<sup>33</sup>, realists posit aid as being “simply an instrument used to achieve the strategic economic and political goals<sup>34</sup> of the donors” (Cusack *et al* 1994: 11); in particular, “development assistance, in reality, is payment for strategic services provided to the donor country” (Poirine 1999: 832).

Liberalism: Liberalism vouches for the use of foreign aid to support democracy. This on the grounds that democracy best serves the courses of peaceful coexistence and stability within nations. That democracy can eventually contribute to world peace (Bridoux *et al* 2012).

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<sup>32</sup> Marxist orthodoxy held that internationalization of capital would lead to competition among capitalists along national lines—a view obviated by the rise of an international cross-national capitalist class (Stephen 1987: 18-39).

<sup>33</sup> For this position, see, among others Zank (1993: 90-102).

<sup>34</sup> Realists insist that if true that aid aimed to tackle poverty, then it should go mostly towards the poorest countries; however, this is not normally the case. See, among others Barrett (2001: 335-349) and Schelling (1955: 606-626).

### 1.9.2.2 Election monitoring/observation

Monitoring regimes, of which election monitoring<sup>35</sup> is an instance, have an important role in ensuring adherence to international norms and commitments (Simpson *et al* 2012).

Election observation has therefore emerged as a key strategy for democracy preservation and, hence, conflict prevention. Election observation undertaken by both local and international monitors, aims to guarantee the integrity of the electoral process by communicating the international community's expectations (Teshome 2013: 1003). As Short-Term Observers (STOs), their larger numbers place election monitors "in an excellent position to render a comprehensive and accurate picture of the entire election, including potential patterns of discrimination" (Binder 2007: 231).

Election observers contribute to democratization in a number of ways: first, they do documentation, by thoroughly scrutinising the conduct of the elections, through the generation and analysis of election-related data; they can then render a final verdict on the conduct of the elections. By so doing, election monitoring can in turn play an important role in institution building; for such external presence "can foster trust among rival parties by providing guarantees, clearing up misperceptions, relaying information back and forth and resolving key issues" (Chakand 1998: 169). Such institutions, once established, could "help counterbalance state power, provide a context for developing civic skills, encourage norms of reciprocity and trust, articulate societal interests and create peaceful channels for the resolution of conflicts that might otherwise result in violence" (*ibid*). However, election monitoring by outsiders can frequently become a target of suspicion and outside hostility as neo-colonial, its advantages notwithstanding (168).

Still, with its increased use governments that seek to cheat have developed other strategies<sup>36</sup>, including the staffing of strategic institutions such as the judiciary with

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<sup>35</sup> On election Monitoring, see, for instance Peski (2013: 49-100).

<sup>36</sup> For this claim see, for example Lukinova *et al* (2011: 603-25).

cronies “practices that have far more damaging consequences on governance in the long run” (Simpson *et al* 2012: 501).

In addition, election monitoring usually relies on hastily assembled data, thus precluding the rendering of a comprehensive verdict; instead what emanates from such data are superficial recommendations. Furthermore, while in theory, international election observers should not take their marching orders from the sending agency; this, however, is not always the case. More often than not, other considerations come into play thus colouring the ensuing evaluation (Teshome 2013).

### *1.9.2.3 Technical assistance*

Technical Assistance involves foreign experts working with their domestic counterparts, from both government and the NGOs, in support of the entire electoral cycle from pre-election preparations to post election capacity building (Mitchell and Phillips 2008). Viewed as an entry point for other desired reforms—such as good governance, among others—the strategy can also help in the identification of other government entities that need assistance (Schroeder 2013: 220).

However, this is not merely a technocratic issue: technical assistance has clear political implications; specifically, it is focused on strengthening institution in order to promote participatory and effective electoral institutions. Seen so, technical assistance, as opposed to election monitoring, is focused on long-term institution building as well as promoting the participation of hitherto excluded groups such as women and social and ethnic minorities “in the political process,”—consistent with a number of international instruments concerning non-discrimination and participation of such groups (Binder 2007: 225).

On the electoral front, technical assistance might involve training candidates; civic education, budgeting procedures, “computerizing voter lists... amending electoral regulations... and training electoral officials on new voting procedures “(Schroeder 2013: 209-10). These activities are usually focused on creating credible electoral institutions and procedures, in the process increasing voter confidence in these institutions and processes (Binder 2007; Schroeder 2013). In addition, technical

teams normally have the chance to discuss with ‘authorities’ emerging issues, as well as providing protection for otherwise exposed local observer teams. Understood in this manner, technical training groups can immensely “strengthen and support local initiatives and civil society organisation” (Binder 2007: 231).

Technical and financial support usually unfold within the ambit of targeted cooperation programmes; these activities can take anyone of many forms: election support teams; these are teams that can analyse key aspects of previous elections and make recommendations for future improvements; leadership training and networking for women, especially in rural areas.

#### *1.9.2.4 Political aid*

By the early 1990s the deleterious effects attendant indiscriminate neo-liberal attacks on the southern state edifice as the epitome of the so-called Neopatrimonial state had become so glaring. Critics responded that such a designation connoted states that were static in nature and thus failed to account for change (Turner and Hulme 1997). This opened the proscenium for an intellectual counter-offensive, on the grounds that “Only the state can organize power so as to harness flows of information, people, money, force and decisions necessary to regulate human behaviour” (Ghlain *et al* 2008: 4). Indeed, both scholars and practitioners have increasingly focused more generally on some of these agenda items as central to state effectiveness.

They argue that failure to perform its routine functions is likely to render a state illegitimate in the eyes of its denizens even if “elections have been held and the attributes of formal democracy are in place” (Papagiani 2008: 55). In particular, in the face of the obvious failures attendant the state retrenchment of the 1980s, there has emerged a new thinking which acknowledges that the strength of state institutions, conceptualized as “the capacity to achieve the goals set by incumbents in chief executive positions” (Huber 1996: 165-6)—is more important in a broader sense than the scope of state functions (Fukuyama 2004: 198).

Central to the shift was an emergent view that for even some of the hypothesized outcomes to occur, it was essential to have “state capacity to enforce the rule of law and to allocate state resources efficiently” (Huber 1996: 164). One expert

explains the rationale behind this shift: “Without a minimally effective and legitimate state at least regulating alternative sources of authority and service delivery, peace is likely to prove unsustainable” (Call 2008: 365). After all, and contrary to neo-liberal claims, “the enormous economic success of East Asian NICs is not simply the triumph of the market but also has much to do with strong state institutions” (Turner *et al* 1997: 49).

Indeed, there is a growing acknowledgement that state failure provides a “fertile breeding ground not only for ethnic violence, but also other debilitating social and economic breakdowns” (Wright 2008: 81-2). This does illuminate the need not only to reinvigorate state capacity, “but also... to re-engineer its entire architecture” (Call 2008: 380), to erect an institutional framework founded on inclusive, participative processes that foster trust and compromise (Papagiani 2008), the more so because the state’s:

Functions can’t be left to even a well-functioning society, any more than society abdicate its functions to the state. The state needs to be restored and its sovereignty needs to be reinstated as the criterion for accountability, short of which its government is not legitimate. (Zartman 1995: 267)

Current foreign aid has prioritized the institutional development<sup>37</sup> of government, “thereby attempting to meet the need to build the capacity of the state to govern” (Hearn 2000: 824). Aid “has promoted and rewarded democratisation” (Brown 2005: 179-80). The various actors in democracy promotion—northern states and their respective state agencies; NGOs; the private sector; international organizations, such as the UN; and regional organizations, such as the EU and AU (Diamond 1995), have sought to deploy aid “targeted at governmental structures such as parliament, the judiciary, and local government, as well as civil society organisations, with the aim of strengthening the institutions and culture of liberal democracy” (Hearn 2000: 815).

Proponents of the new strategy contend that both the resolution and the prevention of lethal intrastate conflicts “require the nurturing of societal structures and

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<sup>37</sup> For rejection of the institution-building agenda with regard to Africa, albeit from another era, on the grounds that the continent has already done enough and that Africa’s main problem is not one of lack of apposite democratic institutions but, rather, the challenge revolves around the need for behavioural modification and value re-orientation, see Oluropo (1986: 119-126).

institutions to assure each combatant group that their interests will be protected through nonviolent means” (Kritz 2005: 803). In their democracy promotion endeavours, these actors are buttressed by an emergent pro-democracy international ethos. As articulated in various international instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and political rights. The new posture negates the hitherto obsession with the principle of non-intervention and state sovereignty (Bishop 1994).

Central to the shift was the recognition that repressive approaches would no longer suffice in an increasingly fluid and turbulent post-cold war era. Instead, “[a]chieving... international stability, is now seen as lying in activities designed to reduce poverty, satisfy basic needs, strengthen economic self-sufficiency, create representative civil institutions, encourage thrift, promote human rights, gender awareness and so on: the name of this new security framework is development” (Duffield 2005: 305). Making this possible also was the fact that with the end of the cold war, globally “democracy is now perceived to be the only legitimate form of government” (Chakand 1998: 162).

It needs emphasizing, though: although democracy assistance first came to the fore in the 1970s, it only came into its own in the 1990s following the demise of the cold war. Designed to fence against the various post-cold war threats to global order, such as terrorism, nationalism, and so on—and buttressing the democratic gains attendant the Third Wave—when it burst onto the scene in the 1990s, democracy assistance—known then as democracy promotion—focused on human rights, democracy and good governance—as part of the so-called New Policy Agenda. The demise of the cold war led to a shift in thinking, with the rejection of the hitherto orthodoxy view that authoritarianism was apposite for rapid economic development. To pursue the new policy agenda, foreign aid was posited as one of the key tools, with the state increasingly seen, contrary to neoliberal claims, as central to development.

This study conceptualises political aid, whether “of a financial or technical nature,” as foreign assistance intended “to develop democratic institutions, practices, and capacities” (Diamond 1995: 39), and it takes three key forms: “helping to develop the formal political institutions of democracy; assisting the preparation, conduct,

and monitoring of elections and strengthening independent organizations in civil society” (40). Unlike orthodox assistance (foreign aid of the 1960s which focused on firming bureaucracies and so on), however, the current political aid is more explicitly focused on political institutions, such as legislatures, political parties, local government, among others” (44).

### **1.10 Organization of the study**

The study falls into eight chapters. Chapter one, the introduction, previews the entire study. Chapter two undertakes a literature review as well as theoretical considerations. This chapter aims to review extant literatures on democratisation as well as undertake an exposition of the relevant theories. The literature review part is important in that it is through such a process that I am able to identify a gap in the existing knowledge on the subject, and therefore the need to undertake this research.

Out of my literature review, it emerged that current research on Kenya’s democratisation tends to be overly focused on a given period, say, the Moi presidency, and so on, in assessing the role of external actors in this process. To correct this bias in the literature, the study has its focus on the role of EU political aid in Kenya’s political development since the early 1990s to 2013. It specifically seeks to assess the role of EU political aid in that process over time, 1990-2013.

The aim is to understand the role of EU political aid as a way to begin to have a much fuller picture of the various factors and actors at play in Africa’s democratisation. To do so, I draw on both democracy support and foreign aid literatures, believing that these two streams of scholarship hold particular promise for a fruitful inquiry into the role that EU political aid has played in Kenya’s political development since the early 1990s. I couple and rely on the two streams of literatures because with the cold war over and democracy apparently in ascendance foreign aid became one of the main tools that developed countries deployed in their engagement with developing countries. The linking of foreign aid and democracy represented a growing acknowledgement that at the heart of post-cold war democratisation challenges was the issue of weak state institutions. In

particular, Democratic Peace Theory postulates that “expanding democracy creates condition congenial to a better world in which conflict, disorder and poverty are replaced by peace, order and stability. Democracy thus contributes to the making of good societies” (Bridoux *et al* 2012: 1947).

Chapter three discusses research methodology. This is a qualitative case study in which I use secondary documents to analyse the role of EU political aid in Kenya’s political development. I deploy the aforementioned strategy because it appears the best approach to gain a deeper understanding of EU policy on development cooperation in Kenya as this relates to political processes. Most of this material is already in the public domain.

Chapter four focuses on the role of EU political aid in Kenya during the Moi-administration, 1991-2002. The chapter attempts to trace EU-Kenya interactions during the Moi era, and even immediately before Moi’s ascension to the presidency in 1978. It aims, by so doing, to show how because of Cold War-related calculations from the 1970s up to the early 1990s, Kenya was ogled as a rare economic and political success story in an otherwise hopeless neighbourhood.

These cold war-related calculations as well as stellar economic performance helped the new government avoid unnecessary scrutiny. Because of these two factors Kenya became a darling of the donors. It was the first country to sign the ACP-EU pact under Lome. Whereas the government’s repressive tactics were there for all to see, aid providers to the country either looked the other way at best or actively supported such tactics at worst. The chapter does however show how this hitherto cosy relationship begun to fray as the Kenya government became increasingly repressive, first during the waning years of the Kenyatta Presidency, and then the Daniel Arap Moi Presidency, especially starting in the early 1980s. Then with the demise of the cold war—and thus the erosion of Kenya’s status as a valued strategic ally, the EU and other major donors increasingly decried ‘mounting corruption’ and the attendant deterioration of social services as well as increased political repression.

The chapter shows how with the end of the cold war, the Moi administration came under sustained pressure, both domestic and external, to undertake political

reforms. Moi—as his colleagues elsewhere on the continent—initially rebuffed calls for political change, moving to cast such calls as unnecessary external infringement of Kenya’s sovereignty. In addition, the chapter shows how Moi and his lieutenants then launched a vigorous national campaign against political pluralism, continuously warning that this would open the door to ethnic atavism.

The chapter next shows that increased external pressure, especially the withholding of much needed aid in the early 1990s, forced Moi to relent and thus legalise multi-party politics. This would set the country on its first multi-party election in 1992. However, Moi and his government would use all manner of tricks, including ethnic violence as well as the fanning of divisions within opposition ranks to win the inaugural multi-party election. The chapter shows how Kenya’s foreign aid providers, including the EU, went ahead and endorsed the outcome of the election—although evidence abounded that Moi had actually manipulated the election—largely because of their own strategic calculations.

In the wake of the elections and then Moi’s attempt to revert to his old authoritarian style, Kenyans increasingly called for major institutional reforms; specifically, a new constitution. Although Moi initially concurred with the opposition on the need for constitutional reform, reformers rejected his attempt to entrust the exercise with foreign experts, viewing this as a furtive move by the president to retain the status quo; this would initially lead to two competing constitution reform visions. Kenyans did consequently go into the 1997 elections under the old constitution, although again under pressure Moi had conceded to some minor electoral reforms, such as the cross-party nomination of electoral commission officials. Following the 1997 elections and again amidst widespread allegations of electoral fraud—although again foreign aid givers elected to remain silent on the matter—after some mediation, the two groups would come together to embark on the process. However, Moi would prorogue parliament *sine die* in readiness for the 2002 elections, in which he was constitutionally barred from vying, just moments before the constitution writing conference endorsed the new constitution.

Moi had all along suspected that the agitation for a new constitution was merely a ploy to remove him and his party, the Kenya African National Union (KANU) from power. His gamble flopped, however: an opposition alliance decimated KANU in

the ensuing general election in December 2002, in the process propelling Mwai Kibaki to the presidency.

Chapter five on the Kibaki/NARC administration, 2003-2008, attempts to explicate political processes in Kenya during the country's pivotal transition from the long Moi—and by extension KANU—rule to the NARC/Kibaki era, and the role of EU aid in that process. The chapter aims to chart major events under the NARC administration with the aim of highlighting the role that EU political aid played at each given stage as well as the limitations that characterized that contribution.

The chapter opens with a discussion of the euphoria that attended the NARC victory, and the palpable hope that many Kenyans and their foreign supporters had that the country had finally entered a new era, one that would herald the launch of major reforms as promised by the victorious party when campaigning for the 2002 general elections. Initially the NARC administration appeared to keep its promises, especially when it came to economic renewal, and some social policies, such as free primary school education. In addition, the country appeared to enjoy unprecedented levels of political freedom.

However, as the chapter shows, with time, elite fragmentations, especially the failure by Kibaki and his wing of NARC to honour their pre-election Memorandum of Understanding (MoU) with Odinga's Liberal Democratic Party (LDP) began to sap reform momentum; these divisions would take a particularly dangerous turn on the issue of constitutional reform, with the two political camps vying to get a constitution that would best serve their personal and partisan interests, disregarding, in the process, the wishes of Kenyans. These elite divisions would undergird the 2007 elections.

Odinga and his camp viewed the elections as offering them the best avenue to dislodge from power what they increasingly denounced as a corrupt, and ethnic-oriented Kibaki-led administration. Kibaki and his wing of NARC were, however determined not to lose state power, fearful that a defeat would spell doom not just for themselves but also members of their ethnic community. This polarized atmosphere would help trigger post-election violence, with Odinga and his

supporters livid at what they saw as blatant electoral fraud perpetrated by Kibaki, working in concert with the Electoral Commission of Kenya (ECK).

The conclusion examines the role that the EU played in Kenya during this period, including its activities during the post-election violence; in the process, it also examines the limitations that characterised the EU's involvement in the country during the period.

Chapter six has its glare on the Grand Coalition Government formed in early 2008 following international mediation efforts that ended the 2007-08 post-election violence. The chapter seeks to limn some of the key issues and controversies that characterised the Grand Coalition Government (GCG), 2008-13, political wrangles/elite fragmentation—both inter and intra-party.

The next part shifts to an examination of reforms, with reform of Kenya's Electoral Management Body in the wake of the 2007-08 crisis, as well as the inauguration of a new Constitution in 2010, as the main focus. The Kriegler Commission had identified the ECK as a major culprit in the post-election violence, finding that the electoral body lacked the requisite capacity to manage a free and fair election. The Commission had called, as a remedy, for the creation of a nimbler electoral body to replace the ECK. I next briefly mention the ICC versus Special Tribunal debate; the issue gets fuller treatment in the next chapter; the section closes by analysing the role of EU political aid in Kenya during the period, 2008-13, with the National Accord providing the context.

Chapter seven discusses Kenya's political development since 2013, including the period leading to the elections that saw Kenyatta declared the 4th president of Kenya. It aims to trace how the reforms launched following PEV, such as institutional and constitutional, are unfolding in practice under the Jubilee administration and the role of EU political aid in Kenya during this period. After all, the current administration is really the first one to preside over these reforms, with the grand coalition government having served merely as a transitional mechanism. The chapter opens with an introduction, including preparations for those elections, the elections themselves—here the focus is on the main campaign issues that framed the elections, and the political alliances that emerged in the run-up to the

elections. The section also examines the reaction, especially by the losing side to Kenyatta being declared the winner, especially the decision to challenge the results in the Supreme Court as well as the ensuing ruling by that court upholding Kenyatta's victory.

The chapter next turns to a discussion of some of the key events—themes—that have emerged under the Kenyatta administration, as a way to understand the dynamics of political change in Kenya since 2013. The section will therefore focus on among other themes, emergent calls for reform of IEBC; The ICC case that confronted Kenyatta and Ruto at the time of assuming office; and so on.

The next substantive part of the chapter then turns to analyses of the role of EU political aid in Kenya from 2013-, the aim being to get a grasp of the contributions that that assistance has made towards Kenya's political development during this period, as well as some of the limitations that have come to the fore in that effort. The chapter then closes with a few concluding remarks on Kenya's political development to date and what the future might portend for the country.

Chapter eight offers conclusions and recommendations that suggest themselves from this study. The conclusions part of the last chapter tries to limn the main lessons that this research has explicated as far as foreign aid and democratisation in Kenya go, the aim being to make broader statements about the role of foreign—political aid—in democratisation more generally. The chapter, to this end, revisits the major theoretical arguments usually made for and against foreign—political aid and democracy support, trying to assess the fit between such arguments and the empirical facts as seen in Kenya.

## CHAPTER 2: Theoretical points of departure and literature review

### 2.1 Introduction

This chapter reviews the literatures on foreign aid and democratization. It seeks to comprehend the nexus between them and also find a gap that would warrant this study. The chapter falls into five sections. The first section gives an overview of foreign aid more broadly and then political aid more specifically. The section does so by tracing the evolution of scholarly thinking on foreign aid right from its inception after WW II to the present. The second section turns to an examination of extant literatures on democratisation. The section explicates the literatures on post-cold war democratisation, especially as these relate to Africa.

Section three attempts to link democratisation and foreign aid. This part specifically examines the rationale behind the coupling of the two phenomena. Section four reviews the literatures that focus on EU and political aid more generally; this is followed by an examination of the scholarship on EU political aid and Africa. The section then closes with an examination of the literatures that deal with EU political aid and Kenya.

### 2.2. A Literature Review of Foreign Aid

Foreign aid for Third World development<sup>38</sup> traces its genesis to the immediate post-World War II period (Riddell 2007). With the onset of decolonization after World War II, there emerged a feeling that for them “political independence without steady and broadly based improvement in economic capacities and in material levels of living would be a hollow achievement” (Mint 1980: 5).<sup>39</sup> Foreign aid hinged on the idea that international efforts could, or should, be undertaken to build the economies and societies of the other world (Weatherby *et al* 2000: 37). Political

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<sup>38</sup> For theories of development consult Rapley (1996).

<sup>39</sup> Find a sampling in, among others Ward (1967).

development focused<sup>40</sup> on developing countries as “a teleological process”<sup>41</sup> (Hagopian 2000: 881).

Given the magnitude of the posited developmental challenge, a view developed that the market mechanism could not get the job done. Rather, drawing important lessons from successful state-led efforts in economic recovery first during the Great Depression in the 1930s and then the reconstruction of both Western Europe and Japan after WW II, a consensus emerged on the need for a robust state.<sup>42</sup> Development economists,<sup>43</sup> bolstered by both Keynesian<sup>44</sup> views and social democratic ideology, posit the state as the precipitate of development, especially for late-developer<sup>45</sup> countries (White 2002: 97).

Myrdal (1956: 460) forcefully articulates the need for an activist state. He first rejects the equilibrium view that trade works “towards equality in remunerations to development factors of production, and, consequently, in income”. He cautions, instead, that trade actually serves as an agent of unequal exchange between the developed and developing countries. He, therefore, counsels: “economic development has to be brought about by policy interferences” (Myrdal 1956: 463).

Development theorists, consistent with this thinking, rejected laze-faire assumptions with the onset of decolonization in the south.<sup>46</sup> Historically when confronted with issues of structural transformation, economists had contended

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<sup>40</sup>For critique of the attempt to elide the fact that “a people can enjoy an unparalleled material plenty with a low standard of living’, see, among others: Sahlins (1997: 3-21).

<sup>41</sup> As for the Western model as the archetype, see, among others Almond (1965: 183-218); Willner (1964: 468-482).

<sup>42</sup>For rationales informing state-led development, Lal (1996: 29-36); (Ward 1962).

<sup>43</sup> On the evolution of development economics, consult, among others Basu (1984).

<sup>44</sup>From the end of WW II up to around 1979 Keynesianism served as the organizing global economic theoretical model; beginning in the late 1970s the approach came under sustained neoclassical assault; see, for instance Pressman (2006), pp. 113-38.

<sup>45</sup> On the state as the precipitate of development in late-developer states, consult especially Gerschenkron (1995), pp. 72-4.

<sup>46</sup>Find a discussion of orthodox views and the rationales for their rejection as obstacles to development in, among others Sannwald *et al* (1959).

themselves with countries exploiting their particular comparative advantages (Harris 1986). Rebuffing orthodoxy, however, development economics argued that only the state had the capacity<sup>47</sup> to oversee the development effort in less developed states. <sup>48</sup>

A number of economic theories of foreign aid in the liberal mould did come to the fore. In stages of development theory W. W. Rostow, drawing on the Harold-Domar model of long-term economic growth conceptualized lack of savings/capital as the main constraint on growth (Rosenstein-Rodan 1961). By positing the need for a net investment as central to economic development, Rostow thereby made a connection between foreign aid and development. Net inflow of foreign resources would augment domestic resources and thereby facilitate development (Meier 1995; Stern 1991).

Chenery and others focused on the requisites of structural transformation. They cautioned that two views exist on the way economic growth happens: a neo-classical camp, on the one hand, and a more expansive approach, on the other (Chenery 1986: 95). They observed that neo-classicists assume that the economy is already operating at Pareto optimum.

The structural view, focused on the theory of the second best, postulates that developing and developed countries have “dissimilar sets of growth factors” (Chenery 1986: 310). Under structural theory, a lot of room exists for economic improvement. The theory traces structural transformation to a movement of resources from lower productivity activities and into higher productivity ones. Scholars therefore investigated the amalgam of strategies that southern countries could deploy to tackle the various structural rigidities that they faced. They

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<sup>47</sup> Consult, for example LaPalombara (1966: 86-88).

<sup>48</sup> But the model's appeal was not restricted to the newly independent states; for example, in their bid to address their country's late development Japanese leaders erected a number of institutions, key among them MITI. See especially Johnson (1982).

therefore posited that external resource flows could serve as a short-term solution to this problem. However, in the long-run, domestic resources would suffice.

Southern countries faced two major structural rigidities: one, with respect to “investment-limited growth, skills and savings are in short-supply. In the second, trade-limited growth, foreign exchange is in short-supply because export earnings are lower than import needs” (Riddell 1987: 90). The theorists contended that southern countries would embark on self-sustaining growth after passing through key phases.

In phase-one, southern countries are characterized by a paucity of skills, although they face no balance of payments problems. It is this skills' shortage that “hampers potential investment levels reaching the level required for the target growth rate to be achieved. Inflows of foreign resources help to close “the gap between the increment in investment and in domestic savings until such a time as the rate of investment is high enough to sustain the target growth rate” (idem).

In phase two, which is brief, foreign aid is mainly focused on the rate of increase of investment due to skills bottlenecks. In addition, because of other rigidities in the economy, a trade gap ensues—due to the fact that the economy is not yet able to react promptly to the loss of foreign aid. Finally, in phase three the savings gap is closed. The main concern now is one of tackling the trade gap—due to lingering rigidities—which continue to hinder self-sustaining growth; this serves as the main reason for continuing foreign aid infusion.

Over time, however, a pessimistic view that cast the state as inimical to development did come to the fore (Howell *et al* 2005). This pessimism issued from the state's perceived failure to accomplish the agenda mapped out for it at the

outset (Evans 1985). Critics increasingly called for a paradigm shift in development theory (Nettl 1969). They maintained that extant theories had left the problem or problems largely unsolved. From the right a revitalized neo-classical counter-movement led the assault on statism, citing the alleged ills attendant Import Substitution Industrialization (ISI), inefficiency for example (White 1995: 163-164).

Dependency theorists similarly faulted orthodoxy for focusing overly on economic growth. They wanted the glare on the more vexed issues of economic development (McKay 2004; White 1992). Leftists, in an amplification, called for a more expansive definition of aid effectiveness, beyond the mere technical macro-economic concerns. They urged “quantifiable relationships that attempt to capture the patterns of poverty and distribution and, relatedly social and political aspects of the development process” (Riddell 1987: 129). This critical appraisal paved the way for a new approach towards aid:

The basic needs strategy. The work of Hollis Chenry and Paul Streeten, both associated with the World Bank, contributed mightily to this intellectual revolution. The former emphasized the need to reconcile the objective of growth and social equity. The latter drew attention to the notion that development assistance should concentrate ‘on the nature of what is provided rather than on income. (Therien 2002: 455)

The basic need’s’ thrust and] its impact on the international agenda was such that the 1970s were said to have been, albeit briefly, the era of dependency theory. (Therien 2002: 456)

Critiques focused increasingly on the classical view of administration. The theory conceptualizes<sup>49</sup> organizations as “relatively closed systems, dependent largely for their success on internal efficiency of operations” (Miles 1980, 189). According to

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<sup>49</sup>For a classification of organizations, consult Berkley (1984).

this perspective, “structures and processes were presumed to serve stable tasks and enduring goals” (idem). However, critics warn that the “organizational aspects of development cannot be distilled down to a technological fix,” (Turner *et al* 1997: 2). Organizations are not mechanical entities. There do not exist universal management menus.

Modern organization theorists see organizations “as open ... systems struggling to perform and survive in a larger context that is both complex and dynamic” (Miles 1980: 189). Organizational environments<sup>50</sup> play key roles in the performance of public sector organizations. Such organizations operate within open, dynamic environments, framed by social, cultural, economic and political factors (Turner *et al* 1997). Behaviorists cautioned in particular that formal structures never “succeeded in conquering<sup>51</sup> the non-rational dimensions of institutional behavior” (Litterer 1974: 388). Formal structures “interact with the environment thus deviating from officially stated goals” (Allison *et al* 1999: 150).

Applied to development administration, critics argued that development planning elided a number of key considerations (Hagopiani 2000: 889). Some maintained, for example, that the state was a class project. Others argued that development planning failed to conceptualize the process as complex —running from policy formulation to implementation (Pressman *et al* 1979). Conceptualizing policy and politics<sup>52</sup> as two entirely separate<sup>53</sup> spheres (Turner *et al* 1997: 3), such plans quickly ran into trouble once they moved from the formulation to the

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<sup>50</sup>See, for instance Costello (1994: 345-364).

<sup>51</sup> Subordinates do not automatically comply, See, for example Kaufman (1973).

<sup>52</sup> Esman (1966: 59-112).

<sup>53</sup> For rejection of the politics/administration dichotomy, in favour of the view that a synthesis of administrative and political theory is essential to better understand government, consult, among others Waldo (1990: 73-83).

implementation phase (Chambers 1983; Pressman et al 1979). The model failed to appreciate “the engagement of social groups with the state, and the mutual transformation that entails” (Magdal 2001: 250). This impasse implied that:

Administration was not an independent variable; rather, it could only facilitate development under a different political constellation of forces or arrangement. In other words, the critics rejected the logic implicit in modernization theory of administration as neutral technology—rather; the implication was that what was needed was a contingency model of development. (Turner *et al* 1997)

The critics maintained that as a result of this circumscribed <sup>54</sup> understanding of change, “centralized urban and professional power, knowledge and values ha [d] frowned out over and often failed to recognize the knowledge of rural people themselves” (Chambers 1983, 82).<sup>55</sup> Other critics maintained that hierarchical social transformation was apt to display the full range of standard bureaucratic pathologies, contending that, by themselves, such arrangements, simplified as they are, cannot:

Generate a functioning community, city, or economy. Formal order, to be more explicit, is always and to some considerable degree parasitic on informal processes, which the formal scheme does not recognize, without which it could not exist, and which it alone cannot create or maintain. [The root of the problem is that formalistic approaches do not pay enough attention to] precisely the practical skills that underlie any complex activity. (Scott 1998: 310-311)

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<sup>54</sup>This represented a revisionist view of liberal democracy, See Gendzier (1985).

<sup>55</sup> For an earlier critique in this vein, albeit addressed to developed-country economic experts venturing in the South, see Bekerman (1956).

In the face of this perceived failures, critics<sup>56</sup> increasingly decried the state in general, but the African one in particular. They simultaneously called for a shift from a macro—development planning—to a micro—project-planning—approach to international development. They, in the main, offered that the ‘rigidities’ and bottlenecks which supposedly vindicated the intervention of the state were in fact the results of earlier public interventions or distorted prices. Arguing that the market<sup>57</sup> “constitute(s) the prime vehicle for achieving economic growth” (Pedersen 1992: 617), they counseled that one advantage attendant:

Involving the private sector is that doing so will help to build institutions in developing countries. Institutions such as a market economy, a fair and enforceable legal system, and basic infrastructure are vital to development. Yet traditional foreign aid, if it focuses on institution-building at all does so from the top-down... The trouble with this approach is that it does not rely on a genuine desire by constituents within states to reform. (Justin *et al* 2008: 20)

The critiques opened the proscenium for the launch of Structural Adjustment Programmes (SAPs) (Riddell 2007). SAPs focused on dismantling import-substitution Industrialization trade regime<sup>58</sup>s (Berg 1988). In fact, however, critics insist that in most instances, the nostra actually represented a misdiagnosis of the malady that they sought to cure.<sup>59</sup> They opined that “[i]n at least some cases the

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<sup>56</sup> At another level, though, this debate has to do with the fact that ultimately every society has to come to grips with the allocation of otherwise scarce resources, consult Middleton (1996).

<sup>57</sup>For this line, see de Soto (1989). Still, critics, insists that the superiority is not to be assumed; rather it depends on the specific context; others reject the uncritical march towards free markets on equity considerations, Ma (2003); Moore (2003).

<sup>58</sup> For liberalization, and especially the role of the IMF, see David (1985). As for strident advocacy of liberalization, see Thorbecke (1988).

<sup>59</sup> Institutional economists originally focused on the economy as both culturally and historically embedded, with the focus on problem solving and not abstract thought-- a view given special articulation by Karl Polanyi in his *The Great Transformation*, Waller (2006).

[state] had, in fact, fostered substantial structural change (Evans 1992: 140). They maintain that neo-liberals distort<sup>60</sup> the historical circumstances that led to the emergence of the state as the locus of development and the global shifts that frame the anti-state agenda.

Critics traced the shift from the state as the solution to the state as the problem a changed definition of structural change due to events exogenous to the third world; the oil shocks for example. They sought to limn what they saw as a major contradiction in neo-liberal thought. Namely, “despite [its] disdain for the wisdom of politicians [it] contained the paradoxical expectation the state (the root of the problem would be able to become the agent that initiated and implemented adjustment programs (become the solution)” (idem). He continues: “It was not that this expectation was unrealistic” (Evans 1995: 140).

Amidst mounting criticism over SAPs, the “Washington-Consensus”<sup>61</sup> group then began to drain its collective gaze on governance.<sup>62</sup> When the World Bank issued its first ever document on the theme in 1989, titled *Sub-Saharan Africa: From Crisis to Development*, it made a link between development failures in Africa and public institutions (Leftwich 1995; Pierce *et al* 2005). The Bank understood governance as implying the manner in which public authority was exercised in managing national socio-economic development (Dixon 2003). The formulation

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<sup>60</sup> Others trace the ebbs and flows of the role of the state in development to the tendency in development economics to first have exalted the virtues of the state and then to have shifted to the market as the panacea. See Klitgaard (1991); Werner *et al* (1993).

<sup>61</sup> This refers to a plethora of policy measures pushed by the IFIs and the US government, and derided by critics as neo-liberalism. See David (1985).

<sup>62</sup> A claim in recent years posits that good political management leads to good economic outcomes. Critics question the operative logic here, arguing instead that changing economic and social structures produce social change.

drew instant fire, however. Critics complained that not only did it fail to recognize SAPs as part of the problem. They also lamented that to blunt increasing opposition to neoliberalism by doggerels:

Regimes have frequently resorted to ruling or legislating by decree<sup>63</sup>. . .

Threats and psychological intimidation accompany the implementation of harsh anti-popular, so-called 'economic reforms' and accompanying loans-foreign aid. There is a growth of neo-authoritarianism in which non-elected foreign functionaries and local executive officials (most of them non-elected or representing a small fraction of the electorate) govern. In short, foreign aid strengthens authoritarian tendencies in the executive branches of government, undermining popular support for the electoral process and representative government, and thus 'democracy.' (Petras *et al* 2002: 290)

Faced with these escalating critiques, coupled with the global policy shifts occasioned by the "war on terrorism," neo-liberalism has given way to development management<sup>64</sup> so that the "new watchwords and metrics [that frame international development] are now civil society, social capital, participation, policy coherence, good governance and democracy" (Carmody 2007: 12).

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<sup>63</sup> See Treisman (1991).

<sup>64</sup> For extant theoretical debates in development literature, see McGregor (2007). For the management aspects of development, consult Esman (1991).

## 2.3 Foreign aid and democracy promotion

### 2.3.1 Introduction

The objective is to understand the role of EU political aid in Kenya's democratization. I draw on both democracy support and foreign aid literatures. I believe that these two streams of scholarship hold particular promise for a fruitful inquiry into the role of EU political aid in Kenya's political development. I couple and rely on the two streams of literatures because with the cold war over and democracy apparently in ascendance foreign aid became one of the main tools that developed countries deployed in their engagement with developing countries (Agresto 2012; Russett 1994).

The linking of foreign aid and democracy represented a growing acknowledgement that at the heart of post-cold war democratisation challenges was the issue of lack of state capacity or weak state institutions. In particular, liberal theory posited democracy as the best form of government for realizing human development and global peace. This would see political aid—in terms of resources specifically focused on institution building and civil society development assume unprecedented prominence in international affairs.

### 2.3.2 Foreign Aid and Democratization

Extant analyses focus on aid's economic aspects; rarely do they accentuate its potential "to promote and support democratization" (Heckelman 2010: 558). However, Huntington (1991: 65) identifies the role of external actors as one of the major precipitants of what he has characterized as the third wave of democracy. Aid as a political tool is used to cajole and induce in a bid to gain "concessions and bringing about change in the potential recipient's policy behaviour" (Soderberg 2006: 433). Overall, however, aid has mixed effects on democratization. Some of it can help institutional strengthening and other indicia conducive to democracy, such as education. However, "foreign aid can also insulate elites and, by increasing the rent-seeking of retaining or obtaining power... [it can] actually

increase the incentives to consolidate power and limit competition and information” (Grossman 1992, qtd in Heckelman 2010: 558).

Aid giving during the cold war issued from geo-strategic calculations (Brown 2005). However, the easing and then the end of the Cold War radically changed the governance terrain in the developing world, with most autocratic regimes there coming under sustained domestic and international pressure<sup>65</sup>. One percipient observer has noted the recent nature of this shift: In the area of “human rights, for example, it was not until the 1980s that rights-based issues began to receive prominence, and then not through the activities of donor countries but rather through the efforts of such groups as Amnesty International. Similarly, it has only been since 1989 with the end of the Cold War and the collapse of the East European and Soviet state systems that democracy has become a new emphasis within the Third World” (Steeves 2007: 492-3).

After 1989 major international agencies, for example the World Bank, quickly appropriated and then ogled the theme as a major plank in their engagement with developing countries, including aid giving. This shift saw the principle of state sovereignty so central to international affairs for centuries come into question. Critics argued that the principle did not suffice for a turbulent post-cold war environment (Koskenniemi 1998).

It deserves mentioning: the Westphalia state system had undergone change over the years. However, the principle of state sovereignty remained sacrosanct. Indeed, despite their strategy of fostering dependency<sup>66</sup> during the Cold War as a way to draw countries into their respective camps, even the super-powers paid some homage to the principle of state sovereignty.

With the Cold War over, however, the principle did come into sharp focus. Critics contended that the principle did not suffice for a fluid post-cold war international environment. As such, on taking office, Dr Boutros Boutros-Ghali, then newly appointed United Nation’s secretary-general, insisted that, “the time of absolute and exclusive sovereignty, however, has passed” (Quoted in Bishop 1994: 77).

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<sup>65</sup> See, for instance Kalyvas (1999).

<sup>66</sup> See, for example, Gibson (2002).

A number of factors account for this change. First, with the Cold War over, and in a rather stunning turn of events, the self-same external powers that had usually used the principle as a pretext to support repression in the developing world now quickly rejected it. In its stead they appropriated democracy—now perceiving it as “the only legitimate form of government” (Chand 1998: 162). This shift in thinking resulted in a change in the discourse; this saw foreign aid now become a tool for “promoting democracy through conditionality... through support to on-going processes of democratization... and through contributions to the consolidation of new democracies by strengthening various institutions considered central to democratic governance” (Mkandawire 2010: 1153). In fact, as a result, in large part, of these post-Cold War changes, key players in the international arena, UN Secretary-General Kofi Annan--[now former UNSG]—for example, did make respect for human rights the lodestar of international action (Leonard and Straus 2003).

The focus on democracy emanated from an emergent belief that “support and promotion of political democracy is not only a valued end in itself, but one that will also contribute towards regional stability and security” (Hurrell 1998: 529). The interest in furthering democracy and stability in the developing world was in turn informed by the emergence in the post-Cold War era of a universal consensus, albeit a fickle one, about acceptable minimum standards of civilized human life (Leonard *et al* 2003).

Second, the demise of the cold war led to increased internal demands for democracy in the third world, part of the Third Wave of Democracy, which commenced<sup>67</sup> as the Cold War drew to a close in the late 1980s. Thus faced with this changed internal situation, most developed countries decided to cast their lot with the ascendant champions of democracy in the developing world. This shift rested on a recognition that repressive approaches would no longer suffice in a changed global environment. This saw political conditionality-- “the linking of aid to administrative and political reforms in recipient countries, in the pursuit of what is termed ‘good governance’” come to the fore (Robinson 2011: 90).

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<sup>67</sup> Find a sophisticated approach to understanding the transition in terms of regional variations based on different regional authoritarian modal types in, among others Geddes (1999: 115-144).

Current “foreign aid has [therefore] prioritized the institutional development of government” (Hearn 2000: 824), especially given that by the early 1990s, the deleterious<sup>68</sup> effects attendant indiscriminate neo-liberal attacks on southern state edifice as the epitome of the so-called Neopatrimonial<sup>69</sup> state had become so glaring. Critics argued that such a designation connoted states that were static in nature and thus failed to account for change (Turner *et al* 1997). This implied that “Only the state can organize power so as to harness flows of information, people, money, force and decisions necessary to regulate human behaviour” (Ghlain *et al* 2008: 4). In particular, in the face of the obvious failures attendant the state retrenchment of the 1980s, there has emerged a new thinking which acknowledges that the “strength of state institutions,”<sup>70</sup> conceptualized as the capacity to achieve the “goals set by incumbents in chief executive position” (Huber 1996: 165-6)—is more important in “a broader sense than the scope of state functions” (Fukuyama 2004: 198).

The shift issued from an emergent view that for even some of the hypothesized outcomes to occur, it was essential to have “state capacity to enforce the rule of law and to allocate state resources efficiently” (Huber 1996: 164)<sup>71</sup>. After all, and contrary to neo-liberal claims, “the enormous economic success of East Asian NICs is not simply the triumph of the market but also has much to do with strong state institutions” (Turner *et al* 1997: 49). Perhaps cognizant of these extant realities, funding to promote democracy has emerged as a major aspect of development aid. In more specific terms, there has been funding directed towards supporting democracy, with:

[t]he EU [a]s the largest single funder of democracy-promotion activities, with over US\$1 billion in Annual commitments... The European Bank of Reconstruction and Development (EBRD), the sole multilateral

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<sup>68</sup> For the implications, especially on state building, of neoliberalism in Africa, see, for instance Laird (2007: 465-486).

<sup>69</sup> This refers to a state that is traditional and not rational/ legal as defined by Weber. For a revealing critique of the patrimonial state formulation when it comes to Africa, especially the failure to account for differences, change, as well as the implication that there exists only one type of state across the continent, see, for example John (2010: 10-30).

<sup>70</sup> By this I mean norms of behaviour, formal and informal institutions. I therefore conflate three streams of institutionalisms: Sociological, historical, and rational choice. For the first, see DiMaggio *et al* (1991). For Historical Institutionalism, see Pierson (1996) and March *et al* (1989). For Institutional Rational Choice, see Green *et al* (1994).

<sup>71</sup> See, for instance Warner *et al* (2002: 70-89).

development bank established after the end of the Cold War, has also been a leader in pushing for democratic reforms. Unique among the multilateral development banks, the EBRD explicitly lists the expansion of democratic governance as one of its two overarching objectives (the other being the development of market economies. (Siegle 2009: 409)

Aid “has promoted and rewarded democratisation” (Brown 2005: 179-80). In particular the various actors in democracy promotion—northern states and their respective state agencies; NGOs; the private sector; international organizations, such as the UN; and regional organizations, such as the EU and AU, among others (Diamond 1995: 38), have sought to deploy aid “targeted at governmental structures such as parliament, the judiciary, and local government, as well as civil society organisations, with the aim of strengthening the institutions and culture of liberal democracy” (Hearn 2000: 815).

Proponents of the new strategy contend that both the resolution and the prevention of lethal intrastate conflicts “require the nurturing of societal structures and institutions to assure each combatant group that their interests will be protected through nonviolent means” (Kritz 2005: 803). In this respect, in their democracy promotion endeavours, these actors are buttressed by an emergent pro-democracy international ethos as articulated in various international instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and political rights; this new posture negates the hitherto obsession with the principle of non-intervention and state sovereignty.

Central to the shift was the recognition that repressive approaches would no longer suffice in an increasingly turbulent post-cold war era. Instead, “[a]chieving... international stability, is now seen as lying in activities designed to reduce poverty, satisfy basic needs, strengthen economic self-sufficiency, create representative civil institutions, encourage thrift, promote human rights, gender awareness and so on: the name of this new security framework is development” (Duffield 2005: 305). Making this possible also was the fact that with the end of the cold war, globally “democracy is now perceived to be the only legitimate form of government” (Chand 1998: 162). It needs emphasizing, though: although democracy assistance first came to the fore in the 1970s, it only came into its own in the 1990s following the demise of the cold war, with a focus on human rights, democracy and good governance—as part of the so-called New Policy Agenda (NPM), designed to

tackle the plethora of emergent threats to the global post-cold war order. The demise of the cold war led to a shift in thinking, with democracy and economic reforms now being seen as linked. To pursue the new policy agenda, foreign aid was posited as one of the key tools, with the state increasingly seen, contrary to neoliberal claims, as central to development.

### 2.3.3 Major themes

A number of themes have come to the fore in the foreign aid debate in general and democracy support in particular. The interplay between foreign aid and national economic development; specifically, the connection between foreign aid and economic reforms, has come to the fore (Brynen 2008: 232). A number of experts have increasingly argued that intrastate conflicts erupt out of perceptions, whether imaginary or real, of economic injustice. Still, observers have increasingly warned of the inappropriateness of rapid economic reforms. They caution that rapid economic reforms have the potential to increase instability (Doorbos 2005; Zaum 2006).

Critics have particularly taken umbrage at the simultaneous launch of political and economic reforms (Ake 1996). Scholars arguing in this vein insist that economic evisceration blunts the move towards democracy. They opine that while even poor countries can make the transition to democracy, such economic scarcity is likely to undermine democratic consolidation. Citizens could increasingly begin to question the utility of democracy, given their continued economic plight (Diamond 1995).

Scholars writing in this vein opine that whereas neo-liberalism is too narrowly focused on economic growth, what is, instead, needed is a comprehensive strategy for development (Commins *et al* 1998). They contend that by circumscribing the policy options open to leaders, neo-liberalism may actually contribute to political instability. What happens in this type of environment, they warn, is that out to gain political mileage, politicians exploit latent signs of economic discontent, along ethnic lines (Heilman 1999).

Other studies have sought to question the type of democracy being promoted. They argue that current foreign aid is focused on developing procedural democracy (Pinkney 1999). Liberalism views the challenge as one of developing political and institutional mechanisms for structuring political contestation (Dahl 1971). Critics argue that based on this thinking the so-called democracy promotion has unduly focused on political and civil rights to the almost total neglect of the cultural, economic and social aspects of democracy (Bishop 1994; Craig 1998).

The critics do however argue that developing countries deserve substantive democracy, democracy that focuses on the delivery of material benefits. They warn that absent this, while even poor countries can make the transition, they are unlikely to consolidate democracy (Pinkney 1999; Suttner 1999). They therefore contend, contrary to neo-liberal orthodoxy, that democratic government “can be the instrument wielded . . . to attenuate the effects of the destructive side of economic development” (Wilber 1994: 137).

Still others have sought to understand the link between democratic consolidation and the constitution or governmental system. Some comparative politics scholars have increasingly made the rather tantalizing argument that parliamentary systems are better suited to democratic consolidation than presidential ones. They insist that because of their fused nature, parliamentary systems make for better aggregation of interests (Linz 1990).

