WARWICK
THE UNIVERSITY OF WARWICK

A Thesis Submitted for the Degree of PhD at the University of Warwick

Permanent WRAP URL:

http://wrap.warwick.ac.uk/165879

Copyright and reuse:
This thesis is made available online and is protected by original copyright.
Please scroll down to view the document itself.
Please refer to the repository record for this item for information to help you to cite it.
Our policy information is available from the repository home page.

For more information, please contact the WRAP Team at: wrap@warwick.ac.uk

warwick.ac.uk/lib-publications

The Politics of Hate Speech

by

Angel Matoke-Njagi

A thesis submitted in partial fulfilment of the requirements for the degree of
Doctor of Philosophy in Law

University of Warwick, Department of Law

November 2020

Table of Contents

THE POLITICS OF HATE SPEECH 1

ACKNOWLEDGMENTS 4

THESIS DECLARATION 6

SUMMARY 7

ABBREVIATIONS 8

INTRODUCTION 10

CHAPTER 1 – SPEECH AND SYMBOLS 20

1. SYMBOLIC POLITICS THEORY 21

1.1 THE MYTH-SYMBOL COMPLEX 22
1.2 ETHNICITY 26
1.3 INSTITUTIONALISATION OF ETHNIC IDENTITIES 33
1.4 PATHWAYS TO VIOLENCE 38
1.5 PRECIPITATING VIOLENCE 42
1.6 SYMBOLIC ATTACHMENT 49
1.7 THE RATIONAL CHOICE CRITIQUE OF SYMBOLIC POLITICS THEORY 55
1.8 THE NON-REPRESENTATIONAL THEORY CRITIQUE OF SYMBOLIC POLITICS THEORY 60

2. THE REGULATION OF SPEECH 64

2.1 SITUATING THE WESTERN DEBATES ON FREE SPEECH 64
2.2 VULNERABILITY & SPEECH ACTS 68
2.3 LEGITIMISATION OF LINGUISTIC VIOLENCE 74
3. CONCLUSION 81

CHAPTER 2 - POST-ELECTION VIOLENCE 84

1. INSTITUTIONALISATION OF ETHNIC IDENTITIES 85

1.1 THE COLONIAL PERIOD 85
1.2 KIKUYU, KALENJIN AND LUO IDENTITY 91
1.2.1 KIKUYU 92
1.2.2 KALENJIN 95
1.2.3 LUO 98
1.3 INDEPENDENCE, LAND, AND THE RISE OF *MAJIMBOISM* 102
1.4 POST-INDEPENDENCE POLITICAL LEADERSHIP 107
1.4.1 JOMO KENYATTA 107
1.4.2 DANIEL ARAP MOI 111
1.4.4 MWAI KIBAKI 128

2. ELECTION-RELATED VIOLENCE (2007)....130

2.1 PATHWAYS TO VIOLENCE....130
2.2 THE RUN-UP TO THE ELECTION....134
2.3 THE ELECTION....136
2.4 POST-ELECTION VIOLENCE....139
2.4.1 PROTESTS....140
2.4.2 PLANNED ATTACKS....141
2.4.3 REPRISAL ATTACKS....145
2.4.4 POLICE VIOLENCE....147
2.5 THE INTERNATIONAL RESPONSE....149
2.5.1 MEDIATION PROCESS....150
2.5.2 THE AFTERMATH....153
3. CONCLUSION....154

CHAPTER 3 - SPEECH REGULATION AS A RESPONSE TO VIOLENCE....157

1. LESSONS FROM THE RWANDAN GENOCIDE....158

1.1 MASS VIOLENCE IS INEXTRICABLY LINKED TO THE MEDIA....159
1.2 POST-GENOCIDE GOVERNMENT MANIPULATION OF SPEECH REGULATIONS....163

2. POST-CONFLICT REGULATION OF SPEECH IN KENYA....177

2.1 HATE SPEECH AS A RECOMMENDATION....178
2.2 HATE SPEECH SURROUNDING 2007 ELECTION VIOLENCE....187
2.2.1 MAINSTREAM MEDIA....189
2.2.3 A CASE STUDY ON KASS FM....196
2.2.4 POLITICIANS....198
2.2.5 NEW MEDIA....201
2.3 USE OF HATE SPEECH REGULATIONS AFTER ELECTION-RELATED VIOLENCE....205
2.3.1 POLITICIANS....206
2.3.2 NEW MEDIA....221
2.3.3 CASE STUDY: ALAN WADI....224
2.3.4 CASE STUDY: ROBERT ALAI....226
2.3.5 FURTHER PROSECUTIONS OF PUBLICATIONS ON NEW MEDIA....227
3. CONCLUSION....233

CONCLUSION....235

BIBLIOGRAPHY....240

Acknowledgements

Completing this thesis has been an enormous feat, which was made possible by the support of so many people. I owe a special debt of gratitude to my supervisor Illan rua Wall for his patient supervision, kindness, and support throughout the project. My deep thanks go to my parents for creating the environment that enabled me to study and work in prestigious universities when so many people in my home country do not have the means to attain their first degree. My mother was the first woman in both her county and the neighbouring one to become a lawyer. That progress (as well as my father's post-graduate accomplishments) enabled me to be the first in the family to be on track to become a Doctor of Philosophy in law. My mother inspired me to pursue a career in the law, and since then, I haven't looked back. I'd like to thank my brother for his intellectual challenges and my sister-in-law for softening the delivery of those challenges. I'd like to thank all my uncles, aunts, and cousins for their support and faith in me. I am grateful to my partner Matija Meško for enabling me to see myself on the other side of the PhD, and for being there during several key junctures—when his unshakeable faith in me and support was critical, particularly in the moments when I needed someone to remind me that: 'This too shall pass'.

I have had so many colleagues and friends throughout this journey that have been critical in my development as a researcher (and as a person). There is not enough space to name all of them. Still, I would like to give special thanks to Betsy Muriithi for the many years we spent together as black Kenyan female researchers living in the diaspora and navigating our way through sometimes-conflicting worlds. Thanks to my dear friend Ivy Ular for her late-night counsel and encouragement. Thanks go to my colleagues (Julie Mansuy, Simon Thorpe, Jaba Shadrack, and Lulwa Al Ben Ali) for being such a wonderful office family and encouraging me to go home and recharge after spending too many hours working. Simon and I have the same supervisor, and we bonded over our shared academic lineage and affection for him. I would like to thank Laura Fraser, Priscilla Mweru, Joy Malala, Nkatha Obungu, Benjamin Hulme, Nobulali Dangazele, Elizabeth Ridley, Geoffrey Lugano, and Nkechi Azinge.

I would also like to thank my colleagues on the Residential Life Team, particularly my supervisors Scott Dwyer and Roxanne Douglas, for giving me the space to complete the thesis in the final weeks without too much interference from demanding residential students or the mouse that happened upon my kitchen (on the harrowing night of Friday 2 October).

I have stood on the shoulders of these great people and so many others, and I am truly grateful to have benefitted from their warmth and support on this journey.

Thesis Declaration

This thesis is the candidate's own work. It has neither been submitted for a degree at another University nor published elsewhere.

Summary

This thesis looks past moralising accounts of insult and injury that deny the complexity of 2007 election-related violence in Kenya. It provides a micro-level analysis of the violence by using Symbolic Politics Theory to understand the reasons, emotions, environments, and affects of violence. The experience of the Rwandan genocide is used to shed further light on the events in Kenya and the transnational and international intervention that followed the outbreak of it. It marries the micro-level analysis with a macro-level analysis by using Judith Butler's work to illustrate how states legitimise linguistic violence and use politically motivated interpretations of free speech to frustrate those seeking to draw attention to inequality and injustice or outlaw individuals who oppose its cultural hegemony. The State, therefore, drives legitimate discussions underground only for them to be rearticulated during periods of tension or instability in a way that sees repressed violence return. Thus, election-related violence happened through the long-term development of ideas, feelings and attachments, which unfolded during colonialism when ethnic consciousness was fomented and territorialised for ease of colonial administration. After independence, the colonial modes of social ordering persist to the benefit of the ruling elite. Those ideas, feelings, and attachments resurged when multi-party politics were reintroduced in 1992. During that time, the flourishing of democracy resulted in the instrumental use of ethnic tensions to advance zero-sum politics. Since everyone's victory could only be secured at the expense of the 'other', everyone lost. Speech regulations stop the expression of social tensions without changing the conditions of the expressions.

