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**INFORMATION NOTE ON THE SITUATION IN KENYA AND THE
EVOLUTION OF THE MEDIATION EFFORTS**

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I. INTRODUCTION

1. At its 105th meeting held on 21 January 2008, Council was briefed on the situation in Kenya, in light of the tension and violence that erupted in that country, following the presidential election of 27 December 2007. In the press statement issued at the end of the meeting, Council requested the Commission to closely follow developments in Kenya and to report to it, as soon as possible, on the situation in the country and the evolution of the mediation efforts. The present report is submitted in pursuance of that request.

II. THE ELECTION DISPUTE

2. Council will recall that, on 27 December 2007, Kenya held its fourth general elections since the reintroduction of multiparty democracy in 1992, to elect its President as well as members of the Kenyan Parliament. The main contenders in the presidential election were incumbent President Mwai Kibaki of the Party of National Union (PNU), Mr. Raila Odinga of the Orange Democratic Movement party (ODM), and Mr. Kalonzo Musyoka of the Orange Democratic Movement-Kenya (ODM-K). Six other candidates, representing smaller parties, also contested the presidential election. The parties also contested the 210 parliamentary seats, as well as the seats to the local councils.

3. The conduct of the elections was regarded by most observers as free and fair. It was only during the process of counting and tallying of the votes that serious problems emerged, which brought into question the entire electoral process and, in particular, the competence of the Electoral Commission of Kenya (ECK). In the event, Mr. Kibaki was declared to have won the presidential election against Mr. Odinga, by 230,000 votes when the results were finally declared on 30 December 2007. Regarding the legislative election, the PNU won 43 seats to the ODM's 99; 18 ministers, including the Vice-President, lost their seats.

4. President Kibaki was sworn in immediately following the announcement of the election results, precipitating a strong rejection by the ODM and its supporters, who argued that the election had legitimately been won by Hon. Raila Odinga. The violence that accompanied the announcement of the election results has, led to the deaths of more than 1 000 people and the displacement of over 300,000 people. While the initial outbreak of violence was largely spontaneous, as the crisis persisted it became apparent that certain groups on all sides of the political divide were manipulating and orchestrating the violence, which increasingly took on an ethnic cast.

5. This was not the first instance of election-related violence in Kenya. Violence had accompanied the elections of 1992, 1997 and 2002. In all instances, the root causes have been: long-standing governance issues; regional disparities and conflict and competition over land, both of which reinforce ethnic grievances; issues of transparency, impunity and corruption; poverty, unemployment and lack of opportunities

among the youth; and mistrust between the leaders. Some of these issues date back to the immediate independence period and even the colonial era.

6. Upon the outbreak of the crisis, a number of national and international attempts were launched to try to mediate between the parties. President Kibaki established a Committee, led by Mr. Musyoka of the ODM-K, but this was immediately dismissed by the ODM. On 4 January President Kibaki announced his willingness to form a Government of National Unity, which would include the ODM and give it a significant number of cabinet positions. On 8 January, he formed a coalition government with a number of smaller parties, including the ODM-K, whose leader, Hon. Kalonzo Musyoka, was appointed Vice-President. The Kenyan churches launched a mediation attempt headed by South African Archbishop and Nobel laureate Desmond Tutu, but this was unsuccessful. Other attempts to defuse the tension, bring an end to the violence and facilitate the search for a solution to the post-electoral dispute were made by leaders from the region, including President Yoweri Museveni, in his capacity as Chair of the East African Community (EAC), other members of the international community and the Forum of Former African Heads of State and Government.

III. THE MEDIATION EFFORTS OF THE PANEL OF EMINENT AFRICAN PERSONALITIES

7. From 8 to 10 January 2008, President John Kufuor of Ghana, the then Chairman of the African Union, paid a visit to Kenya to try to mediate between the two parties. President Kufuor succeeded in getting agreement from both sides on the establishment of a Panel of Eminent African Personalities, to be headed by Mr. Kofi Annan, former United Nations Secretary-General, and including former Tanzanian President Benjamin Mkapa and Mrs. Graça Machel-Mandela. A Secretariat was established to assist the Panel in its work, comprised of officers and analysts from the UN, the AU, and other international conflict mediation experts. A Trust Fund of US\$ 7 million, managed by the UNDP and including contributions from a number of donors as well as the Kenyan Government, was also set up. The African Union, through the Africa Peace Facility, made a contribution of Euro 100,000 to the Trust Fund.