The link between foreign aid, security, and democracy has also emerged as a major theme in the literature. During the Cold War, motivated by economic, political and security calculations, great powers made foreign aid the spearhead of their agendas in the developing world (Harbeson *et al* 1995). However, with the demise of the Cold War foreign aid lost its original rationale and much of its remaining support. Critics had long charged that foreign aid had no discernible impact on economic development and only enriched “the pockets of corrupt dictators, while funding the salaries of a growing, bloated bureaucracy” (Radelet 2010: 107). Contrary to these claims, “[i]t should hardly be surprising aid did not always spur development . . . since that was not its principal aim. Some of its basic goals, such as the support of today’s strategic allies greatly contradicted the interest in longer-term development—contributing to the perception that aid is ineffective” (*ibid*).

However, with the end of the Cold war, foreign powers quickly appropriated democracy, human rights and the rule of law as key criteria for continued engagement with the same countries (Sherman 2008). In particular, since the demise of the cold war, some have sought to emphasis what they perceive as a close nexus between security and development; this assumed added urgency in the wake of the 2001 terrorist attacks in the US (Ganzle 2012: 116). International engagement with troubled states underwent a sea change in the wake of the 11 of

September 2001 terrorist strikes on the US; in fact, some located state atrophy at the heart of some of the world's most vexing problems, terrorism key among them (Fukuyama 2004: ix; Milliken *et al* 2005: 12); it was this calculation that animated international efforts in Afghanistan following the ouster of the Taliban regime in the early 2000s, for example.

As part of this changed menu of goals "the U.S. now claims to prioritize democracy as a key element in its foreign policy engagements" (Travis 1995: 541). America's new commitment to democracy rests on four key motives, "the war on terrorism; projection of soft power; fighting global poverty; and finally an attempt to further U.S. values of equality" (Radelet 2010: 109-10). Thus, because of the 11 September 2001 terrorist strikes on the United States, "development assistance has now a new lease on life" (Dichter 2005: 293).

Still, critics argue that it is not easy to conceptualize the security-development nexus, given that security is not a development goal in and of itself—as opposed to security in security proper (Ganzle 2012: 118). They, for one, argue that establishing a strong state attuned to the dictates of fighting terrorism may not necessarily advance the democratic agenda.

They therefore warn that the current obsession with order and security poses a real threat to third world political development. They worry that repressive regimes will enjoy much latitude in defining domestic opponents as security threats and dealing with them harshly (Hadiz 2004: 67; Harbeson 2005: 278). Indeed, some critics have faulted the strategy as connoting furtive imperialism (Cox 2008), specifically a strategy designed to create new post-cold war client states.

The issue of endogenous versus exogenous factors in democratisation has also come to the fore. Champions of democracy as an endogenous matter insist that domestic actors must assume the lead role for purposes of accountability and legitimacy. They counsel that the emphasis ought to rest on "the capability of national actors and their interactions with the populace. Although international actors have an important role to play, their engagement is rarely the key to ensuring the effectiveness of states" (Call 2008: 366). They insist that because domestic actors have a vested interest in the long-term viability of the state, they

are likely to insist on good governance from their leadership (Fukuyama 2004; Papagiani 2008).

The critics do therefore decry what they currently see as “a grand experiment in liberal imperialism in the use of international authority” to erect democratic polities (Cox 2008: 250). They insist that available evidence does not vindicate this strategy as efficacious for the task (Caplan 2006). However, supporters of greater external involvement posit this as necessary to augment otherwise meagre domestic resources (Bose 2006; Brynen 2008; Ottaway 2005: 246).

Other scholars have sought to question the motives and effectiveness of such assistance. They posit the strategy as a self-serving posture by sender countries (Bosin 2012). Those who question the motives and effectiveness of democracy support cast that effort as selective at best and outright manipulative at worst. They observe that when the strategic interests of democracy promoters are at stake, those countries are likely to sacrifice democracy. Very seldom do values such as democracy matter (Olsen 1998). Indeed, other scholars writing in this vein have assailed democracy promotion as propaganda designed to gloss over historical domination (Ake 1992).

Another theme centres on the impact of foreign aid on sovereignty. Specifically, the legitimacy of foreign intervention to promote human rights, democracy and good governance versus the need to protect state sovereignty. Supporters of the shift point to a growing acknowledgement of the responsibility to protect those under oppression by their own states as part of humanitarian law (Bishop 1994).

However, as supporters of the status quo see it, the modern, sovereign state-based system arose in direct reaction to this situation. Others argue, moreover, that the conceptualisation of human rights has proved difficult and controversial. Critics offer that such a circumscribed definition elides social, economic and cultural rights (Crawford 2009: 67). Other critics contend that such externally-led efforts, besides being motivated by ulterior motives, may also work to blunt the potential for the organic development of the states in question (Himes 1994; Menkhaus 2008).

Another set of literatures has focused on what it views as a furtive attempt to reduce development to a managerial undertaking. The literatures caution that issues of programme design are political and not technical (Brynen 2008; McGovern 2008: 340). They in particular posit that development comprehensively understood is multifaceted, as enunciated at recent World Conferences and then encapsulated in MDGs. They consequently counsel, “Organising policy for global development is thus far from being a mechanistic or technocratic exercise” (Grimme *et al* 2012: 4). The literatures posit that to promote stability, development must ogle both managerial and political aspects of development.

However, critics aver that the focus on governmental processes leads to an inherently hierarchical process—due to the implicit narrow definition of democracy. Indeed, according to this stance, the main flaw inherent to the model of development that predominated in the 1960s was that it focused on bureaucratic efficiency while eliding the fact that states create winners and losers. This implied the need to build popular support for policy-making. Yet under the extant managerialist strategy, continue the critics, issues of participation receive short-shrift. As a result, issues of political development in the Third World “‘that need mediating’ are then quickly criminalized to be punished” (Chandler 2006: 6). Instead to suffice, maintain proponents of this stance, foreign aid policies should facilitate:

[T]he building of legal infrastructure and participatory mechanisms, and that they take into account local perceptions, realities and responses. At the very least, donors must discontinue support of non-inclusive ‘private’ organizations and reform by decree. Rather, donors should broaden the base of recipients and support structures to include all relevant parties. Indeed... th[e] evidence... shows that aid projects that implicate sensitive political processes are very difficult to administer effectively without engendering negative consequences for recipients and/or donors. (Wedel 2001: 202)

## **2.4 The nature of political aid: Election monitoring/observation**

Monitoring regimes, of which election monitoring is an instance, have an important role in ensuring adherence to international norms and commitments (Simpson *et al* 2012). Election observation has therefore emerged as a key strategy for democracy preservation and, hence, conflict prevention in recent years. Election

observation, undertaken by both local and international monitors, aims to guarantee the integrity of the electoral process by communicating the international community's expectations (Teshome 2013: 1003). As Short-Term Observers (STOs), their larger numbers place election monitors "in an excellent position to render a comprehensive and accurate picture of the entire election, including potential patterns of discrimination" (Binder 2007: 231). Such observation helps in a number of ways: first, they do documentation, by thoroughly scrutinising the conduct of the elections, through the generation and analysis of election-related data; they can then render a final verdict on the conduct of the elections (Chakand 1998: 169).

Still, its increased use has seen governments that seek to cheat develop other strategies, including staffing strategic institutions such as the judiciary with cronies—practices that have far more damaging consequences on governance in the long run (Simpson *et al* 2012: 501). In addition, election monitoring usually relies on hastily assembled data, thus precluding the rendering of a comprehensive verdict; instead what emanate from such data are superficial recommendations. Furthermore, while in theory, international election observers should not take their marching orders from the sending agency; this, however, is not always the case. More often than not, other considerations come into play thus colouring the ensuing evaluation (Teshome 2013).

## **2.5 The nature of democracy assistance: Technical assistance**

Technical Assistance involves foreign experts working with their domestic counterparts, from both government and the NGOs, in support of the entire electoral cycle from pre-election preparations to post election capacity building by supporting the establishment and reform of EMBs (Mitchell *et al* 2008: 161-2). Usually seen as an entry point for other desired reforms—such as good governance, as well as the building of relationships—the strategy can also help in the identification of other government entities that need assistance (Schroeder 2013: 220). However, this is not merely a technocratic issue: technical assistance

has clear political implications; specifically, it is focused on strengthening institutions in order to promote participatory and effective electoral institutions.

On the electoral front, technical assistance might involve among other activities training candidates; civic education, budgeting procedures, “computerizing voter lists... amending electoral regulations... and training electoral officials on new voting procedures” (Schroeder 2013: 209-210); these activities are usually focused on creating credible electoral institutions and procedures, in the process increasing voter confidence in these institutions and processes (Binder 2007; Schroeder 2013). In addition, technical teams normally have the chance to discuss with ‘authorities’ emerging issues, as well as providing protection for otherwise vulnerable local monitoring teams. Understood in this manner, technical training groups beyond observing, as LTOs can immensely “strengthen and support local initiatives and civil society organisations” (Binder 2007: 231).

## **2.6 The EU and political aid**

### **2.6.1 The EU’s emergence as a Global Player**

The end of the cold war necessitated a more robust foreign policy posture by the EU. This led to the widening of the policy menu, to encompass issues that “related to foreign and security policy” (Olsen 2004: 426). The bloc placed a big premium on “democracy promotion and human rights” in this transformed security environment (Olsen 2002: 132). This policy shift called for a coherent and coordinated strategy. This would see the EU develop a number of policy instruments/institutions, the Common Foreign and Security Policy (CFSP), for example (Olsen 2004: 376).

The liniments of a Common European Foreign Policy had begun to take shape with the launch of SEA in 1986. SEA called for the EU “to act as a cohesive force in international relations” (Carbone 2008: 324). To this end, Maastricht Treaty of 1992 divided EU policy areas into 3: the 1<sup>st</sup> Pillar—this is where the European Community had full competence. The pillar focused on trade and agricultural policies, with the EU Commission having full implementing powers. 2<sup>nd</sup> and 3<sup>rd</sup>

pillars—these are intergovernmental, with Member States in control. The 2<sup>nd</sup> and 3<sup>rd</sup> pillars focus on Justice and Home Affairs (JHA) and Common Foreign and Security Policy (CFSP) (Mackie 2008: 144). Maastricht established a legal basis for development cooperation by acknowledging existing policies. It also “provided a Title (Title xvii) on development cooperation and specific articles (1300-1304), setting out the objectives of European Community development cooperation and the principles of implementing them.

Development cooperation was defined as a competence of the European Community, but was qualified as ‘complementary’ to the Member States. This left full power with Member States to continue their own policies in this area, alongside those of the Commission” (Reisen 2009: 243-244). EU development cooperation would now pivot on the promotion of social and sustainable development; the campaign against poverty, as well as the integration of southern states into the global economy.

The changes found expression in broader policy statements, such as the Statement of Development Policy (SDP) (2000), European Consensus on Development (ECD) (2005)—and a series of accompanying administrative reforms. In particular, the EU sought to cast itself as a normative power in international affairs. Deriving allegedly from universal norms, the EU's normative power is “founded on and has as its foreign and development policy objectives the consolidation of democracy, rule of law and respect for human rights and fundamental freedoms” (Manners 2002: 241, qtd., in Storey 2006: 331).

The EU has made democracy promotion a major plank in its international relations. For example, the bloc adopted political conditionality for its eastward expansion in the early 1990s. The bloc has, consequently, increasingly cast its activities largely in terms of the creation of participatory governance structures, the development of new social norms, and the establishment of the rule of law and democracy” (Hampson 2001: 393). The bloc posited these as pivots of security, governance, and development on the basis of enhanced political dialogue” (Pere 2009: 266).

A number of themes have come to the fore on the issue of EU democracy support more generally. Some scholars have attempted to assess the EU's attempt to cast

itself as a normative power. Critics counter that in practice the norms are hollow. They aver, for example, that the EU is ready and willing to sacrifice these avowed values if and when the circumstances so warrant. In particular, some of the studies have consistently found that there exists a conflict between the avowed goal of democracy support, on the one hand, and strategic calculations, on the other. The studies report that whenever the two conflict, strategic calculations always trump the democracy support agenda. Critics have looked askance at this development (Bagoyoko *et al* 2009), arguing that it reflects a retreat into cold war thinking when geostrategic calculations reigned supreme.

Other scholars have focused on explicating the origin of the aforesaid gap. Biondo (2010) finds that that inconsistency may also issue from a conflict between the overarching EU goal of promoting development--conceptualised as eradicating poverty, on the one hand, and democracy support, on the other. Whenever the two conflict, the EU, she shows, is wont to focus on development while eliding democracy. The EU rationalises its actions on the grounds that in the long run, with development, democracy is likely to emerge organically.

Other studies have sought to limn what they view as the EU's pursuit of contradictory policies. They, for example, observe that whereas the EU is pledged to advance democracy and human rights, "its implementation has at best been weak and inconsistent," characterized by the fact that "the amount of aid channelled into promoting democracy and respect for human rights was remarkably limited and the implementation . . . flawed" (Cox *et al* 1997: 40; Crawford 2001: 237, qtd in Olsen 2004: 434).

They opine, moreover, that while the EU "Provided substantial assistance to processes of democratic transition [it provided] considerably less to subsequent democratic consolidation" (Crawford 2009: 150-1). Most of the aid went to the electoral process and political and civil rights.

Yet other studies find that the fragmented nature of EU policy making blunts its democracy support agenda (Olsen 2008). According to this line, the EU's attempt to act under the CFSP framework faces stiff opposition from those wedded to MS bilateral involvement. Opponents of EU multilateralism view it as an encroachment

on MS sovereignty. However, champions of multilateralism offer otherwise. To them, the EU "offers a global presence, policy coherence (particularly in regard to trade), a crucial role in facilitating coordination and harmonization, in promoting 'best practice' across the EU and offering particular experience in the areas of governance and democracy promotion" (Dearden 2008: 121).

Other studies find flaws in EU's governance recreation agenda. The studies offer that the EU began the process of governance recreation as enunciated in Country Strategy Papers (CSPs). However, critics claim that there exists a major disconnect between the political and economic analyses of CSPs and actual EU support. According to the critics, the EU is too narrowly focused on technocratic aspects of state capacity; it elides the more crucial political aspects. The studies claim the EU has sought to focus on public sector reforms and public finance. It ignores the key political aspects of governance, such as power distribution, ethnicity, and so on, at play. Critics maintain that the strategy epitomizes the current securitization of development (Hout 2010).

Indeed, other studies have, in similar vein, endeavoured to elucidate the disjuncture that exists between the EU's rhetoric of good governance and the actual, negative results. They observe that the EU uses this concept, contrary to what it claims, to forward its own normative preferences in ACP states. The construction of a specific type of state there—thereby eliding the distinction needed between good governance—an administrative concept—and democratic government—form of state (Slocum-Bradley et al 2010).

## **2.7 EU Aid and Africa: From Lome to Cotonou and the AU**

### **2.7.1 Introduction**

EU-Africa cooperation has its roots in the Treaty of Rome of 1957, the legal document establishing the European Economic Community (EEC) (Gibert 2009: 621). In particular, growing nationalist agitations in the colonies for independence

signalled the need for “new economic orientations and a different shaping of relations with developing countries” (Reisen 2009: 84). Under part I, the Treaty made “Overseas Countries and Territories (OCTs) associates of the EEC” (*ibid.* 37); these involved mostly French colonies or possessions in West Africa. The arrangement lasted from 1958 to 1962. The arrangement was reconfigured in 1963 into preferential trading arrangements for newly independent former French colonies (Archer *et al* 1992: 120; Gibert 2009: 621). Known as the “Yaoundé Agreements”, and in effect between 1963 and 1975, the arrangement focused on economic cooperation in francophone Africa to develop infrastructure in the wake of decolonisation.

The Yaoundé Convention led to the extension of EEC relations with Associated states for an additional five years (1964-1969). The Convention was renewed for another five years. At this earlier stage the agreement focused on trade and financial and technical cooperation with the EU, but later broadened to encompass economic cooperation (Reisen 2009). The signing of the second Yaoundé Convention was accompanied by the Arusha Agreement. Signed between the EEC and East African states, Arusha was a reciprocal trade agreement that did not provide for financial and technical assistance from the EEC (Gruhn 1976). This would then undergo further changes over the years (Udombana 2004).

Enlargement of the EEC in 1973, necessitated expanding the scope of Community. The change sought to extend development policy to former British overseas colonies and territories. This led to the establishment of the Lome Convention in 1975 to replace pre-existing arrangements. Lome 1 came into effect on 1<sup>st</sup> April, 1976 (Gibert 2009: 621). The north—including the EEC—was in a particularly vulnerable position vis-à-vis the south at the time. The north faced pinning post-WW II economic boom, as well as the oil shocks. Southern states were also pressing for a New International Economic Order (NIEO).

When negotiations for Lome I commenced, southern states had a much stronger bargaining position. They therefore pressed for non-reciprocity in trade. They also sought a commitment by the EEC to stabilize their export earnings as well as industrial cooperation, among others. The new arrangement introduced a separate protocol covering sugar to provide guarantees for ACP exporters to EEC—in terms

of a negotiated price and quantity. It also sought to stabilize export earnings for certain ACP exports in times of fluctuations—through STABEX—thus providing some amalgam of security to ACP states (Archer *et al* 1992: 125). Lome was more extensive in its terms than any other arrangement between the developed and the developing world. Legally binding; and occupying the second place at the apex of the pyramid of EU's relationships, Lome would govern the relationship between the two sides for most of the cold war.

Lome received mixed reviews over the years. Whereas some detected signs of progress, others denounced what they saw as dominance and failure (Brown 2002). For example, contrary to the expectations of ACP countries that the allocation of EDF resources would involve joint negotiations, actually the EU remained in control. The final decision to fund actually rested with the EDF Committee—an EEC body, meaning that the EEC actually had veto power over any proposed project. Lome has particularly come under searing critique for allegedly having done nothing to promote the balanced development of ACP (Udombana 2004).

The relationship is now governed by a revised arrangement: the Cotonou Partnership Agreement (CPA). CPA is presented by its proponents as aimed at fast-tracking ACP socio-economic development so as to promote “peace, security and to promote a stable and democratic political environment” (Udombana 2004: 71). Based on ‘equality between the partners and ownership of the development strategies,’ CPA took effect in 2000 (*idem*). CPA enunciates a number of agenda items for the parties’ continued engagement, key among them “political dialogue and governance conditionality as the core strategies for promoting democracy and anchoring the rule of law in developing countries” (Sentyiso 2003: 148). The CPA’s main objectives are the reduction and eventual eradication of poverty and the gradual integration of ACP States into the global economy, in the context of sustainable development (Mackie 2008: 144).

The change in ACP-EU relations derived from a changed international environment. When Lome II was negotiated, not much happened. The south was beginning to lose its strong bargaining position in the global economy. This became patently clear at the time of Lome III. Lome III happened at a time when

the ACP had been seriously weakened by the world recession. This saw the north introduce aid conditionality. The bloc had a greater focus on rural development. This connoted a shift from non-interference in ACP affairs. The EU now sought to define priority areas for cooperation (Brown 2002).

It was Lome IV, however, that marked a watershed in ACP-EU relations. Aid conditionality, in the form of SAPs took centre stage. The negotiations for Lome IV unfolded in the context of the Third World debt crisis in the 1980s. The ACP states pressed for such conditionality outside the confines of the IFIs. The EU easily rebuffed the posture, however (Gibert 2009: 699). It was the mid-term review undertaken in 1995-2000 that introduced political conditionality in the relationship. The requirement that ACP countries “observe the rules of democracy and respect for human rights,” (Olsen 2004: 429). The review also introduced performance-based aid rules. Then in 1996 the EU Commission published a “Green Paper” discussing further relations with the ACP—calling, in the main, for ACP states to be split along-sub regional lines to create Economic Partnership Agreements (EPAs). This would then culminate with the signing of the CPA in 2000 (Olsen 2004).

On the political front, the CPA fortifies the emergent commitment to human rights and democracy in ACP-EU cooperation (Zimelis 2011: 390). CPA calls for regular political dialogue, aimed at strengthening cooperation and promoting an effective system of multilateralism; peace-building policies, conflict prevention and resolution. The EU insisted on political reform in the ACP states as a precondition for continued engagement (Brown 2002: 116). The EU, in shifting to ogle political conditionality, was actually responding to a number of developments. The demise of the USSR undercut EU and US rationale for giving succour to oppressive regimes as bulwarks against the Communist menace (Udombana 2004). In addition, the drive towards greater EU integration, compelled the bloc to ogle complementarity between its own policies and those of its Member States (Gibert 2009: 624).

## **2.7.2 EU Policy-Making and ACP**

EU policy-making differs from the process characteristic of sovereign states. It is one of a mixed system of common actors, involving both the EU and the individual Member States.

Analysing EU decision making must, therefore, take into account the following factors: acknowledge multilevel decision making; different actors need to be specified; modes of bargaining and rationalities; different types of decisions; what actors dominate what stage of policy making. The EU's foreign policy process comports with "a system of external relations, a collective enterprise through which national actors conduct partly common, and partly separate, international actions" (Hill *et al* 1996: 5).

The Commission is the executive arm of the EU and has the formal agenda setting powers. It is the main actor in the relationship on the EU side in the EU-ACP parley. In particular, the following Directorates are directly involved, "Development and Relations with the ACP States –responsible for development policy; Directorate General External Cooperation Programmes (EuroAid)—responsible for the implementation of development programmes and projects; Directorate General responsible for external relations; Directorate General for trade; and "echo"—responsible for humanitarian aid, directorates which operate independently and are also based on different interpretations of the "objectives enshrined in the European Consensus on Development (ECD). ECD is the document that gives expression to EU understanding of development as a holistic process.

### **2. 7.3 Supporting Resources for ACP/OTC Development: The EDF**

The European Development Fund (EDF) is the main instrument for providing Community development aid to the ACP and OCTs. Focused on three key areas: economic development, social and human development, and regional cooperation and integration, the EDF has a number of resource streams and instruments: grants managed by the Commission, risk capital and loans to the private sector, managed by the European Investment Bank under the Investment Facility, the FLEX mechanism, aimed at remedying the adverse effects of instability of export earnings. An extra-budgetary fund, and therefore funded by EU Member States

according to a specific contribution key, and subject to its own financial rules and managed by a specific committee, the EDF is concluded for a multi-annual period (usually 5 years) and is implemented within the framework of an international agreement between the European Community and the partner countries.

The establishment of EDF served another goal. As a multilateral fund managed by the EU, it helped share the burden of supporting those countries among EU members. This was not possible under bilateral arrangements, given that some EU Member States did not believe they had direct interests in the ACP states (Enzo 1993).

Recipients favour multilateral—EDF in this case—over bilateral aid—Member State bilateral aid in this case. However, EU Member States take the exact opposite view, perceiving bilateral aid as a major tool of foreign policy. Hence, the Member States when confronted by calls for more aid through EDF, view it as a tactic by the Commission to usurp their foreign policy prerogatives (Mackie 2008). Most EDF resources for ACP aid programmes unfold in four stages. Indicative programmes identify overall priorities before money is allocated via global commitments to specific projects. Then, contracts with third parties to deliver projects are agreed through individual commitments. Payments are then made to the contractors for the delivery of projects (Udombana 2004).

Increasingly, however, EDF aid has undergone “reform”, which now entails giving the recipient “countries greater responsibility for determining objectives, strategies and operations and for programme management and selection” (From “European Development Fund (EDF).” The EU embraced the new approach in the early 2000s “when the European Parliament and the Council of Ministers approved the communication of the Commission on the Policy of the European Community for development cooperation.

This new policy thrust then received a major boost following issuance of European Consensus on Development of 2005, which makes “a clear commitment towards ‘delivering more and better aid’” through increased use of sector-based approaches, now integrated into EDF activities. As part of the European Consensus on Development, “In all activities, the Community will apply a

strengthened approach to mainstreaming the following cross-cutting issues: human rights, gender equality, democracy, good governance” (Europe Aid Guidelines No. 2: Tools and Methods Serie, 2007. Support to Sector Programmes: European Commission: 32).

The European Consensus on Development was really a response to “The Paris Declaration on aid effectiveness, adopted in March 2005,” (*ibid.* 9-118). The Paris Declaration established “international guidelines and targets for raising the quality of aid” (*ibid.* 9-118). The Paris “Declaration strongly engages partner governments and donors around the principles of ownership, alignment and harmonisation” (*ibid.*16). The DAC of OECD “has become increasingly active in promoting common policy orientations and shared learning with respect to what it has termed ‘Participatory Development and Good Governance’ (PDGG) “(Diamond 1995: 61). The EU has increasingly opted sectoral budgetary support, (SWAPs). A response to the failure of SAPs (Barkan 2001: 72), SWAPs purportedly focus on achieving synergies among the various actors implicated in development to achieve “coherent sector policies and strategies” (*idem*). The strategy aims, allegedly, to broaden government and national ownership over public sector policy and resource allocation decisions within the sector; “increasing the coherence between policy, spending and results and reducing transaction costs” (*idem*).

According to the EU, “Budget Support involves policy dialogue, financial transfers to the national treasury of the partner country, performance assessment and capacity-building. Based on partnership and mutual accountability,” Budget Support is keyed to achieving “sustainable development objectives,” through a process of “fostering partner country ownership of development policies and reforms.” The focus on institution building stems from a recognition that to achieve development in these countries, there is need to tackle “the source, not just the symptoms, of under-development” (ACP Overview: Aid Funding—Investing in a Better Future).

Based on this sector-based approach, the government gradually develops a sector programme. Such sector approaches have three legs—namely: sector policy and strategy; sector budget and its medium term expenditure prospect; and sector indication framework through which the sector strategy, action plans and budgets

are reviewed and updated. In a reformulated version issued in 2010, such budgetary support as a vehicle for structural change, now focuses on 5 priority areas: democracy and human rights; improved financial management; promotion of sectoral reforms; state building in fragile states; and improving tax systems. To reinforce this new thrust the EU committed to provide two different types of budget support programmes. Namely: “Good Governance and Development contracts to replace general budget support, sector performance contracts to provide sector budget support to support sector reforms and service delivery. State-Building Contracts to provide budget support in fragile situations” (ACP Overview: Aid Funding—Investing in a Better Future).

The EU increasingly relies on so-called Country Strategy Papers (CSPs) to identify the priorities for its development assistance. The EDS represents the first instance of EU enunciating an overall development policy statement. The statement calls for “introducing greater focus and clear objectives,” in the way the bloc’s aid is given. The EDF programming under Cotonou calls for concentrating Country Strategy Programmes on only two or three focal sectors. When it comes to managing EU aid, CSP calls for “the establishment of the single implementation agency EuropeAid and the devolution of much decision-making and programme management to the EC Delegations in the field” (Mackie 2008: 145).

An innovation in the 10<sup>th</sup> EDF is the creation of “incentive amounts”, extra resources which countries can earn by improving their governance (in particular, management of their financial, tax and legal systems). The 10<sup>th</sup> EDF has a budget of €22 682 billion, divided as follows: €21 966 billion to the ACP countries (97% of the total), €286 million to the OCTs (1% of the total), €430 million to the Commission as support expenditure for programming and implementation of the EDF (2% of the total). The amount allocated to the ACP countries is further divided as follows: €17 766 billion to the national and regional indicative programmes (81% of the total), €2 700 million to intra-ACP and intra-regional cooperation (12% of the total), and €1 500 million to Investment Facilities (7% of the total). The Commission claims that whereas its funding for ACP development has grown, it still faces a plethora of challenges. For example, it claims that its activities must contend with

the EU's complex decision making processes (ACP Overview: Aid Funding—Investing in a Better Future).

#### 2.7.4 The EU and Africa: The post-cold war era

Historically EU-Africa relations focused on development cooperation. The scenario began to change in the early 1990s. Security and politics took centre stage (Gibert 2009: 699). The EU, in its attempt to play a global role perceived Africa as the best staging ground for that goal. This would see the Community focus on state collapse and conflict prevention as key priority areas. It was with this calculus in mind that the first EU-Africa summit unfolded in Cairo in 2000 (Crawford 2001: 237, qtd in Olsen 2004: 434).

The relationship is currently framed by the Joint Africa-EU Strategy 2007; which focuses on matters of “mutual concern”. Specifically, peace and security, migration, trade, regional integration, amongst others (Pere 2009). The AU-EU Lisbon Summit of 2007 came in the wake of then-British Prime Minister Tony Blair's “Commission for Africa” of 2005 report which had sought to refocus world attention on Africa under British chairmanship of G8 and the Presidency of the EU. The Summit led to transmutation in AU-EU relationship through “a joint EU-Africa Strategic Partnership. The Summit “put the African Union at the centre of EU engagement with the continent” (Khadiagala 2009: 218).

Initially, in the wake of the Blair initiative, the EU had sought to re-evaluate its relations with the continent. This process would then see the EU Commission issue “EU Strategy for Africa: Towards a Euro-African Pact to Accelerate African Development,” in 2005. The EU-Africa joint partnership committed both sides to enhanced cooperation “based on Euro-African consensus on values, common interests and strategic objectives for the future” (*ibid.* 232).

The shift in EU-Africa relations drew sustenance from some recent positive developments on the Africa. Take adherence to democracy, respect for good governance and observance of human rights in Africa, for instance. In a radical departure from the OAU's hitherto modus operandi, “The AU's Constitutive Act of

2000 allowed for interference in the internal affairs of its members in cases of unconstitutional changes of governments, egregious human rights abuses and genocide, and conflicts that threaten regional stability” (Adebajo 2009: 53). Indeed, on the security and peace dimension, the focus of AU-EU engagement is continent-wide efforts in this sphere, such as support to Africa Peace and Security Architecture (APSA) agenda (Pere 2009).

The renewed post-September 2001 EU engagement with Africa is emblematic of the extant attempt to link “security, governance and development” (Pere 2009: 257). The security-development nexus assumes added salience in the context of Africa’s vast natural resource endowments. These resources serve as a stimulus for an inevitable battle between traditional players there, on the one hand, and new entrants, such as China, on the other. Still, it is the emergent attempt to link security, governance and development that has opened new vistas of opportunity in EU-Africa parleys. The continent’s current weaknesses make it a particularly inviting target. This despite current attempts to change this situation, as denoted by the articulation of The New Partnership for Africa’s Development (NEPAD) agenda (Udombana 2004: 60).

The enunciation of NEPAD connoted an acknowledgement by Africans of their stygian situation (Steeves 2007: 495). Through NEPAD, Africans committed themselves to fight poverty and achieve sustainable development, thus launching the continent on the path to reclaiming its rightful place in world affairs (Udombana 2004: 62). As part of this new commitment, Africans did advance a number of mechanisms, such as a Peer Review Mechanism (PRM), to assess NEPAD’s implementation (Chiroro 2010).

#### 2.7.5 EU Political Aid and Africa’s post-cold war democratization

Africa is the second most important arena of EU democracy promotion after East-Central Europe (Olsen 2002). The EU, as previously noted, sought to play a more prominent role globally following the demise of the Cold War. The bloc ogled Africa

as the best avenue for launching that ambitious global agenda (Olsen 2004: 376). EU-Africa relationship has increasingly focused on four priority areas: “first, the integration of Africa into the world economy. . . second, the promotion of human rights, democratic principles and institutions, good governance and the rule of law; third, support for peace building and conflict prevention, management, and resolution... as well as combating terrorism and eliminating small arms and land mines; and, fourth, a focus on development” (Pere 2009: 266-267).

The 2000 CPA between the EU and ACP focuses on “political dialogue and governance conditionality as the core strategies for promoting democracy and anchoring the rule of law in developing countries” (Sentyiso 2003: 148). The CPA fortifies an emergent commitment to human rights and democracy through regular political dialogue (Zimelis 2011). A number of studies have therefore sought to assess the EU's new mission of democracy support in Africa.

Some of the studies have examined the challenges that come to the fore in any attempt to analyse EU democracy support agenda in Africa. The studies point to the fragmented nature of EU policy making as an obstacle in this respect. According to the studies, EU African policy consists of 3 policy sub-fields—with different institutional arrangements as well as different decision making rules: CFSP/ESDP, development aid and trade policy.

Although Maastricht elevated the CFSP/ESDP in relation to the other policy arenas, development policy “has for many years had a fairly high degree of autonomy due to its legal basis in the treaty of Rome, and its own Commission and DG” (Olsen 2008: 159). Trade policy also has a strong basis. The studies do maintain that the EU's agenda in Africa in this regard issues from intra-institutional competition within the bloc. The institutions are attracted to Africa because of the continent's weaknesses; it is an excellent site for experimentation. The institutions hope to use Africa to garner additional resources and legitimacy.

Other studies have limned the disjuncture that exists between the EU's rhetoric and actual policy stances. They note, for example, that a number of problems have come to the fore in attempting to establish CFSP for ACP. The studies note that the strategy cannot mask the pursuit of contradictory policies—especially that

between policy declarations and actual actions. They note, for example, that whereas the EU is pledged to advance democracy and human rights, “its implementation has at best been weak and inconsistent,” characterized by the fact that “the amount of aid channelled into promoting democracy and respect for human rights was remarkably limited and the implementation . . . flawed” (Cox *et al* 1997: 40).

They, in addition, limit the forms of governance being pushed by the EU for adoption by the ACP states under the CPA of 2000, finding that the EU aims to construct a specific type of state structure in the ACP-- a conservative state structure.

Other studies find that the EU has prioritized the development of procedural democracy on the continent (Pinkney 1999). However, critics offer that the role-back of the state inherent to plural democracy may circumscribe governmental policy autonomy. By so doing, they caution, the model may paradoxically undermine itself as “citizens may see even less stake in the system” (Pinkney 1999: 2).

Indeed, in a rhetorical escalation, other studies conclude that the EU has tended to equate democracy with transition; it pays little heed to democratic consolidation (Crawford 2009: 150-151). In doing so, however, the EU thereby fails to see the process in a holistic fashion.

Other studies maintain that, in fact, security and foreign policy--and not democracy-- have become the key anchors of EU policy towards Africa (Olsen 1998). They claim, for example, that it was with this calculus in mind that the first EU-Africa summit unfolded in Cairo in 2000. According to this scholarship, it is only in rare instances--especially when the EU’s vital interests are not at stake-- that values such as democracy assume any meaning.

## 2.8 EU Political Aid and Kenya's Democratisation

### 2.8.1 Introduction: The history of foreign aid to Kenya

The trajectory of foreign aid to Kenya is one of high levels of volatility. Whereas the 1980s witnessed huge volumes of aid inflows, the 1990s saw steep declines (Mweiga 2009). Things did change again with the coming of NARC to power. Enthused by what they envisioned as a more reformist government, donors increased aid allocations to Kenya. Nonetheless, foreign aid has continued to lose its once high profile in Kenya, thanks to the entry of other players such as China. It is true that the post-election crisis saw aid assume new prominence, albeit briefly. In this regard, Kenya is not an aid dependent state; foreign aid constitutes only 4 per cent of GDP. Of the aid given to the country, two-thirds came from bilateral sources as grants, with multilateral aid mainly in the form of loans (86%), and with International Financial Institutions, IFIs, as the main source of the latter form of funding.

The volatility that has historically characterised foreign aid to Kenya issues from a myriad of factors. For example, during the 1970s and early 1980s the high aid inflows stemmed from Kenya's standing as the darling of the West in Africa. However, with the Cold War over, at the donors' Consultative Group Meeting (CGM) in Paris in 1991, aid to Kenya was suspended pending meaningful political and economic reforms. This would see President Daniel Arap Moi abandon his intransigent position and legalize political pluralism. As part of the pressure on Moi, "between November 1991 and December 1992 [Kenya] was subjected to frequent suspension of disbursement of on-going aid programmes and pledges of new aid" (Gibbon 1995: 7).

## 2.8.2. EU-Kenya Cooperation

EU-Kenya cooperation commenced in 1976 when Kenya became the first country to sign a National Indicative Programme for co-operation with the European Community under the first Lomé Convention. Currently, the EU is Kenya's second largest development partner after the World Bank. The EU provides grants to Kenya from the European Development Fund (currently 9th and 10th EDF) and from the development instruments of the General Budget of the EU.

Kenya's development strategy as enunciated in documents such as Vision 2030 has four legs: increased economic growth, development of the physical infrastructure, creating a democratic state responsive to the rule of law, human rights and good governance, and increased human capital. The EU casts itself as a major player in the country's socio-economic transformation as well a major partner in the country's integration into the global marketplace. In particular, according to the Commission, the main thrust of Kenya-EU cooperation is designed to complement the Kenyan government's efforts to eradicate poverty and improve the living standards of the population.

EU development cooperation with Kenya as outlined under the 10th EDF, Country Strategy Paper for Kenya (2008-2013) focuses on two key sectors: transport infrastructure, especially as this relates to regional integration, and agriculture & rural development. Other areas in which EU funds are used are macroeconomic support, trade and private sector development as well as good governance and support for non-state actors.

The EU is signatory to the Kenya Joint Assistance Strategy in support of Vision 2030, the Medium Term Plan (MTP) 2008-2012, as well as the National Accord. Signed in late 2010, KJAS focuses on achieving aid effectiveness consistent with the Paris Declaration on donor aid harmonization and coordination. The KJAS aims to support the Government of Kenya's efforts to achieve the Millennium Development Goals and the targets that the government has set for itself in its

national and sector development strategies. The KJAS therefore informs donors' efforts on the greatest challenges facing Kenya today. The larger donors of the EU are partners in the Kenya Joint Assistance Strategy (KJAS). In the financial year 2009/10, the EU Member States and the European Commission disbursed more than EUR 400 million (approximately Kshs. 39 billion) in official development assistance to Kenya.

Although all KJAS sectors receive some EU development assistance, such sectors as agriculture and rural development, democratic governance, roads and transportation, decentralization, among others receive the most attention (Development Cooperation in Kenya - How the EU member states and the EC contribute to Kenya's development (07/09/2010)).

The Kenya CSP was signed in December 2007; this is the framework that informs "the general approach to cooperation for the period 2008-2013," consistent with EDF's policy stance of engaging ACP countries for 5 year phases (Republic of Kenya—European Community: Country Strategy Paper and Indicative Programme for the Period 2008-2013).

In all, during the period the EU committed a total of Euro 400 million, divided into two parts, A & B allocations, with the former receiving Euro 383 million "to cover macroeconomic support, sectoral policies, programmes and projects in support of the focal and non-focal areas of Community assistance; allocations in the latter camp, totalling Euro 16, 4 million, to cover unforeseen needs, such as emergency assistance where such support cannot be funded from EU budget "(ACP Overview: Aid Funding—Investing in a Better Future). For example, the EU has undertaken a number of projects in the country's arid and semi-arid areas to promote long term development and increased resilience. With regard to agriculture, for example, during the current EDF, the EU has committed to support agriculture and rural development in Kenya to the tune of €119.7 million.

As for rural development, during the same period the EU has allocated €66.4 million, with a focus on improved "food security by increasing crop productivity, improving food marketing and increasing drought resilience of local communities in arid and semi-arid lands. It covers agricultural research, spreading knowledge

on high-yielding and drought-resistant crops and technologies as well as better access to seeds, fertiliser, and markets for small-scale farmers. Special attention is given to improving livelihoods in the arid and semi-arid areas of the country. Concrete activities include the development and marketing of crops and fodder that can resist drought as well as the improvement of post-harvest storage. The programme also helps the government in developing better policies for drought management.

### 2.8.3 EU Political Aid to Kenya, 1990-2013: A Review of the Literature

Olsen (2002) focuses on the disjuncture between EU's tough pronouncements vis-à-vis the Moi regime and the actual tepid pro-democracy policy stances taken. According to Olsen, Kenya came under EU pressure to democratize immediately after the demise of the cold war. This would see President Moi move with alacrity to legalize plural politics and hold elections in 1992, which he won—although the polls were adjudged, by some, including the EU, as not fair. In this environment, the EU was reluctant to resume funding Kenya through aid.

However, by 1993 the EU and others claimed to detect some reforms underway in Kenya, although perhaps this meant “macroeconomic reforms, economic liberalization, and the regime’s accountability to international financial institutions, rather than political reform (Ajulu 1998: 284, qtd in Olsen 2002: 143). This development would see the two sides sign a “memorandum of understanding,” that “recognized the success of economic reforms,” this would see the EU support various development initiatives, with “priority” given “to road rehabilitation; it also provided support to various NGO initiatives” (Olsen 2002: 143).

In extending such support to the Moi regime, the EU was at loggerheads with the stances of some of its members such as Sweden which refused to offer bilateral aid. However, with new elections on the horizon in 1997 and with abundant evidence that no serious reform inaugurated by previous foreign aid, the EU did again move to focus on democracy in Kenya anew, including the suspension of aid. However, again once Moi pretended to embrace reforms—including IPPG reforms—the donors again quickly gave in; this would again lead to flawed elections that year. In all, then, the 1990s were characterized by "inconsistent EU policies in Kenya", characterized by a major disjuncture between rhetoric and reality.

Gibbon (1995) focuses on explicating how the end of the cold war led to a review of EU-Kenya relations. He shows how the changed post-Cold war environment led to the abandonment by donors, including the EU, of the then extant view that Africa's main problem was the threat of socialism. In place of this, came a belief that that there were certain deeply-rooted organic features of African social and political organization (for example patrimonialism) which were responsible for its economic and political difficulties. He opines that this shift was remarkable in that, in the 1970s and 1980s Kenya was ogled as an economic and political success story in Africa.

Pinkney (1999) claims to identify the existence of a trade-off between stability, on the one hand, and democracy, on the other, in EU democracy support in Kenya. He concludes that while the EU and other donors played a key role in Kenya's transition to multi-party politics, consolidation of democracy in Kenya remained an

outstanding issue. He traces the lack of democratic consolidation to the fact that “there are other considerations (Pinkney 1999).

Barkan (1994) examines how the EU and others deployed political conditionality in the early 1990s to force an otherwise obdurate President Moi to legalize plural politics. He goes on to show how this political conditionality and the ensuing multiparty elections contributed to dramatic economic atrophy in Kenya in the early 1990s.

Maina (2000) examines the role of conditionality by the EU and others in Kenya's transition. She finds that while important, it alone could not suffice, however. Rather, it needed coupling with domestic pressure to usher in political pluralism.

Brown (2009) concludes that while the EU and others have rhetorically pledged their support for democracy in Kenya, economic and security interests have in fact always held sway. He does, however, find that the EU did vacate this position during the contested 2007 elections, insisting that it would not countenance a manipulated poll.

Bello (2011), claiming that the role of foreign aid in Kenya's development has continued to atrophy, calls for a recalibration of EU-Kenya relations, from one that revolves around such themes as democracy, good governance, and so on, to focus on the pursuit of more strategic objectives.

Kanyinga (2004) examines the changing patterns of foreign aid in Kenya and the motives. He finds that geostrategic calculations informed the vast aid inflows that Kenya received during the cold war. He does, however, note a shift with the demise of East-West rivalries and the onset of the third wave of democracy. The

EU and others appeared to shift attention to supporting democracy in Kenya, although in practice geostrategic calculations still loomed large.

Ndung'u (2012) examines the role and effect of external actors in Kenya's democratization. She in particular examines the tools of diplomacy actors such as the EU used to promote democracy in Kenya.

#### **2.8.4 The African setting**

Colonialism had a baleful influence on the development of the African state (Mbaku *et al* 2003: 1). It is true that the vested interests of powerful social groups in Africa helped to block any moves toward a more transparent and democratic politics in the post-independence era (Adedeji 1994). Even so, the unequal and anti-democratic structures established by the colonial powers are also responsible for the lack of sustainable development in the region (Huntington 2006). Rather than creating an environment conducive for democratic governance, colonial regimes stifled civil and political rights and precluded the development of representative governments. These political systems were manipulated by colonial powers to advance their economic interests and to solidify their authority. African states, in short:

Inherited legacies from colonialism [that] predisposed them to violent conflicts over the distribution of resources and societies' access to political power and basic political identities. Such legacies helped to create a pattern of state and class formation in which African political leaders relied on external support to reward internal allies and ignored the needs of citizens. (Stedman 1996: 24)

The status quo did come under severe assault after World War II, however, with most African nationalists—as their counterparts farther afield, lambasting it as both alien and unrepresentative (Sandbrook 2001). However, with colonialism in retreat, the new African leaders, fired by modernization theory on the one hand, and the dependency school on the other, saw autonomous associations, and by implication democracy, as inimical to rapid economic development (MacLean *et al* 2003), given that tackling “the three demons of poverty, ignorance, and disease required

the mobilization of all national energies behind the incumbent regime” (Young 2002: 38). One analyst notes:

Self-government and independence were granted to the new nations, but the revolution was hijacked by the new indigenous leaders. The African people were never handed their full sovereignty. In the name of national unity and rapid economic development, many basic human rights and democratic rights were sacrificed. Dictatorships, minority governments, and single party regimes became the new order of the day. The people of Africa watched helplessly as their countries became the new oppressors. Country after country suffered as oppression, tribalism and gross injustices ran rampant. (Muna 1991: 61)

It is worth noting, though, that the erection of one-party system “engendered little hostile commentary externally. Indeed, it was celebrated by a segment of the academic analysis” (Young 2002: 38), due to a circumscribed understanding of change inherent to the then extant ideology of development (Chambers 1997). As part of this thinking, for example, while no one vouched openly for authoritarianism, there existed a tacit international understanding that state leaders “should not be obstructed by groups in society that were ignorant, tribalistic, or ‘premodern’” (Pinkney 2003: 93). As a result, although some semblance of pluralism existed during the era, as the state became the main engine of development, there quickly developed “a pattern of patrimonial politics so that ... [o]ffice holders appropriated state resources to consolidate their power bases” (Stedman 1996: 241).

Over time most African states proved unable to provide people with basic services and lacked legitimacy, thereby illustrating how the mythology of the state fails to suffice when in practice governments prove incapable of exercising control over territory under their purview, coupled with lack of legitimacy (Clapham 1996: 13). Yet, “Democratic stability requires both a strong state and societal strength based upon the values of civil society and democratic institutions embedded in a wider network of state and societal organizations” (Picard 2005: 8).

The continent joined the global clamour for democracy<sup>72</sup> by the early 1990s (Bratton *et al* 1992: 419). In Africa the Third Wave emerged rather suddenly (Ndue 1994). As the movement gathered pace, “there emerged a continent-wide democratic movement that accorded no immunity to any form of oppression,

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<sup>72</sup> On the role of the decay of communism, but especially that of the USSR system, in this shift, see, for instance Bukovsky (1990).

whatever the race, religion, or identity of the perpetrators” (Joseph 1991: 13-14). As a result of these changes, in a span of 10 years “Sub-Saharan Africa witnessed 70 presidential elections spread across most of the regions and countries, involving more than one candidate. Only Congo-Kinshasa, Eritrea, Rwanda, Somalia, Swaziland, and Uganda held no multiparty elections whatsoever” (de Walle 2002: 66).

The shift issued from a confluence of factors, key among them the increasing “weakening of African states by the end of the 1970s. As the magnitude of the economic impasse became evident, and the legitimacy of once-seemingly potent regimes frayed” (Young 2002: 39), coupled with “active demands, spontaneous and organized, from a loose, multiclass assemblage of indigenous protest groups” (Bratton *et al* 1992: 420), as well as a growing acknowledgement that the continent’s “crisis was essentially political in origin and character, though it has serious socio-economic consequences” (Adedeji 1994: 124-125).

This change has “helped to generate real political openings and eroded the ability of “authoritarian regimes to perpetuate themselves in power, free of political opposition and Scrutiny” (Harbeson *et al* 1995: 259). Still, “electoral politics has proven disappointing as corruption, abuse of power, and economic crises continue to plague national life” (de Walle 2002: 66)<sup>73</sup>. Indeed, “regular elections are not changing the nature of politics in many countries, away from politics of exclusion, ethnicity, regionalism and corruption” (Kabemba 2008: 31)<sup>74</sup>. Thus “on the evidence to date, African countries are experiencing a liberalization of authoritarian rule, rather than a full-blown transition” conceptualized as instances in which “free and fair elections are held to choose national political officeholders” (Bratton *et al* 1992: 422). Rather, these new systems are characterized by “[a] coexistence of partial democracies and persistent manifestations of authoritarian rule in what had been describes as hybrid or ‘grey ‘democracies” (Harbeson 2005: 275-6).