Abbreviations

ACHPR	-	African Court of Human and Peoples' Rights
AG	-	Attorney General
AU	-	African Union
CMCA	-	Computer Misuse and Cybercrimes Act 2018
CIPEV	-	Commission of Inquiry into Post-Election Violence
DPP	-	Director of Public Prosecutions
ECK	-	Electoral Commission of Kenya
EUOEM	-	European Union Election Observers Mission
EV	-	election-related violence
FIP	-	Federal Independence Party
GEMA	-	Gikuyu, Embu and Meru Association
HRW	-	Human Rights Watch
ICC	-	International Criminal Court
ICCPR	-	International Covenant on Civil and Political Rights 1966
ICERD	-	International Convention on the Elimination of All Forms of Racial Discrimination 1965
ICTR	-	International Criminal Tribunal for Rwanda
JSC	-	Judicial Service Commission
KADU	-	Kenya African Democratic Union
KANU	-	Kenya African National Union
KNCHR	-	Kenya National Commission of Human Rights
KNDR	-	Kenya National Dialogue and Reconciliation
KPU	-	Kenya People's Union
LDP	-	Liberal Democratic Party
NARA	-	National Accord and Reconciliation Act agreement
NASA	-	National Super Alliance
NARC	-	National Rainbow Coalition
NCIA	-	National Cohesion and Integration Act 2008
NCIC	-	National Cohesion and Integration Commission
NGO	-	non-governmental organisations
NPK	-	National Party of Kenya

ODM	-	Orange Democratic Movement
OHCHR	-	United Nations Office of the High Commissioner for Human Rights
PEV	-	post-election violence
PNU	-	Party of National Unity
RCT	-	rational choice theory
RTLM	-	Radio Télévision Libre des Mille Collines
SLAA	-	Security Laws (Amendment) Act 2014
SPK	-	Special Tribunal for Kenya
SPT	-	Symbolic Politics Theory
The Panel	-	Panel of Eminent African Personalities
UN	-	United Nations
UNAMIR	-	United Nations Assistance Mission for Rwanda
UNSC	-	United Nations Security Council

Introduction

From December 2007 to February 2008, Kenya was engulfed in election-related violence (EV). It was presented as a random outpouring of aggression between 'barbarians' or warring 'tribal' factions in international media. The reality was much more complicated. Ethnic violence did not begin during the 2007 election. It did not even begin in the months before the election. Indeed, EV has been a feature of Kenyan politics since multiparty politics was reintroduced in 1992. The 1,133 deaths that occurred during the 2007-8 EV were directly comparable to previous elections. What made 2007 unique, however, was that most of the violence happened *after* the election and that it attracted an international intervention. These two factors are not unrelated. As this thesis will show, in the wake of the genocide in Rwanda, the way that ethnic tensions could escalate into widespread slaughter was widely discussed and understood. Violence leading up to a particular event, like an election, which is de-escalated after the event, was less risky than violence that spiralled after an event. In this sense, post-election violence (PEV) was dangerous because there was no obvious endpoint. The refusal of legitimacy and the interruption of the peaceful handover of power were seen as markers of an escalating conflict that could turn into ever greater massacres. The international community, particularly the African Union (AU) delegation led by Kofi Annan, intervened to facilitate negotiation and ultimately settlement in Kenya, as the United Nations had done in Rwanda to end the genocide and negotiate a ceasefire 14 years earlier.

This thesis seeks to explore the violence, tracing the long process of conditioning that leads to mass brutality, the gradual process of escalating tensions and finally, the moment of crystallisation where those tensions manifest as violence. To explore this, we will turn to Symbolic Politics Theory (SPT), which enables us to understand the reasons, emotions, environments, and affects of violence. The theory looks at how ethnic identity is constructed and then institutionalised by colonial regimes for ease of administration. Education, access to resources, and lower and higher tiers of citizenship based on ethnicity, among others, serve to institutionalise ethnic identities. After independence, the colonial modes of social ordering persist to the benefit of the dominant social classes. Reconfiguration and rearticulation of the social orderings, especially during periods of political tension, bring the myths, memories, symbols, ideas, and images of an ethnic community (referred to as the myth-symbol complex) to the fore for its members, which are continuously restated, each time with a slight shift. Those rearticulations are used in different ways to suit different ends and resonate with people according to their social, political, economic interests, hopes, and desires that are woven into

symbols. Symbols, in turn, go on to represent how well the group is doing, serve as a reminder of past injustices that the group has endured, and give members of the community the opportunity to strive to become an everlasting symbol of their people. The myth-symbol complex gives texture to the affective dynamics of conflict. Myths and rituals of members of ethnic communities, in particular, contribute to the affective resonance of symbols. Political symbols especially reinforce the accuracy of the myths and rituals. Two symbols will be highlighted in the Kenyan context – '*majimboism'* and circumcision. I emphasise these two symbols in the thesis to illustrate how communities are conditioned to violence. Still, it is worth noting that there are other symbols, which have been highlighted by other authors. For example, hosts vis-à-vis guests, which is most visible in Sarah Jenkin's work, and desert vis-à-vis marginalisation that can be read into the work of various authors, such as Gabrielle Lynch, Michela Wrong, and Peter Kagwanja. *Majimboism* and circumcision were rearticulated and deployed through the symbolic appeals of politicians on the campaign trail in ways that occasioned EV.

The thesis also explores the response to PEV in Kenya. It focuses on speech regulation. As we will see, following the events in Rwanda, there was a growing sense of the role of hate speech in the emergence and escalation of ethnic violence. As part of the Kenyan PEV settlement, there was a commitment to prohibit certain forms of speech. However, the regulation of speech is a dangerous endeavour. The thesis explores the fraught debate over hate speech, focusing particularly on Judith Butler's ideas. The author enables us to see the unexpected and dangerous consequences of a State getting involved in determining what is legitimate speech. Once more, Rwanda is instructive for the thesis. In Rwanda, political considerations formed a significant factor in the regulation of speech after the genocide. The post-genocide government criminalised utterances that were viewed as overly critical of the administration or conflicted with the official post-genocidal government's narrative of the genocide. The thesis will show that states often use normative frameworks to secure an interpretation of the law that suits themselves, protecting their agents while delegitimising and even criminalising critics. Butler's work also shows how something that was created as an emergency response (the regulation of speech) to deal with the specific environment in which election-related violence was rife was then generalised into everyday life. That resulted in a chilling effect, where speech was regulated that shouldn't have been so closely regulated.

This use of speech regulations is also evident in post-conflict Kenya, where the government launched an assault on its critics, especially those who publish on new media platforms. The Kenyan government has sought to criminalise government detractors while

leaving the hateful speech of government agents largely unmolested, particularly when the hateful speech supports the incumbent administration. Ironically, it is the latter speech, the speech of government agents, especially at political rallies or via vernacular radio stations, that numerous inquiries into EV have shown provoked the most violence. What is more, the government is vested with access to broadcasting and media distribution, generally at a level that is not possible for the person with a soapbox, website, or blog. Where the Rwandan government used the pretexts of national security, undermining the authority of the government, and public order, to criminalise dissenting voices, the Kenyan government used hate speech, national security and undermining the authority of a public officer.

Nonetheless, it's worth highlighting that the similarities in political manipulation of speech regulations in Kenya and in Rwanda lend themselves to vastly different levels of 'authoritarianism'. Violating speech offences in Rwanda, at their most severe, resulted in up to 25 years of imprisonment. Whereas, in Kenya, at their most severe, a conviction for a speech offence only resulted in a maximum of five years imprisonment. In Chapter 3, we will see how the Kenyan state was unsuccessful in sustaining a conviction or fully silencing accused persons. Thus, the analogy between Rwanda and Kenya is being drawn on very narrow grounds, particularly in light of the distinctive socio-political contexts. Rwanda is not Kenya, and the thesis is not implying that Kenya is destined to become like Rwanda. The analogy is being drawn to explain SPT. It is also being drawn due to the similarities in the use of ethnic division to portray the ethnic 'other' as an existential threat based on the individual communities respective myth-symbol complexes, the use of hate speech predominantly communicated through vernacular radio to incite and mobilise ethnic communities, and crucially the post-conflict political manipulation of speech regulation. In short, speech regulation has had a significant deleterious effect on Kenyan democracy, as has done on Rwanda's democracy.

Methodology

The theoretical framework forms an important part of the methodology of the thesis, which applies SPT and Judith Butler's work on State regulation of speech to a new empirical context. That is, EV in Kenya. The aims of the thesis are purely theoretical. The distance I had by focusing on the theoretical framing of EV and not conducting primary research was beneficial in my analysis and understanding of the violence. SPT, in its original construction, was designed to be used as a predictive tool, but the thesis uses it purely as a diagnostic one. Thus, SPT is employed not to explain when violence happens but what preconditions are necessary for its outpouring. A substantial amount has been written about 2007/8 EV, from statutory

bodies, non-governmental organisations, think tanks, and so on, which made an original contribution to the study of EV improbable. Particularly as I would not have access to the sheer numbers of people involved in the violence that the statutory bodies or human rights organisations did. Thus, research from other scholars and reports from Commissions and organisations investigating EV and reports from international and domestic human rights bodies were used to provide a symbolic politics analysis of post-election violence.

Judith Butler's work forms the other key part of the theoretical framework because it illustrates how states legitimise linguistic violence. That is done through legal interpretations that result in punishments for the accused that result in them being hurt, restrained, rendered helpless, or even killed. Butler's work is applied in the context of post-conflict Kenya and post-genocide Rwanda by looking at specific speech legislation, research into speech regulation conducted by scholars and organisations like iHub, and case reports. The thesis illustrates the origins of the laws and how they work in practice. The thesis focuses on the impact of the legislation by looking at individual cases of people prosecuted for speech offences. Where the case reports were unpublished or generally unavailable, the thesis relies on an extensive number of newspapers and videos of news conferences published by national news outlets that reported on them.

Limitations

The limitations of secondary research on EV are that the thesis relies on what authors of the secondary materials produced and could not access what they chose to omit. For example, the Commission of Inquiry into Post-Election Violence (CIPEV) report was criticised for not including enough Kalenjin voices. The thesis mitigated this limitation by supplementing that report with reports from a vast array of sources. Virtually every report published on EV was located and reviewed to provide a more holistic view of EV. What is more, the thesis benefitted from secondary access to the testimony of those involved in the violence or its aftermath. The thesis also benefitted from works published in radio, on TV as well as secondary commentary.