8. Both Council, at its meeting of 21 January, and the Assembly of the Union, at its 10th Ordinary Session held in Addis Ababa from 31 January to 2 February 2008, welcomed the visit undertaken by President Kufuor, as well as the efforts by President Museveni and by other leaders. The Assembly also stressed the need for the parties to extend full cooperation to the mediation efforts undertaken by the Panel of Eminent African Personalities.

9. The Panel began its work on 22 January 2008, holding consultations with Kenyan and international stakeholders. In addition to the political parties and their principals, the Panel also met with government agencies, including the ECK, civil society organizations, including women's groups, business groups, humanitarian relief organizations, religious groups and grass-roots organizations. The Panel also met with members of the diplomatic community in Nairobi. The Commissioner for Peace and Security traveled to Nairobi on 24 January 2008, to meet with the Panel and express AU support to its efforts. A number of high-profile individuals also paid visits to the Panel,

including the UN Secretary-General, Mr. Ban Ki-moon, European Commissioner Louis Michel, UK Minister of State for Africa Mark Malloch Brown, and IGAD Foreign Ministers. US Secretary of State Condoleezza Rice and the AU Commission Chairperson-Elect Jean Ping also visited Nairobi and held talks with the Panel and with the parties.

10. The first major breakthrough in the mediation process came on 24 January, when the Panel managed to broker the first face-to-face meeting between the two principal antagonists, President Mwai Kibaki and Hon. Odinga, in the face of increasing and ethnically-based violence. The two leaders appealed to Kenyans for calm, and affirmed their desire to seek a peaceful solution to the crisis, based on a National Dialogue and Reconciliation facilitated by the Panel of Eminent Personalities. The dialogue would be facilitated by 4-person negotiation teams. The Government/PNU side comprised members of the parties in the coalition government. It was headed by Minister Martha Karua, Minister of Justice Constitutional Affairs, and included Moses Wetang'ula, Minister of Foreign Affairs; Sam Ongeru, Minister of Education; and MP Mutula Kilonzo, backbencher and Secretary-General of ODM-Kenya. The ODM team was headed by MP Musalia Mudavadi, and also comprised MPs Sally Kosgei, James Orengo and William Ruto. Each side was also assisted by a liaison officer.

11. The sessions began with a consideration of a roadmap and a timetable that had been proposed by the Panel. Included in the roadmap were: an agenda; annotations to the agenda; modalities for the Kenyan National Dialogue and Reconciliation; the structure and terms of reference of the Panel; and the rules of procedure for the National Dialogue and Reconciliation. The parties agreed to the roadmap, which included the following items for the agenda: 1) immediate action to stop the violence; 2) immediate measures to end the humanitarian crisis; 3) how to resolve the political crisis; and 4) long term issues and solutions, which include land reform, poverty and inequity, unemployment, especially among the youth, consolidating national cohesion and unity, and transparency, accountability and impunity. The parties agreed to conclude agreements on items 1 to 3 within four weeks, and to address the long-term issues within one year.

12. On 1 February, the parties issued a statement in which they agreed on the *Steps needed to end the violence*. These included action to be taken by the Police and by the Kenyan public, as well as a commitment to restore to Kenyans their fundamental rights and civil liberties. The 10th Ordinary Session of the Assembly welcomed the agreement, and urged the parties to build on this encouraging development to find a lasting solution to the crisis. The Assembly also commended Mr. Annan and the members of the Panel for this result and encouraged them to pursue their efforts.

13. On 4 February, a second statement was issued by the parties, relating to item 2 on the agenda, *Immediate measures to address the humanitarian crisis*. These included provision of assistance to encourage displaced persons to return to their homes or to other areas, the provision of adequate safety and protection, in particular to vulnerable groups in the IDP camps, the provision of basic services to people living in displaced persons camps, and immediate action to promote reconciliation, healing and restoration. The latter included the establishment of a Truth, Justice and Reconciliation Commission.