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<sup>73</sup> For the challenges to and opportunities for democratic consolidation, see, for instance Kohli (1992: 52-64); Dahl (1992: 45-59) argues that to function, democracy requires a certain level of citizen sophistication; Bolivar (spring: 72-87). He argues that Brazil faces major challenges on the road to consolidation, impediments stemming from an institutional architecture that—features an uneasy blend of plesbisciterian and consociational procedure, practices and symbols.

<sup>74</sup> Cape Verde defies this characterization; however, having successfully consolidated its democracy, see Maynes (2002).

Not surprisingly, extant analyses have sought to explicate the origin of these obstacles. A number of studies have, for example, sought to illuminate how the question of power sharing and the role of traditional institutions has framed Africa's post-cold war political development. They warn, "there are bound to be serious setbacks... if careful attention is not paid to a country's history, political traditions, culture, symbolic meanings and economic circumstances" (Owusu 1997: 129-30).

Regionalization of conflicts, and the attendant regional instability, is another problem that has received immense coverage in the literature on post-cold war processes of political development in Africa. According to this scholarship, "[f]ew situations are more threatening to the process of democratization than the violent reverberations of ethnic strife from state to region and back again" (Lamarchand 1992: 102), The Democratic Republic of the Congo as the epitome of this phenomenon. The regionalization of post-cold war African conflicts would seem to comport with the finding that, actually in the "transitional phase of democratization, countries become more aggressive and war prone, not less," (Mansfield and Snyder 2001: 113).

Other scholars and analysts have decried lack of vibrant civil societies as a major obstacle to post-cold war processes of political development in Africa. They contend that respect for associational life, conceptualized as the ability of "citizens to organize in defence of their own interests or identities without fear of external intervention or punishment has long been identified as a key ingredient for democracy" (Fox 1994: 151-152). This empowerment, in turn, they maintain, helps such groups transmute relationships of dependency, replacing them with a new order infused with a greater respect for citizenship rights by the state. In the end, such activities permit "community groups to grow in awareness, to increase their commitment to the common good and better to defend the needs and the rights of the excluded" (O'Gorman 1995: 194). By so doing, civil society can serve "a crucial role in providing effective channels of interest representation for the marginalized [and] thereby assisting in integrating them into the democratic ... system" (Heinrich 2001: 3).

Civil society can also play a crucial role as a facilitator of conflict mediation. Civil society can accomplish this, they contend, through its ability to attract people from

different social backgrounds “on a constant and voluntary basis... thereby mitigating cleavages” (Heinrich 2001: 10). Hence, Africa’s ability to successfully navigate its current political development voyage will crucially hinge on “how well... democratizing African governments are able to negotiate in good faith... with those who represent the important and influential social forces” (Owusu 1997: 148). To that end, then, the existence of strong civil societies in Africa “would provide a foundation for sustainable development, both participation and development” (Shaw 1990: 21).

Another set of literatures has sought to illuminate another major obstacle to post-cold war political processes in Africa: “a history of structural social-economic factors” (Bratton *et al* 1997: 234). The literatures, cognizant of a number of external constraints they claim impinge upon African polities contend that the singular focus on internal variables—for example the claim that on the political front “reforms at the constitutional level of politics occur when two circumstances combine: a state elite runs out of politics resources, and an alternative ruling coalition emerges with an articulate political program” (Bratton *et al* 1992: 434). They caution that such claims ignore the degree to which “the global structures of power and great-power policies have had a profound effect on the process of, and the prospect for, democratization in the third world” (Ayoob 2005: 195).

Critics contend that at a macro level, when it comes to this approach, moreover, although supposedly disinterested, actually “the end product is meant to be a specific version of democracy, that of formal, representative democracy without substantial social and economic transformation, or significant popular involvement” (Suttner 1999: 757). Ayoob amplifies the critique<sup>75</sup>:

[I]t is regrettable that the majority of the literature on democratization produced in the past two decades has concentrated almost exclusively on internal dynamics, and the causes of the reversal of the democratization process have also been sought in the domestic sphere, to the near total exclusion of external influences. This attitude is a carryover from the assumptions of the now largely discredited modernization theory, popular in the 1960s, which attempted to explain Third World Underdevelopment by focusing exclusively on domestic factors. Its critics made the compelling case that modernization theory was an historical exercise that also failed to appreciate the connection

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<sup>75</sup> However, for the exact opposite view that in fact traces Africa’s transitions to exogenous factors, see, among others Geddes (1999: 122).

between the domestic situation in the third world and systemic conditions, economic, political, and military—that to a significant degree determined the domestic context. In short, there has been nothing purely ‘domestic’ in the domestic politics and economics of third world countries. This debate demonstrates that one-dimensional explanations... provide an incomplete picture of the obstacles to democratization in the third world. (Ayoob 2005: 187)

The scholarship does therefore counsel that, “development and democracy in Africa must involve a struggle to reform the existing patterns of economic globalization as well as to reform domestic policies and governance” (Sandbrook 2001: 17), given that it is the “interplay and at times the connivance of local and external factors that have undermined accountability in Africa” (Mkandawire 2010: 1149). One expert notes, for example: “French President Francois Mitterrand welcomed Ould Taya [pseudo-democratic president of Mauritania] in a business-as-usual fashion only a few months after the fraudulent 1992 elections” (N’diaye 2001: 92).

According to the critics, the utility of taking such international factors into account in any serious discussion of Africa’s development becomes obvious: “for weak states and nascent democracies of the late 20th and early 21st centuries external support facilitating their alignment with applicable international regimes may be essential in ways that existing democratic and State theories all but ignore” (Harbeson 2005: 277). This strategy, to help align, otherwise weak African states with applicable international norms, stems from mounting evidence that a number of transnational challenges that have surfaced in the post-Cold War era “have flourished primarily in weak, fractured, or collapsed states such as Sudan, Somalia, Condo (sic), which has suggested broadened recognition that the persistence of such dysfunctional states is not in the interest of the state system as a whole” (276).

The issue of foreign aid as a conduit for capacity building has come to the fore in international development in the new millennium (Riddell 2007). With respect to Africa, for example, increasingly it was acknowledged that decades of development policy had not produced desired outcomes; fingers began to point at lack of domestic institutional capacity as the culprit. Hence, the need to focus on

institution building, although critical voices question the efficacy of this strategy, especially its ability for “building sustainable institutional capacity and promoting self-reliance” (Bossnyt *et al* 1992: 1).

Political processes in Kenya since the early 1990s to date provide an excellent opportunity to test these claims. In particular, the study seeks to elucidate one aspect of foreign aid that has not received adequate coverage in the literature—namely, an assessment of the role played by multilateral political aid in political processes in the developing world. Thus, to remedy that lacuna the study examines the role of EU political aid in Kenya’s political development since the early 1990s to the 2013 elections. Extant studies either usually focus on too many actors, or cover too short a period when assessing the role of a single actor, such as the EU.

## **2.9 Theoretical Framework: Liberal Theory**

A theoretical framework provides the lenses through which a scholar can comprehend the phenomena under examination. This implies, in practical terms, that the scholar must situate his or her work within an appropriate theoretical framework. I find Liberal—or what I variously refer to as Democratic Peace---theory an appropriate theoretical framework for this study. Liberal theory provides the framework that has informed democracy support efforts in the post- cold war era (Agresto 2012; Barry 2012).

The demise of the Cold War heralded the ascendancy of liberalism in international affairs (Pinkney1999). The rise of liberalism issued from an emergent view that participatory governance is good for both domestic and international peace. Liberals have increasingly made the argument in international relations that democracies do not fight each other. Liberal theorists argue that democracy “has

proven to be the best system of governance in which to realize universal human aspirations for freedom and to support human development” (Mitchell *et al* 2008: 161-162). Liberal theory contends that democratic regimes are characterized by norms and structures that preclude them from going to war against each other. Such norms predispose democratic regimes to peaceful conflict resolution over war. Once such regimes are framed by these mechanisms domestically, contends Liberalism, they are likely to externalize the same attributes (Allison *et al* 1999).

As a philosophy when deployed as a foreign policy and international relations theory, Liberalism harkens back to Emmanuel Kant’s 1795 theory of *Perpetual World Peace*. Kant’s had three components: Domestic political regimes – Republican states in which governments sought consent of the governed, that is, regimes in which citizens have rights. Two, free market economies –these would promote international division of labour and, with that, there would issue greater international interdependence. Third and finally, a pacific union among republics would have a snowball effect in international affairs (Russett 1994).

Liberalism’s main thesis is that “societal ideas, interests, institutions, influence state behaviour by shaping state preferences (Allison *et al* 1999: 40). The theory focuses on government because “[t]he state is a fiction, a concept employed by certain groups masking their interest under the cloak of the public interest...Historically pluralism has mostly been a theory of society rather than a theory of the state” (Dunleavy *et al* 1987: 42).

Opposed to state centralization, the theory vouches for diversity within the state. Dating back to classical thinkers such as Locke, Montesquieu, among others, the theory posits diversity as the best bulwark against absolutism. Liberal theory celebrates vigorous interest group activity, viewing policy as an outcome of such clashes (Turner *et al* 1997). Liberalism assigns the state the role of mere arbiter of interest group confrontations (Dunleavy *et al* 1987).

Major players in the international arena have pushed particularly vigorously for the global adoption of liberal political and economic agendas. Liberalism vouches for democracy on the grounds that it best serves the courses of peaceful coexistence and stability within nations. That democracy can eventually contribute to world

peace. Promotion of democracy becomes one avenue of globalizing liberal values, both political and economic (Bosin 2010; Russett 1994). In particular, Democratic Peace Theory postulates that “expanding democracy creates condition congenial to a better world in which conflict, disorder and poverty are replaced by peace, order and stability. Democracy thus contributes to the making of good societies” (Bridoux *et al* 2012: 1947).

However, critics contend that the model is overly focused on procedure to the almost total exclusion of the substance of democracy (Diamond 1993). They argue that while such systems might suffice for developed countries, they would not work in the developing world (Pinkney 1999). There, they counsel, the substance of democracy matters a great deal. They argue, moreover, that although the theory presents itself as disinterested, actually, at a macro level, “the end product is meant to be a specific version of democracy. That of formal, representative democracy without substantial social and economic transformation, or significant popular involvement” (Suttner 1999: 757).

Equally, others deride it as merely descriptive and, thus, serves as apologia for the status quo (Ake 1996). Formal procedural democracy can exist alongside “massive material inequality because it is outside the definition of polyarchy to address the economic sphere” (Hearn 2000: 881). The theory, contend critics, glosses over inequality, positing it as a necessary price to pay for increasing production. They trace liberalism’s increasing acceptance of inequality to Bentham and James Mill. The two made “the first formal separation between the organization of the state as a political democracy and the organization of the economy as a class-based, unequal, capitalist production” (Carnoy 1984: 32).

Persistent critiques of procedural liberal democracy have yielded the Maximalist model. The model focuses on the reality and experience of electoral democracy. It seeks to broaden the definition of liberal democracy. Most of the scholarship of the Maximalist model came to the fore in light of the experiences gleaned from the third wave, especially the challenge of democratic consolidation (see, for example, Ake 1996; Pinkney 1999). Proponents of the Maximalist model caution that third wave experience shows that elections alone democracy do not make (Hearn 2000). According to this scholarship “the social and economic needs of the

populations of developing countries must be addressed if democracy is to take root and succeed in the developing world” (Bridoux *et al* 2012: 1948). Still, the model has received criticism, especially on empirical grounds.

Critics have inquired as to how the model proposes to empirically measure democracy. The procedural model is focused on empirical or measurable aspects of democracy, such as the use of electoral procedures and institutions, fair competition and participation, among others, as mechanisms of governance.

Democracy is a means to an end--a vehicle for realizing better lives--in terms of enhanced welfare. At the normative and policy level I view democracy as a precipitate of enhanced human welfare--in terms of human rights, peace and security, cultural and social welfare. I do therefore eschew the distinctions between the maximalist versus minimalist camps. I focus, instead, on analysing how the liberal model of democracy unfolded in Kenya in practice.

### 2.9.1 Analytical Framework: The Democracy Template

I use some of the items gleaned from Thomas Carothers’s (1999) classification--the Democracy Template as the analytical framework (See the diagram). Based on the template, democracy assistance is assessed on three dimensions: the electoral process, state institutions, and civil society (Carothers 1999). These foci comport with the way I conceptualized political aid in this study.

<b>Sector</b>	<b>Type of Aid</b>	<b>Sector Goal</b>
Electoral Process	Free and Fair Elections Strong national political parties	Electoral Aid Political Party building
State Institutions	Democratic Consolidation Independent, effective judiciary and other law-oriented institutions Competent, representative legislature Responsive local government Pro-Democracy Military	Constitution Assistance Rule-of-law Aid Legislative Strengthening Local government development Civil Military Relations
Civil Society	Active Advocacy NGOs Politically educated citizenry Strong Independent media Strengthening Independent Institutions	NGO Building Civic Education Media Strengthening Union Building

Analytical Framework: The Democracy Template (Source: Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve*, 1999. Washington, D.C.: Carnegie Endowment for International Peace, p. 88).

## CHAPTER 3: Methodology

### 3.1 Introduction

This chapter discusses methodological and other related aspects keyed to meeting the goals and objectives of the study. Namely, an explication of the role that EU political aid has played in political processes in Kenya since the early 1990s to the 2013 elections. I use qualitative methods—mainly document analyses to undertake an analysis of the role of EU political aid in political processes in Kenya since the early 1990s to the 2013 elections. By qualitative research, it is meant an inquiry:

Process of understanding based on distinct methodological traditions— [biography, phenomenology, grounded theory, ethnography, and case study] — that explore a social or human problem. The research builds a complex, holistic picture, analyses words, reports detailed views of informants, and conducts the study in a natural setting. (Creswell 1998: 98)

### 3.2 Research paradigm: Social science research

Social science research is framed by a number of philosophical considerations, assumptions that then inform the type of research design that emerges (Creswell 1998). In particular, problem selection in social science research is informed by a researcher's sociological paradigm<sup>76</sup>: “a perspective or frame of reference for viewing the social world, consisting of a set of concepts and assumptions” (Bailey 1978: 18; Hall *et al* 1996: 28), with such assumptions taking five major forms: [first, the ontological theme] focuses on the nature of reality; at the epistemological level the focus is on the relationship between the researcher and his or her study objects; the axiological assumption focuses on the role of values in research; the rhetoric of research assumption has its glare on the appropriate language for research—whether to deploy an informal literary style or a more formal writing

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<sup>76</sup> However, for critique of obsession with paradigms as a hindrance to understanding, see, for example Hirschman (1970: 329-343).

style; the methodological assumption deals with the issue of the appropriate strategy for research, that is, whether this is best served by an inductive or deductive strategy (Creswell 1998).

Methodology<sup>77</sup> refers to the philosophy or general principles behind research; methods, on the other hand, refer to “the practices of research in terms of strategies and techniques” (Hall *et al* 1996, 29). The conflict between social and physical sciences is over methodology, not method—after all:

A researcher’s methodology determines such facts as how he or she writes hypotheses and what level of evidence is necessary to make the decision whether or not to reject the hypotheses. The methodology of the physical sciences is currently somewhat more rigorous and elegant than the methodology of the social sciences, but this may not always be the case. Specifically, physical scientists are more likely than social scientists to state the relationship between variables in exact terms, usually in the form of mathematical equations. The social scientist is often satisfied to be able to prove [demonstrate] the existence of a relationship between two variables, while saying nothing about the nature of the relationships... The question whether social science methodology will ever duplicate physical science methodology is a philosophical issue that we cannot attempt resolve here... The main point is that there is a wide range of alternative methodologies or approaches and criteria for understanding social phenomena in social science. These methods range from qualitative to quantitative. (Bailey 1978, 26-27)

### 3.3 Research design

This is a single case study---Kenya. Serious issues are usually raised about this approach in terms of scientific rigour and potential for generalizability, however. In particular, according to King *et al* (1994: 124), “No issue is so ubiquitous early in the research design phase of a research project as the question: which cases (or more precisely, which observations) should we select for study?” That question, they observe, has potency, especially for qualitative research since it has a bearing on “the outcome of the research and the degree to which it can produce determinate and reliable results” (King *et al* 1994: 125).

Large-n studies can avoid selection bias if observations are randomly selected. However, in qualitative studies random selection is not always possible given that

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<sup>77</sup> See, for example Fischer (1980).

the phenomena under investigation are not usually “clearly specified” (King *et al* 1994: 21). Even in those instances where random selection is possible, they explain, “it is not necessarily a wise technique to use. Qualitative researchers often balk (appropriately) at the notion of random selection, refusing to miss important cases that might not have been chosen by random selection . . . Indeed, if we have only a small number of observations, random selection may not solve the problem of selection bias but may even be worse than other methods of selection.... [R]andom selection of observations in small-n research will often cause very serious biases” (King *et al* 1994: 125-126). They explain that taking these two factors into account—that is, the danger of selection bias coupled with inadvisability of random selection in small-n studies, “selection must be done in an intentional fashion, consistent with our research objectives and strategy” (King *et al* 1994: 139).

The decision to focus on Kenya was informed by the unique nature of the events that shook the country in late 2007 and early 2008. These events took most people by surprise. Most observers did not expect such cataclysmic events to happen in a select number of African countries, namely Kenya, Ghana Tanzania, Zambia, Namibia and Botswana, (I exclude South Africa). Analysts saw these countries as largely immune to such events. Indeed, most, if not all, of the other aforementioned countries have not witnessed events similar to those that unfolded in Kenya, even though some have in fact had what amounted to highly contested, and volatile elections, Zambia being the best example.

I use the case study approach because it dovetails with one of the objectives of my study—description of the role of EU political aid in Kenya. As King *et al* (1994: 44) explain, case studies are “essential for description, and are, therefore fundamental to social science. It is pointless to seek to explain what we have not described with a reasonable degree of precision”. They continue: the main advantage of “the in-depth case study method is that the development of good causal hypotheses is complementary to good description rather than competitive with it” (King *et al* 1994: 45).

In addition, I deploy the case study approach because it allows me to employ qualitative methodology. Qualitative methodology is far much superior in this

specific study because I want, as another objective, to analyse the role of EU political aid in Kenya's democratization. As King *et al* (1994: 44) argue, "Disciplined qualitative researchers carefully try to analyse . . . rather than to merely report what observers say".

Lastly an important distinction needs to be made between statistical generalizability, on the one hand, and analytical generalizability, on the other. The latter implies that the findings and conclusions of single case studies may be generalized and even used in theory construction. I aim, as another objective of the study, to use the findings of this single case to draw broader conclusions on the role of external aid in Africa's current democratization.

In conclusion, it is true that serious issues are usually raised about the utility of single case studies. Still not only can the approach make a unique contribution to our comprehension of otherwise complex political processes and events; single case studies can provide crucial evidence for theory testing.

### **3.4 Secondary sources of information**

This refers to research using already available data sources—namely, public documents and official records; private documents, such as diaries and autobiographies; mass media; physical, non-verbal material; and social science data archives (Black *et al* 1976). Secondary sources provide an immense body of data (Stacey 1969; Taylor *et al* 1998). In particular, such sources add an "historical dimension [to] primary data that [are] necessarily bound to the present day" (McNeill 1985: 104). This study relies on the following secondary data sources:

#### *3.4.1. Document analysis*

Documentary analyses are categorized in terms of the structure of the document itself; hence, "the relatively unstructured and non-quantitative case study approach

and the structured content-analysis approach that yields qualitative data from verbal documents” (Bailey 1978: 272).

I conducted archival analyses of literature on EU political aid in Kenya, and institutional reform more generally. There exist extensive literatures on these topics; I therefore perused official public, archival, mass media and EU documents. At the national level, I examined government reports and records, official reports of public enquiries, among others. As for the EU, I examined publicly accessible agency records, organization documents, and so on. These documents provide more systematic accounts about “the respective assumptions, concerns, and activities of those who produce them” (Taylor *et al* 1998: 129); and, hence, the decisions taken.

Use of secondary documents for research opens up research of otherwise inaccessible subjects, facilitation of the study of those long since deceased for example. I rely, in my case, on analytical history, by which I mean an attempt to look beyond mere descriptions so as to focus on the “sequence of past events to illuminate the present” (Dixon *et al* 1987: 413). Such an historical analysis would, in practical terms, entail:

A reconstruction of past events with an eye on accuracy; applications of a general theory to the... [Kenyan case], which focuses on how the theory applies... and use history to understand present, or explain how... particular phenomena came to be. (414)

### **3.5. Assumptions underpinning this study**

It is a key assumption of this study that the EU is a key player in Kenya’s political development. Furthermore, it is assumed in this study that as part of its being a key player in Kenya’s political development the EU has provided the country with political aid since the onset of political pluralism in the early 1990s. The two assumptions rest on a belief that the EU’s engagement in Kenya’s political development draws sustenance from a liberal theoretical paradigm, one that views political development as encompassing both institutional development and participation.

### **3.6. Delimitation (Scope) and limitations of this study**

I delimit my study to the onset of political pluralism in Kenya onwards—although I will transgress this as warranted, especially in my exposition on the Kenyan political economy.

My study had to contend with both time and other resource constraints. Equally, I have to contend with the dynamic nature of Kenya's political and institutional reforms; in some respects, this process has just begun. In any event, these limitations do not pose too big a challenge: in some canny way, they provide me a golden opportunity to prosecute the study and, thereby, contribute to scholarly literature in this area.

### **3.7 Significance of this study**

The utility of this study stems from the fact that unlike extant studies that focus on endogenous obstacles—and to some extent exogenous ones as well—to Africa's democratization, I examine the dynamics of political change in Kenya since the early 1990s and the role that one external actor—the European Union has played in that process. Indeed, there exists a major lacuna in the literature on the relative roles of endogenous versus exogenous factors and influences in these reform processes, with some findings showing that foreign interventions have a long lineage in Africa, but with a mixed record.

On the issue of foreign aid in particular, whereas some find that it has had beneficial effects in Africa, others maintain that it has had a corrosive influence. I therefore hope that a dynamic analysis of Kenya's political development since the early 1990s to date will help illuminate the role that EU political aid has played in that process and, by so doing, help thus, advance our understanding of the role that political aid has played in Africa's—and by extension the developing world's—current political development more generally. The study transgresses disciplinary boundaries, thus drawing on other fields in social science, such as history, economics, public administration, sociology, among others, in a bid to gain a fuller understanding of the issues under investigation.

### **3.8. Rationale of the study**

The rationale for the study is informed by the relative paucity of dynamic analyses of Kenya's political development since the early 1990s and the role that one external actor—the EU—has played in that process and the way such aid links with political processes in the country. In this respect, this study is substantially different in that most, if not all extant, studies on Kenya's political development since the early 1990s have tended to focus singularly on one period in that drama, say, the Moi Presidency, and so on; none of those earlier studies have thus far attempted analyses that cover the entire period. To fill this void, this study covers the entire period from the 1990s to 2013 by periodicizing Kenya's political development and then examining the role of EU political aid at each given juncture in that reform process.

In addition, whereas most extant studies on Africa's democratization limn the various obstacles that stand in the way of democratization, most of those earlier studies have, however, inexplicably tended to focus on only one-side of this problem—internal, to the exclusion of external, obstacles. Again, this study aims to rectify this misnomer by examining the role that EU political aid has played in political processes in Kenya since the early 1990s to the present.

### **3.9 Research results**

EU political aid has had mixed results: it was initially critical in helping launch plural politics in the early 1990s—animated largely by altruistic intentions attendant the demise of bi-polar rivalries of the cold war. However, with the onset of the so-called War on Terror and, thus, the elevation of security considerations over governance, democracy, and human rights, previous commitment to altruistic goals has given way to self-interested concerns there, mostly security-related, such as the fight against Al Shabaab in Somalia, Piracy off the Somali coast, among others. However, in the wake of the 2007-08 post-election crisis altruism and self-interest have appeared to combine, with the EU and others now claiming to actively support political reforms in Kenya.

## CHAPTER 4: The Moi Administration, 1990-20021

### 4.1 Introduction

This chapter traces political processes in Kenya during the Moi Presidency, 1990-2002, in the process illuminating the unfolding domestic political scenario in the country during this period and the role that the EU and others played in that process. It aims, by so doing, to show how, because of Cold War-related calculations, from the 1970s up to the early 1990s, Kenya was ogled as a rare economic and political success story in an otherwise hopeless neighbourhood. These cold war-related calculations as well as stellar economic performance in the years immediately after independence helped the new government avoid unnecessary scrutiny. Because of these two factors Kenya became a darling of the donors—capped by the fact that it was the first country to sign the ACP-EU pact under Lome. Indeed, as the chapter shows, although the government's repressive tactics were there for all to see, aid providers to the country either looked the other way at best or actively supported such tactics at worst.

The chapter does however show how this hitherto cosy relationship begun to fray as the Kenya government became increasingly repressive, first during the waning years of the Kenyatta Presidency, and then the Daniel Arap Moi Presidency, especially starting in the early 1980s. Then with the demise of the cold war—and thus the erosion of Kenya's status as a valued strategic ally, the EU and other major donors increasingly decried 'mounting corruption' and the attendant deterioration of social services as well as increased political repression.

The chapter shows how with the end of the cold war, the Moi administration came under sustained pressure, both domestic and external, to undertake political reforms. Moi—as his colleagues elsewhere on the continent—initially rebuffed calls for political change, moving to cast such calls as unnecessary external infringement of Kenya's sovereignty. In addition, the chapter shows how Moi and his lieutenants then launched a vigorous national campaign against political pluralism, continuously warning that this would open the door to ethnic atavism. The chapter next shows how increased external pressure, especially the

withholding of much needed aid in the early 1990s, forced Moi to relent and thus legalise multi-party politics. This would set the country on its first multi-party election in 1992.

Moi and his government would use all manner of tricks, including ethnic violence as well as the fanning of divisions within opposition ranks to win the inaugural multi-party election. The chapter shows how Kenya's foreign aid providers, including the EU, went ahead and endorsed the outcome of the election—disregarding, in effect, evidence that Moi had actually manipulated the election—largely because of their own strategic calculations.

In the wake of the elections and then Moi's attempt to revert to his old authoritarian style, Kenyans increasingly called for major institutional reforms; specifically, a new constitution. Although Moi initially concurred with the opposition on the need for constitutional reform, reformers rejected his attempt to entrust the exercise with foreign experts, viewing this as a furtive move by the president to retain the status quo; this would initially lead to two competing constitution reform visions.

Kenyans did consequently go into the 1997 elections under the old constitution, although again under pressure Moi had conceded to some minor electoral reforms, such as the cross-party nomination of electoral commission officials. However, following the 1997 elections and again amidst widespread allegations of electoral fraud—although again foreign aid givers elected to remain silent on the matter—after some mediation, the two groups would come together to embark on the process. However, Moi would prorogue parliament sine die in readiness for the 2002 elections, in which he was constitutionally barred from vying, just moments before the constitution writing conference endorsed the new document.

Moi had all along suspected that the agitation for a new constitution was merely a ploy to remove him and his party, the Kenya African National Union (KANU) from power. His gamble flopped, however: an opposition alliance decimated KANU in the ensuing general election in December 2002, in the process propelling Mwai Kibaki to the presidency.

The government of President Moi came under sustained critique beginning in the late 1980s to the early 1990s. Critics claimed that the regime had transmogrified

into a corrupt and brutal outfit (Sabar-Friedman 1995). Most of the critiques initially focused on economic mismanagement<sup>78</sup>, but then broadened following the end of the cold war to include calls for the legalization of multi-party politics (Mahamdu 1996). One partisan captures the events then animating the country: in recent years “a battle has been raging over political pluralism in Kenya, pitting multi-party agents against Moi, a long time enemy of free political competition” (Kuria 1991: 115).

In particular, critics decried the fact that the president had destroyed Kenya’s governance realm. That is, a certain level of political maturity that the country had attained in the first two decades of independence, characterized by two factors “that determine the relationship between the rulers and the ruled: one, an actor dimension—expectations that individuals have of each other denote . . . agency; [and] the institutionalized procedures, or rules of the game—at play in that system—structures” (Barkan 1992: 168). According to one scholar, champions of change had the President’s “leadership style of personal rule, his government’s ethnic-oriented policies, and the patronage networks of the regime as the top grievances” (Chege 1994: 48).

On the economic side, by the early 1980s Kenya’s economy long hailed as a model of success faced dolorous circumstances (Kanyinga 1995). Whereas some scholars emphasize the role of political mismanagement under Moi in Kenya’s economic atrophy (Barkan 1992), others argue that the decay had in fact set in much earlier—during the Kenyatta presidency (Hyden 1994). Politically, Moi initially received widespread acclaim on assuming the presidency, especially in light of the cronyism and crudities that characterized the waning years of the Kenyatta regime (Throup 1987).

Faced with pining economic fortunes and limited political legitimacy, however, he increasingly ogled exclusionary tactics. He initially sought to develop an alternative base of support by exploiting the “Harambee”<sup>79</sup> movement (Gibbon 1995); these

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<sup>78</sup> For the view that economic decline can actually serve as a precipitate for political mobilization, see, for example Laumonier (1992: 88-92).

<sup>79</sup> This refers to a once formidable nation-wide self-help movement, since largely jettisoned as the seedbed of corruption. For corruption of the Harambee spirit, especially evisceration of participation and thus empowerment, see Ngau (1987: 523-538).

would gather pace in the 1980s. With this goal achieved, he then sought to cement his hold on power, by now shifting to a divide-and-rule strategy vis-à-vis his erstwhile allies (Sabar-Friedman 1995). He would crown this in the late 1980s by jettisoning the secret ballot method in favour of queue voting<sup>80</sup>. Calls<sup>81</sup> for political change intensified in the wake of these events (Kanyinga 1995), led by an increasingly alienated elite.

Still, the president held firm<sup>82</sup> insisting that a turn to multiparty politics would divide Kenyans along ethnic lines. Moi and his supporters made the astute theoretical argument that for multi-party democracy to work, a society requires crosscutting cleavages. Absent this, society would be racked by conflict, with politics being fought solely along the only line of cleavage—ethnicity.

Consequently, amidst intensifying calls for change, Moi and his lieutenants adopted a double-pronged strategy. Increased repression (Bratton *et al* 1992: 427), on the one hand, and febrile denunciation of the nascent democratic movement, on the other, consistent with vehement denunciations of pro-democracy campaigns by other African leaders, warning that multi-party politics would destroy the country (Barkan 1992)<sup>83</sup>. Nevertheless, in the face of mounting domestic and international pressure, in December 1991, the Moi government acceded to the demands and legalized pluralism. However, in doing so:

[I]n a situation where it was unlikely to be able to gain a majority of votes or seats, the ruling party either had to resign itself to losing power (and possibly worse), or was obligated to bring about a favourable outcome by political engineering. The latter course of action was adopted, with consequences—notably the so-called ‘ethnic clashes’ in the Rift Valley. (Gibbon 1995: 14)

The events unfolding in Kenya derived in part from a changed international environment, specifically changing EU-ACP relations. When Lomé IV was negotiated, it marked a watershed in ACP-EU relations; with aid conditionality, in

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<sup>80</sup> Voters literally stand behind their candidate, cast by proponents as consonant with African notions of democracy, but assailed as an affront to democracy; it lacks secrecy and written records in case of disputes.

<sup>81</sup> For an interactive model of how authoritarian regimes attenuate and especially the role of the democratic opposition in that change, see, for instance Stepan (1990: 41-49).

<sup>82</sup> For an example of an entrenched and intransigent ruling party, see, for instance Wayne (1990: 61-70).

<sup>83</sup> Some scholars detect an unstated assumption here—namely, that traditional African polities resembled one-party systems, a claim which ignores the changes wrought with the advent of the colonial state. For this critique, see, for instance Nyong (1992: 90-96).

the form of Structural Adjustment programmes, SAPs, taking centre stage. Kenya “received its first structural Adjustment Loan (SAL) from the World Bank in 1980 in the context of delays in the finalisation of a Kenya government-IMF agreement, itself a response to a balance of payments crisis” (Mosley 1991, qtd in Gibbon 1995: 11).

At this initial stage, however, and with the country still held in high esteem as a valued ally, Kenya was not asked to undertake macro-economic reforms; rather, the loan aimed to support “a more outward-oriented industrial strategy” (ibid). Although the government then undertook a number of reform initiatives on its own—given that the country then still had a lot of policy autonomy vis-à-vis IFIs, all the same, “the World Bank undertook a comprehensive review of the . . . economy (WB 1983), which formed the basis for the conditionality attached to a second SAL in 1982, “which was focused on “trade liberalisation and agricultural sector reforms,” (ibid), two items that would henceforth structure subsequent interactions between the sides.

Agricultural sector reforms proved difficult, however; indeed, the sector was to emerge as a major site of Kenyan government—donor conflicts in the 1980s, due to its importance to Kenya’s political economy (Ikiara et al 1995: 31). In this environment, donor frustration with lack of reform in the agricultural sector quickly spread to other sectors so that whereas:

Kenya would agree to conditionalities, bank the resulting flows of programme aid and then find reasons for non-compliance. Other than with regard to trade liberalisation, where compliance did occur it tended to be in sectors or sub-sectors basically to the interests both of government and donors, or in areas where the Kenya government was already planning change... (Another trend was for the Kenya government to use conditionalities to actually tighten presidential control over state or semi-state institutions which had previously enjoyed a degree of independence from central interference. (Gibbon 1995: 13)

## 4.2. Legalisation of plural politics, the first multi-party elections and the aftermath

The president did manage to cling onto power in the ensuing elections in 1992. One line of critical scholarship holds that it is the “interplay and at times the connivance of local and external factors that have undermined accountability in Africa” (Mkandawire 2010: 1149). The scholarship does therefore counsel that, “development and democracy in Africa must involve a struggle to reform the existing patterns of economic globalization as well as to reform domestic policies and governance” (Sandbrook 2001: 17). A number of factors accounted for Moi’s victory, key among them lack of serious commitment by donors, divisions within the main opposition formation, the Forum for the Restoration of Democracy, FORD, and the president’s adeptness at both fanning and then exploiting dissensions within opposition ranks

In addition, throughout his tenure, although not explicitly stated, Moi had always sought to cast himself as the protector of minority ethnic groups from domination by their bigger counterparts (Holmquist *et al* 1992). This posture harkened back to his days as a key figure in independent Kenya’s official opposition party: The Kenya African Democratic Union (KADU). KADU had as its remit protection of ethnic minority interests against majority domination—a euphemism for perceived Kikuyu and Luo ascendancy in the post-independence state (Boone 2009). Therefore, with the emergence of FORD on the scene, Moi and his strategists worked over time to portray the new outfit as a re-incarnation of the pre- and immediate post-independence alliance between Kikuyus and Luos<sup>84</sup>.

Similarly, consistent with the President’s warning that multi-party politics would augur ethnic divisions; “bands of armed Kalenjins attacked Luo, Luyha, Kisii, and Kikuyu farmers within or just beyond the border of the Rift Valley between December 1991 and March 1992” (Chege 1994), in “a process of ethnic cleansing” to throw out non-Kalenjin... from parts of the Rift Valley” (Ikiara *et al* 1995: 66). The government sought, by way of this tactic, to demonstrate to the migrant communities the futility of supporting the opposition (Barkan 1994). As part of their

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<sup>84</sup> See, for instance Mboya (1964: 6-12).

campaign against political reform, KANU stalwarts had sought to make Rift Valley—the President’s home province—an exclusive KANU zone. They sought to do so by exploiting latent land grievances there—the goal being to intimidate pro-opposition supporters, for in such instances, “ethnicity emerges as a major vehicle of state-instigated violence designed to intimidate opponents and thwart challengers to the status quo” (Lamarchand 1992: 104)<sup>85</sup>.

The suspicions seemed to gain further credence with a number of organizations, including a Parliamentary Select Committee, concluding that leading figures in KANU had played a major role (Kanyinga 1995). This is not surprising, however: in the face of mounting calls for change, “powerful elites often do take an inflexible view of their interests... In extreme cases, there may be only one solution that will maintain the social position of the group... Compromises that may lead down the slippery slope to social extinction or irrelevance have little appeal to such groups” (Mansfield *et al* 2001: 122-123). The group would therefore use whatever means it can to sermon the masses to its cause (Kabemba 2008; Mansfield *et al* 2001). That African elites can so easily manipulate the masses bespeaks a much larger problem: the existence of weak parties. Instead, in most of the countries, ruling parties usually deploy:

Principles of divide-and-rule, exclusion, xenophobia, outright discrimination, and the victimization of those who share different ideological understandings, especially those with the potential to win elections that are democratically organized. [Indeed, although nominally multi-party states, in most of the countries] when it comes to the management of the economy, the characteristics of a one-party state remain entrenched. Most ruling parties have access to government coffers. (Kabemba 2008: 40-41)

Even more alarming to reformists, once ensconced in power Moi appeared to revert to his old authoritarian ways (Mutua 2009). Following the elections and cognizant of the narrow nature of his victory, and so feeling politically exposed, “the president and his colleagues attempted to persuade members of the opposition to defect to KANU” (Barkan 1993: 98). In addition, state-instigated

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<sup>85</sup> One expert implicates donors in the violence, on the ground that their pressure combined with those of domestic forces, forced governments that had mobilized groups along ethnic lines to privatize violence, as a way to escape international responsibility. See Ruessler (2005: 207-227).

violence as well as official corruption appeared to assume a fulsome turn (Branch *et al* 2008).

Faced with an intransigent president, a number of groups quickly undertook a re-evaluation of this situation. They quickly came to the conclusion that they had made a grievous error by equating democratization with the mere re-legalization of parties, while leaving the rest of the institutional infrastructure of the one party state intact (Grosh *et al* 1996/97). The groups therefore increasingly focused on the constitution<sup>86</sup> as the main obstacle to genuine change (Kagwanja 2009). They, not surprisingly, immediately issued calls for a new constitution; the President initially rejected the calls outright (Mutua 2009). To stanch the mounting tide for constitutional reform, Moi shocked both ally and foe alike when on New Year's Eve in 1995 he made constitutional reform the main thrust of his address to the nation. Acknowledging the inadequacy of the constitution to Kenya's changed needs the president gave an undertaking to oversee needed changes.

However, while welcoming the gesture, reformists simultaneously denounced the president's proposal to entrust the exercise with foreign experts, viewing it as a recondite manoeuvre to sabotage meaningful change. Reformists therefore increasingly ogled a "National Convention Assembly (NCA)," insisting that Kenya had to undertake a set of reforms before the 1997 general elections; if not, the opposition boycott those elections, a stance rejected by opposition politicians as too radical<sup>87</sup>.

In addition, the government insisted that there was no time to undertake such reforms; ironically, while all this was happening the opposition had been secretly negotiating with the government for the enactment of minimum reforms. The talks would lead to what became known as the Inter-Parties Parliamentary Group—leading to an agreement to initiate some minimal reforms before the 1997 general elections. However, Moi moved with dispatch following the passage of the reform

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<sup>86</sup> Actually, the focus on the constitution had begun in the early 1980s and then gathered momentum in the 1990s as part of the agitation for political pluralism; this would see the pro-reform group, operating clandestinely, issue a draft constitution—entitled *Proposals for a model constitution*.

<sup>87</sup> For the role of the specific political environment on the nature of opposition politics, see Lusk-Okar (2004).

agenda to prorogue parliament and call the 1997 elections—stymying, in effect, implementation of the agreed minimum reforms (Brown 2001).

#### **4.3 Renewed momentum for constitutional reform, 1997-2002**

Agitation for a new constitution did continue apace after the elections, however. IPPG had put in place the Constitution of Kenya Review Act. However, KANU continued in its determination to control the process, with Moi maintaining that only MPs had the people's mandate to preside over such a process. Thus feeling abandoned, and also cognizant of previous betrayals, "On December 15, 1999, the Ufungamano Initiative, a clergy-led constitutional review process that included all the key stakeholders except KANU and the NDP" (Mutua 2009: 112)<sup>88</sup> commenced, establishing in the process "the NGO People's Commission of Kenya (PCK) to write the constitution" (idem). Interestingly, though, the president's camp had launched its own constitution writing process on the same day that the pro-reform groups launched theirs, through the Parliamentary Select Committee on Constitutional Review (PSC).

McAdam et al (2001: 225) identify what they call 'brokerage of coalitions across unequal categories or distinct trust networks' as a major agent of democratization. In the specific Kenya case, the two groups would finally agree to a merger following extensive negotiations and the signing of a merger bill. The development led to the formation of Constitution of Kenya Review Commission, chaired by the internationally renowned legal scholar Yash Pal Ghai. The CKRC would then embark on collecting and then collating views from the public on the type of constitutional dispensation Kenyans wanted; this would see it produce "a draft bill to amend the constitution of Kenya on September 18, 2000, in effect a draft constitution" (135).

Again, Moi moved with alacrity to prorogue parliament for the 2002 general elections just as the national constitutional conference which was to vote on the

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<sup>88</sup> On the role of Ufungamano in these activities, see, for instance Mati (2012: 71-84).

new document, known as the Bomas constitutional Conference—Bomas being the national cultural site of the conference—was set to commence. Moi, from the very onset, saw the agitation for a new constitution as a ploy to remove him, and by extension KANU, from power. The president's gamble flopped, however: KANU suffered discomfiture in the ensuing polls by Kibaki and his National Alliance Rainbow Coalition (NARC), an alliance of opposition parties.

#### **4.4. EU Political Aid and the push for political pluralism: The Moi Administration**

EU political aid to “Kenya has provided one of the clearest cases in Africa of donor political conditionality forcing multiparty elections” (Barkan 1993: 58). Foreign aid giving during the cold war issued from geo-strategic calculations (Brown 2005). One analyst explains the situation that then obtained with respect to Africa: “paradoxically, Western democracies regularly and purposively undermined democratic reformers, lest they threaten the hold on power of an autocratic ally” (Siegle 2009: 404). It is instructive, as intimated in the introduction, that EU-Kenya—and by extension EU-ACP—relations commenced at precisely this time; specifically, in 1976, a time when most newly independent countries were busy dismantling democracy and erecting one-party dictatorships! Indeed, from the 1970s up to the early 1990s, Kenya stood as the darling of the West in Africa; ogled as a rare economic and political success story in an otherwise hopeless neighbourhood (Khadiagala 2009). These cold war-related calculations as well as stellar economic performance helped the new government avoid unnecessary scrutiny (Gibbon 1995).

However, the easing and then the end of the Cold War radically changed the governance terrain in the developing world. Liberal theory posits that democratic societies show greater respect for their citizens' rights than do their autocratic/non-democratic counterparts. By so doing, postulates the theory, democratic societies allow their citizens to exploit their full potential. The theory contrasts this situation

with that that purportedly exists in non-democracies. There, argue the theorists, governments “lose touch with the needs of their peoples, and shut themselves off from information that might prevent egregious missteps” (Russett 1994: 105). Liberal theorists do therefore aver that developed countries can use aid to buttress the human rights agenda in the developing world (Call 2001). The shift in thinking resulted in a change in the discourse. Key players in the international arena made adherence to democracy the lodestar of international action (Leonard *et al* 2003).

The hitherto cosy relationship between Kenya and donors began to fray as the Kenya government became increasingly repressive, first during the waning years of the Kenyatta Presidency, and then the Daniel Arap Moi Presidency. The demise of the cold war further eroded Kenya’s status as a valued strategic ally. A midst growing domestic opposition to the Moi government, the EU and other major donors increasingly decried ‘mounting corruption’ and increased political repression. The Moi-donor relations took a turn for the worse at the donors’ Consultative Group Meeting (CGM) in Paris in 1991: appropriating the view that “broad-based economic growth and development require reforms,” the EU and other donors “made no further commitments of aid, stating that they would review progress in these areas ‘in 6 months’ time” (Barkan 1993: 91). This mounting pressure would see Moi move with alacrity to legalize political pluralism later that year (Okuku 2003).

However, increasingly one brand of critical scholarship has decried the fact that liberal theory equates democracy with “competitive elections” (Pinkney 1999: 1). In the specific Kenyan case, once the EU and others had reinforced internal demands and forced Moi to legalize pluralism, they then shifted with alacrity on holding elections as the measure of democracy. This posture left the rest of the institutional infrastructure of the one-party repressive state intact. A midst mounting instances of official abuse in the run-up to the first multiparty elections in 1992, donors kept quiet, only making feeble representations to Moi to change course. Indeed, according to the literature, scholars have sought to question the motives and effectiveness of such assistance. They posit the strategy as a self-serving posture by sender countries (Bosin 2012). Those who question the motives and effectiveness of democracy support cast that effort as selective at best and outright

manipulative at worst. They observe that when the strategic interests of democracy promoters are at stake, those countries are likely to sacrifice democracy. Very seldom do values such as democracy matter (Olsen 1998). Indeed, other scholars writing in this vein have assailed democracy promotion as propaganda designed to gloss over historical domination (Ake 1996).

Critics of liberal theory caution, moreover, that inter-party competition may make for appeals to religious and ethnic loyalties (Pinkney 1999: 2). For example, to deflect growing agitation for political pluralism President Moi and his KANU lieutenants had repeatedly warned that taking that route would lead to ethnic atavism. Consistent with the President's warnings "bands of armed Kalenjins attacked Luo, Luyha, Kisii, and Kikuyu farmers within or just beyond the border of the Rift Valley between December 1991 and March 1992" (Chege 1994). The government sought, by way of this tactic, to demonstrate to the migrant communities the futility of supporting the opposition (Barkan 1994). President Moi hailed from the Rift Valley. Even more alarming to reformists, once ensconced in power following the 1992 elections Moi appeared to revert to his old authoritarian ways (Mutua 2009). For example, state-instigated violence appeared to assume a fulsome turn (Branch *et al* 2008). Interestingly, the EU and other aid providers never took serious action against the regime. The EU has, paradoxically, sought to cast itself as a normative power in international affairs.

#### **4.5. Electoral Assistance**

Monitoring regimes, of which election monitoring is an instance, have an important role in ensuring adherence to international norms and commitments (Simpson *et al* 2012). In particular, election observation has emerged as a key strategy for democracy preservation and, hence, conflict prevention during the third wave of democracy. By so doing, election monitoring can in turn play an important role in institution building; for such external presence "can foster trust among rival parties by providing guarantees, clearing up misperceptions, relaying information back and forth and resolving key issues" (Chakand 1998: 169). Such institutions, once

established, could “help counterbalance state power, provide a context for developing civic skills, encourage norms of reciprocity and trust, articulate societal interests and create peaceful channels for the resolution of conflicts that might otherwise result in violence” (Chakand 1998: 169). However, election monitoring by outsiders can frequently become a target of suspicion and outside hostility as neo-colonial, its advantages notwithstanding (Chakand 1998:168).

Still, with its increased use governments that seek to cheat have developed other strategies. These include the staffing of strategic institutions such as the judiciary with cronies “practices that have far more damaging consequences on governance in the long run” (Simpson *et al* 2012: 501).

In addition, election monitoring usually relies on hastily assembled data, thus precluding the rendering of a comprehensive verdict. What emanate from such data are superficial recommendations. Furthermore, in theory, international election observers should not take their marching orders from the sending agency. This, however, is not always the case. More often than not, other considerations come into play (Teshome 2013).

#### *4.5.1. EU and election observation under the Moi Administration, 1992-2002*

Election observation undertaken by both local and international monitors, aims to guarantee the integrity of the electoral process by communicating the international community’s expectations (Teshome 2013: 1003). As Short-Term Observers (STOs), their larger numbers place election monitors “in an excellent position to render a comprehensive and accurate picture of the entire election, including potential patterns of discrimination” (Binder 2007: 231). However, election monitoring by outsiders can frequently become a target of suspicion and outside hostility as neo-colonial, its advantages notwithstanding (Chakand 1998:168).

Indeed, the impact of foreign aid on sovereignty has emerged as a major theme in the democratisation literature. Specifically, the legitimacy of foreign intervention to promote human rights, democracy and good governance versus the need to protect state sovereignty. Supporters of the shift point to a growing

acknowledgement of the responsibility to protect those under oppression by their own governments (Bishop 1994).