There are also limitations of secondary research on the international intervention in Kenya and subsequent use of speech regulation. Namely, I did not have access to elite actors who were involved in the negotiations. Therefore, there is no tracing of how the proposals for speech regulations entered into the peace agreement – whether it was the international actors, domestic actors, or civil society who proposed them. As the international community often works through discourses, which thread international, transnational, and national organisations,

domestic organisations end up incorporating the analysis and understanding of solutions from international actors, and international organisations end up incorporating the analysis and understanding of the solutions from domestic actors. The relationship between international and domestic actors and their discourses is generally symbiotic. Nonetheless, even without tracing who among the parties made the suggestion during the negotiation, the fact is the agreement that ended the violence and recommendations from the United Nations Office of the High Commissioner for Human Rights (OHCHR) specifically mentioned speech regulation as one of the legitimate responses to address the violence. The analysis of the post-post election violence use of speech regulation is still applicable despite the inability to trace who suggested the proposals for insertion. The thesis is also limited by the overall word limit, so a conscious choice was made not to expand into a new area of empirical research by seeking to question elite actors involved in the negotiations.

The Context

The temporal span of the thesis is 2007 to 2016, and that is because the primary focus is on the preconditions that make violence possible and the ways in which speech regulation undermined democracy by contributing to the closing of the political space. The context and landscape changes all the time. Still the findings of the thesis are applicable to the past, present and are applicable in the future. An example of the changing context is in who is considered 'the opposition'. In the thesis, 'the opposition' refers to the person or people who are opposing the President and their agenda.[1] Mutua traces this back to the 1970s.[2] Musila adds, and we return to this in Chapter 2, that progressive centralisation of power in the Presidency started under Kenyatta and was furthered under Moi, who transformed the Presidency into an all-powerful 'imperial' Presidency.[3] The 2010 Constitution of Kenya restructured Kenya's governance institutions, especially the executive, because other arms of government were insulated from its authoritarian tendencies by *inter alia* abolishing the practice of appointing cabinet ministers from parliamentarians, introducing an institutional check on presidential appointments, a reduction in the number of cabinet secretaries and the strengthening of the ability of the legislature and judiciary to exercise their mandate to check and balance executive

[1] Makau Mutua, *Kenya's Quest for Democracy: Taming Leviathan* (Lynne Rienner Publishers 2008), 266.
[2] Ibid, 266.
[3] Godfrey M Musila, 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions' 3 International Journal of Transitional Justice 1, 3.

powers.[4] Nonetheless, the executive retained its ability to influence prosecutorial decisions of those opposing the President's agenda (be it a new Constitution, a presidential bid, or so on) as evidenced by the prosecutorial decisions relating to certain individuals, for example, Alan Wadi, and Robert Alai, which will be discussed in Chapter 3.

The thesis focuses on the tangible impact speech laws have on individuals and the political space, particularly when the laws are employed to outlaw counter-hegemonic voices. It is still worth highlighting the wider context of authoritarian actions the executive was implicated in, which were occurring simultaneously with the prosecutions for speech offences. Intimidation of non-governmental organisations (NGO), the judiciary, and media was also used to silence counter-hegemonic voices of those protesting against repression or supporting the opposition.[5] Well-known human-rights organisations had supported the International Criminal Court (ICC) intervention and campaigned for Uhuru Kenyatta and William Ruto to be barred from campaigning for President and Deputy President, respectively. Thus, when Uhuru and Ruto came to power in 2013, their relationship with NGOs was fraught with hostility. Parliament and the governmental NGO Coordination Board consistently threatened to heavily tax or deregister outspoken NGOs, which led to direct threats to NGOs that supported the ICC and/or disputed the August 2017 election, during which Uhuru and Ruto ran for a second term.[6] The Uhuru-Ruto relationship with the media was not much better. The Uhuru-Ruto administration was noted for its editorial interference. Through leveraging the advertising revenue that the government generated as the biggest advertiser, and also through direct threats.[7] The use of threats to interfere in the editorial independence of mainstream media was suspected until it came to a head on 30 January 2018, when the government shut down leading media houses for the day for going against the executive order not to air the informal swearing-in of Raila as the 'People's President'.[8] That was described as the shrinking of the political space by the Kenya National Commission of Human Rights (KNCHR). It showcased the

---

[4] Joshua Kivuva, 'Different Paths, Similar Destination: The Unending and Un-consolidating Democratic Transition(s) in Kenya and Uganda' in Wanjala S. Nasong'o (ed), *African Governance, Security, and Development* (Lexington Books 2021), 19-20.

[5] Marie-Emmanuelle Pommerolle, 'The 2017 elections and electoral (in)justice (2015–2017)' in Nic Cheeseman, Karuti Kanyinga and Gabrielle Lynch (eds), *The Oxford Handbook of Kenyan Politics* (Oxford University Press 2020), 116.

[6] Ibid, 116. Seth Ouma, 'Reporting for Democracy or Convenience? The Kenyan media and the 2017 elections' 107 The Round Table 1, 12.

[7] Pommerolle, 116. Jared Obuya and Charles Ong'ondo, '"Caught between a Rock and a Hard Place": How Kenyan Journalists are Coping with Pressure for Media Accountability' 40 African Journalism Studies 1, 11. Jacinta Mwende Maweu, 'Still Manufacturing Consent in the Digital Era: Disinformation, "Fake News" and Propaganda in the 2017 Elections in Kenya' in Alan MacLeod (ed), *Propaganda in the Information Age: Still Manufacturing Consent*, vol 142-153 (Routledge 2019), 147.

[8] Maweu, 147. Pommerolle, 116.

intense intimidation and threats to media houses and individual journalists that were critical of the government.[9] Moreover, while international observers feared ethnic violence, Pommerolle indicates that state violence, through police forces and targeted assassinations, was the violence that was front of mind for Kenyans.[10]

In October 2016, Amnesty International reported 122 extrajudicial killings by police in Kenya (out of a total of 177 on the continent).[11] Good believes 122 is a gross underestimation of what the author describes as 'state killings' carried out in the country.[12] According to the Mathare Social Justice Centre, extrajudicial killings by police have been normalised. Since independence, the police service has been used as a tool of state violence for repression and oppression.[13] Those targeted are often young people from slums or marginalised areas, making it easier for police to evade accountability.[14] However, in 2017, protests were sparked by the killing (and alleged torture) of a human rights lawyer, Mr Willie Kimani.[15] Kimani was found dead after lodging a complaint against the police. In the report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Kenya, Philip Alston, it is noted that there are systematic attempts to silence criticisms of security forces in Kenya.[16] Kimani was not alone. Others who tried to investigate police abuses were silenced; for example, Oscar Kingara and John Oulo, the founders of Oscar Foundation, well-known for investigating police abuses. Between 2007 and 2009 (the year of their death), Kingara and Oulo had recorded 6,452 enforced disappearances by police and 1,721 extrajudicial killings, a figure much higher than that presented by Amnesty International.[17] They were shot allegedly by members of Mungiki (a gang discussed further in Chapter 2). But Special Rapporteur Alston said Mungiki are not a rogue squad but 'police who are acting on the explicit orders of their superiors'.[18]

Chris Msando was a more recent high-profile and suspicious murder. Msando was the Information, Communication and Technology Manager at the Independent Election and

---

[9] Pommerolle, 116. Maweu, 147.
[10] Pommerolle, 116.
[11] Amnesty International Report cited in Kenneth Good, *The Struggle of Democratisation Against Authoritarianism in Contemporary Africa* (Cambridge Scholars Publishing 2020), 28.
[12] Ibid, 28.
[13] Douglas Lucas Kivoi and Casty Gatakaa Mbae, 'The Achilles' heel of police reforms in Kenya' 2 Social Sciences 189, 191. Pommerolle, 116.
[14] Good, 28.
[15] Conor Gaffey, 'Kenya: Hundreds Protest Over 'Extrajudicial Killing' of Human Rights Lawyer' *Newsweek* (<https://www.newsweek.com/kenya-hundreds-protest-extrajudicial-killing-human-rights-lawyer-amnesty-477470> accessed 28 November 2021).
[16] Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Mission to Kenya* (26 May 2009), 3.
[17] Xan Rice, 'Two Kenyan rights activists shot dead' *The Guardian* (< https://www.theguardian.com/world/2009/mar/06/kenyan-activists-shot-dead > accessed 25 November 2021).
[18] Ibid.

Boundaries Commission.[19] He had a key role in developing the electronic ballot and voter registration system, so he was among a small number of people with the login details and knowledge of the physical location of the servers that were integral to the 2017 election. He was kidnapped, tortured and murdered days before the 2017 elections. Msando's death, in particular, was widely attributed to the state even without any concrete evidence to substantiate the validity of those claims. The Supreme Court subsequently annulled that election and ordered a re-run (for the first time in the continent's history), citing procedural flaws that invalidated the election.[20] However, even the election re-run was marred with concerns over transparency, which only increased when Commissioner Dr Roselyn Akombe fled to the US[21] and reported that she said she had never been so fearful and that Commissioners and personnel were facing intimidation by political actors.[22]

I acknowledge that this wider context also had the effect of shrinking the political space. Still, due to the scope of this study and the overall word limit, I focus primarily on the regulation of speech.