14. Discussion on agenda item 3, *How to resolve the political crisis*, began on 6 February 2006. Given the contentious nature of the issue under discussion, progress here was much slower than had been the case with items 1 and 2. The basic position of the PNU/Government side was that it was the undisputed winner in the presidential election. Any challenges that the ODM side may have would have to be pursued through the courts. The ODM insisted that it had won the elections, which, in its view, had then been stolen by the PNU. It demanded a rerun to resolve the dispute, with the establishment of an interim Government to rule the country until a run off could be organized. Both sides, however, did agree that the election dispute had merely provided a trigger for violence that was fuelled by long-standing grievances in Kenyan society, and that these grievances had to be addressed if any peace was to be sustainable.

15. As discussions proceeded, the parties reached agreement that a recount, a retally, a rerun and a judicial process were unable to resolve the crisis. A recount would take at least 3 months, which “could significantly increase existing tensions and delay resolution of the current crisis, and... might not further Kenyan unity”. A retally, it was agreed, “could not... identify the correct result in those stations or constituencies where problems or irregularities were identified”. A rerun of the elections was also not considered feasible, given the tense atmosphere then prevailing in the country. Furthermore, given the serious problems in the conduct of the ECK, it was agreed that new elections should only take place after comprehensive electoral reforms had been implemented. As this would take at least one year to complete, it was agreed that Kenyans could not afford to wait that long to resolve the crisis. The judicial option to resolve the dispute was also discounted because the legal time limit had expired. Even though the parties agreed that the only way to properly examine the conduct of the elections and identify the mistakes that had been made would be through a forensic audit, to be conducted by an Independent Review Committee, it was felt that such a process was not a suitable option to resolve the dispute, and was not likely to reduce the tensions and violence.

16. Against this background, the parties concluded that the crisis in the country could only be resolved through a political solution that would promote national reconciliation and healing. At the same time, they agreed that the facts about the 2007 presidential election needed to be known by all Kenyans. Thus, the parties agreed to establish an Independent Review Committee (IREC) that would be mandated to investigate all aspects of the presidential election and would make findings and recommendations to improve the electoral process and ensure that the experience of the 2007 elections was never repeated. The IREC would be a non-judicial body, comprised of Kenyan and non-Kenyan election experts, that would begin its work by 15 March 2008, and would submit its report to the President within 3 to 6 months, for publication within 14 days.

17. The Panel met the two principals, President Kibaki and Hon. Odinga, on 9 February, to brief them on the progress made thus far in the Kenya National Dialogue and Reconciliation. On 12 February, the Panel held an informal 3-hour session with Parliament, a “*Kamakunji*”, to brief its members on the status of the National Dialogue. During this meeting, Mr. Annan also shared with the MPs his preference for the formation of a “Grand Coalition” between the two parties, in an attempt both to resolve the political crisis and to enable the Government to implement wide-ranging political,

social, economic and constitutional reforms that underpinned the crisis and that previous Governments had been unable to carry forward. The Panel urged the MPs to play a role in urging their representatives in the National Dialogue to reach a comprehensive political agreement, to implement those agreements that had already been concluded, and to promote reconciliation among their constituencies. The MPs thanked the Panel for this initiative to engage them and committed themselves to ensuring the speedy implementation of the political agreements.

18. Immediately following the *Kamakunji*, the Panel and the mediation teams traveled to Kilaguni Lodge, in Tsavo National Park, to continue their deliberations away from the glare of the press. Mr. Gernot Erler, the German Federal Minister of State for Foreign Affairs, attended the sessions to brief the teams on the German experience in the formation of a Grand Coalition, i.e. a coalition between two large parties, as opposed to the normal practice of coalition between one large party and smaller parties who share a common ideological platform, as a way out of a political impasse, and one which could facilitate the introduction of far-reaching reforms that would otherwise not be attainable.

19. The parties emerged from the Kilaguni retreat having agreed upon a comprehensive set of reforms and mechanisms designed to address the root causes of the crisis. These included: comprehensive constitutional reforms; comprehensive electoral reform; the establishment of a Truth, Justice and Reconciliation Commission; the identification and prosecution of the perpetrators of violence; respect for human rights; parliamentary reform; police reform; and legal and judicial reforms.