The KANU government greatly circumscribed the activities of election observers during the 1992 elections. President Moi denounced the strategy as an infringement of Kenya's sovereignty. He posited Kenyans as capable of making their own democratic decisions free of external influence (Chege 1994). As a result, most potential observer groups deployed skeletal teams. Most of these focused on the operations of the electoral body in Nairobi.

The literature argues that monitoring regimes, of which election monitoring is an instance, have an important role in ensuring adherence to international norms and commitments (Simpson *et al* 2012). The literature posits election observation as a key strategy for democracy preservation and, hence, conflict prevention during the third wave of democracy. By so doing, election monitoring can in turn play an important role in institution building. External presence "can foster trust among rival parties by providing guarantees, clearing up misperceptions, relaying information back and forth and resolving key issues" (Chakand 1998: 169).

According to the literature, the EU has increasingly sought to present itself as a normative power in international affairs. That is, a global player whose power derives not from military might but rather from moral values that inform both political and economic life. Deriving allegedly from universal norms, the EU's normative power is "founded on and has as its foreign and development policy objectives the consolidation of democracy, rule of law and respect for human rights and fundamental freedoms" (Manners 2002: 241, *qtd.*, in Storey 2006: 331).

Analysts adjudged the ensuing polls as not free and fair –thereby putting Kenya's aid providers in a quandary. However, by 1993 the EU and others claimed to detect some reforms underway in Kenya. This would see the EU support various development initiatives, with priority given "to road rehabilitation; it also provided support to various NGO initiatives" (Olsen 2002: 143). The EU did move to focus on democracy in Kenya anew with new elections on the horizon in 1997. This would see the bloc suspend aid pending "meaningful" reforms". The EU's new posture vis-à-vis the Moi government unfolded in the context of growing domestic

agitations against increased repression coupled with abundant evidence of no serious reforms.

As Short-Term Observers (STOs), their larger numbers place election observers “in an excellent position to render a comprehensive and accurate picture of the entire election, including potential patterns of discrimination” (Binder 2007: 231). Take Kenya’s 2002 elections also. The European Union Observer Mission (UEOM) was in Kenya from mid-November 2002 to mid-January 2003. The EUEOM had over 160 observers. In its Final Report, the EUEOM notes the elections as free and fair, adding, “the conduct of the elections constituted an example for other countries in the region—also because the electoral process resulted in the first transfer of power from one political group to another since independence” (EUEOM Final Report, 2002 elections 4).

The literature argues that monitoring regimes, of which election monitoring is an instance, have an important role in ensuring adherence to international norms and commitments (Simpson *et al* 2012). In particular, the literature posits election observation as a key strategy for democracy preservation and, hence, conflict prevention during the third wave of democracy. By so doing, election monitoring can in turn play an important role in institution building; for such external presence “can foster trust among rival parties by providing guarantees, clearing up misperceptions, relaying information back and forth and resolving key issues” (Chakand 1998: 169). Such institutions, once established, could “help counterbalance state power, provide a context for developing civic skills, encourage norms of reciprocity and trust, articulate societal interests and create peaceful channels for the resolution of conflicts that might otherwise result in violence” (Chakand 1998: 169).

The main objective of the observer mission was “to give an informed and balanced assessment of the electoral process and, by its mere presence, to help reduce tension and minimize any electoral malpractice—thus contributing to a peaceful and transparent election” (55). The mission’s members and the Chief Observer held regular parleys with ECK and government, political parties, civil society, and foreign players. The mission cooperated in these endeavours with other international observers through Kenya-Donor Information Centre (K-DICE). It is

worth noting in this respect that the 2002 elections were important because of their potential demonstration effect regionally, given Kenya's regional status, with the country having served as host on the "negotiations on Sudan and Somalia. Kenya is home to many refugees from Uganda, Sudan, and Somalia" (Barkan 2009: 78).

Still, with its increased use, governments that seek to cheat have developed other strategies that have far more damaging consequences on governance in the long run (Simpson *et al*/2012: 501). Moi appeared to embrace reforms—including IPPG ones--in the face of renewed pressure for political reforms a head of the 1997 elections. However, Moi moved with dispatch following the passage of the reform agenda to prorogue parliament and call for the 1997 elections—stymying, in effect, implementation of the agreed minimum reforms. Interestingly, the donors still pressurized the opposition not to boycott the elections even after Moi had gone ahead and reneged on the IPPG reforms (Brown 2001: 733).

Furthermore, in theory international election observers should not take their marching orders from the sending agency. This, however, is not always the case. More often than not, other considerations come into play, thus distorting the ensuing evaluation of the process (Teshome 2013). Take Kenya's 1992 elections referenced previously. when evidence did emerge of massive rigging, especially in a number of constituencies, some donors moved to suppress this, although others, "such as the EU... issued more critical statements" (Brown 2001: 733).

#### **4.5.2 Liberal Theory and its Critics: EU aid and the Moi Administration**

Liberal theory considers elections—and by extension the electoral process-- the sine qua none of democracy. This has served as the rationale for champions of liberal theory in their calls for aid towards free and fair elections as well as support of the entire electoral process. In the literature, liberalism has, however, increasingly come under attack for attempting to equate democracy with elections (Mitchell *et al*/2008: 162). Some of these critiques seem to comport with the events that unfolded in Kenya.

Once the EU and others had reinforced internal demands and forced Moi to legalize pluralism, they then shifted with alacrity to holding elections as the measure of democracy. This posture left the rest of the institutional infrastructure of the one-party repressive state intact. Amidst mounting instances of official abuse in the run-up to the first multiparty elections in 1992, donors kept quiet, only making feeble representations to Moi to change course. Donors took this position because they “had spent a total of about \$2.1 million on the... elections and were determined to see them take place, even under grossly suboptimal conditions” (Brown 2007: 732). Analysts adjudged the ensuing polls as not free and fair – thereby putting Kenya’s aid providers in a quandary.

However, by 1993 the EU and others claimed to detect some reforms underway in Kenya; this would see donors jettison their hitherto focus on democracy, and shift to a posture of business-as-usual with Moi. Donors now shifted their glare to economic development and political stability; donors replayed this dance during the 1997 elections (Brown 2001: 732). This development would see the two sides sign a “memorandum of understanding” that “recognized the success of economic reforms.”

This would see the EU support various development initiatives, with priority given “to road rehabilitation; it also provided support to various NGO initiatives” (Olsen 2002: 143). However, with new elections on the horizon in 1997 and amidst growing domestic agitations against Moi’s increased repression and with abundant evidence of no serious reforms, the EU did again move to focus on democracy in Kenya anew, including the suspension of aid pending meaningful reforms.

However, once Moi pretended to embrace reforms—including IPPG ones—the EU and other donors again quickly relented. However, Moi moved with dispatch following the passage of the reform agenda to prorogue parliament and call for the 1997 elections—stymying, in effect, implementation of the agreed minimum reforms. Interestingly, the donors still pressurized the opposition not to boycott the elections even after Moi had gone ahead and reneged on the IPPG reforms (Brown 2001: 733).

#### 4.6. EU Political Aid and Institutional Reform: Civil Service Reform

The issue of foreign aid as a conduit for capacity building has come to the fore in international development in the post-Cold War era. Foreign aid as a source of capacity development is a response to extant thinking in international development that lack of capacity represents the biggest obstacle to development, especially in Africa (Bossnyet *et al* 1992). Capacity development rests on a belief that institutional weaknesses constitute the main obstacles to structural change.

A critique of earlier economic theories of development that neglected the impact of context as well as the role of ownership by local players on development, and alert to the charge that “centralized urban and professional power, knowledge and values have frowned out over and often failed to recognize the knowledge of rural people themselves,” (Chambers 1993: 82) the new approach seeks to incorporate participation in development. As part of this bottom-up approach to development, the new focus aims to transcend the earlier fixation on economics, by involving all societal sectors. Available literature indicates general principles under girding CD: local participation and locally driven agenda; building on local capacities; ownership and respect of local values; long-term vision; and targeting sustainable results.

In Kenya civil service reform commenced in the early 1990s with the appointment of the ‘Dream Team’; that is, the appointment of super-technocrats, under Dr Richard Leakey, to revamp the bureaucracy. A view had developed over time that lack of domestic institutional capacity obstructed development in Africa; hence, the need to focus on institution building (Bossnyet *et al* 1992: 1).

In analysing the concept capacity and capacity building and what role they play in public service management, the two terms become important when it is understood that a successful, efficient civil service requires competent people who can perform the tasks commensurate with their specific ranks (Mentz 1997: 1). He traces the problem to the way public administration developed under colonialism, especially its preclusion of the development of neutral competence, with bureaucracy serving merely as an instrument of control vis-à-vis the ‘natives’. At independence most of the new regimes retained the status quo (Mentz 1997: 2).

Kenya's civil service, like its counterparts in the third world, traces its origin to colonial rule, a system that supplanted pre-existing institution (Bennett *et al* 1961). What developed in Kenya under colonialism was an administrative/bureaucratic state in so far as the "roles of administrator and politician were usually amalgamate" (Turner *et al* 1997: 86). However, by the time of the launch of plural politics in the early 1990s, the Kenyan civil service had turned into a pale shadow of its former self; its performance was at an all-time low (Nyong 2009).

By the mid-1990s Kenya's leading donors, the EU key among them, began to agitate for civil service reform, with a focus on achieving good governance, conceptualized as the effective and transparent pursuit of public policy by government, while also respecting human rights and democratic principles (Bekoe 2006). The shift in emphasis unfolded in the context of the emergence of the good governance discourse—a call for fundamental change in politics and administration as essential to development—a stance pushed particularly vigorously by IFIs and northern governments beginning in 1989 as part of so-called New Public Management agenda (Turner *et al* 1997)<sup>89</sup>.

According to Nzioka, "the Civil Service Reform Programme and Action Plan was developed and adopted in March 1992. The long-term objective is to improve efficiency and productivity of the Civil Service" (1994: 1). To do so, the government created a "Steering Committees on the CSRP at the national, provincial and district levels, as well as in each ministry with a national secretariat as its operational arm" (Sawe 1997: 1).

Out of these efforts, a number of policy issues/themes did come to the fore: the issue of staffing; the need to re-orient civil service structure from traditional administration to management-based; the need for training and capacity building; the need to shift towards performance-based management; the need to reform financial management; and the issue of pay and benefits. In this respect, reform of organisation structures aims to achieve better defined "hierarchy of authority and

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<sup>89</sup> NPM is a response to critiques of traditional bureaucracy; it focuses on strategic management—a situation whereby public managers, through a deployment of the various components of strategic management, are able to reshape public sector enterprises in ways that enhance their organizations' worth to the public, both in the short and long run, by reconfiguring their organizations to adequately respond to the opportunities and challenges posed by their environments. See, for instance Moore (1995).

span of control and more accurate job descriptions among other initiatives” (Nzioka 1994: 1).

The reforms unfolded in an environment framed by mounting fiscal constraints; thus, the aim was to move from orthodox bureaucratic administration—seen as the incubator of inefficiency—and towards public management—with a focus on results—and is in line with NPM. The reforms were framed by a number of issues: merit appointments; remuneration concerns, time, and so on. In Kenya, the history shows that after independence, the civil service expanded rapidly up to the 1980s so that over time fears emerged that the public wage bill was becoming unsustainable, with most of the resources going towards salaries and nothing being directed towards capital investment; this then opened the way for the launch of SAPs, under Kenya’s 6th Development Plan, 1989-1993 (Kiragu 1988).

The attempt had only minimal success, mainly a major shrinkage in the labour force from about 300000 to around 200000 civil servants—although the wage bill did continue to grow in percentage terms in comparison with other regional countries—as well as the establishment of Local Authority Transfer Fund (LATF) (Public Sector Reform and Institutional Capacity Building: Joint Statement by Development Partners at the Kenya Consultative Group Meeting, 24th-25th November 2003). A number of other challenges also lingered: key among them lack of institutional capacity, a consequence, largely, of the programme’s rushed nature; as well as the need for ownership of the reform agenda by those directly affected. In addition, corruption remained endemic (Nzioka 1994: 1).

The Dream Team’s failure stemmed in large part from the fact that president Moi was not totally committed to the reforms (Nyong 2009). This implied, contrary to the nostrum of NPM, that without focusing on the political environment, even a highly qualified team could not achieve much (Chandler 2006: 2).

Indeed, a critical set of literatures has focused on what it views as a furtive attempt to reduce development to a managerial undertaking. The literature posits that issues of programme design are political and not technical, given their bearing on state capacity and legitimacy (Brynen 2008; McGovern 2008). Viewing development as multifaceted, the literatures caution that formulating and

“organising policy for global development is thus far from being a mechanistic or technocratic exercise” (Grimm *et al* 2012: 4).

The literatures call for a focus on both managerial and political aspects of development. Yet under the extant managerialist strategy, continue the critics, issues of participation receive short-shrift. As a result, issues of political development in the Third World “that need mediating—are then quickly criminalized to be punished” (Chandler 2006: 6). Instead to suffice, maintain proponents of this stance, foreign aid policies should facilitate:

[T]he building of legal infrastructure and participatory mechanisms, and that they take into account local perceptions, realities and responses. At the very least, donors must discontinue support of non-inclusive ‘private’ organizations and reform by decree. Rather, donors should broaden the base of recipients and support structures to include all relevant parties. Indeed ... th[e] evidence . . . shows that aid projects that implicate sensitive political processes are very difficult to administer effectively without engendering negative consequences for recipients and/or donors. (Wedel 2001: 202)

#### **4.7. Conclusion: EU political aid and the Moi Administration, 1990-2002**

What, then, is the overall perception of EU political aid towards Kenya during the Moi-era, 1992-2002? On the one hand, the EU gets high marks for its role in Kenya’s political development during the 1990s, by first helping incubate civil society. This civil society would then in turn work with external players such as the EU in pressurizing Moi to repeal section 2 (a) of the constitution, thereby ushering in political pluralism. With the legalisation of political pluralism and the emergence of opposition voices both in and outside parliament, and in spite of attempts by then-president Moi to sabotage Kenya’s nascent democracy, the country did become more open politically; for example, the government could no longer imprison regime opponents without trial.

Still, human rights abuses, especially by the police and state-sponsored groups, remained endemic during the Moi regime. In addition, and also as already discussed, save for the agitation for multi-party politics, once this was achieved, donors did not seek any other meaningful reforms.

What explains donor, including EU, behaviour, that is, the apparent leap-service to the electoral process, in Kenya in the 1990s? Strategic calculations help explain donor behaviour. A major player on the donor side—former U.S. Assistant Secretary of State for African Affairs, Herman J. Cohen would explain in later years the rationale for his country's posture in this particular instance:

For us in the Bureau of African Affairs, it was not the onset of democracy that was important. It was our ability to resume full-scale economic and military cooperation. But we had to get over the democracy huddle first, indicating how important that issue had become in our Africa policy in such a short time. (Cohen 2011: 232)

Cumulatively, however, EU efforts during the 1990s, coupled with those from other external actors as well as domestic actors helped lay the proscenium for the pivotal elections that took place in the country in 2002. The elections led to the first transfer of power from one political party—KANU—to another—NARC—since independence, the topic for the next chapter.

## CHAPTER 5: The NARC/Kibaki Administration, 2003-2008

### 5.1 Introduction

Chapter five on the Kibaki/NARC administration, 2003-2007, seeks to explicate political processes in Kenya during the country's pivotal transition from the Moi—and by extension KANU—rule and the role of EU political aid in that process. Given that NARC's was the first post-dictatorship government in Kenya, this chapter provides an opportunity to assess how the EU interacted with this new, apparently, reformist government. The chapter aims to gauge the instruments the EU deployed in its engagement with NARC.

The chapter opens with a discussion of the euphoria that attended the NARC victory, and the palpable hope that many Kenyans and their foreign supporters had. Initially the NARC administration appeared to keep its promises, especially when it came to economic renewal, and some social policies, such as free primary school education. In addition, the country appeared to enjoy unprecedented levels of political freedom.

However, the chapter shows, with time, elite fragmentations, especially the failure by Kibaki and his wing of NARC to honour their pre-election Memorandum of Understanding (MoU) with Odinga's Liberal Democratic Party (LDP) began to sap reform momentum. The divisions would take a particularly dangerous turn on the issue of constitutional reform. The two political camps vied to get a constitution that would best serve their personal and partisan interests, disregarding, in the process, the wishes of Kenyans. These elite divisions would undergird the 2007 elections. Odinga and his camp viewed the elections as the best avenue for dislodging what they increasingly denounced as a corrupt, and ethnic-oriented Kibaki-led administration. Kibaki and his wing of NARC were, for their part, determined not to lose state power. They feared that a defeat would spell doom not just for themselves but for members of their ethnic community also.

This polarized atmosphere would help trigger post-election violence, with Odinga and his supporters livid at what they saw as blatant electoral fraud perpetrated by

Kibaki, working in concert with the Electoral Commission of Kenya (ECK). The chapter concludes with an examination of the role that the EU played in Kenya during this period, including its activities during the post-election violence.

In 2002, the National Alliance Rainbow Coalition (NARC), an alliance of two major opposition parties: Kibaki's National Alliance of Kenya (NAK) and Odinga's Liberal Democratic Party (LDP) (Khadiagala 2009), finally dislodged KANU, the party in power since independence. In the most basic terms, Kenyans saw Kibaki as their equivalent of Nelson Mandela: a man heralding the dawn of an incandescent era. Yet no sooner had Kibaki assumed power than he and associates promptly showed their true colours (Mutua 2009).

In its push to power in 2002 NARC had made a number of promises, key among them the revival of the economy and concomitant creation of jobs, constitutional reform to decentralize power and decision-making away from an imperious presidency (Kagwanja 2009). To its credit, on acceding to power, the new government did register a number of successes. On the economic front, for example, it presided over impressive economic revival and with this a reduction in poverty levels. Socially, it introduced free primary school education (Klopp 2009: 144).

The vignette was, however, different on the political front. Whereas NARC came to "power in 2002 asserting a civic nationalism and riding on the crest of a multi-ethnic coalition," (Kagwanja 2009: 373), once Kibaki took charge of Kenya's imperial presidency, however, he quickly took decisions that would over time precipitate the disintegration of the coalition (Klopp *et al* 2007: 18). In the mould of "predecessors Jomo Kenyatta and Moi, Kibaki sought to inherit the existing power and seemed to have no intention of replacing it, despite much rhetoric to the contrary" (Akech 2010: 12).

In the count-down to the 2002 general elections, then-President Moi had refused to allow for an open contest to pick KANU's flag bearer. He, instead, unilaterally nominated Uhuru Kenyatta, son of Jomo Kenyatta—Moi's predecessor- as the party's presidential candidate. Moi's choice of Uhuru precipitated the defection from KANU of key figures such as Raila Odinga, Kalonzo Musyoka, among others.

The leaders would then take over LDP and commence negotiations with NAK; these would lead to the creation of NARC. NARC would go on to discomfit

NARC would go on to discomfit Kenyatta in the ensuing elections, “capturing 125 seats in parliament to KANU’s 64... Kibaki won 62 per cent of the presidential vote to Kenyatta’s 31.3 per cent” (Steeves 2009: 499). McAdam *et al* (2001: 265), identify coalition formation between segments of ruling classes that are currently excluded from power as a major agent of democratization.

## **5.2 NARC in power: Elite fragmentation, and other unfulfilled pre-election promises**

As part of the negotiations leading to the formation of NARC, Kibaki and his team had signed a Memorandum of Understanding (MoU) with the LDP, promising to create the post of Prime-Minister for the leader<sup>90</sup> of LDP if elected, and to share other government posts equally. They also pledged to adopt “consensus-based decision-making as the basis of NARC’s interethnic coalition” (Kagwanja *et al* 2009: 261). The MoU was informed by provisions of the Bomas Draft Constitution (see the discussion below). However, no sooner had the coalition romped to power than a major power tussle ensued between the erstwhile allies. Kibaki’s inner circle was determined to tame Odinga. The group insisted that not only did Kenya’s then existing constitution not allow for such terms as contained in the MoU; “power-sharing would divide the country along ethnic lines” (Kagwanja 2009: 372).

Once in power Kibaki did not honour his other pre-election commitments either. Take the issue of corruption, for instance. Contrary to a previous pledge to tackle corruption, the vice appeared to take a fulsome turn. Some of the president’s closest allies were accused of involvement in the so-called Anglo-Leasing scandal (Kagwanja *et al* 2009: 264). With its genesis in the Moi era, Anglo-leasing involved a drive to “purchase security-related equipment and services from abroad under ‘lease financing’ Contracts with certain companies” (Nyong’o 2009: 171)—including the fictitious Anglo-Leasing Company purportedly registered in the UK.

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<sup>90</sup> This was understood to mean that wing’s leader, Raila Odinga; as stated previously, once in power, and probably because of this issue, the Kibaki-wing of the coalition reneged on the MOU.

On taking power, despite clear evidence to the contrary, the new President's close associates decide to push through the project "with the aim of stealing public money" (Kagwanja *et al* 2009: 267). One commentator captures the decay of the NARC regime on the corruption score:

Within a short span, Moi era wheeler-dealers had crawled their way from the woodwork and penetrated the Kibaki administration, working in cahoots with certain cabinet ministers... Meanwhile, senior people in government were busy feeding the public with the lies that Kenya was getting the best of the deals by partnering with the East and not the West as had been the tradition—not necessarily a bad thing in itself except the thievery and gluttony that accompanied the transition.<sup>91</sup> (Ngotho, Daily Nation, 11th June 2017: 24)

Take the pre-election promise to enact a new constitution within the first hundred days, also. Once in power, the Kibaki-wing<sup>92</sup> of NARC reneged on this "thereby alienating the Kenyan public and civil society" (Kagwanja *et al* 2009: 269). Indeed, they only gave way—and grudgingly so, in the face of intense public pressure. This paved the way for the reconvening of the Bomas constitutional conference (Branch *et al* 2008).

Yet those who had thought that by this action Kibaki and associates had finally signed onto this important national exercise would soon receive a rude shock. Once the Conference resumed, it immediately became clear that Kibaki and his team had only conceded to the reconvention for tactical purposes. Namely, to stanch mounting public opprobrium against the government, while not giving into the substantive agenda (Steeves 2007). From the onset of the meeting, the Kibaki-wing of NARC did everything to obstruct the work of the Conference. Initially key figures associated with this group, for example Kiraitu Murungi (then Minister for Justice and Constitutional Development), sought on a number of occasions to induce the then-Chairman of the constitutional process, Professor Ghai to alter the proceedings to suit the group's agenda.

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<sup>91</sup> For Kenya's Eastward policy shift, but especially towards China, see, for instance, Ochami (2008).

<sup>92</sup> This was NAK—and even here it was really the DP wing of the triumvirate—that was determined to retain the status quo; matters were made worse by the untimely death of Vice-President Wamalwa just a few months after NARC's accession to power; Wamalwa had acted as a moderating voice between DP—and therefore Kibaki's—conservatism, on the one hand—and LDP—and therefore Odinga's—radicalism.

This goal became patently clear the moment the constitution drafting Convention issued “a new constitution which de-clawed the ‘imperial presidency’” (Steeves 2009: 500). Despite coming under intense pressure, Ghai valiantly rebuffed the group’s nefarious overtures, however. With this route foreclosed and sensing imminent defeat, the group then walked out of Bomas en masse. However, undeterred and guided by conference rules, the delegates proceeded to overwhelmingly endorse the draft constitution, which provided for a parliamentary system of government by creating the post of executive prime minister and also introduced a four-tiered system of government (Mutua 2009).

Following the discomfiture at Bomas, the camp then sought to hijack the constitution review process by altering the role of parliament in the review process. Heretofore parliament could only either endorse or reject the entire draft. Under altered rules it could now “amend the Bomas Draft” (Steeves 2009: 500). The group, in a subsequent manoeuvre, would push through parliament The Constitution of Kenya Review (Amendment Act). The change gave the group the authority to amend the Bomas Draft Constitution before submitting the document to a referendum. The draft that eventually emerged out of the ensuing drama represented a total evisceration of the Bomas document.

The ‘Wako Draft’ would not only see the enhancement of presidential power. More surprisingly, it sought to eliminate the proposed devolved system of government while retaining a highly centralised state. Instead of devolution the Kibaki-camp oglede de-concentration, with technical efficiency and thus greater effectiveness—as the main criteria. The Kibaki camp saw the Bomas draft, especially devolution—which proponents posit as the only true form of decentralization in that it has in-built mechanisms to curb centripetal pressures (Turner *et al* 1997)—as the beachhead of a recondite manoeuvre for the ethnic balkanization<sup>93</sup> of the country. In particular, whereas those not occupying the presidency agitated for reduction of presidential power, “a Kikuyu ethnic cabal, the group from which president Mwai Kibaki came, was determined to stall the constitution-making process , unless it

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<sup>93</sup> This belief did, paradoxically, become a self-fulfilling prophecy: as discussed elsewhere in this study, ethnic balkanization became the hallmark of the 2007-2008 political crisis.

retained executive authority in his person” (Mutua 2009, 22-3)<sup>94</sup>. The Bomas Draft, as previously explained, had sought to curtail presidential power while also establishing a four-tiered system of devolved government.

Having manipulated the constitution-making process, the Kibaki camp would then present the document to the public for a referendum. This would see the emergence of two contending camps, the Banana camp favouring the Wako Draft versus the Orange camp. The latter camp, composed of LDP-allied ministers, led by Odinga, working in collaboration with opposition leader Uhuru Kenyatta, was determined to defeat the draft. In the ensuing contest, Kenyan voters decisively rejected the Wako Draft by “58.5% for the ‘no’ side to . . . 41.5 %” (Steeves 2009: 500-501). Because he had invested so much of his own political capital in the referendum campaign, in the wake of the ‘no’ camp’s victory, Kibaki, feeling personally rebuffed, came under immense pressure from his inner circle to dismiss LDP-allied ministers from his cabinet (The Waki Commission Report 2009: 30). This would see the president first dismiss “his entire cabinet and, to avoid the possible embarrassment of a no-confidence vote, he prorogued parliament until March 2006” (Steeves 2009: 5001).

When he finally reconstituted his government he dismissed all the LDP-allied ministers, while co-opting some opposition MPs in order to buttress his weakened government. However, some appointees rejected the offer, viewing Kibaki’s as an illegitimate government. As for Odinga and his group, in the wake of their victory they would transmogrify into the Orange Democratic Movement (ODM), having adopted the name of the victorious camp’s symbol in the referendum. The NARC rump would, for its part, become NARC-Kenya. However, in the run-up to the 2007 elections ODM would split into two: a Raila Odinga-led ODM Party, on the one hand, and a Kalonzo Musyoka-led ODM-Kenya, on the other. The split purportedly hinged on the mode to deploy in the selection of the party’s presidential candidate

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<sup>94</sup> One school of thought views the ogling of presidentialism as rooted in an authoritarian, hierarchical and personalistic political culture. For this interesting take on the issue, see, for instance Laumonier (1990: 193) and Rappard (1936).

(Namunene *et al* 2007: 4). Meanwhile, internal struggles within the NARC rump would force Kibaki to found the Party of National Unity, PNU<sup>95</sup>.

In the meantime, there had also emerged a split in KANU. One faction led by Uhuru Kenyatta joined Kibaki to create the Party of National Unity in 2007, while William Ruto led the other side into ODM. The National Executive Committee (NEC) of the Kenyatta-led wing of KANU rationalised its decision to support Kibaki. According to the NEC, the party's "priority was to be part of the next government and he [Kibaki] was the candidate 'likely to win' the presidential election" (Warigi 2007: 13).

### 5.3 The 2007 elections

The 2007 elections were the most competitive since the launch of plural politics in the early 1990s. With the 2005 Constitutional referendum as the context, "transparency and accountability" became the main campaign issues in the elections" (Klopp 2009: 146). Given the salience of ethnicity in Kenyan elections, especially in rural areas, the elections were also characterised by "ethnic mobilization strategies" (Kagwanja 2009: 373). Kikuyus were characterized as economic and political parasites, on the one hand. PNU activists, for their part, sought to ignite anti-Odinga sentiment in a bid to create a lager mentality among the Mt. Kenya peoples (*ibid*).

ODM sought to exploit what it perceived as widespread anti-Kikuyu sentiment in the country. To this end, Odinga "campaigned on a reformist, populist anti-corruption platform that promised radical change... although the unofficial ODM rhetoric was tinged with a heavy dose of anti-Kikuyu sentiment." She continues: out to exploit historical grievances, whether real or imaginary, against the Kikuyu, ODM's "overarching idea was to unite all of Kenya's minority ethnic communities against its largest ethnic community, the Kikuyu" (Klopp 2009: 145-146). Odinga's populist tone aroused great apprehension among Kikuyus, especially the call for devolution (Branch *et al* 2009: 17).

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<sup>95</sup> See, for instance Sunday Nation Team (2007: 1 and 13).

Kibaki campaigned principally on his socio-economic record. However, his party PNU “sought to question Odinga’s relationship with Kenya’s Muslim community. The ODM chief had signed “a MoU with that community, and also promised to review Kenya’s position in the War on Terror if he won the presidential race” (Kagwanja 2009: 377). Many PNU leaders “used hate speech in their rallies and reinforced the notion that Kikuyu should vote as a bloc and not let the state slip from what they claimed was their communal grasp” (Klopp 2009: 146). Given the ensuing fear among Kikuyus Kibaki was determined to retain power at any cost. Kibaki’s stance rested on the rather misleading belief borrowed from Kenya’s recent history “that the coercive apparatus of the state was sufficient to cope with protests in the aftermath” (Branch *et al* 2009: 17).

The elections themselves were, however, grossly mismanaged. Both domestic monitors and international observers reported “many anomalies: unusually high voter turnout... Most important... the ECK showed clear signs of manipulating the vote count with bias towards government” (Klopp *et al* 2007/8: 1). Kibaki’s re-election was, for instance, “questioned by international monitors, the EU, and eventually the United States and other major powers” (Stevenson 2008: 11). Nevertheless, the ECK went ahead to declare him the winner. The actual voting itself went well, with the 2002 elections in which Kenyans had finally rejected KANU serving as the backdrop. Indeed, Election Day reports talked of huge but peaceful queues, with Kenyans, but especially the youth, eager to exercise their democratic right.

When the vote count commenced, initial results showed Odinga a head with a healthy lead. However, most of these initial results came from his strongholds. As the results continued to trickle in and with only a few constituency results remaining, the ECK first delayed to announce the results and then at night after three days waiting for who would be the president, that is, on 30<sup>th</sup> December 2007, the chairman of the Electoral Commission was whisked to the State House, leaving the opposition at the Kenyatta International Conference Centre. The ECK then controversially declared Kibaki the winner; he was subsequently sworn-in for his final term at around 7:00 PM (Kagwanja *et al* 2009).

Interestingly, however, even after controversially declaring Kibaki the winner, the ECK chief, Samuel Kivuitu, and a number of his commissioners maintained that the vote tallying itself was flawed and so they could not state unequivocally whether Kibaki had actually won! Indeed, “Five ECK commissioners distanced themselves from the announced results” (Klopp *et al* 2007/8: 1). Although the final tally showed Kibaki the winner “with 4,584,721 votes against Odinga’s 4,352,993 votes, followed by Kalonzo Musyoka’s 879,903 votes” (Kabukuru 2008: 8), in the concurrent parliamentary poll, “ODM won 100 parliamentary seats in six provinces that had a voter registration of 9.5 million (of the total 14.2 million registered voters)” (Ouko 2008: 23).

#### **5.4 ECK’s controversial decision and the eruption of post-election violence**

Kenya has witnessed repeated episodes of violence since it launched plural politics in the early 1990s (Brown 2010; Chege 1994). However, the violence that shook Kenya after the 2007 general elections was unprecedented. It left about 1500 lives lost and almost 650,000 people internally displaced (Branch *et al* 2008; The Waki Commission Report 2009). Of course, those sympathetic to President—now former President—Kibaki would take strong exception to the notion that the 2007 violence stemmed from the “derailment of the people’s right to vote” (Okia 2009: 259); specifically, a rigged presidential election (Brown 2010). Rather, the President’s sympathizers argue that although difficult to abortion blame between the contending poles, “the spread and coordinated nature of the early attacks strongly suggests that it was not spontaneous” (Branch *et al* 2008: 20). They, therefore, posit the violence as a recondite scheme to extirpate members of one lager. Yet a third possibility does in fact exist as to the origin of the violence.

Both interpretations could be correct simultaneously; historically, the country’s elite has exploited violence, secure that it was immune to prosecution. The post-election violence was “both pre-planned and spontaneous” (Okia 2009: 267), given this history.

Read alone, though, the competing accounts do not provide complete vignettes as to how Kenya came to rendezvous with disaster. Read them in conjunction with a

series of policy miscalculations over the years, however, it quickly becomes clear that the elections served merely as the proximate cause. Instead, with an understanding of “the contradictions embedded in the country’s political economy” (Kagwanja *et al* 2009: 261); in particular the personalization of presidential power and weakening of public institutions (The Waki Commission Report 2009: viii), as well as “a deeply ingrained legacy of instrumentalisation of ethnicity and informalisation of violence in the intra-elite struggle for state power in multi-party Kenya” (Kagwanja 2009: 366), coupled with “[i]nequalities and economic marginalization, often viewed in ethno-geographic terms” (The Waki Commission Report 2009: viii), it becomes clear that the root causes to the conflict were “complex, multiple and interrelated” (Kagwanja *et al* 2009: 263).

Those opposed to Kibaki interpreted his being declared winner the ultimate foreclosure of democratic avenues for changing what ia mounted to an illegitimate and odious regime. Make no mistake about it: to those opposed to Kibaki, what the ECK did amounted to nothing short of a civilian coup!! In thinking about this, and although the specifics differ somewhat, we can draw some parallels with events from Nigeria. Junior Eastern military officers staged a coup against the Northern-led federal government in early 1966. However, the armed forces chief, Major-General Johnson Aguiyi Ironsi, an Easterner himself, intervened to restore law and order.

Once in power, however, Ironsi quickly issued so-called decree no. 34 of 24 May 1966—in effect a call for the abolition of the federal state, in favour of a unitary one. However, rather than have the intended unifying force, decree no. 34 was instead “rapidly followed by two violent week ends of riots in various parts of the Northern Regions” (Rivkin 1969: 108). Why the outbreaks of violence? According to Rivkin, and of particular relevance here, because decree no. 34 “*fed their worst suspicions and fears*” (110, emphasis added). Indeed, another scholar traces election—related violence to on-going fears that:

One group wants to control government for the sole intention of protecting its own against domination by other ethnic groups. In protecting an ethic group from domination, by others, a reverse domination is established whereby the ethnic group in power imposes itself and dominates over others. (Kabemba 2008: 35)

With specific reference to Kenya:

Most significantly, the events of late 2007 and early 2008 closely resembled the nightmare scenario outlined by one of sequencing's better known supporters, Amy Chua. In her *World on Fire*, Chua identifies the presence of market-dominant minorities as being the critical variable that pulls democratizing states into the maelstrom of ethnic violence. According to Chua, democratization results in violence as a result of two factors, sometimes working in tandem: first, a market-dominant minority resorts to extra-legal action to protect its privileged position; or, second, a marginalized majority resorts to violence in order to dislodge the minority from its entrenched position. Kenya's dominant Kikuyu and the other Mt. Kenya peoples fit Chua's taxonomy of a market-dominant minority. In an effort to protect the economic interests of Kikuyu elite threatened by the prospect of a Kibaki defeat, the state and its non-state partners undertook a backlash against democracy by forces favourable to the market-dominant minority. (Branch *et al* 2009: 23)

## 5.5 The road to the National Accord

Historically, intrastate conflicts did not present themselves as amenable to compromise. Now, however, "combatants seem more willing to work out negotiated settlements involving compromises, some of which seem to work... and some of which do not... Both internal and external factors seem to be contributing to this trend" (Lacklinder 2001: 698). At the external level, with the Cold War over, "international pressure has pushed parties to negotiate when they otherwise might not have done so." He continues: "Once the process has begun, outsiders have transmitted information, acted as mediators, and offered incentives to reach settlements" (Lacklinder 2001: 700).

It is true that such influences could go either way. For example, "[o]stensibly internal violence is often promoted or made possible by outside assistance of various sorts, such as that provided by the United States in Afghanistan and by South Africa in Mozambique" (*ibid*). With particular reference to African conflicts, foreign interventions have issued out of many different calculi; furtherance of specific geo-strategic and political interests, for example.

Amidst intensifying violence both domestic and international opinion, began to pile pressure on Kenyan leaders to pull the country from the abyss. The pressure rested on "a clear view that the strategic position held by Kenya both in the region

and in the continent could not be allowed to drown” (Kriegler and Waki Reports, Summarized Version, Revised Edition 2009: 1)., Spear-headed by prominent individuals such as retired South African Anglican Archbishop Desmond Tutu, then United Nations’ Secretary General Ban Ki-Moon, among others, these efforts eventually coalesced around the African Union’s<sup>96</sup> Panel of Eminent African Personalities under the Chairmanship of [Ban’s immediate predecessor as UN Secretary-General] Mr Kofi Annan” (Progress Report, South Consulting April 2010: 8). After almost forty days of marathon, and contentious, negotiations the team facilitated the signing of the National Peace Accord between the two principals: Kibaki and Odinga in March 2008.

The principals agreed to end the violence<sup>97</sup>; address the humanitarian situation<sup>98</sup>; Resolve the political crisis<sup>99</sup>, through a National Accord and Reconciliation (hereafter the National Accord). To buttress the National Accord, the parties agreed to examine long-standing sources of grievances<sup>100</sup> and establish: an Independent Commission to Review the Constitution; a Truth, Justice and Reconciliation Commission; an independent Review Commission to examine the electoral process; and a Commission of Inquiry on post-election violence; the latter two being “non-judicial bodies mandated to investigate and report on different aspects of the problematic issues of the crisis” (Kriegler and Waki Reports, Summarized Version, Revised Edition 2009: viii).

## **5.6 The EU and the NARC/Kibaki Administration: 2002-2007**

The EU presents itself as a major player in Kenya’s socio-economic transformation. The bloc also casts itself as a major partner in the country’s integration into the global marketplace. Kenya’s development strategy as

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<sup>96</sup> On the role of regional organisations, see, for instance Peck (2005: 561-583). However, for the case against regional involvement as tantamount to a usurpation of the UN’s role, see, for instance Malan (1999).

<sup>97</sup> Ending the violence and restoring fundamental rights constituted Agenda Number 1 items of the National Accord.

<sup>98</sup> Agenda Number 2 items centred on ending the humanitarian crisis and achieving recovery.

<sup>99</sup> This was Agenda Item Number 3, the basis for the formation of a grand coalition government between Kibaki’s and Odinga’s factions.

<sup>100</sup> These are agenda items number 4.

enunciated in documents such as Vision 2030 has four legs: increased economic growth, development of the physical infrastructure, attaining improved governance, and increased human capital. Therefore consistent with this posture, and as outlined in the then-new NARC government's Economic Recovery Strategy for Wealth and Employment Creation (ERSWEC) Paper "Public Sector Reform and Institutional Capacity Building", according to the Commission, the main thrust of Kenya-EU cooperation is designed to complement the Kenyan government's efforts to eradicate poverty and improve the living standards of the population (Joint Statement by Development Partners at the Kenya Consultative Group Meeting, 24th-25th November 2003).

### **5.6.1 The EU and Civil Service Reform, 2003-2007**

Technical Assistance involves foreign experts working with their domestic counterparts, from both government and the NGOs, in support of the entire electoral cycle from pre-election preparations to post election capacity building by supporting the establishment and reform of EMBs (Mitchell *et al* 2008: 161-162); this is usually seen as an entry point for other desired reforms, such as good governance, as well as the building of relationships and thus identification of other government entities that need assistance (Schroeder 2013: 220). However, this is not merely a technocratic issue; technical assistance has clear political implications; specifically, it is focused on strengthening institution in order to promote participatory and effective electoral institutions. Seen so, technical assistance, as opposed to election monitoring, is focused on long-term institution building as well as promoting the participations of hitherto excluded groups such as women and social and ethnic minorities "in the political process,"—consistent with a number of international instruments concerning non-discrimination and participation" of such groups (Binder 2007: 225), with such obstacles as majoritarian electoral systems, being some of the key barriers to such empowerment.

The EU claims to have provided funding and training as part of institutional reform more generally over the years. The EU has undertaken these activities consistent

with extant thinking in international development that lack of capacity represents the biggest obstacle to development, especially in Africa (Bossnyet *et al* 1992). Foreign aid has therefore “prioritized the institutional development of government, thereby attempting to meet the need to build the capacity of the state to govern” (Hearn 2000: 824).

The EU insists that it aims through its assistance to help the country create a lithe public service. In Kenya civil service reform commenced in the early 1990s with the appointment of what then came to be known as the ‘Dream Team’. All the same, with the coming to power of the NARC government in 2003, the reforms began to receive serious attention, especially in the wake of the party’s commitment to economic reconstruction. NARC made civil service efficiency a centrepiece of its reformist agenda. In particular, in “the articulation of [a] bold comprehensive approach ... to public sector reform as a means to economic recovery” (Public Sector Reform and Institutional Capacity Building, Joint Statement by Development Partners at the Kenya Consultative Group Meeting, 24th-25th November 2003: 3), the new NARC government identified the civil service as “both large and relatively inefficient” (1). Indeed prior to the eruption of post-election violence, the civil service had begun to regain its once vaunted status as an efficient machine, as denoted by, among others, much faster rates of economic growth, mostly attributable to efficient policy implementation by the civil service— although corruption remained endemic.

The Multiple Donors Basket Fund (MDBF) mechanism, to which several European donors contributed in support of the Governance, Justice, Law and Order Sector (GJLOS) reform, and which ended in 2009, stands as the clearest example (Bello 2011: 5). Focused on facilitating good governance, respect for human rights, equal access to justice and respect for the rule of law, GJLOS reforms commenced after NARC’s victory in 2003.

GJLOS unfolded in the context of Kenya’s overall development strategy (ERSWEC), and involved 30 institutions. GJLOS are Kenya’s first SWAPs. The shift to SWAPs in international development aims to improve aid effectiveness by taking an entire sector approach as opposed to focusing on an individual project. ERSWEC had identified governance as the spearhead of economic growth. This

led to a MOU between Kenya and donors, thus leading to the erection of the Multiple Donor Basket Fund for the GJLOS. The programme collapsed in 2009, however, amidst recriminations on both sides (Akech 2005: 47).

The findings with respect to civil service reform more generally and then GLOs in particular seem to vindicate the relevant literature in this area. The literature cautions that for political aid to have any of its intended impact, the political context is crucial. The literature emphasizes the role of political commitment in particular. Otherwise such efforts are likely to eventuate in superficial technocratic reforms. This calls for “a balanced approach . . . , which simultaneously develops societal as well as governmental institutions” (Diamond 1995: 44); hence, the media and NGOs have a crucial role in this process by way of generating public support for such reforms.

## **5.6.2 EU political aid towards Kenya’s EMB**

### *5.6.2.1 Election monitoring and observation*

Monitoring regimes, of which election monitoring is an instance, have an important role in ensuring adherence to international norms and commitments (Simpson *et al* 2012). In particular, election observation has emerged as a key strategy for democracy preservation and, hence, conflict prevention during the third wave of democracy.

By so doing, election monitoring can in turn play an important role in institution building; for such external presence “can foster trust among rival parties by providing guarantees, clearing up misperceptions, relaying information back and forth and resolving key issues” (Chakand 1998: 169). Such institutions, once established, could “help counterbalance state power, provide a context for developing civic skills, encourage norms of reciprocity and trust, articulate societal interests and create peaceful channels for the resolution of conflicts that might otherwise result in violence” (Chakand 1998: 169). However, election monitoring

by outsiders can frequently become a target of suspicion and outside hostility as neo-colonial, its advantages notwithstanding (Chakand 1998:168).

Still, with its increased use governments that seek to cheat have developed other strategies. These include the staffing of strategic institutions such as the judiciary with cronies “practices that have far more damaging consequences on governance in the long run” (Simpson *et al* 2012: 501).

In addition, election monitoring usually relies on hastily assembled data, thus precluding the rendering of a comprehensive verdict. Furthermore, in theory, international election observers should not take their marching orders from the sending agency. This, however, is not always the case. More often than not, other considerations come into play (Teshome 2013).

#### *5.6.2.2 EU and election observation under the NARC/Kibaki Administration, 2003-2007*

In the run-up to the elections in 2007 the EU deployed an EOM headed by Alexander Graf Lambsdorff from “14th November 2007 with the mandate to monitor the pre-election campaign and environment”. In its ensuing Report, the EU EOM noted: “the 2007 General Elections have fallen short of key international and regional standards for democratic elections”. In this regard, the EU EOM offered that “[b]y raising doubts over the credibility of the elections process and results in its preliminary statement at an early stage, the mission set a clear and neutral position which helped to rally the international community and to give the EU a strong and respected image in the eyes of many Kenyans” (EU Election Observation Preliminary Report 2008). The bloc went on to caution that without a legitimate solution to the crisis, it would not be business as usual.

Still, with its increased use, governments that seek to cheat have developed other strategies, such as staffing strategic institutions such as the judiciary with cronies that have far more damaging consequences on governance in the long run (Simpson *et al* 2012: 501). Ominous signs were already abroad even prior to the voting in 2007. For example, based on the 1997 IPPG agreement, the appointment

of ECK commissioners by the president required consultations with the opposition. However, Kibaki violated this requirement in the run-up to the 2007 elections by staffing the body with his cronies without consulting the opposition (Klopp 2009: 146).

Interestingly, the EU and other donors remained mum even as Kibaki employed such manipulative tactics (Wrong 2008: 5). Ironically the EU has increasingly cast itself as a normative power in international affairs (Manners 2002: 241, qtd., in Storey 2006: 331).

In theory, election observers should not take their marching orders from the sending agency; this, however, is not always the case. More often than not, other considerations come into play, thus distorting the ensuing evaluation of the process (Teshome 2013).

Mounting evidence of electoral fraud in the 2007 presidential elections put donors in a difficult situation especially given Kenya's pivotal position in the region, ogled by some as a key ally in the "War on Terrorism" (Wrong 2008: 5). Nevertheless, once the ECK declared Kibaki the winner amidst growing suspicions of fraud, the EU's election observer team refused to endorse the result. The EU's chief observer, Alexander Graf Lambsdorff, stated that, "because of irregularities, doubt remains as to the accuracy of the result of the presidential election announced today" (Guardian, 31 December 2007, Qtd in Brown 2009: 392). In its preliminary report, the EU EOM noted: "the 2007 General Elections have fallen short of key international and regional standards for democratic elections" (Brown 2009: 389).

In addition, while donor response to the crisis once it erupted denoted some marked improvement, still "they failed to learn some important lessons from the past and to take a more proactive role in preventing violence" (Brown 2009: 390). Indeed, by "focusing on ending violence as quickly as possible," thereby eliding the need for "justice and democracy" in favour of "peace", this in effect had negative consequences for "the political reform agenda" (*ibid*). In the end, though,

the EU and others played an instrumental role in ending the crisis, as well as pushing the various reform initiatives agreed under the NARA.

Election monitoring can in turn play an important role in institution building; for such external presence “can foster trust among rival parties by providing guarantees, clearing up misperceptions, relaying information back and forth and resolving key issues” (Chakand 1998: 169). Such institutions, once established, could “help counterbalance state power, provide a context for developing civic skills, encourage norms of reciprocity and trust, articulate societal interests and create peaceful channels for the resolution of conflicts that might otherwise result in violence” (Chakand 1998: 169).