Structure

The thesis has a simple threefold structure. Chapter 1 introduces the theoretical framework of the thesis. It focuses on SPT and introduces some of the critical debates around free speech. It introduces SPT through its application to the Rwandan genocide and makes a case for its use as an analytic tool rather than a predictive one. SPT provides a useful way to understand pathological speech and how it contributes to mass violence. However, SPT does not go on to consider how speech is used by the State to contribute to the many years it takes to override the moral aversion to killing or how speech is used to enact linguistic violence. For that, the second part of chapter 1 utilises Judith Butler's work to elaborate on how governments politicise speech regulation to suit their ends. Progressive efforts of those seeking to dismantle the inequality and injustice that benefit the dominant political class can be readily frustrated through speech regulation. SPT provides a micro-level analysis of discourses that precede specific moments of violence (the pathological speech). In contrast, Judith Butler's work

[19] Good, 29 - 30.
[20] Brandon L Bartels, Jeremy Horowitz and Eric Kramon, 'Can Democratic Principles Protect High Courts from Partisan Backlash? Public Reactions to the Kenyan Supreme Court's Role in the 2017 Election Crisis' American Journal of Political Science.
[21] Michael Gyan Nyarko and Trésor Makunya, 'Selected developments in human rights and democratisation during 2017: Sub-Saharan Africa' 2 Global Campus Human Rights Journal 147, 149. Nic Cheeseman and others, 'Kenya's 2017 Elections: Winner-Takes-All Politics As Usual?' 13 Journal of Eastern African Studies 215, 220.
[22] BBC, 'Kenya Election Official Roselyn Akombe Flees to US' *BBC* (<https://www.bbc.co.uk/news/world-africa-41660880> accessed 25 November 2021).

provides a macro-level analysis that looks specifically at how states legitimise linguistic violence. Together, they provide a holistic view of how speech operates at the moment of violence and in the years (sometimes decades) that lead up to it.

Chapter 2 uses SPT to analyse EV in Kenya. SPT is understood by exploring the long process of conditioning of the population. There are 111 officially recognised ethnic groups in Kenya; due to the overall word limit, the thesis cannot delve into all of them. So, chapter 2 looks specifically at three – the Kalenjin, Luo, and Kikuyu. These are among the largest ethnic groups in the country, and their members were reported to have been central figures during 2007 EV. The chapter explores the colonial institutionalisation of these ethnic identities and their development by the first three post-independence Presidents (Jomo Kenyatta, Daniel Arap Moi, and Mwai Kibaki). Jomo Kenyatta, who will be referred to as Kenyatta, is the father of Uhuru Kenyatta, who will be referred to as Uhuru. Oginga Odinga, who will be referred to as Odinga, is the father of Raila Odinga, who will be referred to as Raila. The chapter explores the manner in which these post-independence leaders modified particular aspects of the colonial social orderings to their benefit in ways that would have lingering consequences. The chapter also shows how Kenyatta, Moi, and Kibaki used speech regulations to quell opposition. Moi was the most effective at it. The second part of chapter 2 focuses on the 2007-08 EV. It explores how the violence unfolded, starting with protests against the fraudulent election, then with planned attacks and reprisals. I pay particular attention to violence attributed to the police, showing that 36% of the total number of deaths can be attributed to them. The chapter concludes by looking at the international response to EV.

Chapter 3 looks at how speech regulation is viewed as a legitimate way for post-conflict societies to prevent a recurrence of mass violence, while the secondary effects of those regulations are largely overlooked. The chapter starts by looking at the international intervention into the Rwandan genocide. It focuses on the insight that mass violence is intricately connected to broadcasts and publications of new and old media outlets. The thesis concedes that speech regulations make sense following the tragic events in Rwanda in 1994. Speech regulation is not bad, but it is dangerous. However, the parties to the peace agreement that ended PEV overlooked how speech regulations were manipulated by the post-genocide government when the time came to address the post-conflict situation in Kenya. That is undoubtedly why speech regulations were specifically mentioned in the agreements and recommendations of the United Nations (UN) and AU as one of the responses to EV. Although, as mentioned earlier, the methodological choice to do desk research prevented me from being

able to trace exactly how speech regulation became a part of the respective documents by speaking to elite actors who were involved in the negotiations.

The thesis will demonstrate that following the Rwandan genocide, there was a huge appetite in international realms of media and intergovernmental organisations for analysis of outpourings of violence through the question of hate speech. Only CIPEV cautioned against the use of monitoring the media to facilitate the implementation of those laws because it understood how Kenyatta, Moi and Kibaki had used these laws. The chapter observes the manner in which the post-conflict Kenyan government has introduced and deployed speech regulation to outlaw legitimate criticisms. While politicians (with significant political capital) fared better, average citizens without political power were particularly vulnerable to prosecution based on their political speech. Politicians would escape imprisonment by making an apology, while the latter were subjected to a potential sentence of three to five years in jail. In the face of this threat, citizens have challenged the constitutionality of the speech laws in the court. However, declarations of unconstitutionality have not stopped the government from continuing to attempt to outlaw dissent.

CHAPTER 1 – Speech and Symbols

To understand Kenya's PEV properly, we must look beyond moralising accounts of injury and insult. The violence did not 'just happen'. It is essential to understand that no population just turns to violence like this. There must first be a long process of conditioning, a gradual process of escalation of tensions, and a moment of crystallisation where the tensions become manifest. This chapter will introduce the theoretical approach to the problem of PEV by exploring the articulation of SPT and Butler's analyses of legitimating speech and violence. Taken together, these two frameworks ultimately help us see the complex relations between generative social structures and particular speech acts. They help to explain both the violence, but also why the turn to speech regulation might be popular.

SPT starts with a constructivist understanding of ethnic identity, namely that people are not born imprisoned by their history or culture.[23] Accordingly, an ethnic group's identity is defined by memories, values, 'myths' and symbols. In SPT, these are referred to as the myth-symbol complex. SPT looks at symbols and the myths encoded therein to illustrate how symbols are manipulated in political discourses to propel members of an ethnic group to violence, especially when the symbols form a part of State propaganda. Thus, SPT looks at mass violence to understand the pathological speech that is said to contribute to it. However, it does not go further to consider the ways speech is employed by the State to contribute to the years (sometimes decades) it takes to override the moral aversion to killing or how speech can be used by the State to enact linguistic violence.

SPT consists of a micro-level analysis of discourses during specific periods of violence and the discourses that precede moments of violence that create the structures in which words are given their force. In so doing, SPT overlooks macro-level discourses, especially the ways in which the State enacts linguistic violence through *inter alia* precedents that promote political goals, and in so doing, often frustrate progressive efforts. The State also uses normative

[23] James D Fearon and David D Laitin, 'Violence and the Social Construction of Ethnic Identity' 54 International Organization 845, 860. Stuart J Kaufman, *Nationalist Passions* (Cornell University Press 2015), 33.

frameworks to control and constrain the semantic fields that terms operate in – terms like freedom and injury, which are decisive in the final determination of whether speech should be protected. What is more, as Judith Butler illustrates, judges deal pain and death through punishments that are deployed through interpretations of the law and through their agents who 'restrain, hurt, render helpless, or kill the accused'.[24] The first part of the chapter will use SPT as an analytic tool that will be applied to Rwanda as an example of how the theory operates and to introduce what will be a qualified, constant and important contrast to events in Kenya. The second part will examine how states enact and legitimise linguistic violence using Judith Butler's analysis of specific discourses.

In summary, the Chapter analyses SPT then uses it to explore ethnic identity in Kenya. I consider how the myth-symbol complex, ethnicity, institutionalisation of ethnicity, pathways to violence, precipitation of violence, and symbolic attachment come together to provide a more holistic understanding of violence. The thesis differs from the existing literature because it argues that SPT should be used as a diagnostic tool rather than a predictive one. SPT is used to unearth the long process of conditioning that makes violence more likely, not to determine precisely when the violence with unfold. The thesis further differs from the existing literature by employing non-representational theories to criticise the structuralist heritage of the social science in theories like SPT, and I argue for the incorporation of the affective dynamics of conflict. The Chapter goes on to consider Butler's arguments on speech while considering counter-arguments, then examines Butler's work on the legitimisation of linguistic violence. I argue that the regulation of speech is not bad, but it is dangerous. The Chapter highlights how speech laws are used to criminalise individuals to prevent escalation into widespread conflict, but it is often states implicated in the dissemination of hate speech on a mass scale that leads to widespread violence. That is evidenced by all the cases in international criminal courts and tribunals, chiefly the International Criminal Tribunal for Rwanda (ICTR) *The Hate Media Trial* decision. Hate speech laws are ineffective at addressing those latter speech acts and can actually generate sympathy for the accused, especially when their words are coded or have multiple meanings. The first Chapter lays the groundwork for the theoretical framework so that it can be easily understood before being applied in Chapters 2 and 3.