20. The parties also agreed that a comprehensive solution to the crisis would need to tackle the long-standing grievances that have bedeviled the country since independence. These include: land reform; tackling poverty and inequity, as well as combating regional development imbalances, particularly promoting equal access to opportunities; tackling unemployment, particularly among the youth; reform of the public service; strengthening of anti-corruption laws and public accountability mechanisms; reform of public finance and revenue management systems and institutions; and addressing issues of accountability and transparency.

21. The parties further agreed that a political settlement, one which reconciled and healed the nation and reflected the best interests of all Kenyans, was the only way out of the crisis. However, they were unable to agree on the actual governance structure that would best extricate Kenya from the crisis, and agreed to continue discussions after consulting with their principals.

22. Negotiations on the governance issue resumed on 18 February, in the belief that an agreement on the governance arrangement would be reached shortly. However, significant differences emerged between the parties on the nature of the governance arrangement. While it had given up on its demand that President Kibaki step down from the Presidency, the ODM demanded, in return, that a position of executive Prime Minister be created for Hon. Raila Odinga, entrenched through a constitutional amendment. For its part, the Government/PNU side, while agreeing to the creation of a post of Prime Minister, insisted that any governance arrangement be established within

the existing Kenyan Constitution, and that President Kibaki's executive powers remain untouched. The ODM would be invited into the Government at the discretion of the President.

23. In an attempt to move the debate forward, the parties were requested to form a legal sub-committee, to attempt to reach agreement on the legal framework that could underpin a political settlement. Former UN Legal Counsel Hans Corell, who had joined the National Dialogue, facilitated the discussions and provided legal and constitutional expertise to the sub-Committee.

24. During three days of intense, closed working sessions, the sub-Committee prepared a draft National Accord and Reconciliation Act 2008, for discussion in plenary. The draft contained provisions on, *inter alia*, the appointment and functions of a Prime Minister, two Deputy Prime Ministers, the modalities for the formation of the coalition government, and the conditions and modalities for the coalition's dissolution. However, the parties were unable to bridge their differences on a number of key issues, including: the powers to be accorded to the Prime Minister; the appointment of the Ministers in the coalition government; and the legal basis for the coalition government, i.e. whether it would be sufficient to ground it in an Act of Parliament without tampering with the current Constitution (the position favored by the Government/PNU), or whether to anchor it in a constitutional amendment (the ODM's demand).

25. By 26 February, the atmosphere in the National Dialogue had degenerated into acrimony, as the sides were unable to alter their initial positions. In this context, the Panel decided to suspend the talks temporarily, and to engage directly with the principals, President Kibaki and Hon. Odinga. Also, on 26 February, President Jakaya Kikwete of Tanzania, Chairman of the African Union, traveled to Nairobi to engage the parties and assist the Panel to push for a final agreement on agenda item 3. On 27 February, the Panel met with both President Kibaki and Hon. Odinga, as did President Kikwete, to emphasize the extraordinary situation facing Kenya, in which over 300,000 people were living in displaced persons camps. It was argued that neither side could realistically hope to govern the country on its own, without the support of the other, and that this extraordinary situation called for real power sharing that would begin the process of reconciliation and healing. At the Panel's request, Hon. Odinga also called off a planned ODM mass protest that had been slated for 28 February.

26. On 28 February, Mr. Annan, former President Mkapa and President Kikwete held a five-hour meeting with President Kibaki and Mr. Odinga, without their negotiating teams. The meeting finally managed to break the deadlock, and the principals agreed to a compromise National Accord and Reconciliation Act, as well as to an *Agreement on the Principles of Partnership of the Coalition Government*, copies of which are herewith attached. These agreements were signed on the steps of Harambee House, the President's office, in a ceremony held later that afternoon. The signing of the Agreements, which was witnessed by Mr. Annan and President Kikwete, was received with great relief by Kenyans.