The EU and other players supported various initiatives keyed to addressing both the conflict and its aftermath. It is true that violence has characterized Kenya since the advent of political pluralism in the early 1990s. However, during these earlier periods, the donors “never acknowledged this publicly” (Brown 2009: 391), but instead “continuing to channel relief funds through the same government that was allowing the attacks to continue, often even sponsoring them” (*ibid*). However, once the post-election crisis erupted, the EU and other donors acted with cohesion, thereby playing an instrumental role in the Annan-led talks, “using targeted sanctions (mainly bans on senior government and opposition figures) and threats of lower aid flows” (Brown 2009: 393). Then following the signing of the National Accord the EU also helped monitor its implementation; it also supported the enactment of a new constitution and other required institutional reforms as well (EU Election Observation Preliminary Report).

#### 5.6.2.3 Technical Assistance: EU Political Aid and the NARC/Kibaki Administration, 2003-07

Technical Assistance involves foreign experts working with their domestic counterparts. The effort focuses on supporting the entire electoral cycle from pre-election preparations to post election capacity building (Mitchell *et al* 2008). Viewed as an entry point for other desired reforms—such as good governance,

among others—the strategy can also help in the identification of other government entities that need assistance (Schroeder 2013: 220).

However, this is not merely a technocratic issue. Technical assistance has clear political implications. It is specifically focused on strengthening institution in order to promote participatory and effective electoral institutions. Seen so, technical assistance, as opposed to election monitoring, is focused on long-term institution building as well as promoting the participation of hitherto excluded groups such as women and social and ethnic minorities “in the political process,”—consistent with a number of international instruments concerning non-discrimination and participation of such groups (Binder 2007: 225).

On the electoral front, technical assistance might involve training candidates; civic education, budgeting procedures, “computerizing voter lists... amending electoral regulations... and training electoral officials on new voting procedures “(Schroeder 2013: 209-10); these activities are usually focused on creating credible electoral institutions and procedures, in the process increasing voter confidence in these institutions and processes (Binder 2007; Schroeder 2013). In addition, technical teams normally have the chance to discuss with ‘authorities’ emerging issues, as well as providing protection for otherwise exposed local observer teams. Understood in this manner, technical training groups can immensely “strengthen and support local initiatives and civil society organisation” (Binder 2007: 231).

Technical and financial support usually unfold within the armpit of targeted cooperation programmes; these activities can take anyone of many forms: election support teams; these are teams that can analyse key aspects of previous elections and make recommendations for future improvements; leadership training and networking for women, especially in rural areas.

### 5.6.2.3.1 Supporting civic education: EU and the NARC Administration, 2003-2007

Donors, the EU included, supported voter education<sup>101</sup> in preparation for the 2007 elections, through the election support office under UNDP-Kenya. Inspired by previous democratic successes, such as the 2002 elections and the 2005 referendum more specifically, the donors increasingly came to believe that a successfully run election in Kenya would have a demonstration effect regionally, especially given the country's regional status.

Donors provided funding to the elections through Joint Election Support Program, under UNDP-K called the 2007 Kenya Election Assistance Program.

This saw the donors establish an Election Support Donor Group led by USAID—with ECK and UNDP as key players, with a budget of over \$12 million. Key areas of support included: EMB capacity building.

### 5.7 EU aid and the Development of Kenya's Political Institutions, 2003-07

The EU and other providers of political aid did not help Kenya develop its political institutions. Take the issue of comprehensive constitutional reform prior to the post-election crisis of 2007-08, for instance.

NARC, as explained elsewhere in this chapter, had in its push to power, made a number of promises, key among them economic and political renewal (Kagwanja 2009). Whereas the new government performed admirably in the economic sphere, its political record told a completely different story, however. Rather than undertake constitutional reforms within the first one-hundred days of the new government as promised during the campaigns, the Kibaki-wing of the coalition sought to maintain the status quo (Akech 2010: 12). To that end, having failed to get their way at Bomas, the pro-Kibaki forces then sought to manipulate the Parliamentary Select Committee on the constitution to change key aspects of the Act on the role of parliament in the constitution reform process.

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<sup>101</sup> On the role of education in political development more generally, see, for example Kim *et al* (1968: 407-420) and Duncan (1968: 187-210).

Developing Political Institutions is usually seen as the most important and proximate challenge of democratic consolidation. According to the literature, the development of political institutions has its glare on liberalizing and eventually democratizing otherwise weak, autocratic national, and local level institutions. When making their submissions to the CRCK, Kenyans had clearly indicated that they wanted a system of governance that fostered both participation and accountability (Final Report on Devolved Government in Kenya 2010). Thus, at the Centre the draft sought to foster participation and accountability through: the creation of a constitutionally constrained presidency alongside the office of prime minister, a two-chamber legislature—a Senate and a National Assembly; it then made special provision, through special electoral procedures, numerical requirements, and so on, for the participation at all levels of government of groups, such as women, ethnic minorities, among others, hitherto excluded from power. Finally, on the judicial front, the draft limned a plethora of judicial institutions, with the Supreme Court at the apex of that architecture.

At the sub-unit level, moreover, the draft sought to use devolution to foster participation and accountability, through the creation of a four-tiered system of government: National, Provincial, County and sub-county—with Provincial governments more skeletal in nature.

But defenders of the status quo immediately took umbrage at the Chapters on the Executive and devolution in particular. On the executive, for example, critics inveighed against what they posited as a furtive move to transfer power from a popularly elected president to a non-elected PM (Mutua 2009). It is true that the draft constitution had recommended the creation of the office of Prime Minister alongside that of the president. However, under that arrangement, the occupant of the former position would have had to come from the majority party in parliament. In any case, contrary to the claims, the document actually still envisioned a relatively robust presidency endowed with important powers, key among them: the nomination of key state officials, the Chairmanship of the National Security Council, and Commander in Chief of the Armed Forces.

Also, the presidency would have had influence on the legislative agenda. Whereas available evidence does appear to vindicate the utility of parliamentary systems in

nurturing democracy, especially in deeply divided societies such as Kenya, “powerful opposition from groups with vested interests in the existing system” (Haggard *et al* 1994: 14) would blunt any such attempt at systemic transmutation. Constitution-making<sup>102</sup> did once again find its way onto the national agenda in the wake of the 2007-2008 post-election violence, as discussed previously.

Equally, the EU and others did not vigorously press the NARC government on corruption. It was under the NARC government, for example, that the country witnessed some of the most debilitating corruption scandals in its post-independence history, capped by the so-called Anglo-leasing scandal. Although the president initially relented under intense public pressure and suspended a number of senior ministers and other close associates implicated in the scheme, most were quickly exonerated by the various anti-corruption institutions following what the majority of the public viewed as sham investigations; Kibaki then reinstated them to their positions.

Donors’ quietude in this regard stemmed from their changed relationship with the Kenya government. Donors supported civil society in Kenya in the early 1990s as a major component in the struggle against the oppressive Moi regime. However, with the ouster of the KANU regime in 2002 and NARC’s ascendancy to power, donors decided to engage with the Kenyan state more directly—consistent with changed donor strategies more broadly—with a focus on aligning their aid with priorities and objectives of aid-recipient governments, as well as to better coordinate and harmonize bilateral aid by channelling greater support through government-owned programmes (Lind *et al* 2010: 339-340).

With the onset of the War On Terror, donor priorities shifted from good governance, democracy and human rights to security-related agendas. To this end, “[s]ince 2002, diplomatic missions in Nairobi representing leading western donors have pressed the Kenyan government to adopt controversial new counter-terrorism legislation” (343):

In particular, amidst on-going threats of terrorist activity in East Africa, Kenya has come under intense pressure to join the war on terrorism,

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<sup>102</sup> A number of scholars have argued that the adoption of new, comprehensive constitutions would go a long way towards achieving a much needed sustainable peace, see Harbeson (1986: 7-17).

thus demonstrating —the strategic use of aid in achieving the political objectives of the War On Terror... Generally, the leverage of aid has shifted away from previous priorities on good governance and human rights, although these issues acquired new prominence as part of political reform and national reconciliation following the disputed results of the December 2007 election and its aftermath. (Lind *et al* 2010: 336)

Indeed, the link between foreign aid, security, and democracy has emerged as a major theme in the literature. In particular, since the demise of the cold war, some have sought to emphasize what they perceive as a close nexus between security and development; this assumed added urgency in the wake of the 2001 terrorist attacks in the US (Ganzle 2012: 116). However, some question the alleged nexus. They argue that establishing a strong state attuned to the dictates of fighting terrorism may not necessarily advance the democratic agenda. Indeed, some critics have faulted the strategy as connoting furtive imperialism (Cox 2008), specifically a ploy designed to create new post-cold war client states (Bowles *et al* 2008).

## **5.8 Conclusion: EU political aid and the NARC/Kibaki Administration, 2003-2007**

It is true that in the Kenyan context, in the early 1990s donors worked closely with civil society groups to challenge entrenched KANU rule. However, once NARC took over in 2003, the EU and other donors shifted to working with the government more directly—consistent with changed donor strategies more broadly—focused on aligning their aid with priorities and objectives of aid-recipient governments, as well as to better coordinate and harmonize bilateral aid by channeling greater support through government-owned programmes.

This produced desired results in some instances, it did not do so in other areas. On the plus side, as a result of the government's collaboration with foreign partners, the country witnessed higher levels of economic growth and with it a reduction in poverty. On the social side, moreover, and as a spin-off from the higher economic growth, Kenyans also witnessed improved social service provision by the government. For example, working with the donors, the NARC government

was able to launch Free Primary School Education, thereby raising primary school attendance appreciably.

On the downside, however, in most instances, the post-Moi government either abated corruption outright or shielded those implicated in it from the full force of the law. Interestingly, aside from empty proclamations, the EU never took any concrete action against those implicated in graft. In addition, Kenya's EMB—the ECK—which had previously received high praise and support from the EU and others—proved unequal to the challenge during the 2007; this led to the post-election political crisis that roiled the country in late 2007 to early 2008. But in the wake of the crisis, the EU, consistent with CPA provision for regular political dialogue, played a major role in supporting efforts to resolve the 2007-08 post-election crisis, as well as ongoing reform of the electoral process.

## CHAPTER 6: The Grand Coalition Government, 2008-2013

### 6.1 Introduction

This chapter aims to highlight what role, if any, EU political aid played at a critical juncture in Kenya's democratisation process. Kenya witnessed unprecedented levels of violence in late 2007 and early 2008 due to a disputed presidential election. Indeed, it was only after concerted national, regional and global efforts that the country was pulled back from the abyss. As part of the negotiations that ended the violence, the warring sides agreed to form a grand coalition government. The chapter seeks therefore to also analyze the role of EU political aid in the reform process.

The National Accord had as its immediate goal the facilitation of an elite power-sharing arrangement (Kagwanja *et al* 2009). Specifically, the establishment of a Grand Coalition Government<sup>103</sup> between the formations led by Kibaki and Odinga respectively. The two leaders and their respective parties were, as indicated previously, the main players in the 2007 elections. Previously allies in the NARC Coalition. Odinga and Kibaki had acrimoniously parted ways over the unfulfilled terms of a MoU that the two, and their respective parties at the time LDP and NAK, had signed thus paving the way for the creation of NARC. The NARA deal also led to the creation of the posts of Prime Minister (PM), and two Deputies (D-PM).

Power sharing<sup>104</sup> has increasingly drawn widespread acclaim<sup>105</sup> as part of the larger strategy of conflict prevention (Steiner 1989). In particular, theorists of consociational democracy ogle such arrangements--- along with other devices such as mutual vetoes, segmental autonomy, among others-- on the ground that, "although not necessarily democratic" (Lacklider 2001: 707), they bring "all major

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<sup>103</sup> For a critique of the coalition government, though, see, among others "Kenya in the fog of Peace" (3), with the government being characterized as over-bloated and composed of tainted individuals from previous corrupt regimes.

<sup>104</sup> For the trend towards power-sharing in Africa and its associated problems, see Norma (2012: 11-26), but especially the author's focus on informalisation of politics that is, for those at the centre of power to form informal channels of power, and thereby vitiate such arrangements.

<sup>105</sup> See, for example McRae (1989: 93-106).

parties together to enable hard-decision making and promotion of the national good” (Progress Report, South Consulting April 2010: 27).

Scholars increasingly have argued that an astute approach to this process should begin with constructing an interim government. They counsel that such an arrangement “may take the form of a coalition among national forces pursuant to an agreement or a monitored government consisting of previous incumbents.” He continues: “The main purpose of the transitional government is to preside over a process that establishes a legitimate legal framework for political contestation and rule (generally, a constitution) and to administer the first stage of the implementation of this framework” (Rubin 2008: 36). As part of this process, political reinvigoration should strive to erect various Consultative Mechanisms among political elites, the aim being to foster wider and broader elite interactions so as “to settle outstanding issues and bring non-signatories into the process, thus expanding political participation beyond the narrow group of elites who sign peace agreements” (Papagiani 2008: 61).

While important, however, if prematurely executed, they warn, the strategy may actually open the door to elite and “nationalist manipulation and extremist rhetoric” (Papagiani 2008: 66). In most instances, though, such political processes tend to unfold at a frenetic pace, “which is often due to the deadlines imposed by the international community” (Rubin 2008: 58). Yet such a “frame is too short to record sufficient progress on even the reforms prescribed by the peace accords” (Ball 2001: 2).

Dissenters do, however, retort that while such arrangements sound noble in theory; if executed along ethnic lines they may paradoxically, in practice actually buttress<sup>106</sup> the very divisions they seek to heal (Bieber *et al* 2009; Oberschall 2007)! They observe, in addition, that because justice and peace are mutually exclusive that, therefore, in prioritizing peace over justice the approach thereby vitiates certain norms. In particular, power sharing “may actually encourage incumbent regimes to rely on coercion to resist the will of the people and the

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<sup>106</sup> Others reject consociationalism as a recipe for chaos, offering instead what they call an incentives based model (Horowitz 1989: 115-130). Others do worry, though, about the essentialism inherent to ethnic thinking. See, for instance Deng (1989: 343-362).

transfer of power to electoral winners” (Southall 2009: 445)<sup>107</sup>. They do however concede that power sharing and transitional justice can be reconciled, especially when the former focuses on addressing broader societal issues such as the need for institutional reforms (Vandeginste *et al* 2011: 492)<sup>108</sup>. As part of this effort, however, society must undergo reconstruction as well, including the restructuring of power structures from the grassroots up (Zartman 1995).

In the specific Kenya case, the power-sharing arrangement issued out of Agenda number 3 items of the National Accord. Agenda number 3 items focused on how to overcome the political crisis—that is, “the political and humanitarian catastrophe that engulfed the country after the incumbent President Mwai Kibaki was controversially declared... the winner of the country’s closely contested election” (Kagwanja *et al* 2009). Power-sharing was informed by the understanding that the “crisis revolves, in large measure, around the issues of power and the functioning of state institution” (Review Report, South Consulting, October 2012: 1). The meeting that facilitated the NARA resolved that the “Parties will negotiate and agree on a solution towards resolving the crisis... as well as the ensuing violence” (Review Report, South Consulting, October 2012: 2).

Cognizant therefore of extant feelings “of marginalization from power,” (1), and also aware that in the then existing environment “neither side can realistically govern the country without the other” the parties agreed to form a coalition government based on “real power sharing” (*ibid*). It was this understanding that saw the parties agree to enact the National Accord and Reconciliation Act. The Act called for the creation of the office of PM, “to serve as coordinator as well as supervisor of government affairs” (1). As the Public Statement of the Kenya National Dialogue and Reconciliation, mediated by H.E Kofi Annan and the Panel of Eminent African Personalities, Feb 4, 2008, states in its preamble, “[t]he final goal of the National Dialogue and Reconciliation is to achieve sustainable peace,

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<sup>107</sup> Conflict managers focus on proximate causes—with the aim of an immediate end to the violence; democratizers have their glare on longer-term solutions that address the root causes of the conflict; specifically enduring democratic stability. Thus whereas the former see peace as a precondition for democracy; the latter see democracy as a precondition for peace. See, for example Baker (2005: 753-764).

<sup>108</sup> Indeed, critics worry that elite pacts may in fact stymie institutional development. For this line, see, for example Leiken (1990: 26-38).

stability and justice in Kenya through the rule of law and respect for human rights” (KNDR 2008: 1)<sup>109</sup>.

The Grand Coalition Government had as its fundamental mandate in this regard the pursuit “of comprehensive reforms including those that would address the fundamental causes of the conflict” (Progress Report, South Consulting April 2010: 22). Agenda Number Four focused on the following themes: Constitutional, Legal and Institutional reforms; Land Reforms; Poverty, Inequality and Regional Development Imbalances; Unemployment, especially among the youth; Consolidation of national Unity and Cohesion; and, Addressing Transparency, Accountability and Impunity “to address the root causes of recurrent conflict and create a better, more secure and prosperous nation” (38)<sup>110</sup>.

Most of the measures would form the core of The Constitution of Kenya Review Act, No. 9 of 2008 (CKR). This was assented to “on December 2008 and then come into force later that month” (Review Report, South Consulting, October 2009: 16). Not only have these institutions repeatedly received low ratings among Kenyans. Equally, various commissions have repeatedly called for their overhaul. Numerous reports have, for example, consistently catalogued “police brutality and extra-judicial killings” (Review Report, South Consulting, August 2010: 21). The Waki Commission of Inquiry implicated the police in the violence, finding that in most instances police officers had served as partisan agents for Mr Kibaki’s party (The Waki Commission Report 2009: ix). However, promotion of good governance, lasting peace and development depends, to a large extent, “on breaking this history of police bias, intimidation and brutality” (Celador 2006: 58). Indeed, the inability to forge an elite compromise during the violence until external intervention and signing of the National Accord suggested:

[A]widespread lack of trust in the ability of Kenyan democratic institutions, such as courts... to deliver fair political outcomes. That lack of faith suggests that the longevity of the Kenyan crisis was rooted in the prior failure to carry out a genuine process of constitutional review. (Branch *et al* 2008: 126)

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<sup>109</sup> The National Accord seems to draw on both consociational and incentive-based models, thereby suggesting that the two are better seen as complementary, rather than opposites. For a formulation that seems to recognize the two models as complementary, see, for instance Stubb (1989: 279-307).

<sup>110</sup> See, for instance Skowronek (1982).

On 19th March 2008 Kenya's parliament voted and amended the constitution as required by the National Accord to create the posts of Prime Minister and two Deputy-Prime Ministers, and also to enact the National Accord into law. The NARA led to the creation of a bloated grand coalition government—Government of National Unity—involving, as intimated previously, the formations led by Kibaki and Odinga. Kenyan leaders increasingly voiced their commitment to national renewal following the signing of the NARA and then the launch of the grand coalition government, with, for example, Kibaki outlining his vision of a new and prosperous Kenya, one devoid of crime, corruption and impunity (Opiyo, Daily Nation 21st October 2009).

Still, because both sides “include[d] people guilty of corruption and violence,” the grand coalition, like its counterparts elsewhere, “creates a common interest in perpetuating impunity and opposing the forces of accountability and transformation” (Klopp 2009: 143). Given the specific Kenyan context at the time, perhaps such a trade-off between peace, on the one hand, and justice on the other, was inevitable. Thus once in office, a number of issues and problems quickly came to the fore.

## **6.2 Elite fragmentation, 2008-2013**

The Grand Coalition Government was wracked by both inter and intra-party wrangling. Intra-party discord emerged within ODM immediately following the formation of the grand coalition government in early 2008. Ruto cited as the main bone of contention “Raila’s disown[ing] hundreds of youths who heeded ODM party call for mass action [in the wake of the allegedly rigged 2007 presidential polls]” (By Standard Team 2010, 15th February: 6). However, others claimed that Ruto, a member of ODM’s then so-called Pentagon and the party’s chief strategist in the Rift Valley during the 2007 elections felt that his region had not received its fair share of government positions from the ODM-wing of the. Ruto denied the accusation.

Also, the two leaders differed over the eviction of squatters from the Mau Forest, a major water catchment facility. The Grand Coalition Government, in one of its major policy initiatives, sought to reclaim the Mau water tower by evicting those who had encroached on it (Njoroge, *The Standard*, 15<sup>th</sup> November 2009). A campaign spearheaded by the Prime Minister, according to the Government's eviction plan, those without title deeds—mostly small landholders—could not receive any compensation. However, because most of the squatters were Kalenjins, “Ruto portrayed the Prime Minister as betraying the Kalenjin; the community had widely supported Mr Odinga during the 2007 General Election” (By Standard Team 2010, 15<sup>th</sup> February: 6).

In addition, the two camps differed over the party's approach to the post-election violence issue, with Ruto feeling “that Kenyans fought because Kibaki stole elections and Raila should accordingly drop The Hague or local tribunal affair” (Obonyo, *The Standard* 5th July 2009: 1). Hence, while Mr Odinga advocated for the formation of such a local tribunal, Mr Ruto preferred the—International Criminal Court [ICC] (Barasa *et al*, *Sunday Nation* 28th June 2009: 16), with his supporters worried that “in addition to damaging the Agriculture Minister's political future, a local tribunal would damage the Kalenjin” (Kisiangani, *The Standard* 5th July 2009: 23).

These intra-party developments would see Ruto increasingly voice his intention to vie for the Presidency in 2013 (Bartoo *et al*, *The Standard*, 15<sup>th</sup> November 2009). Nevertheless, there was widespread concern, both locally and internationally, that the infighting within the Grand Coalition government was endangering the country's essential reform agenda (Rugene, *Daily Nation*, 16<sup>th</sup> February 2010). For example, in the face of intensified assaults on the Prime Minister by his estranged ally William Ruto and his Rift Valley lieutenants those within the Prime Minister's camp sought to change priorities. They sought to focus on environmental conservation instead. This would see the PM jettison his previous eviction policy mantra in favour of “rehabilitation”; specifically tree planting.

### **6.3 Constitutional and institutional reforms: The GCG and the new Constitution**

NARC had, as explained elsewhere in this study, made a number of promises in its push to power in 2002, economic and political renewal key among them (Kagwanja 2009). Whereas the new government performed admirably in the economic sphere, its political record told a completely different story, however. Rather than undertake constitutional reforms within the first one-hundred days of the new government as promised during the campaigns, the Kibaki-wing of the coalition sought to maintain the status quo (Akech 2010: 12).

Constitution-making did once again find its way onto the national agenda in the wake of the 2007-2008 post-election violence. Agenda number 4 reforms had called for, among others, “comprehensive constitutional and institutional reforms to address the root causes of recurrent conflict and create a better, more secure and prosperous nation” (Progress Report, South Consulting April 2010: 38). According to the schedule of Agenda Number Four Items, constitutional review was designed to commence in August 2008; consequently, “Parliament passed the Constitutional (Amendment) Bill, 2008, and the Constitutional Review Bill in December 2008. Both received Presidential assent the same month (Review Report, South Consulting January 2010: 44). Nonetheless, the process did then stall after these initial promising steps. Indeed, “[i]t was not until 23 February 2009 that the government gazetted the Committee of Experts (CoE); the CoE then commenced work in March 2009” (*ibid.*).

### **6.4 EU Political Aid and the Development of Political Institutions, 2008-2013**

Liberalism accentuates the need for institutions (Goodin 1992: 14). In particular, liberalism contends that Developing Political Institutions is the most important and proximate challenge of democratic consolidation. Developing Political Institutions focuses on liberalizing and eventually democratizing otherwise weak, autocratic national, and local level institutions. The focus on developing institutions is

animated by the realization that, contrary to behaviourist valorization of agency over structure, even individual choices are both constrained and enabled by institutions (Goodin 1992: 14). Events in the global arena provide the context for the rediscovery of institutions. Following the demise of the Cold War, there emerged "a flurry of political scientific interest in the sorts of Constitutions one might write, and the institutions one might try to impose in a world in which the mediating institutions of civil society and the internal checks of the civic virtue have so systematically been destroyed" (Goodin 1992: 15).

The Grand Coalition Government had as its fundamental mandate in this regard pursuit "of comprehensive reforms including those that would address the fundamental causes of the conflict" (Progress Report, South Consulting April 2010: 22). Agenda Number Four focused on the following themes: Constitutional, Legal and Institutional reforms; Land Reforms; Poverty, Inequality and Regional Development Imbalances; Unemployment, especially among the youth; Consolidation of national Unity and Cohesion; and, Addressing Transparency, Accountability and Impunity "to address the root causes of recurrent conflict and create a better, more secure and prosperous nation" (38).

Liberals posit a number of factors as crucial to institutional design. They argue in particular that such a development presupposes the thorough discrediting of pre-existing institutions. They must have failed to perform their routine functions as well (Offe 1992: 210). With respect to Kenya, the 2007-08 "crisis was largely due to weaknesses in key institutions of governance, including the Constitutional framework, Judiciary, Police, Executive, the electoral system, and Parliament" (Devolved Government Report 2010: 10).

Indeed, not only have these institutions repeatedly received low ratings among Kenyans. Various commissions have repeatedly called for their overhaul. Numerous reports have, for example, consistently catalogued "police brutality and extra-judicial killings" (Review Report, South Consulting, August 2010: 21). The Waki Commission of Inquiry implicated the police in the violence, finding that in most instances police officers had served as partisan agents for Mr Kibaki's party (The Waki Commission Report 2009: ix). However, promotion of good governance, lasting peace and development depends, to a large extent, "on breaking this

history of police bias, intimidation and brutality” (Celador 2006: 58). Indeed, the inability to forge an elite compromise during the violence until external intervention and signing of the National Accord suggested:

[A]widespread lack of trust in the ability of Kenyan democratic institutions, such as courts... to deliver fair political outcomes. That lack of faith suggests that the longevity of the Kenyan crisis was rooted in the prior failure to carry out a genuine process of constitutional review. (Branch et al 2008: 126)

Constitution-making did once again find its way onto the national agenda. A number of scholars have argued that the adoption of new, broad-based constitutions would go a long way to buttress attempts to establish a new democratic ethos. Those who argue in this vein insist that constitution-making can be “a process of national education with respect to concepts of government ...and international norms of human rights that have been incorporated into recent constitutions (Kritz 2005: 814). Indeed, there is a growing acknowledgement that state failure provides a “fertile breeding ground not only for ethnic violence, but also other debilitating social and economic breakdowns” (Wright 2008: 81-2). This does illuminate the need not only to reinvigorate state capacity, “but also... to re-engineer its entire architecture” (Call 2008: 380), to erect an institutional framework founded on inclusive, participative processes that foster trust and compromise (Papagiani 2008).

Liberals argue that aspiring reformers are usually emboldened by the ready availability of an acceptable alternative model. Liberals argue that reformers usually ogle a supposedly recent glorious past in their country's history for inspiration (Offer 1992). They simultaneously denounce the current putrid order they seek to supplant. In the specific Kenya case, champions of a new constitution as the best antidote to PEV traced the country's governance flaws "to the re-centralization of power in the executive through post-independence constitutional and legal amendments. A small political-cum-economic elite that accumulated both political control and economic wealth to protect the centralised system captured state power. Democratic advancement was stifled as the governance of the

country descended from constitutional rule to personal rule" (Devolved Government document 2010: 10). The reformers drew inspiration from the fact that "At independence, Kenya adopted a fairly progressive liberal Constitution. Its primary features were an extensive Bill of Rights; a bi-cameral parliament; devolved government; separation of powers between the arms of government; judicial independence; and a multi-party political system" (Devolved Government 2010: 12).

One expert conceptualises a constitution as "a Charter that delegates and marks the limits of power" (Berger 1979: 488). In particular, a constitution, the vital instrument of the state, "defines, distributes, and constrains the use of state power and provides a power map for the construction of the society and the running of the affairs of the state" (Devolved Government 2010: 15). The CoE initially issued a Draft constitution that sought to encapsulate Kenyans' aspirations for accountability, participation and efficient utilization of public resources. With respect to decentralisation, for example, the document had called for the establishment of robust County Governments. The draft sought to use devolution to address Kenyans' desire for a governance mode that comports with the two requisites of modern democratic states: participation and accountability. Indeed, theorists of consociational democracy ogle segmental autonomy--- along with other devices such as mutual vetoes, constitutional courts, among others-- on the ground that, "although not necessarily democratic" (Lacklider 2001: 707), they bring "all major parties together to enable hard-decision making and promotion of the national good" (Progress Report, South Consulting April 2010: 27).

But defenders of the status quo did quickly take umbrage at the Chapters on the Executive and devolution in particular. On devolution critics favoured de-concentration instead—an arrangement whereby administrative structures delegate responsibility for functions within given territories to field-level civil servants—in effect a slightly modified version of the then pre-existing arrangement. The main difference with devolution is that although decision-making and power are decentralized from headquarters, and also while keyed to technical efficiency and greater effectiveness "the ensuing delegation of power is to an official appointed by and accountable to central government rather than to a

representative of the local community who is accountable to that community” (Turner et al 1997: 160-161). In addition, once the CoE had issued the draft, the proposed Constitution had to contend with a determined bid by assorted groups to derail its enactment. The groups, fronted by the ‘no’ side, sought to achieve this by defeating the ‘yes’ side in a referendum slated for August 2010.

In addition, once the CoE had issued the draft, the proposed Constitution had to contend with a determined bid by assorted groups to derail its enactment. The groups, fronted by the ‘no’ side, sought to achieve this by defeating the ‘yes’ side in a referendum slated for August 2010. For example, chief ‘no’ campaign lights, then-Higher Education Minister William Ruto and ex-President Moi launched a vigorous bid to derail enactment of the new document, arguing that it posed a major threat to land ownership/rights (Sigei *et al*, Daily Nation, 22nd July 2010: 1+). Similarly, Kenyan Catholic bishops intensified calls for changes in the draft constitution as the referendum approached, taking particular umbrage at articles on Kadhis courts, abortion, and international law, among others (By Nation Correspondents and KNA, 22nd July 2010: 5). Kadhis’ Courts; these are subordinate courts that deal entirely with matters involving<sup>111</sup> persons that profess the Muslim faith; they in fact existed even under the old constitution, designed as a symbolic gesture to propitiate the country’s Muslim minority.

Interestingly, the ‘no’ side insisted that the field was tilted against their side, with state machinery especially civil servants, increasingly being used to push the ‘yes’ message (Shiundu, Daily Nation, 22nd July 2010). Concerted opposition to enactment of a new constitution issued from the realization that the new document sought to challenge an entrenched, conservative status quo (Review Report, South Consulting, August 2010).

Major international players deployed a plethora of tools as part of the effort to pressure Kenyan leaders to undertake needed reforms as envisaged under NARA. Indeed, there was widespread concern, both locally and internationally, that in fighting within the Grand Coalition government was endangering the country’s

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<sup>111</sup> In this regard, Article 170(5) of the new constitution reads: “The jurisdiction of a Kadhi’s court shall be limited to questions of Muslim law... in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s courts.”

essential reform agenda more generally (Rugene, Daily Nation, and 16 February 2010). Others even worried that the coalition was collapsing and warned that “the country could be plunged into renewed chaos” (Menya, Daily Nation, 15th February 2010, 9), as affected leaders retreated into their respective ethnic cocoons. The EU decried emergent partisan politics in enacting a new constitution and promised to impose sanctions on hardliners on both sides of the referendum divide (Standard Team, The Standard, 5th February 2011).

Despite numerous hiccups, the country finally endorsed the New Constitution at a National Referendum in August 2010. Enactment of a new constitution signalled “the attainment of major structural reforms” (Review Report, South Consulting, October 2012: 18). In particular, the new constitution represents “a transition [for Kenya] from the old order to a new one” (Review Report, South Consulting, October 2011: 16). According to the literature, *Developing Political Institutions* focuses on liberalizing and eventually democratizing otherwise weak, autocratic national, and local level institutions.

At independence KADU agitated for, and received, a quasi-federal constitutional settlement. This resulted in three tiers of government: The Centre; Regions and Counties. The Independence Constitution had jettisoned the oppressive provincial administrative system in favour of elected Regional and County governments--to foster accountability and participation. However, when Kenyatta and his minions embarked on re-establishing the colonial authoritarian, administrative state they quickly moved to abolish the system of elected regional and county governments. They simultaneously ogled the system of Provincial Commissioners (PCs), District Commissioners (DCs), and District Officers (DOs)—prefects so to speak—the president’s personal representatives in their respective domains, but without the administrators having any direct or indirect connection to those areas (Gertzel 1970). Moi had then consolidated the system to create a highly oppressive state.

This is the system that the new constitution sought to dismantle. In particular, the Constitution tries “to cure the problem of how power is exercised by firming up checks and balances on presidential powers, but has not cured the shortcomings of Kenya’s ‘First-Past-the-Post’ Electoral System” (ibid). Although the “politics of the ‘winner-take-all’ is still embedded in the electoral system and its consequences

are likely to radiate through the newly established institutions of governance” (ibid), the Constitution creates “the much-needed environment for implementing reforms envisaged under Agenda 4 of the National Accord” (ibid).

## **6. 5 EU aid and Human Rights/ Rule of Law in Kenya: The GCG, 2008-13**

### **6.5.1 The Context: The Waki Commission Report on PEV**

The National Accord mandated the establishment of a Commission of inquiry to investigate the cause of the 2007-2008 post-election violence. This led to the formation of the Waki Commission. The Waki Commission recommended that to break the cycle of violence characteristic of Kenyan politics every five years, Kenya needed to establish a Special Tribunal to look into perpetrators of post-election violence. The report notes: “[s]adly, violence has been a part of Kenya’s electoral processes since the restoration of multi-party politics in 1991” (The Waki Commission Report 2009: vii). The Commission does, however, note that throughout all this period, no one was ever held accountable, thereby incubating “a culture of impunity” (26).

Although the Commission did not publicly reveal the names of those it considered bore the greatest responsibility, it nevertheless “places [them] in a sealed envelope, together with its supporting evidence. Both will be kept in the custody of the Panel of Eminent African Personalities pending the establishment of a special tribunal to be set up in accordance with our recommendations” (16). The report stressed: in case of failure to establish such a local mechanism:

Consideration will be given by the Panel to forwarding the names of the perpetrators to the Special Prosecutor of the International Criminal Court (ICC) in The Hague to conduct further investigations in accordance with the ICC Statutes. This is a major recommendation made by this Commission. (18)

On the 16<sup>th</sup> of December 2008, in a bid to facilitate the smooth operation of the Special Tribunal, Kibaki and Odinga reached an agreement pledging to have

parliament “pass the Freedom of Information Bill and to operationalize the Witness Protection Act and the International Crimes Act” (Makokha’s News, Daily Nation 31<sup>st</sup> January 2009: 16). The idea of a local tribunal proved divisive from the outset, however.

The Kenyan elite had initially scoffed at the Waki Commission Report. However, faced with overwhelming public and international clamour for action as recommended by the report, the elite now focused on the establishment of the proposed tribunal (Klopp 2009: 150-151). At issue were the nature and contents of a draft Independent Tribunal Bill (Namunene *et al*, Daily Nation, 21<sup>st</sup> July 2009, 1+). Critics lamented that the proposed bill suffered myriad flaws. Citing numerous previous failed attempts to end impunity, they insisted that the proposed mechanism remained susceptible to executive manipulation (Dolan, Daily Nation 14<sup>th</sup> Feb 2009)<sup>112</sup>.

Supporters<sup>113</sup> of a local mechanism focused, for their part, on, among others, the need for a speedy process as well as the need to protect Kenya’s sovereignty. Adherents of the ‘state sovereignty principle’ sought to cast ICC incursions into Kenya as external interference in the country’s internal affairs (Mathenge, Daily Nation 16<sup>th</sup> June 2009: 1). In particular, proponents of a local mechanism increasingly expressed concern that “President Kibaki and Prime Minister Odinga may also be exposed to prosecution” (Nation Team, 3<sup>rd</sup> July 2009: 2)<sup>114</sup>. Thus whereas the ICC angled for a local mechanism that comported with international standards, some of the elite pressed for “a Truth, Justice and Reconciliation Commission (TJRC) as the platform to address crimes against humanity” (Namunene *et al*, Daily Nation, 21<sup>st</sup> July 2009).

In early 2009 opponents defeated the proposed local tribunal bill. MPs insisted that they had voted against the Special Tribunal Bill because of “a deep mistrust of the

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<sup>112</sup> For calls to use the ICC in this case to end impunity in Kenya, see for instance Oriang (2009: 10).

<sup>113</sup> In fact, other MP’s pushed for what they called a ‘third option’; specifically, a UN Special Court modelled on those that operated in Rwanda and the former Yugoslavia, see Mutua (2009: 1).

<sup>114</sup> However, Kilonzo, the then-line minister—and a staunch ICC supporter—was said to have extensively referred to the Rome Statute; the International Crimes Act, and the agreement that was struck between the Kenyan delegation and Mr Moreno-Ocampo to justify the proposal to strip the president of his immunity from prosecution. See, among others Gitonga (2010: 6).

government and influential individuals” (Rugene, Daily Nation 2009: 5). As an indication that perhaps the government indeed planned to protect the suspects Attorney General Amos Wako taking the line that Waki had not done a thorough job insisted that the suspects would not be put on trial immediately; they “would be investigated afresh” (The Standard 25<sup>th</sup> October 2008: 18). Opponents found fault with various discretionary powers that the proposed bill sought to confer upon the president; the notion, for example, that “the president could terminate the proceedings of the tribunal as he pleased” (Kisiangani, The Standard 5<sup>th</sup> July 2009: 23). Others doubted that the two leaders and their respective parties actually wanted such a local mechanism in place, fearful that “any form of tribunal would target supporters and leaders of both parties” (Kisiangani, The Standard 5<sup>th</sup> July 2009: 23).

Nonetheless, available evidence indicated that some of those who had voted against the bill had done so at the urging of some of the suspects “believing that The Hague process would take years or fail altogether” (Rugene, Daily Nation 2009: 5). Equivalently, some of those who voted for the Haque option did so “hoping that the Netherlands-based court would indict President Kibaki and Prime Minister Raila Odinga” (*ibid*). As an indication of the scheming involved, opponents had reportedly worked overtime “to block the government’s push to meet the deadline [for establishing a local tribunal” (Namunene, Daily Nation 31<sup>st</sup> January 2009: 6). Indeed, opponents “challenged Kofi Annan to hand over the envelope containing names of politicians linked to the violence to the International Criminal Court” (Ojwang, The Standard 17<sup>th</sup> June 2009: 4). Hence, the cry: ‘don’t be vague; let’s go to The Hague!’.

In the wake of dithering, activists and other proponents of strong action to end impunity agitated for the ICC option (Barasa, Daily Nation 16<sup>th</sup> September 2009: 11). Terming parliament’s failure to enact the special tribunal bill “a major setback and a blow to the efforts to end the culture of impunity” (Namunene, Daily Nation 2009: 4), Annan and his team promised therefore to explore the possibility of handing the names to the ICC. This would see ICC Chief Prosecutor visit Kenya in late 2009 to ask that the cases be transferred to The Hague. However, following pleas by Kenyan officials, the ICC agreed to extent by one year the deadline for

forming a local tribunal , a move that drew varied reactions (Mutua *et al*, The Standard 1<sup>st</sup> July 2009, 1 and 9). Whereas opponents—supporters of The Hague route—characterized the move “a delaying tactic against justice,” those in favour of an extension opined, on the other hand, that this would afford Kenya “ample time to consult widely before a local tribunal is set up” (The Standard 5<sup>th</sup> July 2009: 4).

However, in the wake of repeated failed attempts in Kenya to form the Tribunal, “[o]n 15th December 2010, the ICC Chief Prosecutor named six persons suspected to bear the greatest responsibility for crimes committed during the post-election violence” (Review Report, South Consulting, January 2012: 50). The six suspects were: Deputy Prime Minister and Minister for Finance Uhuru Kenyatta, Minister for Agriculture William Ruto, Head of the Civil Service and Secretary to the Cabinet Francis Muthaura, Minister for Industrialization and ODM chairman Henry Kosgey, former National Police Commissioner Major-General Hussein Ali and radio presenter Joshua Sang; these were subsequently committed to trial (Review Report, South Consulting January 2010: 29).

Following the naming of six P.E.V. suspects, Kenya’s parliament voted to annul the country’s membership of the ICC (Namunene *et al*, Daily Nation, 9th February 2011: 64). The government sought, to this end, to exploit a widespread perception among African political elites that the court was inherently biased against the continent. Indeed, in the wake of ICC’s interest in the Kenyan case, the AU had amplified its critique of that institution. In tandem with Kenya’s posture, the AU increasingly posited the ICC as anti-Africa, citing as evidence the fact that the institution did not follow the appropriate channels in its excursions into Kenya: “either a referral from the UNSC” or one from a Rome Statute Signatory member state. The AU contended that in the Kenyan context, the ICC acted on its own initiative. Spearheaded by Vice President Kalonzo Musyoka, the government’s shuttle diplomacy effort would in particular entail the enlistment of the powerful AU PS & C to support the proposal for the deferral of Kenya’s cases.

However, this increasing anti-ICC rhetoric drew instant fire. Supporters of greater adherence to international norms warned that the attempt to present the ICC as an instrument designed to trample African sovereignty completely missed the

point. In the first instance, they explained that in fact it was “an outsider sent here by the United Nations that got these two men to sit down together to sort out our problems” (Odipo, *The Standard* 24<sup>th</sup> January 2011: 15). Thus, one, such as the President of States Signatory to the Roman Statute, advised “the country to instead negotiate for the deferral directly with the ICC” (Mutua *et al*, *The Standard*, 24<sup>th</sup> January 2011: 1). To ICC supporters, though, the Kenya government’s deferral call was nothing other than a furtive attempt to subvert the cause of justice for the victims of PEV (Mutua, *Sunday Nation*, 23<sup>rd</sup> January 2011).

The Kenya government’s shuttle diplomacy came unhinged, however, thereby opening the door for a ruling by the ICC’s Pre-Trial Chamber that the 6 Kenyans had a case to answer (Mutua *et al*, *The Standard*, 24<sup>th</sup> January 2011: 1 and 6). None the less, opponents faulted the ICC for privileging justice over peace, arguing that peace is a precondition for justice, human rights and freedom, especially in fragile environments (Kagwanja, *Sunday Nation* 23<sup>rd</sup> January 2011). Interestingly, former ICC Chief Prosecutor Moreno-O’Campo seems to have become an ardent advocate of the peace over justice stance. In a speech on the Kenyan cases he gave after leaving office, he lauded Uhuru and Ruto for:

forging a successful alliance that turned the perceived rivalries of their communities to their advantage,” thereby “demonstrating that international justice is not just about judges and prosecutors. You need political leaders because basically what I see in Kenya is Kenyatta and Ruto were allegedly killing each other [but now are working as a team]. (Menya, *Daily Nation*, 8th February 2014: 1 and 6)

Still, ‘opponents’ of international justice could not fail but notice that The Pre-Trial Chamber’s majority ruling clearing the way for ICC prosecutors to commence investigations came with caveats, for instance, “whether the prosecutor has powers to trigger the court’s jurisdiction in the absence of a referral by a State Party or the UNSC” (Ng’eno, *Sunday Nation* 23<sup>rd</sup> January 2011: 26).

## 6.5.2 The nature of EU political aid: The Special Tribunal Vs The Hague Debate

Deployment of foreign aid to promote human rights, democracy and good governance has emerged as a major theme in the literature. Champions of this stance contend that an uncritical focus on sovereignty in the Post-Cold War environment fails to take account of how changes in a variety of issue areas pose a challenge to existing modes of governance (Bishop 1994: 77). Supporters of the shift point to a growing acknowledgement of the responsibility to protect those under oppression by their own states as part of humanitarian law.

The EU took a particularly hawkish stance on the Local Tribunal vs. The Hague Debate. The bloc emphasized the need for Kenya to prioritize the “trial of those who bear the greatest responsibility for the violence which claimed more than 1,300 lives early last year, following disputed presidential elections” (Mathenge, Daily Nation 5<sup>th</sup> October 2009: 1). Insisting that it would not accept a flawed domestic process, the EU urged the grand coalition government to either set up a credible mechanism that met international standards or let the ICC handle the case. It is as part of this strategy, for example, that the EU claims to have played a major role in supporting the Panel of Eminent African Personalities in encouraging implementation of the reform agenda agreed by the Government of Kenya after the 2007-2008 post-election crisis<sup>115</sup>, as well as ongoing reform of the electoral process.

The theme of state sovereignty has received a lot of coverage in the democratization literature. Adherents of the status quo have taken umbrage at the new activist human rights posture. They see it as a blank cheque for external intervention in the internal affairs of sovereign states. They counter that the modern, sovereign state-based system arose in direct reaction to this situation.

Adherents of the ‘state sovereignty principle’ sought to cast ICC incursions into Kenya as external interference in the country’s internal affairs (Mathenge, Daily

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<sup>115</sup> <http://www.dialoguekenya.org/>

Nation 16<sup>th</sup> June 2009: 1). In particular, proponents of a local<sup>116</sup> mechanism increasingly expressed concern that “President Kibaki and Prime Minister Odinga may also be exposed to prosecution” (Nation Team, 3<sup>rd</sup> July 2009: 2)<sup>117</sup>. Thus whereas the ICC angled for a local mechanism that comported with international standards, some of the elite pressed for “a Truth, Justice and Reconciliation Commission (TJRC) as the platform to address crimes against humanity” (Namunene *et al*, Daily Nation, 21<sup>st</sup> July 2009).

One line of critique in the literature holds that the extant conceptualisation of human rights has proved difficult and controversial. Critics contend that the liberal formulation equates human rights with political and civil rights. They opine that such a circumscribed definition elides social, economic and cultural rights (Pinkney 1999). The UN Universal Declaration of Human Rights, adopted in 1945 seats economic, social and cultural rights alongside the more political ones (Bishop 1994: 74). This theme also manifested itself in the Local Tribunal versus Hague debate. Thus whereas the ICC angled for a local mechanism that comported with international standards, some of the elite pressed for “a Truth, Justice and Reconciliation Commission (TJRC) as the platform to address crimes against humanity” (Namunene *et al*, Daily Nation, 21<sup>st</sup> July 2009). Those agitating for a TJRC maintained that whereas the ICC would focus narrowly on political and civil rights violations during the 2007-08 PEV, the former mechanism would help address both the proximate and the underlying causes of that crisis, including historical injustices. They included under the historical injustices rubric such things as economic marginalization, grievances related to land allocation, regional inequalities and inequities, among others. Supporters of a TJRC argued, in other words, that this approach would go beyond political issues, and address also economic, social and cultural human rights.

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<sup>116</sup> In fact, other MP’s pushed for what they called a ‘third option’; specifically a UN Special Court modelled on those that operated in Rwanda and the former Yugoslavia; see, for instance Mutua (2009: 1).

<sup>117</sup> However, Kilonzo, the then-line minister—and a staunch ICC supporter—was said to have extensively referred to the Rome Statute; the International Crimes Act, and the agreement that was struck between the Kenyan delegation and Mr Moreno-Ocampo to justify the proposal to strip the president of his immunity from prosecution. See, among others Gitonga (2010: 6).

## 6.6 The nature of EU political aid: Funding of elections in Kenya

Technical Assistance involves foreign experts working with their domestic counterparts, from both government and the NGOs, in support of the entire electoral cycle from pre-election preparations to post election capacity building (Mitchell and Phillips 2008). Viewed as an entry point for other desired reforms—such as good governance, among others—the strategy can also help in the identification of other government entities that need assistance (Schroeder 2013: 220).

However, this is not merely a technocratic issue: technical assistance has clear political implications; specifically, it is focused on strengthening institution in order to promote participatory and effective electoral institutions. Seen so, technical assistance, as opposed to election monitoring, is focused on long-term institution building as well as promoting the participation of hitherto excluded groups such as women and social and ethnic minorities “in the political process,”—consistent with a number of international instruments concerning non-discrimination and participation of such groups (Binder 2007: 225).

There exists a link between the national electoral process and democratic consolidation (Pronizer 1977): liberal democratic theory considers free and fair elections the sine qua none of democracy (Sainna 2009). Given the central place that elections occupy in a democratic system, the need for an independent and impartial electoral oversight body<sup>118</sup> needs no gainsaying, if the exercise is to garner legitimacy. Otherwise, such an exercise is likely to exacerbate societal divisions (Makulilo 2011: 264). Thus an emergent consensus holds that whereas African countries made some important progress towards democracy in the 1990s, a number of challenges linger, with the electoral system as a major contributory factor (Kabemba 2008: 35). Indeed, as the 2007-2008 political events in Kenya illustrate, poorly organized elections can become the proximate cause of electoral related violence.