1. Symbolic Politics Theory

SPT was pioneered by David Sears and Murray Edelman and updated to include recent developments in psychology and neuroscience by Stuart Kaufman.[25] The individual subject

[24] Judith Butler and Sara Salih, *The Judith Butler reader* (Blackwell Pub. 2004) 217.
[25] Kaufman 12.

engaged in conflict is conceived as making decisions based principally on their biases and emotions while accounting for more 'rational' matters, such as economic concerns. The way leaders appeal to biases and emotions is by using symbols.[26] Symbols operate in three ways: they represent how well the ethnic group is doing, serve to remind the group of the historical domination and suffering they have endured at the hands of the ethnic 'other', and provide ethnic warriors with something to strive for – symbolic status – through which they can become an everlasting symbol of the people. Incidentally, symbols can be vehicles for communication that fuel group cohesion or they can be manipulated to undermine it.[27] SPT's core assumption is that ethnic conflict results from a combination of ancient hatreds, manipulative leaders, economic rivalry, and a spiral of insecurity. This latter element is particularly important because it represents a sharpening of the tensions. Throughout, I will refer to it as the security environment. To introduce SPT, it is useful to focus on six distinct but interrelated elements: the myth-symbol complex, ethnicity, institutionalisation, pathways to violence, precipitation of violence and symbolic attachment. Let us take each of these in turn.

1.1 The Myth-Symbol Complex

At the core of SPT is the idea of the myth-symbol complex; this is the way in which mythic structures and associations can be deployed in contemporary situations. Kaufman does not put forward a definition of myth. Instead, in *Modern Hatreds*, he speaks of historical mythology that is useful in understanding attitudes about ethnicity that are held by the people involved.[28] This makes it difficult to abstract generic elements of all conflicts. Instead, a better way to understand SPT is to follow Kaufman's theorisation of the myths at play in a particular conflict. In *Modern Hatreds,* Kaufman looks at the myths underlying the Kosovan conflict.[29] In particular, he focuses on the myths of the famed 1389 battle between the Serbs and the Ottomans, known as the 'Battle of Kosovo Fields'.[30] The Battle of Kosovo Fields was recorded as the 'greatest defeat of Serbs' and spawned five years of Muslim Turkish rule.[31] Little data is available to corroborate accounts of the battle, but what is clear is that both Serbian and

[26] Ibid 3-4.
[27] Rozann Rothman, 'Political Symbolism' in Samuel Long (ed), *The Handbook of Political Behavior*, vol 2 (Plenum Press 1981) 285.
[28] Stuart J Kaufman, *Modern hatreds: The symbolic politics of ethnic war* (Cornell University Press 2001) 203.
[29] Ibid 3-4.
[30] Ibid, 4. Arben Salihu, 'The Western Accounts on Early Albanian-Serbian Interactions and the Kosovo Myth' 7 ILIRIA International Review 194, 199.
[31] Olga Zirojević, 'Kosovo in the Collective Memory' in Nebojsa Popov and C Drinka Gojkovi (eds), *The Road to War in Serbia Trauma and Catharsis* (Central European University Press 2000), 189.

Ottoman losses were significant. However, where the Ottomans still had a segment of their troops available after the battle, the Serbs lacked these reserves.[32] In this way, the Ottomans effectively dislocated the relatively large Serbian Empire.[33]

Still, the medieval Serbian Kingdom left a legacy that shaped Serbian identities for generations and still influences the nation. Serbians mostly view the middle ages as the golden age of Serbia's past, signifying the superiority of its spirit, culture, and state.[34] For example, the fact that Serbians are mainly Eastern Orthodox has been traced to Saint Sava, the son of the first Serbian king, who established a Serbian Orthodox Church in 1219.[35] Sava drew a parallel between his father, the King of Serbia, and the biblical patriarch Abraham. According to Sava, Serbians were divine people whose land was promised to them by God. The *Battle*, therefore, was a necessary sacrifice; it gave the Serbian people their 'empire of heaven'.[36] It was inscribed into their 'national consciousness'.[37] Not because of historical records (for which there are insignificant quantities), but because, sometime after 1389, the *Battle* was systematically and incrementally lifted into Serbian mythology in a way that is difficult to find in the history of other European countries.[38] It led to the unjustified but widespread belief that Kosovo Fields is the place where 'the Serbian State perished, and its independence was buried'; it is the place where the Turks enslaved the Serbs'.[39] Thus, the *Battle* represents the idea of martyrdom and sacrifice, and the region of Kosovo is 'sacred soil', the symbol of the historic battle. It is presented as the last position through which State integrity or national identity could be defended and the argument for ideological unity and political actions. Those actions included attempting to prevent the succession of Kosovo from Serbia and expanding the borders of Serbia into other Yugoslavian regions with Serbian inhabitants.[40] It still engrosses the imagination of Serbians and has a prominent position in daily communications.[41]

---

[32] John VA Fine, *The Bosnian Church: A New Interpretation; A Study of the Bosnian Church and Its Place in State and Society from the 13th to the 15th Centuries* (Columbia Univ. Press 1975), 409 - 414.
[33] Salihu, 197. New World Encyclopedia, 'Serbian Empire' (*https://www.newworldencyclopedia.org/entry/Serbian_Empire*) accessed 18 October 2020.
[34] Marko Šuica, 'The Image of the Battle of Kosovo (1389) Today: a Historic Event, a Moral Pattern, or the Tool of Political Manipulation' in R.J.W Evans and Guy P. Marchal (eds), *The Uses of the Middle Ages in Modern European States* (Palgrave Macmillan 2011), 152 - 153.
[35] Kaufman, *Modern hatreds: The symbolic politics of ethnic war, 170 - 171.*
[36] David Aberbach, 'European National Poetry, Islam and the Defeat of the Medieval Church' 18 Nations and Nationalism 603, 616.
[37] Zirojević, 189.
[38] Šuica, 152.
[39] Zirojević, 189.
[40] Šuica, 153. Dejan Guzina, 'Socialist Serbia's Narratives: From Yugoslavia to a Greater Serbia' 17 International Journal of Politics, Culture, and Society 91, 104.
[41] Šuica, 153.

It is worth highlighting that myth is used interchangeably with long-standing bitterness and ancient hatred.[42] Ancient hatred is further defined as hostility rooted in a historical event that is real, imagined, or a combination of both. According to Kaufman, the three terms (myths, long-standing bitterness, and ancient hatred) detail hostility that is based on a historical incident or series of incidents that may or may not be founded on actual past events. They only continue to exist if they are renewed in the culture. This renewal arises from the repetition of stories, especially contemporary revisions of older stories containing distinct messages.[43] Regarding the mythical *Battle*, it was revived through generations as a result of prodigious poetry, songs, and a series of legends that carefully selected historical facts that portrayed a picturesque homogenous cast of Serbian characters (portrayed as courageous martyrs, victims, or heroes). The myth is derived in part from historical elements (for which there are poor records) and in large part from imaginary.[44] According to one famous song, the ill-fated Prince Lazar had been given a choice between his Empire and the Empire of Heaven.[45] In the song, the Prince chose heaven because it was apparently longer lasting than the one on earth. The song exemplifies how Serbians define themselves as the defenders or martyrs of the Orthodox Church against the oppressive Muslim Turks. Through the myths, poems, songs, and legends, hatred of Turkish-Muslims was passed down from one generation of Serbian to the next.[46]

In the twentieth century, Bosnian Muslims were conflated with the 'Turkish-speaking holy warriors of the Ottoman Empire'.[47] Still, Bosnia was openly pluralistic (at the time, it was made up of 44% Bosnian Muslims, 31% Serbians, 17% Croatians, and 5.5% of 'Yugoslavians'), and intermarriage was standard. However, before the Bosnian war that started in 1992, there was a widespread resurgence of the myth to redirect the resentment that had been directed at the Ottomans (whose Empire had been ousted centuries before) towards the Bosnian Muslims. The war was sparked by a two-thirds majority vote for independence in Bosnia and Herzegovina from the mostly Serbian-controlled Yugoslavia earlier in the same year. [48] The referendum triggered numerous countermeasures from Bosnian Serbs. The *Battle* became directive of action, especially the most brutal and severe sorts of action against the Bosnian Muslims (murder, gang rape, use of concentration camps, and mental and physical torture). During the war, journalist Andrej Gustincic interviewed a woman who voiced her belief that a

[42] Kaufman, *Modern hatreds: The symbolic politics of ethnic war, 3 - 4.*
[43] Ibid 11.
[44] Šuica, 153. Zirojević, 190. Kaufman, *Modern hatreds: The symbolic politics of ethnic war, 171.*
[45] Kaufman, *Modern hatreds: The symbolic politics of ethnic war, 171.*
[46] Ibid, 4.
[47] Ibid, 4.
[48] Anne Lammertink, 'The Bosnian War 1992-1995' 8 International Relations 1 , 17 - 18.

town in Bosnia was once destined to be the new Mecca, and there was a list of Serbians marked down for death. Kaufman traced this belief back to the *Battle*.[49] It was used as justification for the brutality that was perpetrated against Bosnian Muslims. It contributed to the security environment.