27. At its 113th meeting held on 28 February 2008, Council welcomed the signing of the *Agreement on the Principles of Partnership of the Coalition Government*; expressed appreciation to President Kikwete, for his role; and paid tribute to Mr. Kofi Annan and the members of the Panel of Eminent African Personalities, for their sustained efforts in assisting the Kenyan parties to reach this important agreement. Council encouraged the parties to implement the Agreement fully, including the enactment of the National Accord and Reconciliation Act 2008, and carry on with the urgent task of addressing the long-term issues and creating conditions for lasting peace and stability in Kenya. Finally, Council stressed the need for the international community to continue to support the ongoing efforts and render all assistance needed for the promotion of lasting peace and stability in Kenya.

28. On his part, the Chairperson of the Commission wrote to both President Kibaki and Honorable R. Odinga, to express his appreciation for the wisdom and leadership they have shown in reaching this Agreement. He expressed confidence that the Kenyan parties will be able to successfully overcome the crisis and lay the foundation for lasting peace and stability in their country, reiterating AU's commitment to continue extending full assistance to the Kenyan leaders and people in this endeavor.

29. The Agreement creates the position of Prime Minister, who will be the parliamentary leader of the largest party or coalition in the National Assembly. The Prime Minister will be charged with the coordination and supervision of the functions and affairs of government. Each member of the coalition will nominate one person to the position of Deputy Prime Minister. The creation of the cabinet will take into account the principle of portfolio balance and will reflect the parliamentary strength of the parties in the coalition. The removal of any Minister of the coalition will be subject to consultation and concurrence in writing by the leaders. The Prime Minister and Deputy Prime Ministers can only be removed through a motion of no confidence passed in Parliament by a majority of MPs. The Agreement provides substantial powers for the Prime Minister, and also a large measure of protection from arbitrary dismissal. At the same time, it allows the parties to move beyond partisan considerations, to take account of the interests of the Kenyan nation. The parties also agreed that the Act would be anchored in a constitutional amendment.

30. Having concluded the Agreement on the governance structure, the parties resumed the National Dialogue on 29 February to begin tackling agenda item 4, *Long-Term Issues and Solutions*, and to address some of the outstanding issues in the other items. Ambassador Oluyemi Adeniji, the newly appointed session Chair, arrived to chair the sessions on a daily basis. The Panel members would return to their countries of residence, but would retain a close interest in the process, and would travel to Nairobi from time to time to ensure that the reform process stays on track. The parties quickly reached agreement on the Terms of Reference of the Independent Review Committee, the Truth, Justice and Reconciliation Commission, the Commission of Inquiry on Post-Election Violence, as well as the Roadmap for the Comprehensive Constitutional Review (copies herewith attached).

31. On 6 March, President Kibaki presided over the opening of the 10th Parliament, in a ceremony that marked a new beginning in a spirit of cooperation and unity between the parties. Parliament has committed itself to fast-tracking the legal and constitutional amendments that would give effect to the coalition agreement, as well as to the other items agreed to, such as the IREC and the Truth, Justice and Reconciliation Commission, etc.

V. HUMANITARIAN AND ECONOMIC IMPACT OF THE CRISIS

32. It is estimated that about 235,000 people remain in IDP camps, while 270,000 are believed to be outside the camps; furthermore, 12,000 people are refugees in Uganda, and a small number of other people have crossed over into other neighbouring countries. On 26 January, shortly after its arrival in Kenya, the Panel visited the Rift Valley to see for itself the conditions under which the displaced were living. Deeply concerned with prevailing conditions in the IDP camps, the Panel held a press conference on its return to Nairobi, appealing to all Kenyans to refrain from acts of violence. In his opening address to Parliament, President Kibaki also committed the Government to prioritizing support to displaced persons, to enable them to return to their homes or to any other place they choose to go to. The Government has set up a national humanitarian assistance fund with an initial endowment of 1 billion Kenya Shillings to provide humanitarian assistance and resettle displaced persons, and welcomes contributions from other countries and institutions. It has also established a new directorate for resettlement that will oversee the resettlement of IDPs, including through the provision of free seeds and other farming inputs to IDPs in rural areas.