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<sup>118</sup> The Australian Electoral Commission stands as the epitome of such a body. For the full read, see, for instance Brent (2009: 405-419).

Electoral assistance has therefore emerged as a major theme in the post-cold war era. Indeed, electoral support has become the chief means of UN democracy assistance. UN democracy assistance is facilitated by the United Nations Development Programme (UNDP) and the UN's Electoral Assistance Division (EAD), nested in the Secretariat's Department of Political Affairs (Schroeder 2013). Free and fair elections<sup>119</sup> are increasingly seen as the most visible form of democracy assistance (Mitchell and Phillips 2008: 161-2). Election support takes two main forms: observation/monitoring of elections as well as technical assistance. The support rests on the rationale that although such activities enhance voter participation while curbing electoral fraud at the same time (Schroeder 2013: 218), preparing and running elections is an expensive undertaking, especially for poor developing countries.

Donors continue to support the electoral process in Kenya by way of funding. It is true that government funds play a major part in these activities. Still, donor assistance to democracy and governance programmes is substantial and critical. When it comes to elections, for example, "donors have traditionally given about 10 per cent of the total election budget" (Review Report, South Consulting, October 2012: 41). In line with this track record of assistance, "In June 2012 donors gave IEBC Kenya Shillings 2.2 billion [about \$26m] as part of financing towards its preparations for the next general elections [ones held in early 2013]" (Review Report, South Consulting, October 2012: 41). In addition, the EU through its foreign policy Chief Catherine Ashton committed \$2.8 million to fund the activities of the IEBC in preparation for the by-then impending general elections, since held in March 2013.

## **6.7 The nature of EU political aid: Supporting civic education**

Technical Assistance involves foreign experts working with their domestic counterparts, from both government and the NGOs, in support of the entire electoral cycle from pre-election preparations to post election capacity building

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<sup>119</sup> This can at times lead to a dangerous conflation of elections and democracy, though. See, for instance Ake (1992: 32-36).

(Mitchell *et al* 2008). On the electoral front, technical assistance might involve training candidates; civic education, budgeting procedures, “computerizing voter lists... amending electoral regulations... and training electoral officials on new voting procedures “(Schroeder 2013: 209-10).

These activities are usually focused on creating credible electoral institutions and procedures, in the process increasing voter confidence in these institutions and processes (Binder 2007; Schroeder 2013). The EU and other donors have also consistently supported voter education, especially after the 1997 elections. For example, in early 2012 the EU jointly with the United Nations Development Programme—Kenya under the Joint Training Facility—a working arrangement on democracy support between the two entities—organised a workshop for EMB officials from across the globe in Mombasa on the issue of ICT and elections.

Technical and financial support usually unfold within the ambit of targeted cooperation programmes. These activities can take anyone of many forms: election support teams; these are teams that can analyse key aspects of previous elections and make recommendations for future improvements; leadership training and networking for women, especially in rural areas.

Liberal theory holds that respect for associational life, conceptualized as the ability of “citizens to organize in defence of their own interests or identities without fear of external intervention or punishment has long been identified as a key ingredient for democracy” (Fox 1994: 151-152). This empowerment helps such groups transmute relationships of dependency, replacing them with a new order infused with a greater respect for citizenship rights by the state. In the end, such activities permit “community groups to grow in awareness, to increase their commitment to the common good and better to defend the needs and the rights of the excluded” (O’Gorman 1995: 194).

Civil society can also play a crucial role as a facilitator of conflict mediation. Civil society can accomplish this, they contend, through its ability to attract people from different social backgrounds “on a constant and voluntary basis... thereby mitigating cleavages” (10). Hence, Africa’s ability to successfully navigate its current political development voyage will crucially hinge on “how well...

democratizing African governments are able to negotiate in good faith... with those who represent the important and influential social forces” (Owusu 1997: 148). The existence of strong civil societies in Africa “would provide a foundation for sustainable development, both participation and development” (Shaw 1990: 21).

Donors have extended financial support to a number of national civil society initiatives to guarantee free and fair elections. This has been especially the case with regard to funding for Elections Observation Group (E-LOG). This is a consortium of civil society organisations and other stakeholders “established in 2010 to provide a permanent national platform through which citizens can monitor general elections in Kenya and other countries in Africa” (Review Report, South Consulting, October 2012: 41).

## **6.8 Conclusion**

This chapter focused on Kenya under the grand coalition government that came to power following international mediation efforts that ended the 2007-2008 political crisis. The chapter has examined some of the issues with which the grand coalition government had to grapple: The Special Tribunal versus The Hague debate, as well as implementation of some of the reform initiatives mandated by the NARA. Kenya witnessed unprecedented violence following a disputed presidential election in December 2007. However, combined domestic and international pressure was brought to bear on Kenyan leaders; this forced them to seek a negotiated solution to the crisis-in the form of a power-sharing arrangement between the formations led by Kibaki and Odinga respectively.

The two leaders agreed to undertake institutional and structural reforms as mandated under agenda number four items of the NARA. In addition, the two leaders agreed to use the window of opportunity opened by the grand coalition government to address other pending issues, such as corruption. Once in power,

however, the Grand coalition government seemed to always make two steps forward, and then one back.

Still, the elite, cognizant of both public and international concerns in the wake of the violence, did undertake some of the country's major pending reform agenda items, constitution reform key among them. This would see the country finally inaugurate a new constitution in 2010, after many previous false starts. Implementation of the new constitution as well as the other reform items would devolve to the new administration, which assumed power after the 2013 general elections. The next chapter has the current administration, under Uhuru Kenyatta, as its main focus.

## **CHAPTER 7: The Kenyatta/Jubilee Administration, 2013-**

### **7.1 Introduction**

Chapter seven discusses Kenya's political development since 2013. The chapter seeks to elucidate the dynamics of political change in Kenya since 2013 and the role of EU political aid in the country under the Kenyatta/Jubilee administration.

Kenya held a general election in 2013 to elect a government that would succeed the grand coalition administration. The new government was the one to preside over implementation of the reforms inaugurated in the wake of that violence. These were anchored in the constitution adopted under the grand coalition government. The National Accord had called for both institutional and constitutional reforms.

The first section of the chapter seeks to provide the contextual setting. The first section limns political developments in the country as Kenya headed into this crucial election, especially in light of the PEV. The section opens with an introduction, including preparations for those elections, the elections themselves. Here the focus is on the main campaign issues that framed the elections, and the political alliances that emerged in the run-up to the elections. The section also examines the reaction, especially by the losing side, to Kenyatta being declared the winner... The next part of this section examines how some of the reformed institutions have performed; it will also analyze the ICC case that confronted Kenyatta and Rut.

The next section—the substantive part—then shifts to a discussion of some of the key events—themes—that have emerged under the Kenyatta administration, and the role that EU political aid with respect to these issues/themes. The section will therefore focus on the role of EU political aid in Kenya during this period with respect to, among other themes: the Uhuru-Ruto presidential ticket, emergent calls for reform of IEBC, The ICC case that confronted Kenyatta and Ruto at the time of assuming office; and so on. This substantive part of the chapter aims to analyze the role of EU political aid in Kenya from 2013- .

The first conducted under the new constitution, the 2013 elections pitted two major political-cum ethnic alliances<sup>120</sup> against each other: the Jubilee Alliance (JA) versus the Coalition for Reforms and Democracy (CORD). Captained into the elections by Uhuru Kenyatta—son of Kenya’s founding President Jomo Kenyatta—and William Ruto, as its presidential and Deputy-presidential candidates respectively, Jubilee was actually a coalition between two parties: Kenyatta’s The National Alliance (TNA), and Ruto’s the United Republican Party (URP). In addition, and on the ethnic front, Jubilee drew majority of its support from the Mount Kenya region and the Rift Valley—or from the Gikuyu, Embu and Meru (GEMA) group from the Mt Kenya region, and the Kalenjin and other related, and marginalized groups in the Rift Valley and parts of North Eastern Kenya.

With Raila Odinga<sup>121</sup>—son of Kenya’s founding Vice-President Oginga Odinga—and Kalonzo Musyoka as its presidential and Deputy-Presidential candidates respectively, Cord, similarly, was a coalition between Odinga’s ODM, Musyoka’s Wiper-Kenya and Moses Wetangula’s Ford-Kenya. The coalition’s base of support lay in Western Kenya (among the Luo and Luhya people—collectively referred to during the colonial era, ‘the people of Kavirondo’), the Coastal region, Nairobi, parts of eastern Kenya inhabited by the Kamba people, as well as some marginalized groups in Northern Kenya and the Rift Valley.

The crimes against humanity cases stemming from the 2007-2008 post-election violence facing a number of prominent Kenyans, key among them Kenyatta and Ruto, and implementation of the new constitution, were the main campaign issues. In the face of the ICC threat, key figures—and former nemeses—implicated in PEV, namely Kenyatta and Ruto, moved to cement an ethnic alliance: The Kalenjin-Kikuyu alliance (the K-K Alliance). Forged out of apprehension that Odinga’s ascension to power would see them handed over to the ICC prosecutor in The Hague, the K-K alliance focused on isolating Odinga by insinuating that he was the mastermind of “the Ocampo list” (Obonyo, Sunday Standard, 23<sup>rd</sup> January 2011: 1 and 6). As a key plank in its electoral grand strategy, the K-K alliance

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<sup>120</sup> Some observers decried formation of the two alliances, viewing them as antithetical to national unity, see, for instance Kanjama (2011: 15).

<sup>121</sup> Odinga was the country’s incumbent Prime Minister, and Kenyatta one of his two deputies; Musyoka was the Vice President. See, for instance Lang’at (2016: 4).

worked assiduously to convince its supporters that the Cord team was even opposed to government's effort to rally African countries against The Hague (Kerrow, Sunday Standard, 23<sup>rd</sup> January 2011). To this end, exploiting the ICC issue, Kenyatta and Ruto sought to cast the case they faced at The Hague as an imperialist plot designed to infringe Kenya's sovereignty by imposing leaders on the populace (Chagema, The Standard, 22<sup>nd</sup> December 2016: 15).

Odinga and Musyoka sought to make implementation of the new Constitution, as well as experience the thrust of their campaign. Focused especially on devolution, the Cord team repeatedly warned Kenyans not to entrust the task of implementing the Constitution with the Jubilee team, arguing that some within that camp, most prominently William Ruto, had led the 'no' team in the referendum. In addition, they claimed that although Kenyatta had in the end thrown his weight behind the 'yes' camp in the referendum, he had done so in a tepid manner, mostly after Kibaki and his camp had come under intense pressure to support the passage of the new document. In this regard, Odinga and Musyoka and the rest of the Cord ensemble made a point of reminding Kenyans of the events that unfolded right after independence.

At independence KADU agitated for, and received, a quasi-federal constitutional settlement; this resulted in three tiers of government: The Centre; Regions and Counties. The Independence Constitution had jettisoned the oppressive provincial administrative system in favour of elected Regional and County governments--to foster accountability and participation. However, when Kenyatta and his minions embarked on re-establishing the colonial authoritarian, administrative state they quickly moved to abolish the system of elected regional and county governments. They simultaneously ogled the system of Provincial Commissioners (PCs), District Commissioners (DCs), and District Officers (DOs)—prefects so to speak—the president's personal representatives in their respective domains, but without the administrators having any direct or indirect connection to those areas (Gertzel 1970). During the campaigns, the Kenyatta-Ruto team continued to defend the provincial administration.

The 4<sup>th</sup> March 2013 General Elections proceeded peacefully, contrary to earlier apprehensions. Based mostly on the events of late 2007 and early 2008, the

apprehensions proved unwarranted, thanks, in part, to “meticulous planning and serious gathering of intelligence by the country’s security organs” (Ombati, *The Standard* 13<sup>th</sup> March 2013: 4). Fearful of a repeat of the 2007-2008 events, the government had invested huge financial resources in security.

On 6<sup>th</sup> March, just two days after the election, the IEBC declared<sup>122</sup> Kenyatta the overall<sup>123</sup> winner of the presidential poll, having garnered 50 per cent of all the valid votes plus 1. Article 138(4) of the constitution, ordains that a candidate will be declared president if the individual receives: “(a) more than half of all the votes cast; and (b) at least twenty-five per cent of the votes cast in each of more than a half of the counties.” Kenya has 47 counties. One commentator captured the implication of declaration of Kenyatta by IEBC as president thus:

The declaration of Uhuru Muigai Kenyatta as President-elect has set into motion seismic legal processes without precedent and into uncharted legalities in international, commonwealth, continental, and local arenas. (Bowry, *The Standard* 13<sup>th</sup> March 2013: 15)

Claiming to have in their possession evidence proving manipulation of poll results in favour of Kenyatta, CORD exuded confidence of legal victory in a suit the party planned to file at the Supreme Court<sup>124</sup> (Mosoku, *The Standard* 13<sup>th</sup> March 2013: 1 and 4). Cord picked Odinga’s chief campaigner Eliud Owallo to file<sup>125</sup> the petition against Kenyatta’s purported first round overall victory, a victory which would, if allowed to stand, negate the need for a run-off (Thuku *et al*, *The Standard* 13<sup>th</sup> March 2013: 4).

The decision to let Owallo, and not Odinga, file the petition represented a clever strategy by Cord to turn the glare away from Odinga. Cord planned to rely “on a full audit of the presidential election” as “the basis of their case” (*ibid*).

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<sup>122</sup> Article 138(10) of the new Constitution of Kenya enacted in 2010 demands that within seven days after the presidential election, the IEBC chairperson shall: “(a) declare result of the election; (b) deliver a written notification of the result to the Chief Justice and the incumbent president.”

<sup>123</sup> Article 138(4) of the constitution, ordains that a candidate will be declared president if the individual receives: “(a) more than half of all the votes cast; and (b) at least twenty-five per cent of the votes cast in each of more than a half of the counties.” Kenya has 47 counties.

<sup>124</sup> Article 163(3) (a) of the Constitution vests the Supreme Court with “exclusive original jurisdiction to hear and determine disputes relating to the election to the office of president”.

<sup>125</sup> Article 140(1) of the Constitution states thus: “A person may file a petition in the Supreme Court to challenge the election of the president-elect within seven days after the day of the declaration of the result of the presidential election.”

Out to prove that the entire electoral process was inherently flawed, the party wanted IEBC to provide them with key electoral documents such as “all form 34, 35, and 36 from the more than 33,000 polling stations and constituencies, serial numbers of electronic devices used as well as provisional and final registers of all registered voters” (*ibid*). Form 34 is a declaration of presidential election results signed by the presiding officer and election agents; form 35 details results from 5 other elective seats. Cord planned to use these documents to demonstrate that the presidential election was a sham, a sham it attributed to the manipulation of electronic tallying<sup>126</sup>.

Odinga’s—and by extension Cord’s—decision to seek legal redress elicited mixed reviews. Kenyatta supporters denounced the move as a waste of time and resources. However, Odinga backers lauded the decision as “a major boost for democratisation of our country and helps sustain respect and upholding of the rule of law” (Mosoku, *The Standard* 13<sup>th</sup> March 2013: 1 and 4), they simultaneously castigated opponents as being engaged “in an abuse of the constitution... [an] abuse of the constitution because electoral disputes are part [and parcel] of an electoral process in a democratic society” (*ibid*).

The Court, in a controversial ruling, unanimously upheld<sup>127</sup> Kenyatta’s victory, thereby clearing the way for his swearing-in as Kenya’s fourth president. The Supreme Court’s decision received mixed reviews. Whereas pro-Kenyatta groups hailed the ruling as apposite for democracy, those allied to Odinga denounced it as both lacking in legal reasoning and empirical evidence. In particular, critics argued that the Court appeared not interested in the evidence adduced before it, but rather in merely endorsing Kenyatta’s purported victory. One acerbic critic of the court’s verdict put it thus many years later:

A number of us have spent the last four years criticizing the Supreme Court over that decision and demonstrating the profound harm that it caused the judiciary. Our criticism has relied on the text of the judgment, whose reasoning we have discredited, and also on the observable procedures that the court employed which we have also questioned. (Kegoro, *Sunday Nation*, 16<sup>th</sup> July 2017)

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<sup>126</sup> Article 138(3) (c) of the Constitution declares: “after casting the votes in the polling stations, the IEBC shall tally and verify the count and declare the result”.

<sup>127</sup> Article 140(2) of the Constitution mandates that: “Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final”.

Indeed, one percipient legal expert had made what would prove a prescient prediction. He had wondered if in case of a legal dispute over the announced presidential results, the new judicial architecture was perhaps too nascent to handle such a situation, thereby raising a big question mark as to whether “Will the justice meted out suffice?” (Bowry, *The Standard* 13<sup>th</sup> March 2013: 15). In the event, Odinga and his Cord team having pledged to respect the Supreme Court’s ruling, accepted, albeit reluctantly, the Court’s final affirmation of Kenyatta and Ruto as the winners of the 2013 contest.

In the wake of their victory, the Kenyatta-Ruto duo went on to construct a government that appeared to cast them as the builders<sup>128</sup> of a new, modern Kenyan state. In particular, cognisant of the new, stringent constitutional requirements that they faced in naming their cabinet, the two leaders not only named mostly technocrats—with only two politicians included. They also honoured the gender requirement in the constitution. Indeed, when they named the cabinet, most of the plum posts—foreign affairs, defence, devolution and planning, energy, among others, went to women.

Once they got down to the business of governing the country, moreover, the duo continued with or, in some instances, even intensified some of the developmental policies launched by the two predecessor administrations, NARC and the Grand Coalition. On the economic front, for example, the new administration intensified the country’s investment in infrastructural projects, epitomized by commencement in 2013 of construction of the first phase of a Standard Gauge Railway (SGR) line from the port of Mombasa to Nairobi. The next two phases would extend the facility to the western part of the country, to link Kenya with Uganda and Rwanda and possibly other countries in Central Africa. (By Sunday Nation Team, *Sunday Nation*, 7<sup>th</sup> May 2017: 4). Funded and undertaken by the Chinese, and intended to replace the pre-existing facility constructed at the beginning of the colonial era, the first phase is already operational, commissioned by the president at the end of May 2017. The next phase of the project—intended to extend the facility from Nairobi to Naivasha—the Western phase—is already underway (*ibid*).

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<sup>128</sup> For statebuilding in historical perspective, See, for instance Skowronek (1982).

The administration has continued and intensified efforts in other areas as well. Take the attempt to extend social services to a majority of Kenyans. With respect to access to electricity, for example, when Jubilee took over, approximately thirty per cent (30 %) of Kenya's households had access to this vital service—itsself a vast improvement over the state of affairs that existed in this domain under the previous KANU administration (By Sunday Nation Team, Sunday Nation, 7<sup>th</sup> May 2017: 4). Then less than five (5 %) per cent of households had access to power. Jubilee has increased connectivity to electricity appreciably, thanks to massive investment in the sector in the last five years; as a result, now more than fifty per cent (50 %) of all households in the country have access to electricity. In addition, the administration has had the vast majority of, if not all, primary schools in the country connected to power, an unheard of development previously. Similarly, to cushion more of the country's senior citizens from the ravages of poverty, the administration intensified a programme that begun under the grand coalition government of monthly cash transfers to the most indigent senior citizens; the administration has increased the programme's reach appreciably (*ibid*).

Still, corruption continued to blight Kenya even under the Jubilee administration. For example, critics contend that after the administration floated the country's first ever Eurobond rather than use the proceeds to finance various so-called flagship projects under vision 2030 as initially promised, most of the cash was actually squandered through corrupt arrangements (Leftie, Daily Nation 28<sup>th</sup> October 2015: 1). Similarly, the EACC, in an investigation launched at the invitation of the National Assembly Speaker, discovered that MPs are employing all manner of tricks to filch public coffers (Otieno, Daily Nation 5<sup>th</sup> December 2015: 1). In one such scam, "an MP claimed mileage allowance for visiting his constituency when he had [in fact] travelled to Australia on parliamentary expense for six days" (*ibid*)<sup>129</sup>.

Kenyatta first used his State of the Nation Address in March 2015 to address the corruption issue. Kenyatta used the occasion to present to parliament a list of senior government officials, both elected and appointed, at both the County and

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<sup>129</sup> No wonder, then, given this context, that the country's youth would inform Pope Francis during his maiden visit to Kenya in 2016, that "the biggest challenges the youth and the country are facing are tribalism and corruption," with one of the youth leaders alerting the pontiff: "sometimes one has to pay extra cash and in kind to access services" (Ngirachu 2015: 17).

National levels, reportedly implicated in graft by the country's anti-graft agency, the Ethics and Anti-Corruption Commission (EACC). The president reinforced his speech with the suspension of a number of senior government officials. However, critics accused State House of doctoring the list unveiled in parliament by Kenyatta to excise names of key government figures (Kegoro, Daily Nation, 5<sup>th</sup> November 2016: 5).

The foregoing governance challenges would see Kenyatta ogle politicians in a mini reshuffle of his administration so that he could have a "Cabinet that can also offer political advice in times of crisis," a move assailed by critics as inconsequential, on the grounds that the president "moved people who have failed in one docket into another" (Wanga, Daily Nation, 15<sup>th</sup> June 2016: 4). The next part of this section will therefore limn some of the issues, especially the way some of the reformed institutions have performed, analyze the ICC case that confronted Kenyatta and Ruto at the time of assuming office as well as trace Kenya's role in the war on terror. This examination should then provide the context for analyzing the role of EU political aid during the Kenyatta/Jubilee administration, again, with a focus on the institutions and issues identified in the first section.

## **7.2 The showdown over IEBC**

CORD begun to agitate for a 'national dialogue' starting sometime in 2014 in the wake of what it characterized as major national crises, corruption key among them. However, Jubilee and the clergy rejected Cord's call for dialogue as an unnecessary waste of time (Kegoro, Daily Nation, 12<sup>th</sup> June 2016: 37). Although the team continued to make intermittent calls for national dialogue, it shifted gears and launched a new campaign aimed at 'reform' of the IEBC<sup>130</sup>.

On the 31st of May 2016, just a day before Madaraka Day—celebrated on 1st June to mark the day when the country received internal self-rule from Britain in 1963—Cord leaders Raila Odinga and Moses Wetangula announced a break-through. They claimed that following their meeting with the president and his team at State

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<sup>130</sup> The IEBC, as discussed previously, is one of the new governance institutions established under the new Constitution.

House the two sides had reached an understanding to open talks on the IEBC (Ongiri, Daily Nation, 2<sup>nd</sup> June 2016: 5). State House, through Deputy President Ruto, subsequently rubbished the claim. In the subsequent State House rejoinder, Ruto claimed that although the Cord leaders had made a proposal to this effect, because of time constraints, no “deal was struck between the two sides with specific timelines given to resolve the matter” (By Standard team, The Standard, 5<sup>th</sup> June 2016: 12). The statement, in addition, stated that no such agreement had been struck as it would vitiate the president’s position that anything touching on constitutional institutions, such as the IEBC, unfold within the armpit of the law. The statement went on to intimate that because the relevant parliamentary committee had already signaled its desire to tackle the issue, that therefore that was the appropriate venue to address any concerns about the IEBC.

The government’s position would see Cord vow to intensify its public demonstrations—already underway— “to push electoral commissioners out of office” (Jubat *et al*, The Standard, 5<sup>th</sup> June 2016: 13). The opposition’s call for intensified civil action drew a sharp response from the police. The police characterized such action as illegal and thus subject to the full force of the law. However, Cord rejected this interpretation. Cord maintained that the court ruling on which the police claimed to base their position had “only barred the storming of IEBC offices and the destruction of the Commission’s property” (Ongiri, Daily Nation, 6<sup>th</sup> June 2016: 4).

The leaders also moved to reject the government’s claim that the anti-IEBC demonstrations enjoyed the tacit support of some neighbouring countries (read: Tanzania). Cord and allied groups counselled that while they, too, respected the Constitution, they still believed it “possible to get a solution outside the Constitution” (By Standard Team, The Standard, 5<sup>th</sup> June 2016: 12). Kenyatta moved to recapture the initiative. Calling for the need to always prioritise national interests over personal gain, the president announced that “he had offered to dialogue with the opposition to save the country from constant wrangles” (Sunday Nation Team and PSCU, Daily Nation, 12<sup>th</sup> June 2016: 10)<sup>131</sup>.

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<sup>131</sup> See, also Barasa (2016: 6).

The clamour by the opposition for IEBC's reform stemmed from a number of considerations. First, the opposition had developed antipathy towards the IEBC ever since the electoral body declared Kenyatta the overall winner of the 2013 presidential race. Cord and its supporters maintained that while they agreed that Kenyatta had won the first round, available evidence showed that he had not secured 50 per cent of the votes cast plus 1 to negate the need for a run-off (Kegoro, Sunday Nation, 16<sup>th</sup> July 2017).

To buttress allegations of fraud, Cord offered, for example, that there was a major discrepancy between the total number of people who cast votes for the other five elective offices being contested, on the one hand, and those that cast ballots for presidential candidates, on the other. They claimed that available evidence showed that 2 million extra people had cast votes in the presidential elections vis-à-vis those who did so in the other races. Cord and supporters wondered how the IEBC could account for this discrepancy, other than the fact that it indicated manipulation of the presidential vote in favour of Kenyatta (Kegoro, Daily Nation, 12<sup>th</sup> June 2016: 37). Cord's animus towards the IEBC gained further momentum as a result of a number of post-election controversies that engulfed the electoral body.

### **7.2.1 The so-called 'Chickengate' scandal**

The first major post-election crisis to engulf the IEBC centred on the so-called chickengate scandal. The scandal stemmed from revelations that a British firm had bribed top IIEC officials to win the tender for the supply of electoral material for use in the referendum and the Bamachoge by-election in 2010. The information came to light following investigations by British anti-corruption agencies. It emerged that IIEC officials had actually actively advised the firm to inflate the price of the items in question; the two sides would then share the difference. UK prosecutors alleged that as part of this scheme, IIEC officials were "paid a sum of British Pounds 349,057.39 (shs 46m at current rates). The Serious Fraud Office (SFO) alleged

that the electoral body & S & O officials accommodated bribes in pricing by inflating the prices by up to 38 per cent” (Menya, Sunday Nation 24<sup>th</sup> July 2016: 9).

The British government proceeded to prosecute the firm’s officials. However, when it came to the Kenyan side of the story, save for the forced resignation of IEBC’s then-chief executive officer James Oswago, no one else on the commission was ever prosecuted. Finally, in 2016 the EACC summoned IEBC chief Isaak Hassan for interrogation over his role in the scandal. Hassan was a senior official with IIEC at the time of the scandal; he was also among those adversely implicated in the event.

### **7.2.2 Allegations of biased voter registration**

In addition, as new voter registration got underway in readiness for the 2017 elections, Odinga and other Cord leaders increasingly accused the electoral body of bias. The leaders decried in particular “the inadequate number of BVR kits [allocated to Cord’s strongholds] and called on IEBC to extend the registration period,” suggesting, “each polling station should have one clerk and one BVR machine daily. The period should be extended and if possible be done continuously” (Onyango, The Standard, 22<sup>nd</sup> February 2016: 1)<sup>132</sup>.

### **7.2.3 The “Okoa Kenya” initiative fiasco**

Cord had sought starting sometime in 2015 to use a popular initiative to begin the process of amending<sup>133</sup> the Constitution. Cord collected what it claimed were well over one million signatures, as required by the constitution. Cord then submitted these to IEBC for verification.

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<sup>132</sup> ODM did some introspection, increasingly coming to the conclusion that rigging allegations aside, it had not done a good job of marketing itself, see, especially Kiplang’at (2014: 1 and 8).

<sup>133</sup> Article 257, (1) and (4) states that a popular initiative to amend the constitution needs at least one million signatures; these are then to be presented to the IEBC for verification. Subsection (5) further states that if “IEBC is satisfied with the signatures it is then to submit these to County Assemblies for consideration; this is to happen within three months of IEBC’s receipt of a draft bill vouching for the proposed amendment”.

However, the electoral body declared the initiative to have failed. IEBC's action came just two days after the deadline and following complaints by Cord leaders that the electoral body took too long to verify the signatures. Cord had wanted Kenyans "to vote on whether they wanted funding to counties to increase from 15 per cent to 45 per cent of the total audited and approved national revenue; security to be devolved to counties and the Constituency Development Fund (CDF) entrenched in the constitution among other issues" (Shimoli, Daily Nation, 23<sup>rd</sup> March 2016: 5).

IEBC claimed that after perusing the signatures it had found that "741,979 of the 1,633,577 submitted had failed to meet the threshold, leaving only 891,598 of the signatures to be valid" (*ibid*). Cord denounced the decision as the clearest evidence yet that IEBC was working with government to undermine democracy (Mubatuk, The Standard, 5<sup>th</sup> June 2016: 9). In this regard, others cautioned that the focus on IEBC not obscure the larger point that Cord and others were making, albeit clumsily. Namely, the need for genuine reforms before the 2017 elections (Kegoro, Daily Nation, 12<sup>th</sup> June 2016: 37).

The two sides did therefore abandon their respective positions and launch preparatory inter-party talks over IEBC reform. Both sides would then name their respective representatives—from the National Assembly and the Senate<sup>134</sup>. Interestingly, though, and consistent with the president's Team's posture that the talks unfold via a parliamentary mechanism, the National Assembly's Justice and Legal Affairs Committee had been busy, also holding public hearings on whether IEBC Commissioners should be forced out of office. This followed a petition<sup>135</sup> to the committee by a citizen, alleging that IEBC officials had committed a number of egregious transgressions inimical to the tenets and spirit of the constitution.

The parallel sittings by the parliamentary committee did, however, draw a lot of criticism. Critics cast them as a diabolical plot hatched solely to divert attention from the need for essential reforms. Cord and other 'pro-IEBC reform' groups did

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<sup>134</sup> Article 124(2) of the Constitution states: "Parliament may establish joint committees consisting of members of both Houses and may jointly regulate the procedure of those committees".

<sup>135</sup> Article 119(1) of the Constitution declares: "Every person has a right to petition parliament to consider any matter within its authority, including enacting, amending or repealing any legislation".

therefore call for the immediate abandonment of the parliamentary effort; if not, they would resume public demonstrations. This would see the parliamentary committee terminate its 'investigation', having found, perhaps in a face saving gesture, that the allegations lacked merit. This development shifted the focus back to the joint parliamentary initiative.

After some posturing, the team brokered a deal that allowed IEBC commissioners to vacate office before the expiry of their terms. This was in return for payment<sup>136</sup> of the balance of their dues up to when they would have left office in 2017 (Mukinda and Ngirachu, Daily Nation 24<sup>th</sup> June 2016: 4). The joint committee remained deadlocked on other aspects, such as whether the next team of IEBC commissioners would serve on a fulltime or part time basis, for instance. New IEBC commissioners have since taken office and the country is already in election mode for the August 2017 elections, again pitting the Uhuru-Ruto team against the Odinga-Musyoka ticket.

### 7.3 The ICC issue

With the demise of the cold war and the onset of intra-state conflicts, the previously reactive approach to peace maintenance began to find strong theoretical anchors, first captured in then UN Secretary-General Boutros Boutros-Ghali's 1992 *Agenda for Peace* (Ryan 2000). Because of this enhanced understanding, now conflict has increasingly come to be seen as progressing through different phases; these require distinct resolution tools (Lederach 2007). In the immediate after-math of the Cold War this new understanding called for conflict prevention and management under Chapter VI of the UN Charter (Ryan 2000).

However, when faced with ever escalating crises, the international community sought to recalibrate its approach and tactics. The shift led to major changes in international legal norms (Schabas 2001: 604). This shift entailed a new focus on

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<sup>136</sup> Most Kenyans expressed relief at the resolution of the IEBC issue had finally been resolved; others viewed the part about payment of outstanding dues askance, equating it with rewarding wrongdoing.

curbing wanton violations of humanitarian law and rights. This meant, in practice, a de-emphasis of state sovereignty concerns in international affairs. The shift now had a new conception of state sovereignty as a responsibility; that is, state sovereignty as conditional upon a state's treatment of its own citizens. This led to the enunciation of a new principle: The Responsibility to Protect (R2P); the notion that working collectively the international community had the right to intervene in the internal affairs of sovereign states in order to protect victims of state oppression.

This initially led to the creation of ad hoc international criminal tribunals, such as those created to deal with crimes against humanity committed in the former Yugoslavia, Rwanda, among other post-cold war global hotspots. However, with ever escalating conflicts and rights violations in the post-Cold War era, human rights campaigners and others increasingly called for a more robust response. These efforts would culminate in the establishment of the International Criminal Court (ICC) in 1998. The Rome statutes of the ICC state that the prosecutor can decline to proceed with a case when submitted by a state party or the UNSC, "when [t]aking into account the gravity of the crimes and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice" (602). Equally, the statutes allow the court itself to decline jurisdiction in matters that are "not of sufficient gravity to justify further action" (*ibid*).

As previously intimated, the ICC became a key campaign issue in the 2013 elections, with the Kenyatta-Ruto team and supporters positing the case as a neo-colonial attempt to impose leaders on Kenyans.

Following his electoral victory, Kenyatta's first agenda item on the ICC issue was to try and have the cases referred back to the Pre-Trial Chamber for reconsideration. Kenyatta insisted, contrary to the Prosecutor's stated determination to proceed with the case to trial, that confirmation of the case against him by the Pre-Trial Chamber was a mistake. He in particular took issue with the fact that the prosecution had failed to take note of an acknowledgement by a number of its key witnesses that they had provided false testimony. The Kenyatta defense team explained, for example, that the ICC Prosecutor had "recently

admitted that witness number 4, who linked Uhuru and Muthaura to the infamous State House meeting lied,” even if she, the Prosecutor, maintained that the case proceed (Olick, *The Standard* 13<sup>th</sup> March 2015: 13). However, the Pre-Trial Chamber rebuffed the request; it then ordered the duo to appear in person before the Court to enter a plea.

Both the Kenyatta administration and the AU responded with uncharacteristic fury. They launched a determined bid to scuttle the ICC process. This would see them threaten a mass withdrawal by African states from the ICC as well as attempt to enlist the support of two of the five permanent members of the UNSC, China and Russia. The AU even requested for an opportunity for continental institutions to handle the case, insisting that this stance comported perfectly with ICC’s founding statutes. Those statutes envision the Court as complementary to local/domestic/mechanisms, and not as a substitute.

The pleas fell on deaf ears, however, with critics casting the overture as disingenuous, merely a clever ploy to defeat the ends of justice. This would see Ruto and Kenyatta become the first incumbent leaders to appear before the court in person. The Court then issued tough conditions, such as non-interference with potential witnesses that the duo would have to meet to remain free; any deviation from these would lead to automatic arrest and detention in The Hague.

However, once the cases commenced the prosecution was forced to progressively withdraw charges against suspects citing lack of sufficient evidence. The prosecution first withdrew its case against Muthaura and Major-General Ali; it then followed with that of Henry Kosgey. These developments left only three of the six suspects, Kenyatta, Ruto and Sang, with cases pending.

Sensing a shift in momentum, Kenyatta and the AU intensified their campaign for the dismissal of the case against the president. Incidentally, the strategy proved a success: the ICC prosecutor eventually terminated the case against Kenyatta. The prosecution accused Kenyatta of interfering with key witnesses, citing bribery and

intimidation as the tactics that Kenyatta had deployed to defeat<sup>137</sup> the ends of justice. The prosecution claimed that as a result of this development, it lacked sufficient evidence to sustain the case against Kenyatta. This development left only two of the suspects, Ruto and Sang, with cases pending (Menya, Daily Nation 13<sup>th</sup> September 2015: 10).

The Court committed<sup>138</sup> Ruto and Sang to trial to face charges related to crimes against humanity issuing from the 2007-2008 post-election violence. The court permitted the prosecution to use “prior recorded testimony of five witnesses who ha[d] since recanted their written statements and transcripts of their interviews with prosecutors” (Muthoni, Daily Nation 11<sup>th</sup> September 2015: 1). ICC trial judges stated: “Trial Chamber V (A) grants the prosecution’s request to use into evidence the prior recorded testimony of a number of witnesses pursuant to Rule 68(2) (c) & (d) of the Rules of Procedure & Evidence, without prejudice to the weight, if any, which will be attached to them in the Chamber’s weighing of the evidence” (Musau, The Standard 20<sup>th</sup> August 2015: 2).

However, emboldened by Kenyatta’s acquittal, the Jubilee administration sought to pressure the ICC to drop the charges pending against Ruto and Sang. This would see the government actively champion what became known as “Prayer Meetings”—but actually political mobilization intended to pressure the ICC—for the acquittal of Ruto and Sang (Tanui, 11<sup>th</sup> September 2015: 13). Held across the country and denounced both locally and internationally as a blatant attempt to blackmail the ICC, the ‘prayer meetings’ did, however, have President Kenyatta’s full support. The president offered:

As Kenyans, we should continue praying for Ruto. A judge cannot tell us that we cannot pray. As Kenyans, we should not accept to be divided or made to fight. We understand the value of our unity. We are the only ones who can resolve our issues. (Jamnah, The Standard, 21<sup>st</sup> October 2015: 1 and 4)

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<sup>137</sup> Kenyatta maintained—contrary to the prosecution’s claim—that he and Ruto had in fact co-operated with the ICC, citing as proof their submission to the ICC process, consult, among others By Standard Reporter and PSCU, The Standard (2015: 4).

<sup>138</sup> The Trial Chamber used the occasion to issue arrest warrants targeting mostly close allies of Ruto’s and Sang’s, seen as engaged in witnessing tampering, Consult, for instance, Kajilwa (2015: 2).

In early 2015 ICC judges granted Ruto the chance to appeal against use of previously recorded testimony of witnesses who had since recanted<sup>139</sup>. In addition, the defence questioned, “the amendment to Rule 68 of the rules of Procedure and Evidence that allowed use of prior recorded testimony” (Muthoni, Daily Nation 11<sup>th</sup> September 2015: 2), arguing that applying the rule would amount to a retroactive application of the law. Kenya and the AU also vigorously contested the Trial Chamber’s ruling, insisting that applying amended rule 68 violated an earlier pledge by the ICC to the Assembly of State Parties in 2015, when amending the Rule against its retroactive application in the Kenyan cases (Makana, The Standard 21<sup>st</sup> October 2015: 10). The AU maintained that use of Rule 68 would negate the purposes for Amended Rule 68—namely, to speed up some trials in some instances.

These concerns would see the African Union Commission (AUC) move to be enjoined in the case as an *amicus curae* (a friend of the court). The AUC contended that when the bearers of the testimony in question appeared before the court, consistent with jurisprudential principles of orality and cross-examination, the prosecution was not satisfied with the ensuing encounter; hence, the attempt to use recanted evidence. Kenya, for its part, continued its bid to have the cases referred back to Kenyan institutions. The government planned, as part of this effort, to win the support of ICC delegates at the Assembly of State Parties at The Hague in 2015 (Nyamori, The Standard 22<sup>nd</sup> November 2015: 9). Kenya had successfully lobbied “during the 12 session of ASP held in 2013, for the change in Rule 34” to allow Kenyatta and Ruto be tried in absentia at The Hague. The push to have Rule 68 suspended saw a major division emerge among African states, with those from the West, supported by civil society and opposition forces, against the bid, “arguing that the government was not in pursuit of justice but to protect the Deputy President” (*ibid*).

After concerted efforts by both the Kenya government and civil society to influence ASP on the use of recanted evidence, in late 2015 the ASP—the legislative arm of ICC—issued a statement to the effect that “ASP reaffirms its understanding that the amended Rule 68 shall not apply retroactively” (Wanzala, Daily Nation 28<sup>th</sup>

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<sup>139</sup> On witnesses who had recanted their prior evidence against Ruto, see, among others Munuhe (2014).

November 2015: 19). The ASP statement received varied reviews. The Kenya government hailed the announcement as a victory for its stance, with one key government figure enthusing, “after a protracted 10-day legal, political and diplomatic struggle by Kenya, the 14th ASP of the ICC has adopted our agenda” (Musau 2015: 19).

However, civil society and associated groups, begged to disagree, offering “[t]he fact is that the ASP declined Kenya’s request. Only judges can interpret Rule 68” (*ibid*).

On the 13 of February 2016, ICC Appeals judges, in a unanimous decision “ruled that the Trial Chamber had erred in allowing Ms Bensouda to rely on out-of-court statements of witnesses who either recanted them or refused to take the stand to testify” (Menya, Daily Nation, 14<sup>th</sup> February 2016: 4). In its ruling, the Appeals Chamber found that Rule 68 had been applied retroactively in the Ruto /Sang case, offering that this had “resulted in additional exceptions to the principle that evidence shall be given orally and was a restriction on the right to cross-examine those witnesses” (Kegoro, Daily Nation, 14<sup>th</sup> February 2016: 5). The Appeals Chamber observed that the retroactive application of amended Rule 68 had led to the admission of evidence, not previously admissible in that forum under former rule 68 of the Rules of article 69 (2) and (4) of the statute which could be used “against the accused in an Article 74 decision” (Menya, Daily Nation, 14<sup>th</sup> February 2016: 4). The judges cautioned that such an approach ran counter to some of the major requirements of the Rome Statute, “such as the requirement for open case hearing in court” (Kegoro, Daily Nation, 14<sup>th</sup> February 2016: 5).

Following the Appeal Chamber’s ruling, Ruto’s defence team moved to file a motion for termination of the case against their client. In his submission to ICC judges for acquittal in 2015, Ruto maintained that the prosecution had failed to prove its case against him, and “instead blamed the ‘Mt Kenya mafia’ for the 2007/2008 post-election violence” (Namunene, The Daily Nation, 28<sup>th</sup> October 2015: 9). Thus, to the prosecution’s claim that Ruto and allies had orchestrated the violence, Ruto’s defence team retorted that “the violence was ‘spontaneous’ and in ‘isolated’ attacks following a perception by many Kenyans that the election results were rigged in favour of President Mwai Kibaki of PNU” (*ibid*). Thus,

contrary to prosecution attempts to place Ruto at the centre of the violence, the defence maintained that “it was the combination of several factors unconnected to Mr Ruto, which raised tensions about rigging and contributed to the outbreak of violence” (*ibid*), citing both domestic and foreign election monitors and observers who adjudged the elections flawed and thus the spring well of post-election violence.

On 5th April 2016 the ICC Court declared a mistrial and acquitted Ruto and Sang. With the other four suspects already acquitted for lack of evidence, the acquittal of the two brought to an end Kenya’s post-election violence cases at The Hague (Opanga, Daily Nation 10<sup>th</sup> April 2016: 34). That the Kenyan cases collapsed should not have come as a surprise. From the outset, supporters of a local judicial mechanism had repeatedly cautioned against putting too much stock in the ICC process (Chiloba, The Standard 8<sup>th</sup> February 2009).

## **7.4 Judicial reforms**

### **7.4.1 Introduction**

Societal revitalization; specifically, the establishment of a functioning and impartial law enforcement and criminal justice system, has emerged as one of the major elements in the democratization literature. For example, scholars posit that in such volatile environments it is imperative to have an independent legal system, to serve as a forum for the resolution of a number of issues that could otherwise turn into major sites for on-going instability. However, the pre-existing law enforcement agencies are, for one reason or another, likely to be discredited. Alive to this reality, the “training and cleansing of the law enforcement and criminal justice systems need to begin promptly” (Kritz 2005: 806). Specifically, to restore trust in these

vital organs, it becomes essential to quickly launch a judicial system that is above “corruption and intimidation by criminal elements, police forces need to be supported and individual officers must be held accountable for violations of the rule of law” (Kritz 2005: 801).

The foregoing provides the context for comprehending inclusion of judicial reforms in Agenda number four. Cognisant of the need to address the permissive factors that propelled the conflict, and thus lay the proscenium for long term stability and prosperity, Agenda Number Four Reforms on the judicial front sought to achieve: financial independence; a transparent and merit-based appointive system; discipline and removal of judges; respect for human rights and gender equity; formation of an impartial and inclusive JSC; the enactment of a Judicial service Act—calling for peer review mechanisms; performance contracts; streamlining the functioning of judicial and legal institutions (Review Report, Annex 3, South Consulting, 2012).

On the Judicial reforms front, consistent with new constitutional dictates, the Judges and Magistrates Vetting Board (JMVB)—one of the institutions created following the enactment of the new constitution—vetted all sitting judges, offering the public the opportunity to provide evidence that would help the board in its vetting process; the process led to removal from office of a number of sitting judges. However the affected judges had the right of appeal<sup>140</sup>, initially to the same board for a review of its decision. However, when they appealed to the board and then lost, some of them proceeded to challenge the board’s decision in court<sup>141</sup>.

Once the dust had settled, the reinvigorated judiciary then got down to work. Generally, the courts now operated with a high level of independence. The High Court took a particularly tough stance against the government on several

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<sup>140</sup> The board initially contended that Article 262 of the Constitution, on transitional and consequential provisions, the Sixth Schedule, Article 23(1) which mandates parliament to create systems “for vetting... the suitability of all judges and magistrates [already in office] to continue to serve”; and subsection (2), which reads: any decision to remove someone from office based on the operation of “subsection (1) shall not be subject to question in, or review by, any court”, immunized its operations against such legal action.

<sup>141</sup> The High Court citing Article 165(6), which gives it supervisory authority “over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function,” ruled that JMVB’s actions were subject to judicial review. The ruling would see a number of aggrieved judges seek legal redress; while most failed in the ensuing legal drama; quite a few managed to get their jobs back.

occasions. That court has in particular repeatedly struck down as unconstitutional a number of pieces of legislation designed to recreate the imperial presidency that the new constitution sought to tame. It struck down as unconstitutional in early 2016 a law that would have compelled the JSC, in naming candidates for appointment to the bench, to submit three names to the president. The president would have then had to select one person from the list, and then forward the name onto the legislature for either approval or rejection (Wanga, Sunday Nation, 22<sup>nd</sup> May 2016: 18).

That law ran counter to the provisions of the New Constitution on the selection of judges. Those provisions vest such power solely with the JSC<sup>142</sup>. What this means in practice is that once the JSC has conducted public interviews/hearings for a judicial opening, it is then to select one individual and forward his or her name to the President for appointment. The President has no power, in this process, to reject the JSC's selection; rather, he formally forwards the name to the legislature which can then either approve or reject the selection. If the legislature approves the nominee, then the president moves to formally appoint him or her to the respective position. If, however, the legislature rejects the nominee, then the process commences a fresh, with the JSC re-advertising the position in question.

These stringent requirements aimed to restore the independence of the judiciary, compromised over the years. Those manipulations had, as previously discussed, reduced the JSC to an empty shell, with the president now solely in charge of appointing, and in the late 1980s removal, of judicial officers. In any event, cognizant of the attempt by the executive to resume its historic control of the judiciary, concerned groups moved to court, and Judge Isaac Leonala<sup>143</sup> of the High Court issued an injunction stopping implementation of the new rule.

The High Court subsequently declared the change unconstitutional (*ibid*). Given the country's recent history, judge Leonala—and the High Court in general—rightly viewed any attempt to give the president any substantive say in the selection of

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<sup>142</sup> Article 172(a) of the constitution states: the JSC shall “recommend to the President persons for appointment as judges”.

<sup>143</sup> He has since moved to the Supreme Court; he won one of three seats that became vacant on the Supreme Court—as discussed below. In fact, he is touted as a future CJ.

judges as a furtive attempt to subvert the judiciary's new found independence<sup>144</sup> by yet again making it a mere arm of the executive branch. Indeed, it is precisely because of this newly found "independence of the judiciary that today the political class tries to care about the legality of their actions and decisions" (Mungai, Daily Nation, 16<sup>th</sup> June 2016: 9).