The *Battle* illustrates how myths become meaningful during specific moments, at particular times, because the security environment demands them. Older stories are retold in a way that is meaningful for contemporary problems; they create an emotional attachment for the parties to a conflict, enabling conflicting groups to take sides. That is the case mainly when the environment consists of entities or objects that are perceived to be an existential threat to an in-group. The sources of group conflict are said to lie in the struggle for relative group worth.[50] That is to say: when given the option, an in-group would typically choose to maximise the difference with the out-group.[51] So, the in-group would opt to benefit less, provided the out-group benefitted less still. This contest for group advantage quickly becomes one for dominance of the State, and a way for each group to show their superior group worth.[52] The language of the contest is also one of legitimacy, with each group trying to prove that its historical and moral claims give it the legitimate right to political dominance. Horowitz adds that for an escalation of violent conflict, there must be an exaggerated fear of group extinction.[53] This exaggeration turns the sombre analysis of demographic or military action into visceral reactions seeing a danger to the group.[54] This fear of group extinction leads to feelings of hostility towards the out-group, and ultimately, to violence. Young points out that this added hostility increases solidarity, encouraging people to see events in terms of ethnicity and to promote misperceptions of the out-group.[55] The resurgence of the *Battle* and the associated beliefs occurred at a period of instability and political tension, namely the Bosnian independence vote. The Bosnian vote for independence (on top of the Croatian and Slovenian independence declared the year before) was viewed as an existential threat to Serbians living outside Serbian-controlled territory (about 40% of the total Serbian population).[56] Two-thirds

---

[49] Kaufman, *Modern hatreds: The symbolic politics of ethnic war, 3 - 4.*
[50] Donald L Horowitz, *Ethnic groups in conflict, updated edition with a new preface* (Univ of California Press 2000), 226-7.
[51] Kaufman, *Modern hatreds: The symbolic politics of ethnic war, 25-26.*
[52] Horowitz, 145-147.
[53] Donald L Horowitz, 'Making moderation pay: The comparative politics of ethnic conflict management' 451 Conflict and peacemaking in multiethnic societies 451, 455.
[54] Stuart J Kaufman, 'Symbolic Politics or Rational Choice? Testing Theories of Extreme Ethnic Violence' 30 International Security 45, 53.
[55] Crawford Young, 'The Politics of Cultural Pluralism' in Robert Melson (ed), *ASA Review of Books*, vol 6 (The University of Wisconsin Press 1976), 161-2.
[56] Guzina, 96 - 97.

of the Yugoslavian industry and the majority of the exports were sourced from Slovenia and Croatia, where there was a higher standard of living.[57] As the republics declared their independence, economic outputs would no longer be funnelled through Belgrade, Serbia.

By 1992, only Serbia and Montenegro remained in the Socialist Federal Republic of Yugoslavia (SFRY), which was renamed the Federal Republic of Yugoslavia (FRY). Slobodan Milošević, the Serbian leader of FRY, anointed himself the modern-day Lazarus, even going as far as to dig up the bones of the fallen Prince to parade them around Serbian parts of Yugoslavia.[58] Milošević and his followers used the *Battle,* and its themes (betrayal, martyrdom, and moral worth) to turn the myth into a metaphor for the struggle of contemporary Serbians, especially the Serbians living in the Croatian and Bosnian diaspora. During one of the anniversaries of the *Battle,* Milošević said 'The Kosovo heroism does not allow us to forget that at one time we were brave and dignified and one of the few who went into battle undefeated'.[59] The *Battle* was the launchpad for 'Greater Serbia' spearheaded by Milošević.[60] Though the myths existed as far back as the fourteenth century, they suddenly rose to prominence when Bosnian independence (and the independence of other republics) resulted in problems that were operationalised by Milošević and his followers.

This account of the myths of Serbian victimhood and Ottoman aggression help Kaufman explain the explosion of ethnic conflict that emerged in the late Balkans in the 1990s. The myth-symbol complex – that is, the myths, memories, values, and symbols of an ethnic group – forms a crucial part of the ethnic group's identity. It helps to give texture to the affective dynamics of conflict.

1.2 Ethnicity

SPT is a theory that is developed to be applied exclusively to ethnic conflict. Ethnicity is said to be defined by the ethnic group's myth-symbol complex.[61] Kaufman defines it as the 'combination of myths, memories, values, and symbols that define not only who is a member of the group but what it means to be a member'.[62] Hence, ethnic symbolism is at the core of

---

[57] Ben Bagwell, 'Yugoslavian constitutional questions: Self-determination and secession of member republics' 21 Ga J Int'l & Comp L 489, 489.
[58] Kaufman, *Modern hatreds: The symbolic politics of ethnic war, 181 and 199.*
[59] Ibid, 181 and 199.
[60] Guzina, 103 - 104.
[61] Kaufman, 'Symbolic Politics or Rational Choice? Testing Theories of Extreme Ethnic Violence', 50-1.
[62] Anthony D Smith, *The Ethnic Origins of Nations* (Blackwell Publishing 1986) 15-16. SPT can be criticised for the reliance on myth in the search for justification of outgroup hostility. Myth has negative connotations associated with its use in nineteenth-century anthropology. Myths were originally thought to be rooted in the experience of

the understanding of the myth-symbol complex. The group's myth-symbol complex also identifies elements of shared culture and what interpretations of history bind the group and distinguish it from others. Goals and expectations within each ethnic group originate from hostile interpretations of history encoded in the relevant group's myth-symbol complex.[63] The myth-symbol complex defines the group's membership, its homeland and history, and what it means to be a member. It forms a crucial part of the group identity. It also consists of ethnic narratives that identify elements of shared culture, the interpretation of history that binds the group, and the differences with other ethnic groups.[64] Culture and history are central in the creation of incompatible values among ethnic groups, which often result in mutually incompatible goals, where the domination of an ethnic adversary is thought to be the only acceptable outcome ensuring peace. In *Bloodlines,* Volkan notes that myths often contain chosen traumas and memories of the tragedy that befell the group's ancestors.[65] Accordingly, through their myth-symbol complex, the group can be defined as a victim that must seek harmony, security or revenge. A key hypothesis in SPT is that the more the myth-symbol complex focuses group hostility on a particular adversary, the more likely there is to be a violent clash with that adversary, and the greater the intensity of such conflict.

The application of SPT solely to ethnic conflicts may appear quite limiting until one understands the broad view of what is considered ethnicity in the theory. It begins with a

---

death and fear of extinction and used to speak of another plane that exists alongside our world. Karen Armstrong, *A Short History of Myth* (Canongate Books 2005), 3 and 5. They enabled individuals to make sense of the world and their position in it. Ibid, 6. However, in the nineteenth-century, myth was described as something false often used to categorise an inferior mode of thought, particularly in the colonies. Ibid, 135. There was a deep-rooted sense of imperialism embedded in the nineteenth-century theories of myth. Ivan Strenski, *Four Theories of Myth In Twentieth-Century History: Cassirer, Eliade, Levi-Strauss and Malinowski* (Macmillan Press 1987), 198-9. For example, Malinowski tended to associate myth exclusively with non-literate societies. He argued that myth in a 'savage community' is not merely a story but a reality lived. Bronislaw Malinowski, *Myth in Primitive Psychology* (Norton 1926), 21. Malinowski wrote, 'myth is to the savage what, to a fully believing Christian, is the Biblical story of the Creation…' Additionally, he stated that myth provides a screen against the 'vast emotional void gaping beyond the savage'. Ibid, 106. Malinowski does not seem to consider that the term 'myth' did not come from the 'tongues of tribal folk'[62] Strenski, 50. It was developed in the 19th century from the Greek word *muthos*.

Contemporary psychologists have also been more willing to see the myth-making process as an important mental activity unrestricted by social conditions not to be viewed negatively, or in relation to the less evolved mind, like its use in the aforementioned explanation put forward by Malinowski. Fiona Stafford, *The Last of the Race* (Clarendon Press 1994), 7. For example, Chase contends that myth has the power to create 'recognition scenes' in which we have the exciting experience of coming face to face with a disinherited part of ourselves. Richard Volney Chase, *Quest for Myth* (Louisiana State University Press 1949), 101. Rochlin notes that myth-making is partly a form of the need for a defence against the limitation that living imposes. Gregory Rochlin, *Griefs and Discontents: The Forces of Change* (Little, Brown and Company 1965), 135. Modern psychologists and contemporary anthropologists converge in their ideas because they see myth as a psychological shield against unpalatable truths. Stafford, 9. Through the author, myths fulfil a similar function for its society.

[63] Kaufman, *Modern hatreds: The symbolic politics of ethnic war, 16 and 20.*

[64] Stuart J Kaufman, 'Narratives and symbols in violent mobilization: the Palestinian-Israeli case' 18 Security Studies 400, 404.

[65] Vamik D Volkan, *Bloodlines: From ethnic pride to ethnic terrorism* (Basic Books 1998), 48.

constructivist understanding of ethnicity. This maintains that ethnic groups are new, and even newer identities are capable of being carved out in favourable contexts.[66] There is no single accepted definition of ethnicity. Ethnicity comes from the word 'ethnic' derived from the Greek word *ethos:* literally, people relating to a typical character of a group of individuals. Thus, the word ethnicity refers to both the character and quality of the group.[67] Ethnic groups are defined as members of a group with an awareness of their common interests.[68] However, their common interests are never static. Even with distinctive language, customs and culture common interests, ethnic groups have been lost or recreated by new experiences.[69] Thus, ethnicities are 'dynamic, ambiguous, constantly contested, and the changing result of cultural politics'.[70] Under the constructivist understanding, intellectuals and political leaders can reinterpret history and culture to reconstruct ethnic identity.[71] In some situations, the new identity becomes widespread and well-established through the process of socialisation. However, leaders and intellectuals cannot move too far from existing beliefs or actual group needs because the identity may create weak cultural roots from which the identity will not survive. That initial construction of the ethnic identity is considered the initial 'take-off phase', which precedes the period of institutionalisation.