33. The Agreement also gives hope to the East African region, as the crisis has had severe consequences for neighbouring states. Indeed, in addition to the impact it has had on Kenya itself, with the loss of revenue in the tourism, transport, horticulture and agriculture sectors, the crisis has seriously affected the economies of Uganda, Rwanda, Burundi, the southern part of the Sudan, and the eastern part of the Democratic Republic of Congo (DRC), all of which are heavily reliant on the transport routes through the Kenyan port of Mombasa. During the worst bouts of violence, these countries were unable to move their goods to Mombasa for export, or to transport imports through the port, resulting in inflationary pressures, as well as productivity losses, as the effects of commodity shortages, especially fuel, became apparent.

VI. OBSERVATIONS

34. Clearly, much has been achieved in the Kenyan National Dialogue and Reconciliation, and the parties should be commended for the leadership and spirit of compromise they have shown. At the same time, important challenges remain. It is, therefore, critical that the parties remain committed to the implementation of the comprehensive reform agenda, which includes land reform, constitutional, legal and institutional reform, and policies to address regional inequities and lack of opportunities, as well as negative ethnicity.

35. One clear lesson that has emerged from the Kenyan mediation process has been the clear unity of purpose of the international community, and the effectiveness of the engagement with the parties to reach an agreement that would move beyond partisan politics, and to look instead to the interest of all Kenyans. In this respect, it is worth mentioning the leadership, and legitimacy, provided by the African Union, and the fact that all engagements by the international community were channeled into the mediation efforts spearheaded by the Panel, thus preventing a proliferation of competing initiatives that would have had an adverse effect on the search for a solution. The intervention of AU Chairman, President Kikwete, at a decisive moment, was also critical. He should be commended for his role and timely intervention.

36. Also key to the success of the mediation was the firm support, under the AU umbrella, provided by the United Nations and other international actors. In this instance, this was facilitated by the fact that the Chair of the Panel of Eminent African Personalities, Mr. Kofi Annan, was able to use his prestige and networks dating back to his days as the Secretary-General of the United Nations, to mobilize technical, logistical and financial support to the mediation process. He, together with the other members of the Panel, should be commended for the remarkable work they have accomplished and for the true spirit of solidarity with Kenya and its people that they have exhibited.

37. Clearly, the international community, including the AU, should, through the most appropriate mechanism, remain seized with the situation in Kenya, to provide support to, and accompany, the parties. Such engagement would go a long way in facilitating the implementation of the reform agenda that would address the long-standing underlying problems that led to the crisis and that exacerbated the levels of violence, especially in its ethnic dimensions.

38. As highlighted above, the crisis has had a devastating effect on the economy, especially tourism, which generates an estimated US\$ 1 billion to the Kenyan economy annually. The destruction of property and the loss of confidence will have a serious impact on the economy. In addition to the tourist sector, it is expected that the agricultural sector will also be badly affected during the 2008 planting and harvesting season. The fertile Rift Valley, which has borne the brunt of the violence and which has contributed the majority of IDPs, is traditionally known as the breadbasket of the country. With much of its farming and business population fleeing to IDP camps, the harvest for 2008 and 2009 will likely be affected. The 2008 planting season ends in mid to late March, leaving very little time for IDPs to return to their homes in time to plant. This disruption is expected to have a significant impact on food security for the whole region.

39. In order to mitigate these effects, the AU, working closely with the Kenyan Government and with its international partners, should capitalize on the support that has been expressed by the international community in the wake of the signing of the National Accord and Reconciliation Act, to assist in mobilizing the much-needed resources to consolidate the results achieved and support the implementation of the commitments made. Individual countries, including AU Member States, can also consider immediate bilateral contributions to Kenya National Reconciliation Fund.

40. As indicated by both Council, at its meeting of 21st January 2008, and the Assembly, at its 10th Ordinary Session, stressed the need to initiate Finally, Council stressed the need to initiate a collective reflection on the challenges linked to the tension and disputes that often characterize electoral processes in Africa, including the strengthening of the African capacity at national, regional and continental levels to observe and monitor elections. At the same time, there is need for the AU to review the Declaration on the Principles Governing Democratic elections in Africa, adopted in Durban, South Africa, in July 2002, with respect to the requirement for the deployment of AU election observation and monitoring missions. Indeed, due to the requirement that invitations to AU to participate in election observation and monitoring missions should be send at least two months before the date of the election, the AU was enable to deploy an election observation team to Kenya.

2008

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