Still, Kenya's refurbished judiciary has had its fair share of scandals and controversies. In early 2016, there surfaced bribery allegations against Supreme Court Justice Philip Tunoi. Justice Tunoi was accused of having received a kshs 200 million bribe<sup>145</sup> to rule in favour of Nairobi City County Governor Evans Kidero in an election petition filed by his challenger—and loser—in the 2013 elections, Mr Ferdinand Waititu. The governor sought to rubbish the claims, insisting that they originated with Senior Counsel Ahmednasir Abdulahi, who he accused of a vendetta stemming from Kidero's refusal to hire him as his counsel in the case (Ogemba, Daily Nation 3<sup>rd</sup> February 2016: 6). Pleading his innocence, Justice Tunoi, on his part, claimed that the same forces at play had worked assiduously to defeat his nomination to the Supreme Court (Menya, Daily Nation, 16<sup>th</sup> June 2016: 9).

The JSC, bowing to immense public pressure, moved to appoint a 6-member committee to investigate the allegations levelled against Justice Tunoi. The ensuing investigation prompted the team to recommend<sup>146</sup> to the President to suspend Justice Tunoi, to pave way for investigations by a tribunal appointed by the president. Although the president initially hesitated, he nevertheless came under immense pressure to act as required by JSC; he subsequently suspended justice Tunoi and appointed a tribunal to investigate the allegations.

Established in late February (Karanja, Daily Nation 28<sup>th</sup> June 2016: 8), the tribunal concluded its work in June 2016 without giving a verdict on the accusations against

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<sup>144</sup> On the independence of the Judiciary, Article 160(1) of the Constitution clearly proclaims: "The exercise of judicial authority... shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."

<sup>145</sup> Others trace these corruption scandals to the larger Kenyan national culture, a culture which they contend tends to glorify rather than vilify corruption. See, for instance Abdullahi (2016: 6).

<sup>146</sup> Article 168(5)(b)(i) of the Constitution states that after receiving a recommendation from the JSC for the suspension of a judge "The President shall, within fourteen days... suspend the judge from office" pending an investigation by a tribunal.

Tunoi. This followed a decision by the majority of the five eligible Supreme Court justices—I discuss this presently—not to review an earlier ruling by the Court of Appeal—upholding an earlier ruling by the High Court—that 70 years was the retirement age for judges. The ruling was, incidentally, in a case filed by Deputy Chief Justice Kalpana Rawal and Justice Tunoi contesting the 70-year retirement requirement. In the wake of the Supreme Court’s ruling, the team appointed to investigate Justice Tunoi came to the conclusion that “there was no legal mandate for the tribunal to investigate a retired judge” (*ibid*).

Kenyans witnessed a major national spectacle in 2016. This stemmed from a case whereby two Supreme Court justices, Deputy Chief Justice Kalpana Rawal and colleague Philip Tunoi, sought to contest their retirement age after attaining the constitutionally-mandated 70 years. The duo contended that as judges originally appointed under the old constitution—the document had 74 years as the retirement age for judges—the 70 year rule did not apply to them<sup>147</sup>. Pleading a breach of their fundamental<sup>148</sup> rights as enshrined in the Bill of Rights, the two subsequently petitioned the High Court for a constitutional interpretation<sup>149</sup>.

Pursuant to this mandate, “on December 11, 2015... a five-bench panel of the High Court determined that the retirement age of judges was 70 as set out in the Constitution [and not 74 as claimed by some of its members]” (Imanyara, Daily Nation, 8<sup>th</sup> July 2016: 10). The High Court observed in its ruling that the issue of the old constitution had become a moot point once the country adopted a new document in 2010 and then the two judges took a new oath of office under it.

Not satisfied with the High Court’s ruling, however, the two then lodged an appeal with the Court of Appeal<sup>150</sup>. The Court of Appeal in its preliminary ruling granted the two justices stay orders pending determination of their case. In a unanimous

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<sup>147</sup> Four Supreme Court justices first made their anti-70 -year retirement sentiment public in an unrelated matter in late 2015. See, for instance Ndurya (2015: 8).

<sup>148</sup> Article 22(1) of the Constitution states: “[E]very person has the right to institute court proceedings claiming a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened,”

<sup>149</sup> Article 165 of the Constitution vests the High Court with original jurisdiction with regard to the interpretation of the Constitution.

<sup>150</sup> Article 164(3) (a) of the Constitution states: “The Court of Appeal has jurisdiction to hear appeals from the High Court”.

ruling by a seven bench-judge, on 27th May 2016 The Court of Appeal upheld the High Court's ruling. Still unconvinced, the two sought to take their case<sup>151</sup> to the highest court in the land—the Supreme Court, the very institution in which they served<sup>152</sup>.

No sooner had the Court of Appeal rendered its unanimous decision affirming the High Court's finding than the two moved and had one of their colleagues, Justice Njoki Ndung'u—grant a stay of the Court of Appeal's ruling—pending hearing by the Supreme Court. Justice Ndung'u then went ahead and fixed the date for the hearing for a later date—a time when the chief Justice Willy Mutunga was to have left the court. He retired almost a week later. One of the litigants, Justice Rawal, as the deputy CJ, would have become the CJ, albeit in an acting capacity. However, using his administrative power over the judiciary, the CJ moved with haste to reverse Justice Ndung'u's ruling, and reschedule the hearing before the Supreme Court to occur just two days before his retirement.

In the subsequent ruling, “a majority verdict of three Supreme Court judges out of five, on Tuesday [14<sup>th</sup> June 2016] declined to hear their appeals, arguing that they did not want to be perceived to be biased having made public their positions regarding the retirement age”<sup>153</sup> (Ochieng *et al*, Daily Nation, 16<sup>th</sup> June 2016: 70). Interestingly, the other two members of the court, Justices Ndung'u and Ojwang, perceived to be in favour of the litigants, and also suspected to have been receiving their marching orders on this front from the executive, boycotted the session. In any event, the three justices also allowed the Court of Appeal's verdict to remain in force until “another bench is constituted to hear the appeals” (*idem*), although their other two colleagues, “Njoki Ndung'u and Jackton Ojwang' said they were ready to hear the appeal” (*ibid*).

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<sup>151</sup> Article 163(3) (b) (1) of the Constitution grants the Supreme Court appellate jurisdiction to hear and determine appeals from the Court of Appeal.

<sup>152</sup> Reportedly, when CJ Mutunga got wind of his two colleagues' plan, he cautioned them that, given that they served on the Supreme Court, the public would perceive such a case being handled by this same institution as self-serving. They then reportedly struck a deal to the effect that the two would abide by whatever decision the Court of Appeal delivered.

<sup>153</sup> The court has seven members but because two of them were the litigants in the case, conflict of interest automatically disqualified them from participating.

Following the ruling, the two contesting judges—Rawal and Tunoi—“applied to suspend the Supreme Court’s judgement but the CJ directed them to appear in court [the following day] for direction” (Ochieng *et al*, Daily Nation, 16<sup>th</sup> June 2016: 70). The majority three subsequently rejected their two beleaguered colleagues’ prayers—thereby ending Rawal’s and Tunoi’s careers on the bench. To most observers, by this action the court thereby appeared to “technically clear the way for the Judicial Service Commission (JSC) to start the process of replacing the two judges who had reached the retirement age but who were kept on pending their appeal” (Editorial, Daily Nation, 16<sup>th</sup> June 2016: 14). The rejoicing in the wake of the ruling proved premature, however. When the JSC sought to publish the two vacancies in the Kenya gazette, the Government Printer initially refused to do so (Kiai, The Sunday Nation, 25<sup>th</sup> June 2016).

The retirement controversy was really a sub-plot in a much bigger contest: the struggle over the future control and direction of the judiciary. That struggle over the future of the judiciary also had as one of its other major—*the major*—target the office of Chief Justice. Chief Justice Mutunga had elected to retire one year ahead of his official retirement date. The CJ argued that his decision was informed by a desire to afford the country ample time to have another judiciary head in place well ahead of the 2017 elections<sup>154</sup>.

Pro-status quo forces both in and outside the judiciary perceived Mutunga’s impending departure—given his reformist track record—as a fine moment to fight “to ensure that the next CJ was not an activist but a conservative pro-establishment figure who could be trusted not to rock the boat” (Imanyara, Daily Nation, 8<sup>th</sup> July 2016: 10)<sup>155</sup>. This is the group that was really behind the retirement controversy. The group planned to install a judiciary “insider” as the next Chief Justice (Sunday Nation Reporter, Sunday Nation 24<sup>th</sup> July 2016: 4).

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<sup>154</sup> Article 171 of the Constitution vests the Supreme Court, of which the CJ is the President, with original jurisdiction in presidential election petitions.

<sup>155</sup> It would later emerge that before leaving office Mutunga had send a secret memo to JSC on this matter.

They hoped to stage what amounted to a coup<sup>156</sup> within the judiciary (Kiai, *The Sunday Nation*, 25<sup>th</sup> June 2016). The group planned to ask Kenyatta to circumvent or usurp JSC's powers and name one of their allies—Justice Ojwang—acting Chief Justice—just before JSC could publish the existence of any vacancy in the Judiciary. However, following warnings that the president did not have the authority to appoint a chief Justice and after being briefed, Kenyatta, who was abroad at the time, rejected the conservatives' proposition, thereby opening the door for publication by JSC in the Kenya Gazette of vacancies in the judiciary (Imanyara, *Daily Nation*, 8<sup>th</sup> July 2016: 10).

Why the great focus on CJ's replacement—and by extension the Supreme Court? Because the stakes are so high; for, “[j]ust as the 2013 [presidential] race ended up in the Supreme Court after Cord candidate Raila Odinga contested... Uhuru Kenyatta's victory, whoever assumes [that] office may preside over such a petition next year” (Wanga, *Sunday Nation*, 22<sup>nd</sup> May 2016: 18).

## 7.5 The war on terrorism

Kenya's position in international security has historically been pro-West (Leys 1974). Following the September 11 2001 terrorist attacks in the United States, Washington moved with alacrity to designate Kenya “an anchor state in the Horn of Africa”, and a ‘frontline in the Global War On Terror’ GWOT” (Mogire *et al* 2011: 437). Kenya has therefore emerged as a crucial player in counter-terrorism efforts in East Africa and the horn of Africa more generally.

Kenya first came under terrorist threat in the late 1990s, following twin terrorist attacks on US embassies in Dar es Salam and Nairobi. Since then Kenya has remained under constant terrorist threat (Jude *et al* 2009: 336). In addition, events in neighbouring Somalia, especially the emergence of a radical Islamist regime there—and then the decision by both Ethiopia and the US to fight the “Islamic Courts Union” (ICU), which was briefly in charge of the southern part of that country

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<sup>156</sup> Indeed, even as the conservative forces within the judiciary had been laying stratagems to subvert an adverse ruling by the Court of Appeal, their allies within the executive and the legislature had also remained busy laying plans of their own.

“has drawn Kenya deeper into the prosecution of the War on Terror” (*ibid*). Specifically, in light of the perceived terrorist threats, “since 2002, diplomatic missions in Nairobi representing leading Western donors have pressured the Kenyan government to adopt controversial new counter-terrorism legislation” (343), thereby demonstrating:

The strategic use of aid in achieving the political objectives of the War On Terror... Generally, the leverage of aid has shifted away from previous priorities of good governance and human rights, although these issues acquired new prominence as part of processes of political reform and national reconciliation following the disputed results of the December 2007 election and its aftermath. (Lind *et al* 2010: 336)

Kenyan officials contend that their country’s proximity to Somalia exposes it to Al Shabaab terrorist activity (Mogire *et al* 2011). This would see Kenya, with external assistance, create a number of security and intelligence related institutions during both the NARC and grand coalition administrations. In particular:

Foreign security assistance and training aid were pivotal to the establishment of many post 9/11 counter-terrorism structures in Kenya. These feature new and greater levels of cooperation with foreign security and intelligence agencies, some, by way of extra-judicial practices and institutions. Kenya was one of only five states to receive special training through the US government’s Anti-Terrorism Assistance Program in the 2005 budget, which included support for establishing a National Security and Intelligence Services Agency (NSIS). Other measures have included the establishment of a joint Terrorism Task Force in 2003 and the National Security Advisory Committee. The US government has also funded the establishment in Kenya of a National Counter-Terrorism Centre that notionally sits within the NSIS, but is rumoured to be under direct operational guidance of Washington. Muslims continue to endure police abuses—including the involvement of foreign security and intelligence personnel; in particular, Kenya has been accused of being involved in the regional rendition of suspects as part of the War on Terror. (Lind *et al* 2009: 341)

Kenya’s counter-terrorism strategy also focused on ‘stabilising’ Somalia. When on a visit to the US then president Kibaki intoned: “‘Stabilising Somalia is essential in sustaining the war against terrorism’” (Etats-Unis 2003: 1257 qtd in Mogire *et al* 2011: 483), with his counterpart and host, then-US Chief George W. Bush concurring, “the establishment of an effective representative government in Somalia will help stabilise the region and dispel the hopelessness that feeds terrorism” (*ibid*). As part of its attempt to ‘stabilise’ Somalia, the Kenya government took some measures that invited global condemnation; for example:

In recent months, Kenya has come under criticism from the United Nations and human rights groups for barring additional Somali refugees. The government of Kenya handed over more than 40 Somalis to the Transitional Federal Government of Somalia and the Ethiopian government. Human rights groups are concerned that some of these individuals would be tortured or killed. In addition, Kenyan Muslim leaders accuse the Kibaki government of handing over Kenya Muslims to Ethiopian and Somali security services. (Lind *et al* 2009: 10-11)

Kenya capped its involvement in Somalia with military invasion of that country in 2011—the first time Kenya has taken such a step since independence. Codenamed Operation Linda Nchi, the incursion into Somalia commenced in late 2011 purportedly in pursuit of Al Shabaab terrorists who had launched a number of deadly attacks on Kenyan soil. The immediate trigger, though, was the seizure of tourists at the Coast in late 2011, by gunmen suspected to have links to terrorist groups. The attack on tourists coupled with other previous such incidents by militant groups prompted the Kenya government to deploy its troops in Somalia, fearful that inaction would embolden terror groups and thus pose a grave danger to the country's vital interests. Kenyan forces, over 3000 strong, integrated into the African Union Mission in Somalia (AMISOM) in early 2012. The Kenyatta administration has continued Kenya's involvement in Somalia and the War on Terrorism more generally.

Increasing voices have, however, begun to question the rationale behind the country's continuing involvement in Somalia. Critics cite both the materiel and human costs that the war effort has exacted on the country, the fact, for example, that the government has had—at least prior to the integration of Kenyan forces into AMISOM—to divert scarce national resources into the war effort—as against the outcome. To add to the economic pain, contend the critics, the war has seen families lose young soldiers who, in most instances, served as sole breadwinners for their families. Domestic critics have therefore called on the Kenyatta administration to enunciate a clear exit strategy from Somalia. Opposition leader, Raila Odinga, encapsulated the critics' position:

We want the Government to define and limit Kenya's military objectives in Somalia and to make sure that the war on terror is not fought on Kenya's territory and to ensure that our engagement in Somalia is time-bound and does not mutate into a military occupation. (Mbaka, *The Sunday Standard*, 22<sup>nd</sup> June 2014)

However, insisting that Kenyan troops are in Somalia as part of AMISOM, Kenyatta and administration supporters have maintained that the troops will not leave Somalia before accomplishing the mission that took them there—defeating Al Shabaab and the erection of a stable government. The president’s spokesperson, Manoah Esipisu, put it sententiously: “we have a clear objective. That objective will be met. And when that objective is met, we will have that discussion of thinking about withdrawal” (Mbaka, *The Sunday Standard*, 22<sup>nd</sup> June, 2014: 8).

These critical voices come in the wake also of a number of recent terrorist activities within Kenya and against Kenyan interests elsewhere. Thus on the security situation, the country has remained under constant terrorist pressure (Angira, *Daily Nation*, 12<sup>th</sup> July 2016: 12). First—and here I merely touch upon the major attacks—in 2013 terrorists launched a daring attack on Westgate Mall in the suburbs of Nairobi. The attack—actually the siege—lasted several days and when it was over it left many dead and also inflicted heavy economic losses. Al Shabaab claimed responsibility for the attack and said that it had done so in revenge for Kenya’s invasion of Somalia as well as Nairobi’s continued cooperation with the United States and Israel in the war on terrorism. Owned by Israelis, Westgate mall is usually patronized by affluent Kenyans as well expatriates—mostly west Europeans and Americans—resident in Nairobi and its environs.

Similarly, in early 2015 Kenyans came face to face with yet another deadly terrorist attack, with Garissa University College as the main target. On 2<sup>nd</sup> April 2015, in the early morning hours Al Shabaab fighters and sympathizers infiltrated and killed a total of 148 people at Garissa University College in Northern Kenya, with 142 of the dead being students and the remaining 6 security officials (Muasya, *Standard* on Sunday, 3<sup>rd</sup> April 2016: 11).

Then in January 2016 Kenyan forces<sup>157</sup> in Somalia became the target. Although the government has never seen it fit to release the full details of what transpired, the little information that there is in the public domain shows that Al Shabaab fighters surrounded and then discomfited Kenyan forces at El Adde. It would

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<sup>157</sup> This is not terrorism; under international law, Kenyan forces have become a legitimate target for attack by Al Shabaab, given that they are actively involved in hostilities against the group.

appear, based on the sketchy information available, that Kenyan forces lost an entire company—perhaps one-hundred and eighty to two-hundred men in this episode, representing the worst military defeat since Kenya attained independence in 1963.

As part of the increased terrorist activity within Kenya, in mid-July 2016, for example, “security forces fought off Al Shabaab terrorists, who tried to storm the Managai Rapid Deployment Unit’s (RDU) camp in Lamu”; this was the third such attempt “on the camp [which houses administration police officers]” (Kaungu, Daily Nation, 15<sup>th</sup> July 2016: 5).

Increased terrorist attacks on Kenyan targets have had two interesting results. As part of the determination to stay the course, the administration has adopted some of the policies that characterised its predecessor regarding suspected domestic Al Shabaab sympathizers<sup>158</sup>. Kenyan security forces working clandestinely with their foreign counterparts, but especially American and Israeli agents, continue with the previous administration’s policy of extra-judicial killing targeting Islamist radicals and anyone else who might fit the bill; this has seen a number of such assassinations take place across the country.

In one such incident<sup>159</sup>, for example, police officers killed a young-man in Kwale in early June 2016, claiming that he was a terrorist suspect. However, rejecting this account, “several sources told the Standard on Sunday that the young-man was killed in a stationery *tuk tuk* at a bus stage... A police officer approached the *tuk tuk*, lifted the plastic back cover and shot him at point blank [range]” (Wesangula, Standard on Sunday, 5<sup>th</sup> June 2016: 8). In fact denying that her son was a terrorist, the victim’s mother explained that he had just recently moved to the city, having recently “finished secondary education in Malimuni Makueni... and later did driving and computer courses” (*ibid*). In their version, the police had claimed that “they were on patrol based on what has been happening in the area when they stopped

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<sup>158</sup> The war on terrorism has at times appeared to take a particularly dangerous ethnic/regional turn. See, for instance Njangili (2015: 6).

<sup>159</sup> In another incident, and a variation on the theme, widows whose husbands had been extra-judicially killed on allegations of being Al Shabaab agents complained of being denied access to normal public services, such as national identification cards. See, Ahmed (2016: 29).

the *tuk tuk* that had three occupants with the driver who jumped out and one started running while shooting at the the[m]" (*ibid*).

The policy has, however, invited continuing condemnation from human rights groups and other conscientious Kenyans. Critics argue that the government cannot flout the constitution in the name of fighting terrorism when in fact the document offers the best antidote to the problem. In this respect, they claim that it is tactics such as the ones being deployed by Kenya and its allies that could actually be worsening the security situation. They, for example, trace the rise of Al-Shabaab in Somalia to an impolitic move<sup>160</sup> by the US and Ethiopia to militarily attack and unseat the putative Islamic Courts Union militia regime in 2006.

Second, faced with increased attacks in Kenya the Kenyatta administration took the unprecedented decision to close Dadaab refugee camp. The government had ordered the camp's closure<sup>161</sup> by May 2017. Kenya has cited security as its main rationale for seeking to close down the refugee complex arguing that most, if not all, of the terrorist attacks inflicted on the country recently, including the September 2013 Westgate Mall siege "have been planned and executed from Dadaab" (Kagwanja, Sunday Nation 22<sup>nd</sup> May 2016: 35). Founded in the early 1990s as Somalis fled their then collapsing country following ouster of the Barre dictatorship (Kubania, Daily Nation 23<sup>rd</sup> June 2016: 9), Dadaab's insecurity stems from its close proximity to Somalia: it is less than 100 kilometers away. Indeed, "there are whispers of Al Shabaab sleeper cells inside the camp, who lay dormant until such a time as they are called upon to host active fighters who have been deployed to wreak havoc within Kenya's borders" (*ibid*).

Why the obsession with the War on Terror, though?

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<sup>160</sup> Even though the militia enjoyed wide spread support in Somalia because of its ability to restore law and order to Mogadishu—thereby opening the door for Al-Shabaab to rise and fill the power vacuum (Mogire et al 2011; Whitaker 2008).

<sup>161</sup> However, High Court Judge John Mativo issued a ruling in early 2017 nullifying the government's decision to close the refugee camp, finding that the decision to repatriate refugees against their will violates the principle of non-refoulement as per the laws relating to status of refugees. For the full read, see, for example, Kakah *et al* (2017: 10).

### **7.5.1 Kenya's pivotal role in the East African and Horn of Africa region**

That Kenya has emerged as a major theatre in the war on terrorism stems, in part, from the country's pivotal<sup>162</sup> role in the region. Not only is Kenya the major power in the region; "it has historically been pro-west, it is also the key regional economy, it is a key player in regional diplomacy" (Stevenson 2008: 12). In addition, "Nairobi is home to regional headquarters for embassies, non-governmental organizations (NGOs), and the United Nations" (Burns 2009: 6). These factors make Kenya "the only regional power with the political capacity and moxie to step up to the diplomatic plate" (Stevenson 2008: 12).

### **7.5.2 Kenya as the hinge of regional security, as well as a key player in APSA**

Kenya achieved independence in 1963 under a multiparty political system. Although it became a de facto one-party state shortly thereafter, it continued to conduct its election successfully every five years; this infused the regime with a modicum of legitimacy, thus creating stability in the country. This situation contrasted sharply with events elsewhere in the region. With the exception of Tanzania, most of Kenya's neighbours endured high levels of political instability. Indeed, even under the calcified Moi regime, Kenya remained, at least to some, "the principle beacon of stability in a sea of weak states convulsed in civil wars and militarism" (Khadiagala 2009: 431).

Kenya has traditionally served as the fulcrum of regional affairs (Bachmann 2012: 130); being a key player in both the East African Community (EAC) and the Inter-Governmental Authority on Development (IGAD). Kenya has previously served as a regional peacemaker in Sudan and Somalia. Acting through IGAD, for example, during this period Kenya oversaw negotiations between the Khartoum regime and the Sudanese People's Liberation Army (SPLA) rebels, then fighting for South Sudan's independence. The negotiations would then lead to the signing of the

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<sup>162</sup> As an indication of Kenya's pivotal role in the region, the country hosted a number of major events and personalities in 2015, including most prominently the WTO's Ministerial Conference, The Global Enterprise Summit (GES), President Obama, Italy's Prime Minister, the Pope, among others in what one commentator called "a glorious year of basking in the sun" (Ngugi 2015: 35).

Comprehensive Peace Agreement (CPA) in 2005. The agreement opened the door for South Sudan's independence in 2010.

Kenya has also historically played a major role in conflict resolution in Somalia. It was as part of this long term engagement, for example, that Kenya "hosted a two-year reconciliation conference that resulted in the formation of the Somali Transitional Federal Government in 2004" (TFG) (*ibid*). It then hosted the TFG in Nairobi for a while, only relocating much later (Whitaker 2006: 263). A major troop contributor to the AMISOM in Somalia, currently Kenya has well over 3000 troops serving in that country.

In addition, following the emergence of attempts by Africa to address its own emergent security challenges, Kenya has emerged as a key player in continental affairs. As part of its remit under the APSA, for example, currently Kenya serves as the host of "the coordination Mechanism of the Eastern Brigade (Easbricom) as part of the proposed African Standby Force [ASBF]". Kenya is "home to the International Peace Support Training Centre [IPSTC], the regional training centre for peacekeeping forces in Eastern Africa" (Bachmann 2012: 130).

### **7.5.3 Kenya as the centre of humanitarian activity in the region**

Kenya has historically served as the epicentre of humanitarian activity in the region and the Horn of Africa more generally (Bachmann 2012). In particular, at the urging of the international community, Kenya has traditionally hosted hundreds of thousands of refugees from neighbouring countries. At the beginning of refugee inflows to the country in the late 1980s and early 1990s, Kenya had a liberal policy, with the government itself in charge of refugee policies, especially Refugee Status Determination (RSD).

However, with growing instability in the region—and then the attendant inflows of vast numbers of refugees into the country in the mid-1990s, the Kenya government moved to create two refugee camps. Dadaab—the largest refugee camp in the world—in North Eastern Province (NEP), bordering Somalia—for Somali

refugees—and another one at Kakuma, near Sudan—mostly for refugees from other neighbouring countries. The government did also hand over the responsibility for these refugees to the United Nations High Commissioner for Refugees (UNHCR), so that the UNHCR and NGOs became the implementers of refugee policy beginning in the mid-1990s. With these changes, the Kenya government served merely in an advisory role.

The Kenya government has, however, recently taken an uncompromising stance towards the refugees, viewing them as a potential national security risk (Burns 2006: 5). The Kenyatta administration has, as previously mentioned, decided to close<sup>163</sup> Dadaab refugee camp. The largest refugee camp in the world, Dadaab has a population of 348,130. The government of Kenya cites security as the main reason for its decision, arguing that the camp is “a fertile breeding ground for terrorists, the worst of whom are suspected to be responsible for the massacre at Garissa University College where 147 people, mostly college students, were killed” (Kubania, Daily Nation 23<sup>rd</sup> June 2016: 9). Founded in the early 1990s as Somalis fled their then collapsing state, the camp has become synonymous with insecurity over the years.

The situation in Dadaab contrasts sharply with that that obtains in the Kakuma refugee camp. Kakuma, hosting mostly Sudanese refugees, “anyone can walk in and out as they please, and stay as late as they want, with no fear that they might end up victims of a bloodthirsty terrorist” (*ibid*); this despite the fact that Kakuma is also in close proximity to South Sudan, “which just a few months ago was in the midst of a bloody civil war” (*ibid*).

#### **7.5.4 Kenya and the commanding heights of the regional economy**

The key economy within the region, Kenya serves as a hub for trade and finance (Burns 2009). Kenya has, as the regional leader, played an instrumental role in the revival of the East African Community. A trading bloc that initially yoked Tanzania, Uganda and Kenya, and that has its roots in the colonial era (Hazlewood 1975;

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<sup>163</sup> However, and to the administration’s great chagrin, the High Court nullified this decision; see footnote 127.

Musila 2002), the EAC has now expanded to include Burundi, Rwanda and South Sudan. The EAC assumes added importance in the context of the changes wrought in EU-ACP relations by the CPA.

On trade and aid, the CPA divides ACP countries into three categories, based on their levels of development (Lee 2000). The three categories comprise so-called Least Developed Countries (LDCs); so-called non-LDCs; and so-called Non-LDCs ACP states. Kenya, unlike its EAC partners, falls into the second category. Under CPA, so-called non-LDCs can negotiate Economic Partnership Arrangements (EPAs) with the EU, but as ACP sub-regions and not ACP as a whole, and without overlapping ACP membership in different EPAs. So-called non-LDCs that do not want EPAs with the EU, will have their status upgraded to receive GSP of the EU, or they can negotiate WTO-compatible trade agreements with the EU; such arrangements would, however, hinge on reciprocity.

Of course, besides purely economic considerations, both political and security issues<sup>164</sup> have historically had a central role in regional integration (Manzetti 1993-94; Theret 1999). Regional integration as a search for political stability assumed a new meaning following the demise of the cold war (Bresslin *et al* 2002), with most integrating countries viewing this as a strategy to buttress democracy<sup>165</sup> (Khanyile 2001: 7). In the past, though, regionalism in East Africa was decidedly economic in nature (Khadiagala 2009).

The region begun to ogle regionalism as source of stability in the 1990s in response to emergent conflicts, including those that roiled the Great Lakes<sup>166</sup>, with Kenya and Tanzania as central movers. Then with the emergence of terrorism in East Africa, the two countries moved to make security part of the agenda items of the EAC; this would lead to a MOU in 1998, itself only a harbinger of much broader discussion on “conflict resolution and peacebuilding institutions”. This would in particular lead to the formation of a “Sectoral Committee on Cooperation in

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<sup>164</sup> The view that political stability is necessary for economic development hinges on two aspects namely, first, development pre-supposes long-term commitment and, two, private investors are viewed as the agents of investment—hence, they need stability in order to do so. See Henick *et al* (1983: 112).

<sup>165</sup> For regional integration as a guarantor of democracy, see, for instance Musila (2004).

<sup>166</sup> For developments in the Great Lakes region in the post-cold war era, see, for instance Nzongola-Ntalaja (2002: 91-115).

Defence (SCCD) and the Inter-State Security Committee (ISSC) to exchange information and harmonise policies on a host of peace and security concerns” (Kagwanja 2009, quoted in Khadiagala 2009: 433). However, EAC’s security architecture remains bucolic in nature—a fact dramatized by the failure of regional conflict and peacebuilding instruments, such as the EAC and IGAD; during the Kenyan post-election crisis, thus opening the door to continental and global involvement (Khadiagala 2009).

## **7.6 EU political aid, the Jubilee administration, 2013-:**

### **7.6.1. EU Political Aid and Human Rights/ Rule of law in Kenya, 2013-13:**

The use of foreign aid to promote human rights, democracy and good governance has emerged as a major theme in the literature. Champions of this stance contend that an uncritical focus on sovereignty in the Post-Cold War environment fails to take account of how changes in a variety of issue areas pose a challenge to existing modes of governance (Bishop 1994: 77). Supporters of the shift point to a growing acknowledgement of the responsibility to protect those under oppression by their own states as part of humanitarian law.

The ICC became, as previously stated, a major campaign issue during the 2013 presidential elections. Perhaps sensing a shift in momentum in the Jubilee team’s direction, “[a]head of the March 4 Presidential elections, Western states sent out strong signals that electing leaders who face trial at the International Criminal Court (ICC) in The Hague would have ‘consequences’ for Kenya internationally” (Olick *et al*, *The Standard* 23<sup>rd</sup> January 2014: 7). The EU then went ahead and stated that it would limit its dealings with the Kenya government and the two leaders were they even to win, pending conclusion of the case at the ICC. The EU then indicated that until the case was concluded, it would in the interim continue its other activities in Kenya, but working in league with other players, such as civil society (*ibid*).

The theme of state sovereignty has received a lot of coverage in the democratization literature. Supporters of the status quo have taken umbrage at this new activist human rights posture. They see it as a blank cheque for external intervention in the internal affairs of sovereign states. The theme manifested itself on different occasions on the ICC debate during the Kenyatta administration. First, the pronouncements by the EU and others drew instant protest and rebuke from both the Kibaki-wing of the grand coalition government and the Kenyatta-Ruto team. The ICC was a major issue during the 2013 presidential campaigns, with the Kenyatta-Ruto team and supporters positing the case as a neo-colonial attempt to impose leaders on Kenyans. By issuing the warnings, the international community appeared to play right into the two leaders' hands on this issue just a few days to the elections.

Sensing an opportunity to exploit, Kenyatta and Ruto advised the diplomatic community to stick to its brief in the country and let Kenyans exercise their democratic right to choose their own leaders, free of external intimidation and interference (Bowry, *The Standard* 13<sup>th</sup> March 2013: 15). Instructively, in his first major speech on the Kenyan cases after leaving office, former ICC chief prosecutor Moreno-O'campo revealed that "some, diplomats, whom he didn't want to name, exerted pressure on him to ensure President Uhuru Kenyatta and his Deputy William Ruto were not on the ballot at the elections" (Menya, *Daily Nation* 8<sup>th</sup> February 2014: 1 and 6). The prosecutor claimed to have rebuffed the request, insisting that that was not the ICC's business, but rather an issue best left to Kenyan institutions and the citizenry.

State sovereignty as a theme did also come to the fore once Kenyatta assumed the presidency. Following his electoral victory, Kenyatta's first agenda item on the ICC issue was to try and have the cases referred back to the Pre-Trial Chamber for reconsideration. Kenyatta insisted, contrary to the Prosecutor's stated determination to proceed with the case to trial, that confirmation of the case against him by the Pre-Trial Chamber was a mistake. However, the Pre-Trial Chamber rebuffed the request; it then ordered the duo to appear in person before the Court to enter a plea. Both the Kenyatta administration and the AU responded with uncharacteristic fury to the order; they launched a determined bid to scuttle the

ICC process. This would see them threaten a mass withdrawal by African states from the ICC. The AU even requested for an opportunity for continental institutions to handle the case, insisting that this stance comported perfectly with ICC's founding statutes. Those statutes envision the Court as complementary to local/domestic/ mechanisms, and not as a substitute.

The pleas fell on deaf ears, however. Critics cast the overture as disingenuous, merely a clever ploy to defeat the ends of justice. Supporters of greater adherence to international norms warned that the attempt to present the ICC as an instrument designed to trample African sovereignty completely missed the point (Odipo, *The Standard* 24<sup>th</sup> January 2011). This would see Ruto and Kenyatta become the first incumbent leaders to appear before the court in person. The Court then issued tough conditions, such as non-interference with potential witnesses that the duo would have to meet to remain free; any deviation from these would lead to automatic arrest and detention in The Hague. However, once the cases commenced the prosecution was forced to progressively withdraw charges against suspects citing lack of sufficient evidence.

The EU moved with alacrity to embrace the two leaders following termination of the cases. In fact, the EU and other key states had begun to retreat from their previous tough position vis-à-vis the duo immediately following Kenyatta's victory. According to Amina Mohamed, Kenya's Cabinet Secretary for Foreign Affairs, for example, contrary to extant belief, Kenya's "relationship with the West was stable... The country's Government had been invited to the UK by the country's foreign secretary" (Olick *et al*, *The Standard* 23<sup>rd</sup> January 2014: 7).

That the Kenyan cases collapsed should not have come as a surprise. From the outset, supporters of a local judicial mechanism had repeatedly cautioned against putting too much stock in the ICC process (Chiloba, *The Standard* 8<sup>th</sup> February 2009). Champions of democratization as an endogenous matter insist that domestic actors must assume the lead role in this process for purposes of accountability and legitimacy. Kenyatta appeared to allude to this, albeit cynically, when he defended the anti-ICC 'prayer sessions':

As Kenyans, we should continue praying for Ruto. A judge cannot tell us that we cannot pray. As Kenyans, we should not accept to be divided

or made to fight. We understand the value of our unity. We are the only ones who can resolve our issues. (Jamnah, *The Standard*, 21<sup>st</sup> October 2015: 1 and 4)

### 7.6.2 The EU and institutional reforms: The IEBC ‘reforms’ debate

There exists a link between the national electoral process and democratic consolidation (Pronizer 1977). Liberal theory considers free and fair elections the *sine qua non* of democracy (Sainna 2009). The need for an independent and impartial electoral oversight body<sup>167</sup> needs no gainsaying, given the central place that elections occupy in a democratic system. Otherwise, such an exercise is likely to exacerbate societal divisions (Makulilo 2011: 264). Thus with regard to Africa, and as stated earlier, an emergent consensus holds that whereas African countries made some important progress towards democracy in the 1990s, a number of challenges linger, with the electoral system as a major contributory factor to this situation. (Kabemba 2008: 35). Indeed, as the 2007-2008 political events in Kenya illustrate, poorly organized elections can become the proximate cause of electoral related violence.

Electoral assistance has therefore emerged as a major theme in the democratization literature. In particular, electoral support has become the chief means of UN democracy assistance. UN democracy assistance is facilitated by the United Nations Development Programme (UNDP) and the UN’s Electoral Assistance Division (EAD), nested in the Secretariat’s Department of Political Affairs (Schroeder 2013). Free and fair elections<sup>168</sup> are increasingly seen as the most visible form of democracy assistance (Mitchell *et al* 2008: 161-162). Election support takes two main forms: observation/monitoring of elections as well as technical assistance. The support rests on the rationale that although such activities enhance voter participation while curbing electoral fraud at the same time (Schroeder 2013: 218), preparing and running elections is an expensive undertaking, especially for poor developing countries.

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<sup>167</sup> The Australian Electoral Commission stands as the epitome of such a body. For the full read, see, for instance Brent (2009: 405-419).

<sup>168</sup> This can at times lead to a dangerous conflation of elections and democracy, though. See, for instance Ake (1992: 32-36).

European and North American diplomats made concerted efforts to resolve the IEBC imbroglio in a bid to lower rising ethnic and regional tensions in the country over the issue. This involved attempts to persuade the Opposition to cancel its anti-IBEC demonstrations, with informed sources confiding of the involvement of “an external and powerful hand that wants an amicable solution found. They are therefore keen not to be seen as failing” (Wanga *et al*, Daily Nation, 12<sup>th</sup> June 2016: 4). The same sources intimated that as part of the diplomats’ tactics to get the parties to talk, they “used subtle threats,” including “travel bans for hardline politicians” (*ibid*). As part of this effort, “ambassadors from the European Union met Mr. Kenyatta at State House, a session understood to have discussed the economy and diplomatic impact of the growing instability” (*ibid*). As part of the EU’s itinerary, then “British Foreign Secretary Philip Hammond visited Kenya... and talked with the president and [wa]s understood to have raised issues” (*ibid*).

Liberal theory holds that respect for associational life, conceptualized as the ability of “citizens to organize in defence of their own interests or identities without fear of external intervention or punishment has long been identified as a key ingredient for democracy” (Fox 1994: 151-152). Such activities permit “community groups to grow in awareness, to increase their commitment to the common good and better to defend the needs and the rights of the excluded” (O’Gorman 1995: 194). By so doing, civil society can serve “a crucial role in providing effective channels of interest articulation. Civil society can also play a crucial role as a facilitator of conflict mediation. Civil society can accomplish this, they contend, through its ability to attract people from different social backgrounds “on a constant and voluntary basis... thereby mitigating cleavages” (10). Africa’s ability to successfully navigate its current political development voyage will consequently hinge on “how well... democratizing African governments are able to negotiate in good faith... with those who represent the important and influential social forces” (Owusu 1997: 148). To that end, then, the existence of strong civil societies in Africa “would provide a foundation for sustainable development, both participation and development” (Shaw 1990: 21).

To pressure the politicians to the negotiating table, the diplomats had worked in concert with two major domestic groups: religious and private sector leaders.

Insisting that the country could not afford to go into the next elections under a discredited IEBC, the two domestic groups had persistently called for compromise (Editorial, Daily Nation, 2<sup>nd</sup> June 2016: 10). The private sector besought the political class to find a speedy solution to the issue, warning that a prolonged conflict would have devastating economic consequences, with previous “studies hav[ing] shown that Kenya’s economic fortunes always suffer a thorough beating in the run-up to and aftermath of hotly contested elections” (Musau, The Standard, 5<sup>th</sup> June 2016: 9).

## **7.7 EU Political Aid and Kenya’s Regional position**

Liberals have increasingly made the argument in international relations that democracies do not fight each other. Liberals specifically posit that “societal ideas, interests, institutions influence state behaviour by shaping state preferences, that is, the fundamental social purpose underlying the strategic calculations of governments’ (Allison *et al* 1999: 40).

### **7.7.1. EU Political Aid and Counter-Terrorism**

Kenya’s position in international security has historically been pro-West (Leys 1974). Following the September 11 2001 terrorist attacks in the United States, Washington moved with alacrity to designate Kenya “an anchor state in the Horn of Africa’, and a ‘frontline in the Global War On Terror’ GWOT” (Mogire *et al* 2011: 437). Kenya has therefore emerged as a crucial player in counter-terrorism efforts in East Africa and the horn of Africa more generally.

Kenya first came under terrorist threat in the late 1990s, following twin terrorist attacks on US embassies in Dar es Salam and Nairobi. Since then Kenya has remained under constant terrorist threat (Jude *et al* 2009: 336). In addition, events in neighbouring Somalia, especially the emergence of a radical Islamist regime there—and then the decision by both Ethiopia and the US to fight the “Islamic

Courts Union” (ICU), which was briefly in charge of the southern part of that country “has drawn Kenya deeper into the prosecution of the War on Terror” (*ibid*). Specifically, in light of the perceived terrorist threats, “since 2002, diplomatic missions in Nairobi representing leading Western donors have pressured the Kenyan government to adopt controversial new counter-terrorism legislation” (Jude *et al* 2009: 343), thereby demonstrating:

The strategic use of aid in achieving the political objectives of the War On Terror... Generally, the leverage of aid has shifted away from previous priorities of good governance and human rights, although these issues acquired new prominence as part of processes of political reform and national reconciliation following the disputed results of the December 2007 election and its aftermath. (Lind *et al* 2010: 336)

The Strategic Framework for the Horn of Africa (SFHA) frames overall EU security and development engagement at the regional level. EU-Kenya co-operation hinges on two areas: Development assistance and security co-operation and support. As part of the security co-operation strategy, Kenya and its western allies, but especially the EU, have mounted counter-piracy efforts off the coast of Somalia. Indeed, the EU was to lead international counter-piracy efforts off the coast of Somalia in 2014; hence “[t]he EU looks forward to working with all the stakeholders in the region and with the international community to bring the fight against Somali piracy to an end”.

This aim reflects the strategic framework and broader objectives set out during the Conference on a New Deal for Somalia in Brussels on the 6<sup>th</sup> of September 2013. The Contact Group on Piracy off the Coast of Somalia (CGPCS) was established in 2009 pursuant to UNSCR 1851 (2008), as the coordinator of counter-piracy strategy among the various entities involved; since its inception, at least the report claims, CGPCS has made tremendous gains, as denoted by reduction in pirate attacks.

Kenyan officials contend that their country’s proximity to Somalia exposes it to Al Shabaab terrorist activity (Mogire *et al* 2011). This would see Kenya, with external assistance, create a number of security and intelligence related institutions during both the NARC and grand coalition administrations. In particular:

Foreign security assistance and training aid were pivotal to the establishment of many post 9/11 counter-terrorism structures in Kenya. These feature new and greater levels of cooperation with foreign security and intelligence agencies, some, by way of extra-judicial practices and institutions. Kenya was one of only five states to receive special training through the US government's Anti-Terrorism Assistance Program in the 2005 budget, which included support for establishing a National Security and Intelligence Services Agency (NSIS). Other measures have included the establishment of a joint Terrorism Task Force in 2003 and the National Security Advisory Committee. The US government has also funded the establishment in Kenya of a National Counter-Terrorism Centre that notionally sits within the NSIS, but is rumoured to be under direct operational guidance of Washington. Muslims continue to endure police abuses—including the involvement of foreign security and intelligence personnel; in particular, Kenya has been accused of being involved in the regional rendition of suspects as part of the War on Terror. (Lind *et al* 2009: 341)

Kenya's counter-terrorism strategy also focused on 'stabilizing' Somalia. When on a visit to the US then president Kibaki intoned: "Stabilising Somalia is essential in sustaining the war against terrorism" (Etats-Unis 2003: 1257 qtd in Mogire *et al* 2011: 483), with his counterpart and host, then-US Chief George W. Bush concurring, "the establishment of an effective representative government in Somalia will help stabilise the region and dispel the hopelessness that feeds terrorism" (*ibid*). As part of its attempt to 'stabilise' Somalia, the Kenya government took some measures that invited global condemnation; for example:

In recent months, Kenya has come under criticism from the United Nations and human rights groups for barring additional Somali refugees. The government of Kenya handed over more than 40 Somalis to the Transitional Federal Government of Somalia and the Ethiopian government. Human rights groups are concerned that some of these individuals would be tortured or killed. In addition, Kenyan Muslim leaders accuse the Kibaki government of handing over Kenya Muslims to Ethiopian and Somali security services. (Lind *et al* 2009: 10-11)

Kenya capped its involvement in Somalia with military invasion of that country in 2011—the first time Kenya has taken such a step since independence. Codenamed Operation Linda Nchi, the incursion into Somalia commenced in late 2011 purportedly in pursuit of Al Shabaab terrorists who had launched a number of deadly attacks on Kenyan soil. The immediate trigger, though, was the seizure of tourists at the Coast in late 2011, by gunmen suspected to have links to terrorist groups. The attack on tourists coupled with other previous such incidents by militant groups prompted the Kenya government to deploy its troops in Somalia, fearful that inaction would embolden terror groups and thus pose a grave danger

to the country's vital interests. Kenyan forces, over 3000 strong, integrated into the African Union Mission in Somalia (AMISOM) in early 2012. The Kenyatta administration has continued Kenya's involvement in Somalia and the War on Terrorism more generally.

Increasing voices have, however, begun to question the rationale behind the country's continuing involvement in Somalia. Critics cite both the materiel and human costs that the war effort has exacted on the country, the fact, for example, that the government has had—at least prior to the integration of Kenyan forces into AMISOM—to divert scarce national resources into the war effort—as against the outcome. To add to the economic pain, contend the critics, the war has seen families lose young soldiers who, in most instances, served as sole breadwinners for their families. Domestic critics have therefore called on the Kenyatta administration to enunciate a clear exit strategy from Somalia. Opposition leader, Raila Odinga, encapsulated the critics' position:

We want the Government to define and limit Kenya's military objectives in Somalia and to make sure that the war on terror is not fought on Kenya's territory and to ensure that our engagement in Somalia is time-bound and does not mutate into a military occupation. (Mbaka, *The Sunday Standard*, 22<sup>nd</sup> June 2014)

However, insisting that Kenyan troops are in Somalia as part of AMISOM, Kenyatta and administration supporters have maintained that the troops will not leave Somalia before accomplishing the mission that took them there—defeating Al Shabaab and the erection of a stable government. The president's spokesperson, Manoah Esipisu, put it sententiously: “we have a clear objective. That objective will be met. And when that objective is met, we will have that discussion of thinking about withdrawal” (Mbaka, *The Sunday Standard*, 22<sup>nd</sup> June, 2014: 8).

These critical voices come in the wake also of a number of recent terrorist activities within Kenya and against Kenyan interests elsewhere. Thus on the security situation, the country has remained under constant terrorist pressure (Angira, *Daily Nation*, 12<sup>th</sup> July 2016: 12). First—and here I merely touch upon the major attacks—in 2013 terrorists launched a daring attack on Westgate Mall in the suburbs of Nairobi. The attack—actually the siege—lasted several days and when it was over it left many dead and also inflicted heavy economic losses. Al Shabaab

claimed responsibility for the attack and said that it had done so in revenge for Kenya's invasion of Somalia as well as Nairobi's continued cooperation with the United States and Israel in the war on terrorism. Owned by Israelis, Westgate mall is usually patronized by affluent Kenyans as well expatriates—mostly west Europeans and Americans—resident in Nairobi and its environs.

Similarly, in early 2015 Kenyans came face to face with yet another deadly terrorist attack, with Garissa University College as the main target. On 2<sup>nd</sup> April 2015, in the early morning hours Al Shabaab fighters and sympathizers infiltrated and killed a total of 148 people at Garissa University College in Northern Kenya, with 142 of the dead being students and the remaining 6 security officials (Muasya, Standard on Sunday, 3<sup>rd</sup> April 2016: 11).

Then in January 2016 Kenyan forces<sup>169</sup> in Somalia became the target. Although the government has never seen it fit to release the full details of what transpired, the little information that there is in the public domain shows that Al Shabaab fighters surrounded and then discomfited Kenyan forces at El Adde. It would appear, based on the sketchy information available, that Kenyan forces lost an entire company—perhaps one-hundred and eighty to two-hundred men in this episode, representing the worst military defeat since Kenya attained independence in 1963.