Elder et al. assert that during the initial 'take-off phase', ethnic identity is constructed according to three specific symbolic codes – namely primordial, traditional, and/or universalist codes, which can change, but only after an extensive period.[72] Primordial codes perceive certain distinctive features as 'innate' and unchangeable and exempt from communication or exchange. Thus, they are taken as given and not changeable through voluntary action – for example, race and age. Traditional codes are based on familiarity with specific rules of conduct, traditions and social boundaries. They are regarded as the core of the collective identity. Examples of traditional codes include routines, traditions, and social boundaries. Lastly, universalist codes connect differences among groups to the relationship between the members of the ethnic group and a sacred being, commonly a deity. The authors base their understanding of ethnic identity on sociological theories of structure and action, which are said to illustrate

---

[66] Kaufman, *Modern hatreds: The symbolic politics of ethnic war 7.*
[67] John O Oucho, *Undercurrents of Ethnic Conflicts in Kenya* (Brill 2002), 5.
[68] M Omie and Howard Winant, *Racial Formation in the United States: From the 1960's to the 1980's* (New York: Routledge and Kegan Paul 1986), 14.
[69] Ibid, 18.
[70] Jacqueline M Klopp, 'Can Moral Ethnicity Trump Political Tribalism? The Struggle for Land and Nation in Kenya' 61 African Studies 269
[71] Kaufman, *Nationalist Passions 33.*
[72] Klaus Eder, Bernd Giesen and Damian Tambini, *Collective Identities in Action: A Sociological Approach to Ethnicity* (Ashgate Publishing Limited 2002), 17-25.

how ethnicisation (the process of identification through which collective identities are formed) is the product of interaction processes.[73] Structuralist theories conceive of the world through variables, like capitalism, the State, and culture in the absence of human actors. Under this theory, ethnicisation creates ethnic differences. In contrast, action theories conceive of the world as the product of socialisation. For action theorists, ethnicisation will result in ethnic prejudice. Together structuralist and action theories are used to demonstrate how interaction processes, specifically social interaction, lead to acknowledgement of the 'us' versus 'them' divide through the aforementioned symbolic codes, thereby institutionalising the ethnic divides.[74]

Ethnicisation plays a more significant part in social reality, which is at the heart of social life, as more societies become media-dependent, with the 'social reality of communication beyond individual utterances and before rational discourse'.[75] Interaction processes are the reality that transforms factors proposed by structuralists and action theorists into a 'social world in which things happen'. Thus, interaction processes may be shaped by big structures and motivations of actions but aren't determined by them.[76] Without being reproduced in everyday interactions and public communication, ethnicisation will have little effect.[77] Hall illustrates how the process of identification is a historical, cultural and political construction, which needs to be understood as produced in specific historical and institutional sites, within 'specific discursive formations and practices, by specific enunciative strategies'.[78] Ethnicity is a product of social imagination, which is a product of a specific type of lived or imagined history.[79] The dialectical process attributes meaning to socio-cultural signifiers of human beings, resulting in people being assigned within a 'general category of persons' – one which reproduces itself biologically, culturally, and economically.[80] Thus, identity is constituted or performatively enacted through subject positions availed in language and broader cultural codes.[81] Hall cites Lacan to assert that ethnic identity exists in opposition to

---

[73] Ibid, 158-161.
[74] Ibid, 4.
[75] Ibid, 162.
[76] Ibid, 4.
[77] Ibid, 162.
[78] Stuart Hall, 'New Ethnicities' Stuart Hall: Critical dialogues in cultural studies 441, 446. Stuart Hall, 'Who Needs' Identity?' in Paul Du Gay, Jessica Evans and Peter Redman (eds), *Identity: a reader* (Sage Publications 2000), 17.
[79] Elisha Stephen Atieno-Odhiambo, 'Hegemonic Enterprises and Instrumentalities of Survival: Ethnicity and Democracy in Kenya' 61 African Studies 223, 231..
[80] Karim Murji and John Solomos, *Racialization: Studies in Theory and Practice* (Oxford University Press on Demand 2005), 14
[81] Peter Redman, 'Introduction' in Paul Du Gay, Jessica Evans and Peter Redman (eds), *Identity: a reader* (Sage Publications 2000), 11.

the identity of the 'other'. So, identity primarily signifies natural unity while inadvertently marking differences and excluding certain groups. [82]

Habermas delves into an analysis of language and how language forms identities, especially in two of his works: *Theory of Communicative Action Vol 1*[83] and *Knowledge and Human Interests*.[84] According to Habermas, language is a 'medium of domination and social force'.[85] It serves to 'legitimise relations of organised power… [and is] also ideological'.[86] Language plays a central role in the construction of ethnicities as it becomes a 'prominent objective factor in defining ethnicity'.[87] Moreover, human action and understanding can be analysed as having a linguistic structure where utterances are dependent on the anticipation of freedom from unnecessary dominion.[88] Hence, social life depends on the use of language. Consequently, the use of different languages naturally separates people into groups; when one group fails to understand the others, they are identified as different. [89] Separate identities are based on the subjective will of speakers. Even in instances where the language is virtually identical, minor differences are used to differentiate between groups. For example, while Serbian and Croatian are linguistically equivalent, there is a slight divergence in the choice of pronunciation that distinguishes Serbs from Croats.

The use of ethnic identities, then, is not problematic in itself. Njoroge and Kirori assert that, if constructed appropriately, ethnic identities can become a national treasure.[90] It is only when they are manipulated for self-interest that they become harmful. Kebede notes that ethnic identities can be useful in the activation of democratization, economic progress and the neutralisation of the emotional component that results in negative confrontation.[91] He notes the use of ethnicity is less about the rights of peoples and more about the battle for power among elites. Njoroge and Kirori observe that ethnicity 'reinforces a people's social-cultural

---

[82] Murji and Solomos, 14

[83]Jürgen Habermas, Thomas McCarthy and Thomas McCarthy, *The Theory of Communicative Action*, vol 1 (SciELO Brasil 1984)

[84]Habermas Jürgen, *Knowledge and Human Interests* (Beacon Press, Boston 1971)

[85] Jürgen Habermas, *Erkenntnis und Interesse: mit einem neuen Nachwort* (Suhrkamp 1973). As cited in Felicia Yieke, 'Ethnicity and Development in Kenya: Lessons from the 2007 General Elections' 3 Kenya Studies Review 5, 26.

[86] Habermas. as cited in Yieke, 26.

[87] Yieke, 9.

[88] Thomas McCarthy, *The Critical Theory of Jürgen Habermas, Massachusetts* (Massachisetts Institute of Technology Press 1978), 272 – 275. Barbara Fultner, 'Introduction: Communicative Action and Formal Pragmatics ' in Barbara Fultner (ed), *Jurgen Habermas: Key Concepts* (Routledge 2014), 4.

[89] Yieke, 9.

[90] Margaret Wanjiru Njoroge and Gabriel Njoroge Kirori, 'Ethnocentrism: Significance and effects on Kenyan Society' 8 African Journal of Political Science and International Relations 356, 361.

[91] Messay Kebede, 'The Ethnicization of Ethiopian Politics: Origins and Significance' (*http://www.sudantribune.com/spip.php?article19003*) accessed 13 April 2015

background in charting out their destinies' with national unity'. [92] Further, Eder et al. explain that ethnicisation exists about a past that is seen as the basis of good social order in the present.[93] Collective identities like ethnic, national or class identities are not naturally given or logically defined.[94] They are a universal phenomenon of social life – a social construction. A common cause, like a sense of common origin, beliefs or values, and a feeling of survival, have been crucial in the unification of people into self-defining groups from time immemorial.[95] Growing up together in a social unit and sharing a common verbal and gestural language allows humans to develop mutually understood accommodations, which in turn diminish situations of confrontation and conflict. Ethnic divides can nevertheless be used for violence and instability.

Bottom-up productions of ethnicity through social interaction and language can create and maintain oppositional identities, primarily through a narrative of ethnic 'others' as immigrants.[96] The 'us' versus 'them' divide propels the opposition to the position of 'other' through leaders of conflict-ridden states who manipulate the psyche of their followers.[97] Othering refers to any action by which an individual or group becomes classified as 'not one of us', often to the extent that this individual or group (the other) is seen as less human and less worthy of respect and dignity.[98] This process is utilised for the obliteration of the identity of the 'other'. Their identity as a professional, a citizen, a member of the family, or, for our purposes – a member of an ethnic group. It is used anywhere from the terraces of a football match to the confines of a police custody suite.[99] Subsequently, this 'metaphorical murder' of people who are marginalised boils down to an exclusion that is felt by the victim as 'complete annihilation, and understood by other potential offenders as a call for bloodshed'. [100] Classification as the 'other' deprives the group of the rights that are granted to ordinary citizens – thereby legitimising acts of violence that had previously been considered ethically and morally unacceptable. Thus, ethnicity is weaponised for protection from the loss of attained