As part of the increased terrorist activity within Kenya, in mid-July 2016, for example, "security forces fought off Al Shabaab terrorists, who tried to storm the Managai Rapid Deployment Unit's (RDU) camp in Lamu"; this was the third such attempt "on the camp [which houses administration police officers]" (Kaungu, Daily Nation, 15<sup>th</sup> July 2016: 5).

A major critique of the democracy-security nexus holds that establishing a strong state attuned to the dictates of fighting terrorism may not necessarily advance the democratic agenda. In particular, the obsession with order and security may mean that repressive regimes will enjoy much latitude in defining domestic opponents as security threats and deal with them harshly (Hadiz 2004: 67; Harbeson 2005: 278).

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<sup>169</sup> This is not terrorism; under international law, Kenyan forces have become a legitimate target for attack by Al Shabaab, given that they are actively involved in hostilities against the group.

Increased terrorist attacks on Kenyan targets have had two interesting results. As part of the determination to stay the course, the administration has adopted some of the policies that characterized its predecessor regarding suspected domestic Al Shabaab sympathizers<sup>170</sup>. Kenyan security forces working clandestinely with their foreign counterparts, but especially American and Israeli agents, continue with the previous administration's policy of extra-judicial killing targeting Islamist radicals and anyone else who might fit the bill; this has seen a number of such assassinations take place across the country.

In one such incident<sup>171</sup>, for example, police officers killed a young-man in Kwale in early June 2016, claiming that he was a terrorist suspect. However, rejecting this account, "several sources told the Standard on Sunday that the young-man was killed in a stationery *tuk tuk* at a bus stage... A police officer approached the *tuk tuk*, lifted the plastic back cover and shot him at point blank [range]" (Wesangula, Standard on Sunday, 5<sup>th</sup> June 2016: 8). In fact denying that her son was a terrorist, the victim's mother explained that he had just recently moved to the city, having recently "finished secondary education in Malimuni Makueni... and later did driving and computer courses" (*ibid*). The literature warns that he obsession with order and security may mean that repressive regimes will enjoy much latitude in defining domestic opponents as security threats and deal with them harshly (Hadiz 2004: 67). In their version, the police had claimed that "they were on patrol based on what has been happening in the area when they stopped the *tuk tuk* that had three occupants with the driver who jumped out and one started running while shooting at the the[m]" (*ibid*).

The policy has, however, invited continuing condemnation from human rights groups and other conscientious Kenyans. Critics argue that the government cannot flout the constitution in the name of fighting terrorism when in fact the document offers the best antidote to the problem. In this respect, they claim that it is tactics such as the ones being deployed by Kenya and its allies that could actually be

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<sup>170</sup> The war on terrorism has at times appeared to take a particularly dangerous ethnic/regional turn. See, for instance Njangili (2015: 6).

<sup>171</sup> In another incident, and a variation on the theme, widows whose husbands had been extra-judicially killed on allegations of being Al Shabaab agents complained of being denied access to normal public services, such as national identification cards. See, Ahmed (2016: 29).

worsening the security situation. They, for example, trace the rise of Al-Shabaab in Somalia to an impolitic move<sup>172</sup> by the US and Ethiopia to militarily attack and unseat the putative Islamic Courts Union militia regime in 2006.

Second, faced with increased attacks in Kenya the Kenyatta administration took the unprecedented decision to close Dadaab refugee camp. The government had ordered the camp's closure<sup>173</sup> by May 2017. Kenya has cited security as its main rationale for seeking to close down the refugee complex, arguing that most, if not all, of the terrorist attacks inflicted on the country recently, including the September 2013 Westgate Mall siege "have been planned and executed from Dadaab" (Kagwanja, Sunday Nation 22<sup>nd</sup> May 2016: 35). Founded in the early 1990s as Somalis fled their then collapsing country following ouster of the Barre dictatorship (Kubania, Daily Nation 23<sup>rd</sup> June 2016: 9), Dadaab's insecurity stems from its close proximity to Somalia: it is less than 100 kilometers away. Indeed, "there are whispers of Al Shabaab sleeper cells inside the camp who lay dormant until such a time as they are called upon to host active fighters who have been deployed to wreak havoc within Kenya's borders" (*ibid*).

The administration has steadfastly rebuffed international pressure to reconsider its decision to close the Dadaab camp. For example, in a meeting with UNSC ambassadors in 2016, President Kenyatta came under pressure to reconsider the planned closure, with the delegation "offering instead that the UN holds further discussions on refugee management in the country" (Mutambo, Sunday Nation, 22<sup>nd</sup> May 2016: 16). Kenyatta spurned the overture, however, insisting that security<sup>174</sup> and not financing was the main consideration that informed his decision to close Dadaab. He has equally rejected accusations that his decision ran counter

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<sup>172</sup> Even though the militia enjoyed wide spread support in Somalia because of its ability to restore law and order to Mogadishu—thereby opening the door for Al-Shabaab to rise and fill the power vacuum (Mogire et al 2011; Whitaker 2008).

<sup>173</sup> However, High Court Judge John Mativo issued a ruling in early 2017 nullifying the government's decision to close the refugee camp, finding that the decision to repatriate refugees against their will violates the principle of non-refoulement as per the laws relating to status of refugees. For the full read, see, for example, Kakah *et al* (2017: 10).

<sup>174</sup> Indeed, following relatively peaceful presidential elections in Somalia—won by Mohamoud Abdullahi Mohamed—Kenyatta, decrying the "terrible" conditions in the refugee camp and security risks associated with the camp, maintained that it was time for the refugees to go back home, insisting that in fact a sizable number had already done so voluntarily. Consult, in this case PSCU (2017: 2).

to humanitarian law. That law forbids host countries from forcibly repatriating refugees. In the face of Kenya's continuing insistence that it would close the camp the UN has promised to "seek funds to ensure the refugees are repatriated safely" (Namunene, Daily Nation 16<sup>th</sup> June 2016: 10).

Kenya is currently one of the major troop contributors to the AMISOM mission in Somalia, with well over 3000 troops serving in that country. However, Kenya threatened and then begun to withdraw its troops from Somalia in 2016; this followed failure by the mission's main financier, the EU, to remit the troops' monthly stipends for five months. This development came hot on the heels of an announcement by the EU that it was reducing its funding to the mission by 20 per cent. The EU cited "a constrained budget and new security needs" (Mutambo, Daily Nation 28<sup>th</sup> June 2016: 6), as the reason for its reduced funding. However other sources, mostly notably "the BBC... reported that lack of accountability on the part of AMISOM was behind the funding delay" (*ibid*).

The EU had hoped that troop contributing countries would plug AMISOM's funding gap. However, in a meeting with ambassadors of the UNSC President Kenyatta had threatened to withdraw Kenyan forces from the mission, insisting that Kenya would not shoulder any such responsibility. Indeed, Kenyatta informed the ambassadors that AMISOM was not receiving adequate<sup>175</sup> international support.

### **7.7.2. EU-Kenya engagement: Kenya and the regional economy**

Kant's 1795 theory of Perpetual World Peace postulated that free market economies would promote international division of labour and, with that, there would issue greater international interdependence. Post-cold war liberalism has taken up this same argument (Russett 1994).

On trade and aid, the CPA divides ACP countries into three categories, based on their levels of development (Lee 2000). The first category comprises so-called

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<sup>175</sup> New UN chief Antonio Guterres appears to agree with Kenya on the need for predictable funding to ensure the mission has the wherewithal to fulfil its mandate, see, for instance, Mutambo (2017: 11).

Least Developed Countries (LDCs). Under this arrangement, all LDCs, both ACP and non-ACP members alike, will continue to have free access to the EU, without reciprocity after 2005. The second category includes so-called non-LDCs; these can negotiate Economic Partnership Arrangements (EPAs) with the EU. To do so, however, the EU insisted that it would only negotiate such arrangements with ACP sub-regions and not ACP as a whole. Equally, it forbade ACP members from participating in more than one EPA—thereby forcing ACP States to negotiate new arrangements among themselves to meet this goal; in all this, EU aimed to avoid negotiating with one, unified ACP states.

Non-LDCs ACP states that do not want EPAs with the EU, will have their status upgraded to receive Generalised System of Preferences (GSP) of the EU. Otherwise they can negotiate WTO-compatible trade agreements with the EU. Such arrangements would, however, hinge on reciprocity. The renegotiations to that end must commence no later than 2002 and be finalized no later than 2007. The final category includes so-called non-LDCs; they will/cannot negotiate EPAs with the EU (Royeen 2001).

The non-reciprocal aspects of Lome were to lapse in 2007 under CPA. Thereafter ACP countries had to enter into reciprocal trade relations with the EU. Future ACP-EU relations would have as their goal integration of the former into the global economy (Mackie 2008: 144).

In addition, in the late 1980s the General Agreement on Trade and Tariffs (GATT)-predecessor of the World Trade Organization (WTO)--had ruled that Lome violated multilateral trade rules. GATT had specifically ruled that Lome, by extending trade preferences to ACP countries while excluding other equally poor, but non-ACP developing countries, especially in Latin America, breached the multilateral trading system's "MFN Principle and a 1979 enabling clause designed to support developing countries" (Gibb 2003: 890). To continue with Lome, the two sides had had to obtain a waiver with respect to these principles and issues. However, the EU saw the waiver as a short-term measure only. It argued that for the long-term, Lome needed major revisions to bring it into compliance with GATT rules. Hence the shift to reciprocal trade relationship, by way of the 2000 CPA.

The EU and the EAC have continued to negotiate the liniments of an EPA. The EU posits the arrangement thus: “a comprehensive trade agreement that is expected to deepen existing trade relations in a host of areas; simplify customs procedures and reduce trade barriers caused by burdensome industrial standards and food safety requirements, improved administrative cooperation” (EU-Kenya Relations: EU and Kenya on the brink of Consolidating Closer trade ties).

The EU is Kenya’s biggest trading partner. More than 25 per cent of the country’s exports, valued at over Euro 1 billion a year are destined for the bloc. Kenya worries that failure to sign an EPA would have devastating consequences for its economy, but especially horticultural and other agricultural products. The other EAC members are categorized as least developed. The changes inaugurated by CPA will have no impact on their existing relations with the EU. They have therefore refused to sign the proposed EPA (Andae, Daily Nation, 5<sup>th</sup> March 2017). Kenya’s pleas to its partners to sign the EPA have thus far proven unsuccessful. In the face of this delay, to continue to export to the EU duty-free Kenya “and Rwanda signed the agreement last year to renew the terms, although for a short period” (Andae, Daily Nation, 5<sup>th</sup> March 2017: 38). In any event, Kenyan leaders insist that they can apply “for market access to Europe in the event that the Heads of State fail to reach a decision on a joint EPA” (*ibid*).

Critics reject the EU's stance. They observe instead that the end of the cold war necessitated a more robust foreign policy posture by the EU. The EU, in its attempt to play a global role perceived Africa as the best staging ground for that goal. The EU perceives promotion of regional integration around the world as part of its mission (Bechmann *et al* 2010: 2). Scholars writing in this mold opine that whereas neo-liberalism is too narrowly focused on economic growth, what is, instead, needed is a comprehensive strategy for development (Pinkney 1999). With respect to the EU'S ogling of EPAs, a critic, retorts:

This obsession with WTO rules obviously is based on the dominant paradigm that the free market and the ACP countries’ full participation in it will create conditions necessary for the eradication of poverty. This is a lie for the simple reason that trade liberalization—which is an offshoot of globalization—is not the route to economic salvation in ACP States, in particular Africa. Trade liberalization is not an end; it is not even an effective means to global prosperity, given that an essential

ingredient—Social Justice—is lacking in its execution. (Udombana 2004: 91)

## 7.8 Conclusion

This chapter examined the role of EU political aid in Kenya during the current administration's tenure, a critical stage in the country's political development. What makes this a particularly important phase in Kenya's political development and, therefore, worth examining is the fact that the current administration is actually the one that is to oversee the various institutional and constitutional reforms launched as part of Agenda Number 4 Items of the National Accord. Agenda number 4 focused on institutional and constitutional reforms as key to Kenya's prosperity and stability. The chapter has, to this end, first traced the events that characterized the road to the 2013 elections, including campaign issues and the attendant political alliances that vied for power; it has next examined some of the issues and institutional reforms that have come to the fore as a way to lay the proscenium for analyzing the role of EU political aid during this critical phase in the country's democratization.

On the events that characterized the road to the 2013 elections, the chapter has examined how the ICC became *the* defining issue in that race so much so that hitherto political nemeses Kenyatta and Ruto, both indicted by the Court, felt compelled to form an alliance to rally their respective communities to their anti-ICC banner. The two leaders sought to use this strategy to capture state power and, once in office, use their positions to fend off the legal dragnet that threatened to ensnare them. This, the two leaders hoped to do—and sure did!—by casting the ICC as an imperialist plot hatched by some foreign powers working in cohorts with Odinga, to lock them out—and by extension their communities—from vying for the presidency. The chapter has also shown how Odinga sought to counter his opponents by constructing an alliance of his own, albeit again with ethnicity as the main force of gravity.

The chapter did then show how the international community appeared to play right into the two leaders' hands by making what amounted to impolitic statements to the effect that the international community would take exception to Kenyans

electing indicted leaders. Kenyatta and his team exploited this pronouncement to the hilt, and it no doubt played a major role in their eventual triumph in the ensuing contest. Interestingly, the former ICC Chief Prosecutor Moreno-Ocampo would much later appear to corroborate the two leaders' allegation of external attempts to meddle in Kenya's elections. In an interview he gave some time after leaving office, the former prosecutor claimed to have rebuffed suggestions from some key diplomats in Nairobi that he use his office to block the duo's candidacy in 2013.

The next section has attempted to show how the losing side reacted to IEBC's decision declaring Kenyatta the overall winner of the elections in the first round, thus rendering the need for a run-off superfluous. In particular, the section has shown how Odinga and his team exuded confidence of vindication in a suit they planned to file at the Supreme Court, arguing, one, that they had solid evidence to support their claim of electoral fraud in favour of Kenyatta and, two, that they had confidence in the reformed judiciary to render an impartial verdict. However, and contrary to these assertions, the Court affirmed Kenyatta's victory and, the losing side expressed dissatisfaction with that ruling, in fact questioning whether the judiciary had actually undergone reform! But having pledged to respect the Court's verdict as final and in the face of intense domestic and international pressure not to do anything that would ignite another political firestorm in the country, Odinga accepted the Court's ruling, however reluctantly; the decision cleared the way for Kenyatta to become the 4th president of Kenya.

This introductory part of the chapter has then limned corruption, with the section highlighting how the phenomenon continues to dominate Kenyan life. In this regard, the chapter has shown how the country's elite and weak or highly compromised anti-corruption institutions have remained major impediments to that fight, the changes inaugurated by the new constitution notwithstanding.

The next section of the chapter—the substantive one—focused on some of the institutions that reportedly underwent reform such as IEBC and the judiciary; it also examined the ICC debate and Kenya's involvement in counter-terrorism under the current administration. On both the IEBC and the ICC controversies, the chapter sought to limn the issues at play and the role of EU political aid in addressing them.

On IEBC, the chapter sought to show how the body's woes with Cord went back to the 2013 elections; these were then amplified by a number of post-election controversies that dogged the body. Initially, it appeared as if though the controversies that surrounded the IEBC would tear the country apart; what with Cord vowing to press on with its country-wide, anti-IEBC demonstrations! However, following intense negotiations, mediated by both domestic actors and the international community, but especially the EU, the parties did abandon their previously entrenched positions and open dialogue; this culminated in the reconstitution of the IEBC.

On the judiciary, the discussion has focused on highlighting attempts to reform this crucial institution, and how the institution has functioned thus far. In particular, the discussion has endeavored to demonstrate how the judiciary, because of its centrality in a democratic society, remains contested terrain in Kenya. Whereas pro-status quo forces have thus far tried various stratagems to recoup what they believe they lost in the reforms, they have had to contend with reformists out to erect an institution that can serve as an impartial and honest arbiter of political and policy differences in a democratic society.

On ICC, the chapter has demonstrated how the EU tried to employ a calibrated approach to grapple with the issue. The bloc warned, on the one hand, that it would not engage with indicted individuals; it simultaneously maintained that it would continue with some of its activities in Kenya, albeit by engaging other actors in society, especially civil society, and not necessarily the government. It meanwhile insisted that it would interact with the two leaders only when absolutely necessary. However, the chapter has also shown how, in the wake of the duo's victory, and then commencement of the cases against them, the EU, although continuing to insist that it would not deal with them on a business-as-usual basis, nonetheless took 'a wait-and-see' approach. Then following collapse, first of the case against Kenyatta, and then declaration of a mistrial in the Ruto case, the bloc finally moved to soften its approach towards the two leaders, arguing that it was now time to move on to address other pending problems, such as terrorism and instability in the region.

Finally, the chapter moved to show how in fact, the EU's political aid to Kenya under the Jubilee administration has increasingly been one of 'a hands-off approach', save for the engagement over counter-terrorism. True, the EU initially took a hardline position vis-à-vis the Uhuru-Ruto candidacy for the 2013 Presidential elections and then the ICC case that the two faced. As part of this tough stance, for example, the EU, along-side the US, made it clear to Kenyans that electing indicted leaders would have negative repercussions for the country's international standing, including harming relationships with key partners. However, in the wake of the resultant backlash, especially the acerbic reactions by both the Uhuru-Ruto camp and the Kibaki-wing of the grand coalition government, the EU, and even the US, appeared to recalibrate its position, now terming the presidential contest an entirely domestic matter, one for Kenyans to decide. The EU and others were, by this position, actually vacating their previous position on this matter. Incidentally, the EU and others interested in ending impunity in Kenya now placed all their hopes in the ICC process itself.

It is also true that once the IEBC declared Kenyatta the outright winner, having scored fifty per cent of the votes cast plus one, the EU played an important role in emphasizing to the losing side the need to address whatever grievances they might have through the legal process. And once the Supreme Court affirmed Kenyatta's victory, the EU also played a major role in convincing Odinga to concede defeat. In addition, the EU played a major role in bringing the feuding parties to the negotiating table during the IEBC 'reforms' controversy.

These actions aside, what is, however, clear is that the EU's other actions undertaken in support of democratization in Kenya under the Jubilee administration—and even the previously discussed ones—appear to have been motivated in large part by a desire to maintain stability in Kenya, rather than really to advance democracy. This is particularly so because the EU has always appeared to take a nonchalant approach to developments in the country until such a time that matters appeared to get out of hand; the EU would then get involved. This stance would appear, superficially at least, motivated by the need to let Kenyans themselves sort things out, especially in light of the backlash that attended the bloc's pronouncements vis-à-vis the Kenyatta-Ruto presidentially

ticket. Perhaps the EU drew the ineluctable conclusion that overt statements and actions in support of democracy could do more harm than good in the long-term.

It is also possible that the EU has had the view that what really matters in Kenya is stability, a stance perhaps best exemplified by the bloc's apparently more robust engagement with the Jubilee administration in the area of counter-terrorism. Apparently, the EU has continued an emergent trend—since 2001—of elevating counter-terrorism concerns over other considerations, such as respect for human rights and democracy. I focus on some of these issues and concerns in the concluding chapter, to which I now turn.

## **CHAPTER 8: Findings, conclusions and recommendations**

### **8.1 Introduction**

Chapter eight—the final one—offers the main findings issuing out of this research; it revisits the major theoretical arguments made for and against political aid. Also, the chapter re-examines some of the key concepts discussed in this study in light of the findings. It is hoped that the attempt to link empirical and theoretical arguments will help elucidate the main conclusions and recommendations issuing from this study, both retrospective and prospective, with the aim of improving the role of political aid in the support of democracy in Africa in the post-cold war era.

This study analyzed the role played by EU political aid in political processes in Kenya since the onset of plural politics in the early 1990s to the 2013 elections.

### **8.2 Findings**

The study shows that, on the one hand, the EU gets high marks for its role in Kenya's political development during the 1990s, by first helping incubate civil society; this civil society would then in turn work with external players such as the EU in pressurizing Moi to repeal section 2 (a) of the constitution, thereby ushering in political pluralism. In particular, the chapter on the Moi administration elucidates how with the demise of the cold war and then the onset of the third wave of democracy—itsself a major force in the end of the cold war—the Moi administration, like its authoritarian counterparts elsewhere, came under intense domestic and international pressure to allow political pluralism.

Initially, however, Moi resisted these pressures, seeking, instead, to cast agitation for multi-party politics as inimical to economic development and political stability, a tactic applied astutely during the cold war. But the strategy proved ineffective: pressure for change continued to mount, culminating, on the external front, with the Group of Donors Club suspending in mid-1991 further aid to the country pending political reforms. The strategy worked wonders: Moi moved with alacrity

to repeal section 2(a) of the constitution that made the country a de jure one party state; as a result, the country did become more open politically; for example, the government could no longer imprison regime opponents without trial.

Still, human rights abuses remained endemic during the Moi regime. In addition, save for the agitation for multi-party politics, donors did not seek any other meaningful reforms. However, this changed amidst increased instances of state abuse, especially in the run-up to the 1997 elections. In this atmosphere, the EU and other donors did ogle democracy, good governance and human rights again. Overall, however, the 1990s were characterized by a major disjuncture between rhetoric and reality: whereas the EU increasingly denounced Moi's tactics, funding continued to grow and also the bloc refused to decertify flawed elections in both 1992 and 1997. In any event, continuing domestic and external pressure would combine and help unseat the reviled KANU regime in the 2002 general elections.

Turning focus to the Kibaki/Narc administration and the contributions made by EU political aid towards Kenya's political development during the period, the study shows that the EU and other donors shifted to working with the government more directly; this produced desired results in some instances. For example, because of this collaborative effort Kenya's once anaemic economy begun to thrive again.

However, in other instances this increasingly cozy relationship prevented the EU from using its political aid leverage in ways that would have advanced Kenya's nascent democracy. For example, even as Kibaki reneged on some of the agreements that led to the formation of NARC and therefore the unseating of KANU from power, such as constitutional reforms as well as others such as the 1997 IPPG deal that mandated the cross-party nomination of ECK commissioners, the EU never raised any questions.

EU quietude in the face of anti-democratic stances by Kibaki issued, in part, from a change in Kenya-donor relationship occasioned by the onset of the WOT. With the onset of the War On Terror, and thus the elevation of strategic calculations in the bloc's interaction with Kenya—and here Kenya meant the government—the EU appeared to have retreated into the cold war posture of security, as over human rights, good governance and democracy. This, in practice, meant that as the EU

focused more and more on security issues, such as the fight against piracy off the coast of Somalia as well as the War On Terror in East Africa, it tended to elide democracy and human rights. For example, the international community was hamstrung by internal divisions in its response to the post-election political crisis, with some key players predisposed to support Kibaki, viewing him as an invaluable ally in counter-terrorism. The various policy and political miscalculations by Kibaki would lead to the fragmentation of NARC and sow the seeds of the 2007-08 PEV; in fact, signs of violence were already extant even prior to the voting itself, but donors ignored all this, on the grounds that Kenya had finally embarked on a more promising trajectory.

However, in fairness to the EU with mounting suspicions that the ECK had manipulated the vote in favour of Kibaki, not only did the bloc issue tough statements questioning that decision; it reinforced these by insisting that without a fair settlement to the crisis it would not be business as usual. It then deployed a number of instruments, such as threats of travel bans for key leaders to press the parties to reach a negotiated settlement. The EU then continued to play a major role in the implementation of the reforms agreed under the NARA, such as extending financial support towards reform of Kenya's then discredited EMB.

As for the grand coalition government, the study shows that the EU played a major role both in facilitating the agreement that led to the formation of the grand coalition as well as the various reform initiatives undertaken by that government as part of the NARA, especially the adoption of a new constitution in 2010. The chapter shows that the EU played a major role during this period of political reforms in Kenya using both carrots and sticks: the former coming in the form of tangible monetary assistance, such as that extended by the bloc to Kenya's EMB in readiness for the 2013 elections; and sticks, mainly in the form of threats to key leaders to abandon their obstructionist posture or face the consequences.

The EU took a particularly hawkish stance on the Local Tribunal vs. The Hague Debate. Insisting that it would not accept a flawed domestic process, the EU and other international players cautioned the grand coalition government to either establish a credible mechanism that met international standards or let ICC handle the case.

The EU's political aid to Kenya during the current Jubilee administration has increasingly been one of 'a hands off approach', save for the engagement over counter-terrorism. True, the EU initially took a hardline position vis-à-vis the Uhuru-Ruto candidacy for the 2013 Presidential elections and then the ICC case that the duo faced. However, in the wake of the resultant backlash, especially the acerbic reactions by both the Uhuru-Ruto camp and the Kibaki-wing of the grand coalition government, the EU appeared to recalibrate its position, now terming the presidential contest an entirely domestic matter, one for Kenyans to decide.

What is, however, clear is that the EU's other actions undertaken in support of democratization in Kenya under the Jubilee administration appear motivated in large part by a desire to maintain stability in Kenya, rather than really to advance democracy. Or, perhaps the EU drew the ineluctable conclusion that overt statements and actions in support of democracy could do more harm than good in the long-term.

A number of findings present themselves from the preceding summary. One, EU political aid to Kenya has been most effective when supporting the process of democratization—such as helping the country's EMB improve its capabilities, or in the procurement of election related material. In such instances, the EU has usually been positively perceived by most domestic political players in Kenya; they have usually seen such measures as merely intended to augment otherwise scarce local capabilities. This was the case in the early 1990s when EU political aid helped augment local efforts by civil society in the fight against an obdurate President Moi.

Aid seems to make the most contribution to democratization when the recipient is genuinely in need of such assistance; the giver can then use it as leverage to get desired reforms. This was the case in 1991 when the EU and others, working through the Paris Donors' Club, withheld much needed aid pending reforms; Moi moved with alacrity to legalize pluralism. We see the same logic at work during post-election violence, with the EU making it clear to Kenyan leaders, both within government and the opposition, that without a speedy and acceptable solution to the crisis, it would not be business as usual. This stance, coupled with other

measures would force Kenyan leaders to the negotiating table, thereby opening the way to the National Accord agreement.

The point that aid is likely to make the most contribution to democratization when the recipient is in need warrants emphasizing. Although it sounds, at least at first glance, pedestrian—after-all, is it not only commonsensical that aid would be most effective in achieving desired reforms when the potential target is in dire need of such assistance, and thus susceptible to the demands of the sender? This finding is, however, not as simplistic as it initially appears; in fact, it seems to contradict some other findings. For example, other studies contend that although potential recipients are usually susceptible to senders' pressure before the desired assistance is given, once the aid is given, however, senders have no more leverage; the reform effort is henceforth at the mercy of the recipients.

In other words, the recipient can renege on previous promises of reform and return to old ways of doing things. In fact, others in the same vein, taking a particularly hawkish stance, claim that even when given, such aid was likely to make only negligible contributions to reforms, or that such aid has corrosive influences—that it, for example, merely helps to cement neo-colonial relationships between the sender and the recipient. The finding being discussed here is pointing in a radically different direction; namely, that properly calibrated, aid can make a major contribution to reform, more so when the potential recipient is actually in need of that assistance.

The key word here is calibration; it is designed to denote aid that is keyed to addressing the immediate issue at stake, say, moving towards multiparty politics, as was the case with the aid freeze in 1991, or ending the PEV, and so on. We see this phenomenon at play in 1991 when Moi, under pressure following refusal by donors to release further funds pending reforms, moved with alacrity to legalize pluralism. In this case, the aid was tied to a specific reform measure—legalization of pluralism. It is true that after that action, Moi tried every trick to resuscitate the one-party state.

The recalcitrance on Moi's part after the launch of plural politics does not invalidate the finding that political aid was likely to make the most contribution to

democratization when the recipient was in need of such aid. Straight to the point, to the extent that the 1991 aid conditionality was about the legalization of pluralism—which Moi actually undertook with alacrity. To the extent, then, that Moi sought to sabotage pluralism after his initial reform action, an astute critique would then be that EU failed to help sustain the reform momentum—perhaps by deploying other instruments to support further democratization.

Relatedly, and in the second place, EU political aid to Kenya seems to make the most contribution to democratization when supporting domestic demands for reform. We see this dynamic at work in the early 1990s during the push for plural politics. The EU supported domestic forces agitating for reform, when it first helped incubate civil society—an entity which would then confront the Moi dictatorship frontally. The EU also supported pro-reform forces' push for pluralism when, as previously indicated, it joined other members at the Donors' Consultative meeting in 1991 in denying Moi new lines of aid, pending reforms; Moi gave in a few months later.

We see a similar logic at work during the disputed presidential election of 2007 and then the eruption of PEV. Amidst growing domestic calls for an end to the crisis, the EU joined the fray, insisting that without a satisfactory formula to resolve the crisis, it would not be business as usual with Kenya. This stance forced Kibaki and Odinga to relent and agree to a negotiated settlement to the crisis; the ensuing parleys would lay the proscenium for reaching the National Accord and, with that agreement, formation of the grand coalition government. The EU played a similar role in support of the other reforms envisaged under NARA, Constitution reform, for example.

In similar fashion, following the signing of the NARA, the EU played a crucial role in supporting domestic calls to end impunity, as recommended by the Waki Commission. The EU lend its support to calls to end impunity by insisting on the establishment of a credible local mechanism to deal with PEV cases, as recommended by the commission or, failing this, to turn the cases over to the ICC, again as recommended by the same commission. When Kenyan leaders failed to establish such a local entity, the EU once again vigorously supported domestic forces calling for transfer of the cases to The Hague. These concerted domestic

and external efforts would see the cases move to The Hague as well as the indictment of six prominent Kenyans suspected to bear the greatest responsibility for the violence and attendant crimes.

Similarly, aware that the country's EMB had been implicated as a major culprit in the eruption of the chaos that attended the 2007 elections, and alive to domestic demands for reform of the electoral commission as recommended by IREC, the EU provided resources toward reform of Kenya's EMB, now renamed IEBC, prior to the 2013 elections. The resources were especially geared towards the purchase of biometric voter registration kits (BVRs). This finding, that is, that EU political aid was likely to make the most contribution towards democratization in Kenya when supporting domestic demands for such reform is consistent with other findings. These other findings show that emphasis ought to rest on "the capability of national actors and their interactions with the populace. Although international actors have an important role play, their engagement is rarely the key to ensuring the effectiveness of states" (Call 2008: 366).

The obverse of the argument that EU political aid was likely to make the most contribution to democratization in Kenya when supporting domestic forces is that the EU was most likely to hurt the cause of democratization in Kenya when it failed to act, in light of domestic calls for reform. This development issues from two factors: one, because on their own domestic forces were likely to lack the wherewithal to compel the government to undertake change, the government was at best most likely to ignore whatever domestic calls existed for change; at worst, it was likely to take a tough stance vis-à-vis those that sought such reforms.

We see this dynamic on full display following legalization of plural politics in 1991 and then the ensuing inaugural multiparty elections in 1992. Although evidence of rigging in those elections abounded, the EU and others chose to ignore this; this only emboldened Moi in his determination to try and resuscitate the one-party state. Indeed, the EU's ensuing entanglement with Moi—under cover of supporting economic reforms and road rehabilitation—only served to delay; indeed, undermine desired reforms. We see the same behavior both in the run-up to and in the aftermath of the 1997 elections: although there were voluble domestic calls for reforms, especially the need for a new constitution, prior to the elections, the

EU never showed enthusiasm for the calls. Indeed, when pro-reform forces called on the opposition to boycott the polls—fearing that as things stood, the rules worked in Moi's favour, the EU advised otherwise.

Finally, the findings serve as cautionary note against the technical vs. political arguments so prominent in the democratization literature; this study suggests that these binaries are misleading. The two are complementary. In particular, the study shows that whenever the EU has tried to promote one of the two at the expense or neglect of the other, the effort has not succeeded. For example, the 1991 aid freeze focused mostly on political aspects: expansion of the political space to facilitate greater citizen participation; the aid never focused on any institutional reforms—quintessential technical aspects. The study shows that, although Kenya did become a multiparty state and citizens routinely voted, the country did not consolidate/institutionalize democracy.

In similar fashion, and on the technical side, when the EU and others sought a technocratic approach to reform of the civil service in the early 1990s, the effort registered only negligible results; that effort had to await the NARC administration—when there existed the requisite political will to undertake meaningful civil service reforms. However, in the wake of the 2007-2008 political crisis, the EU and others have appeared to couple the need for technical and political reforms—or the need for legitimacy (participation) and capacity (technocracy), as denoted by the various reforms enunciated under Agenda number four of the National Accord and then enshrined in the new constitution enacted in 2010, such as a reformed IEBC—keyed to conducting free and fair elections. In other words, to manage the tensions inherent in democratization, a proper balance needs to be struck between the need for legitimacy, on the one hand—this the institutional design aspect, and the need for capacity, on the other.

### **8.3 Going back to the future: Literature revisited**

A review of extant literatures on democratisation shows that current research on African democratization tends to be overly focused on the role of endogenous factors in this process, to the exclusion of a serious consideration of the role of

exogenous variables in this equation. This study sought to correct this misnomer by analysing the role of EU political aid in democratisation in Kenya since the advent of plural politics in the early 1990s to the 2013 elections. I drew on both democracy support and foreign aid literatures, believing that these two streams of scholarship hold particular promise for a fruitful inquiry into the role that EU political aid has played in Kenya's political development since the early 1990s.

I couple and rely on the two streams of literatures because with the cold war over and democracy apparently in ascendance foreign aid became one of the main tools that developed countries deployed in their engagement with developing countries. True, the demise of the Cold War initially generated widespread optimism that the world would finally focus on pending problems. The optimism proved fleeting, however: the demise of the cold war was immediately followed by the outbreak of conflicts across the globe. Mostly intra-state in nature, majority of the conflicts stemmed from democratisation experiments gone sour.

To grapple with this situation, the international community employed a graduated series of tactics—peace-enforcement, mediation, and finally the shift to the use of foreign aid as an instrument for the promotion/ or support of democracy—all aimed at responding to the chaos that followed what so many had actually initially visualized as the beginning of a new dawn. The linking of foreign aid and democracy issued from a growing acknowledgement that post-cold war democratization challenges stemmed from weak state institutions. This would see political aid—in terms of resources specifically focused on institution building assume unprecedented prominence in international affairs. A view developed that to consolidate democracy in the south, third world political institutions needed strengthening. Democratic Peace Theory provided the intellectual anchors for this shift, contending that the spread of democracy would provide conditions for replacing disorder, conflict and turmoil with peace, stability and order in the world.

A number of themes have come to the fore in the foreign aid debate in general and democracy support in particular. One theme centres around the impact of foreign aid on sovereignty; specifically, the legitimacy of foreign intervention to promote

human rights, democracy and good governance versus the need to protect state sovereignty. The sovereignty versus intervention debate has manifested itself on several occasions in Kenya's political development since the early 1990s. The issue first came to the fore during the Moi administration, 1990-2002. As he came under intense pressure to legalize multi-party politics, the president and his lieutenants unleashed febrile denunciations of the nascent democratic movement, consistent with vehement denunciations of pro-democracy campaigns by other African leaders, warning that multi-party politics was alien to Africa and that its adoption would augur ethnic divisions. Still, in the face of mounting pressure, in December 1991 the Moi government acceded to the demands and legalized pluralism. Interestingly, Moi went on to win the inaugural plural elections.

The issue of sovereignty did not feature prominently under the NARC administration with the government, by and large, working harmoniously with the EU and others to advance its progressive agenda such as implementation of free primary education, for example. To the extent, then, that the 'state sovereignty' mantra did surface at all, it did so during the contested 2007 elections, with the EU and others insisting that Kibaki respect the will of the electorate. Those within the Kibaki orbit reacted by telling the EU and others not to interfere in Kenya's internal affairs. However, the theme assumed saliency in EU-Kenya discourse after formation of the grand coalition government.

The sovereignty theme was also salient during the 2013 presidential elections, thanks to the crimes against humanity cases stemming from the 2007-08 post-election violence. Indeed, the Kenyatta-Ruto team posited the case as a neo-colonial attempt to impose leaders on Kenyans. The international community appeared to play right into the two leaders' hands on this issue just a few days to the elections. Perhaps sensing a shift in momentum in the Jubilee team's direction, diplomatic representatives of key nations in Kenya—including those from the EU, led by then-US Assistant Secretary of State for African Affairs—and his country's former ambassador to Kenya—John Carson issued a warning, cautioning Kenyans that there would be consequences if they elected indicted leaders. The EU then went ahead and stated that it would limit its dealings with the Kenya government and the two leaders were they even to win, pending conclusion of the case at the

ICC. The EU then indicated that until the case was concluded, it would in the interim continue its other activities in Kenya, but working in league with other players, such as civil society.

These pronouncements drew instant protest and rebuke from both the Kibaki-wing of the grand coalition government and the Kenyatta-Ruto team, with the latter advising the diplomatic community to stick to its brief in the country and let Kenyans exercise their democratic right to choose their own leaders.

However, and contrary to claims of external infringement of Kenya's sovereignty, once the IEBC declared Kenyatta the overall winner of the first round of elections thereby obviating the need for a run-off with Odinga, the EU was in the forefront in calling for calm and advising any aggrieved party to seek redress through legal and constitutional means. In particular, cautioning against any action that would plunge Kenya into a crisis similar to that that attended the disputed 2007 elections, the EU encouraged Odinga and his team to pursue whatever grievances they might have through the legal system, now that the country had a reformed and credible judiciary. It, in the meantime, cautioned that the international community would look askance at any action likely to lead to violence.

Similarly, and again contrary to accusations of external meddling, following the termination of the case first against Kenyatta, and then against Ruto, the EU moved to soften its hitherto tough stance towards the duo, arguing that with the cases over, the international community was now free to engage with the two leaders to tackle other outstanding issues such as the fight against extremism and regional instability.

The link between foreign aid, security, and democracy has emerged as a major theme in the literature. However, critics caution that the current obsession with order and security poses a real threat to third world political development, as governments feel emboldened to repress pro-democracy forces. Donors supported civil society in Kenya in the 1990s as a major component in the struggle against the oppressive Moi regime. With the ouster of the KANU regime in 2002 and the accession to power by NARC, donors decided to engage with the Kenyan state more directly—consistent with changed donor strategies more broadly—

focused on aligning their aid with priorities and objectives of aid-recipient governments, as well as to better coordinate and harmonize bilateral aid. However, with the onset of the WoT and the designation of Kenya “an anchor state in the Horn of Africa”, and a ‘frontline in the Global War On Terror’ GWOT:

It is more certain that there has been less diplomatic support for Kenyan Civil Society, democracy and governance groups, particularly those against Government’s counter-terrorism policies and planned legislation. (Lind *et al* 2009: 341)

## **8.4 Key concepts revisited**

### **8.4.1 Election monitoring/observation**

The literature identifies assistance directed towards the preparation, conduct and monitoring of elections as a component of political aid. EU political aid to Kenya has mostly manifested itself in the form of assistance towards the preparation conduct and monitoring of elections.

It is clear from this record that the EU has consistently supported the preparation, conduct and monitoring of elections in Kenya since the launch of plural politics in the early 1990s. The EU has done this, and as postulated in the literature, informed by the knowledge that while democracy is essential for development, on their own, however, developing countries lack the wherewithal, both political and economic, to undertake democratisation. This thinking has seen the EU fund the activities of Kenya’s EMB in preparation for general elections; the thinking has animated EU activities directed towards election monitoring in Kenya as well.

It is, however, also clear from this record that, in most instances EU political assistance to Kenya lacked a certain level of seriousness; in most instances, the aid usually came with an election on the horizon. This would explain why most of the financial resources went to Kenya’s EMB. However, and perhaps not surprising—given that the focus was usually an impending election, with the election over, EU political aid to Kenya in this area would then pine. The EU would then ogle other areas for engagement with Kenya, especially in the economic and security arenas. For example, following what some saw as highly manipulated elections in 1992, and notwithstanding initial criticisms, by 1993 the EU had

already signaled its intent to parley with the Moi government, on the pretext that it could detect some reforms underway in the country. Adopting a business-as-usual attitude towards the strongman the EU now drained its glare squarely on economic development and political stability.

In addition, in theory, election observation should guarantee the integrity of the electoral process. This was the case with the 2002 elections, with the EU's observer team hailing the exercise as exemplary regionally. Indeed, the observer mission had even expressed hope that the 2002 elections might serve as a harbinger of much greater things for the region, an example worth emulating by other democratizing states. However, on a number of occasions in Kenya, but especially in 1992 and 1997, foreign observers took it upon themselves to suppress evidence indicating that Moi and his party had manipulated the vote. To EU's credit, though, it was among those that denounced the elections as not free and fair.

The EU's position regarding the 2007 elections continued the aforesaid trend. Not only did the EU cast the elections as not free and fair; also, it warned of the consequences that forces out to derail Kenya's democracy stood to incur. The hardline stance by the EU would see the bloc emerge as a major player in the negotiations that ended the crisis as well as in the implementation of the NARA.

#### **8.4.2 Technical assistance**

The literature identifies technical assistance as another major aspect of political aid. The political aid literature identifies civic education as one of the activities that fall under technical assistance. The EU and others have consistently supported this aspect of political aid to Kenya since the advent of plural politics in the early 1990s, save for the stringent conditions this had to surmount during the Moi administration, with the president opposed to such activities as inimical to Kenya's sovereignty.

Indeed, the EU and other donors have also consistently supported voter education, especially after the 1997 elections. For example, in early 2012 the EU jointly with

the United Nations Development Programme-Kenya under the Joint Training Facility—a working arrangement on democracy support between the two entities—organised a workshop for EMB officials from across the globe in Mombasa on the issue of ICT and elections. In addition, the EU in collaboration with other donors have extended financial support to a number of national civil society initiatives to guarantee free and fair elections; this has been especially the case with regard to funding for Elections Observation Group (E-LOG). This is a consortium of civil society organisations and their stakeholders; it is to help monitor elections both nationally and regionally.

### **8.4.3 Political aid**

The preceding discussion warrants a re-examination of the concept “political aid” itself. A critique of indiscriminate neo-liberal attacks on the southern state edifice as the epitome of Neopatrimonialism, the concept came to the fore in the early 1990s. Critics responded that such a designation connoted states that were static. They instead argued that the problem in the South was one of lack of effective states.

Focused on the institutional development of government (Hearn 2000), political aid takes two main forms: election observation, and technical assistance, with the former focused on guaranteeing the integrity of the electoral process by ensuring adherence to internationally accepted standards of democracy; the latter has its glare on long term institution-building, through the sharing of expertise, among others.

However, the evidence from Kenya shows that prior to the eruption of post-election violence and then the launch of agenda number four reforms, EU political aid in the country tended to equate democracy with procedure alone; hence, the attempt to reduce democracy to elections. This explains the apparent obsession with electoral assistance and civil and political rights. By so overly focusing on the electoral process and political and civil rights, the EU thereby failed to see the process in a holistic fashion.

#### 8.4.4 Theoretical issues

Political aid and foreign aid are not ends in and of themselves; rather, these are mere means to an end. Properly understood, foreign aid and democracy support are means deployed towards development of the third world state. Indeed, the demise of the cold war and the attendant challenges that accompanied the third wave of democracy thrust the issue of the third world state- back onto the international policy agenda. Prominent on the international agenda during the 1960s as part of the modernization drive, the theme had fallen into disrepute by the 1980s, with critics lampooning the third world state as part of the problem.

However, by the late 1980s the deleterious effects attendant this discriminate attacks on the third world state had become too glaring to ignore. This counter-offensive received added impetus with the end of the cold war and the eruption of numerous conflicts around the globe, most of which stemmed from democratization gone awry. Increasingly practitioners and scholars identified lack of state capacity as the main issue.

Understood this way, it is apparent that since the onset of pluralism in the early 1990s up to the eruption of post-election violence, the EU and others are/were engaged in an attempt to construct a certain type of state in Kenya—a liberal democratic state. Liberal democracy draws on pluralist theory of democracy. Pluralist theory is focused on procedural democracy—that is, a number of procedural aspects; for example, elections, which facilitate pluralist interest group contestation, as a precondition for political stability. For example, in his book, *A Preface to Democratic Theory* Robert Dahl conceptualizes democracy in procedural terms.

However, serious scholars have identified a multiplicity of possible historical trajectories in the development of the state (Badie *et al* 1983: 24). Cognizant of these critiques and a live to the multiplicity of factors at work, most historical work emphasizes the fact that the historical process of political differentiation that underlies the formation of the state is therefore exogenous just as much as it is endogenous, and it is characterized by discontinuity just as by continuity.

Myriad of challenges frame life in the third world. Democratisation there needs to pay attention to both legitimation and capacity. This, in practice, means democracy support must go beyond support for elections and focus more on institution building, a development that calls for a serious commitment of resources. This understanding calls for some conceptual clarity, specifically a distinction between liberalization, on the one hand—a short-term, non-encompassing phenomenon, and democratization—a far-reaching and institution-building undertaking, on the other. With that understanding EU political aid would then focus on supporting good governance as well as the reform of political institutions, while also supporting independent organizations in society. This strategy should be informed by an acute understanding of the contextual setting within which political aid came to the fore.

In Kenya, and back to EU political development, the reforms augured by the National Accord, and which were given expression through the enactment of a new constitution, would seem to provide a sound starting point for the EU and others—both external and domestic—to start the arduous, yet necessary process of constructing a state attuned to both procedural and substantive aspects of democracy—the surest guarantor of socio-economic prosperity and political stability in the country as well as for a post-cold war world that has yet to realize the full potential of the third wave of democracy. For according to the literature:

... although the design of states is generally so historically rooted that the state's organizational arrangement seems impervious to change, the extraordinary circumstances of war and its termination both compel and provide windows of opportunity for national elites, or external powers... involved, to revisit the state's organization for better or worse. [Issues of state design or institutional arrangements usually trump that of state capacity] in the immediate aftermath of state or regime collapse. [However], once these constituting rounds of state design occur, capacity once again becomes the fundamental characteristic of stateness and state power in the eyes of international organizations. (Call 2009)

## **8.5 Conclusion and recommendations**

As to what these activities have contributed to Kenya's political development in the aggregate, the picture that emerges is a mixed one: initially, the EU and others

played a crucial role in Kenya's transition to democracy. However, with the shift to security-matters EU political aid begins to assume a self-interested hue, with security and economic interests trumping those focused on governance, human rights, and democracy. In short, the study reveals that EU political aid has made some important contributions in Kenya, such as helping to end one-party rule and launch political pluralism. However, this aid has also been bedevilled by a warped view by the EU that technical solutions would suffice to fix what ails Kenya! To suffice such aid would have to ogle the political issues at play here—which agenda number four and the ensuing reforms correctly identify—such as ethnicity, structural inequalities, among others; this calls for long-term investment. Consequently, the EU must seek to understand the political implications of its political aid—namely, the long-term political development of Kenya.

A number of recommendations propose themselves from this study on the use of political aid to support democracy: the Kenyan case reveals that:

1. For political aid to support democratization, there needs to be proper Coordination/harmonization among aid providers; such a strategy would help guard against the ever present danger of aid providers working at cross-purposes.
2. For political aid to work, there need to be clearly defined goals or policies that the aid in question seeks to support; such a strategy ensures that there are clear policy benchmarks against which the efficacy—or lack thereof—of the political aid in question can be assessed.
3. Political aid must be designed to support, not to undermine, domestic players/actors in the democratization process; such a strategy is essential in guaranteeing domestic ownership of the reform process and, by implication, its sustainability.
4. Finally, and stemming from the previous point, for it to suffice as an agent of democratization political aid must be sustained over time. Because democratization is a process and not an event, episodic commitments of political aid would not suffice; rather, what is required is sustained commitment of political aid, both quantitatively and qualitatively.

Therefore, for future research, others might want to more fully examine the role of EU political aid in agenda number four reforms; others could also interview EU officials in Nairobi—and even Brussels—to get their perceptions of the events discussed here; finally, others could also examine in more detail the role of other donors in the reform process; finally, other researchers could, for comparative purposes, focus on similar dynamics, but in other countries.

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