[92] Njoroge and Kirori, 359.
[93] Eder, Giesen and Tambini, 18.
[94] Ibid, 20.
[95] George De Vos, 'Concepts of Ethnic Identity' in Lola Romanucci-Ross and George De Vos (eds), *Ethnic Identity: Creation, Conflict, and Accommodation* (Altamira Press 1995), 15.
[96] Sarah Jenkins, 'Ethnicity, Violence, and the Immigrant-Guest Metaphor in Kenya' 111 African Affairs 576, 576.
[97] Oucho, 5.
[98] There Are No Others, 'Othering 101: What is "Othering' (*https://therearenoothers.wordpress.com/2011/12/28/othering-101-what-is-othering/*) accessed 16 March 2015.
[99] Marie-Claude Barbier, Bénédicte Deschamps and Michel Prum, *Racial, Ethnic, and Homophobic Violence: Killing in the Name of Otherness* (Routledge 2007), 1.
[100] Ibid, 1.

privilege or as a scapegoat in the transformation of dissatisfaction with the government into complaints about the ethnic group or groups in power.[101]

Under SPT, much like the aforementioned theories, ethnicity is said to be ascriptive. Most people are born into it, while others can change their ethnic identity through, for example, marriage, adoption, or religious conversion.[102] Nevertheless, most people stay within the group into which they are born. This demonstrates that sectarian, racial, and religious groups can all be seen as having an ethnic character. Kaufman contends that this is only so if members of the group imagine themselves as family. Conflicts are identified as ethnic because of the subjective view adopted from members seeing each other as family or from recruitment along ethnic lines. Regarding the former, the only way to truly tell someone's ethnic identity is to ask them.[103] Their answer will largely depend on a combination of what members of the group believe it is and what others in their society think it is. Kaufman asserts that this is because an ethnic group consists of people who mutually accept each other as members.[104] It is worth highlighting that no group, ethnic or otherwise, is entirely united. However, as Brubaker highlights, ethnic conflicts are predominantly between organisations that claim to be acting in the interest of their groups, with moderates who stand aside and others who may use fighting to pursue different agendas.[105] Consequently, when considering what constitutes an ethnic conflict, SPT looks at how ethnic groups identify themselves and how groups are recruited.[106]

The problem with Kaufman's use of ethnic identity is he says that ethnic identities are distinct but operate with the same psychology. He uses the example of Tanzanian ethnic groups that were divided by language, Indian ethnic groups that were communally divided between Muslims and Hindus, Sudanese and Philippine ethnic groups that were divided between Muslims and Christians, and finally, South African and Rwandan ethnic groups that were divided along racial lines.[107] At the same time, Kaufman says that these different kinds of identities work the same way psychologically. But the assertion that various ethnic identities have the same psychological effect is unprovable. Additionally, the idea that they could be distinct – not just in the type of division, but also in the region and cultural composition – and yet still operate the same way psychologically is illogical. This is one of the reasons why, rather than using SPT as a predictive tool, which is how it was designed to be used, it is more useful

[101] Atieno-Odhiambo, 232.
[102] Kaufman, *Nationalist Passions, 5.*
[103] Ibid, 5-6.
[104] Ibid 6.
[105] Rogers Brubaker, *Ethnicity Without Groups* (Harvard University Press 2004) 12-13.
[106] Kaufman, *Nationalist Passions, 6.*
[107] Ibid, 6.

for our purposes as an analytical tool. An analytical tool that helps to unravel the layers of conflicts that have already taken place.

1.3 Institutionalisation of Ethnic Identities

While ethnicity is a key aspect of SPT's analysis of violence, it is important to see that this is only the beginning of the process. It is also important for ethnic identities to be institutionalised. To explain this, it is useful to explore the unfolding of the Rwandan genocide, looking specifically at the institutionalisation of Hutu and Tutsi ethnic identity. In Rwanda, until recently, there were three administratively recognised ethnic groups, the Hutu, Tutsi, and Twa.[108] All of which have the same language, culture, and religion. It is worth noting that, according to several Belgian clergymen, before colonisation the Rwandans had the feeling of being one people and that their country was the centre of the world.[109] The clergymen also said that the markers of national cohesion, namely language, faith, and law, were present in pre-colonial Rwanda at a level greater than could be found among European people at the time. The main difference that came to distinguish the ethnic groups was their stereotypical physical attributes (a primordial symbolic code).[110] Hutus were seen as shorter and stockier with broader noses than Tutsis, and both Tutsis and Hutus were seen as much taller than the Twa. These stereotypical attributes were continuously perpetrated as identifiers, even though intermarriage was common, resulting in physical differences becoming more and more blurred.[111] Gourevitch notes that until 1959 there had been no record of systematic political violence between Hutus and Tutsis.[112]

Tensions that led to the violence from 1959, and culminated in the 1994 genocide, were sown in colonial Rwanda. Though there was a monarchical power structure in place before European settlement, it was only after this settlement that the Rwandan monarchy was given a racial caste.[113] The monarchy can be traced as far back as the 1860s when the king, Kigeri Rwabugiri, entrenched a process of ethnic polarisation grounded on cattle and land

---

[108] In 2003, the Rwandan government outlawed the use of ethnic labels on identity cards. Leo Nwoye, 'Partners or Rivals in Reconciliation: The ICTR and Rwanda's Gacaca Courts' 16 San Diego International Law Journal 119, 185.

[109] Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families*, vol 24 (Pan Macmillan 2015) 54-55.

[110] Kaufman, *Nationalist Passions 122.*

[111] Robert Melson, 'Modern Genocide in Rwanda: Ideology, Revolution, War, and Mass Murder in an African State' in Robert Gellately and Ben Kiernan (eds), *The Specter of Genocide: Mass Murder in Historical Perspective* (Cambridge University Press 2003) 327. Marc Lacey, 'A Decade After Massacres, Rwanda Outlaws Ethnicity' (*The New York Times* 2004) accessed 14 August 2018.

[112] Gourevitch 54-55.

[113] Melson 327. Kaufman, *Nationalist Passions 122.*

ownership.[114] That is to say; ethnic identification was based on wealth, not race. Rich and powerful cattle owners were identified as Tutsi and had some form of legal jurisdiction over Rwandan society, most others as Hutu.[115] Hutu were land cultivators who had the opportunity to rise in social rank if they attained enough wealth.[116] The King then ruled over mostly Hutu, some Tutsi, and a small number of Twa.[117] Rwabugiri also imposed a system of one out of five days of forced labour in place of taxes. This is relevant to the genocide because it was revived during Habyarimana's 1973 to 1994 presidency in the form of a requirement for at least two days of '*umuganda* service'.[118] By 1994, it had become such a habitual practice of the Hutu to provide forced labour, Hutus are said to have been left predisposed to calls for 'work' even when the work was on Tutsis, particularly in light of the existential threat that the Tutsi were said to pose.

The Germans, and later, the Belgians, came to rely on the Tutsi ruler to impose their domination.[119] Tutsi and Hutu then came to be perceived and labelled as different 'tribes' and races by the colonial administration. Particularly as the aristocrats in the King's court were said to be distinguishable by way of being slimmer, taller, and had facial features closer to the European ideal of beauty. The colonialists claimed those distinctions meant that all Tutsi were of a different, superior race to the Hutu. According to one Belgian administrator in the 1920s, the Batutsi were meant to reign because their fine racial presence 'is in itself enough to grant them great prestige vis-à-vis the inferior races surrounding them.[120] This reliance on the Tutsi ruler for domination led to the Tutsi being favoured in virtually every way and thereby institutionalised the ethnic identities while reproducing them in day to day social interactions. There are several examples; for instance, the powers on the chief were bestowed on both Tutsis and Hutus until the colonialists centralised them in one man, usually a Tutsi.[121] Hutus were compensated for their land before they were disposed of it, leaving those Tutsi closest to the Belgian administration with the most profits.[122] Most importantly, Tutsis were favoured in primary and secondary education controlled by the Belgian Catholic priests. Thereby further institutionalising ethnic identity and reproducing it in daily social interactions. It is no surprise

---

[114] Kaufman, *Nationalist Passions 122.*
[115] Ibid 122. Dylan Craig and Nomalanga Mkhize, 'Vocal killers, silent killers: popular media, genocide, and the call for benevolent censorship in Rwanda' Popular Music Censorship in Africa 39, 43.
[116] Craig and Mkhize, 43.
[117] Melson 326-7.
[118] Kaufman, *Nationalist Passions 129.*
[119] Melson 327.
[120] Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (Columbia University Press 1997) 11.
[121] Melson 328.
[122] Ibid 329.

that in 1932 in the elite Groupe Scolaire d'Astrida school, 45 out of 54 students were Tutsi, and in 1959, 279 out of 422 were Tutsi. The school system was used to spread the 'Hamitic Hypothesis' through teachings that constructed the Tutsi as a civilising and alien race known as the Hamites.[123] The education itself was separatist. Tutsi children were given what was considered a superior education that was taught in French in a separate stream to prepare them for administrative positions and citizenship, albeit at a lower level to the colonialists.[124] Thus, those Rwandans educated under colonial rule came to believe the Hypothesis, which was later woven into the narrative of Alexis Kagame, particularly the narratives in his book *The Triumphant Kalinga*.

Teachings of Alexis Kagame were incorporated into the school system. They led even those Tutsi who had not benefitted from the system to believe they were of a superior race, which was amplified when many were later in exile without the social barriers differentiating between Tutsis.[125] Kagame was a priest, philosopher, and the royal historian of King Mutara III Rudahigwa. He was tasked with writing down the traditions of the court that had previously only been articulated through oral traditions.[126] His work was weaved into Catholic-run school curriculums and spread colonialist theories that subjugated the Hutu while offering citizenship to Tutsis.[127] Chief among the theories was the aforementioned Hamitic Hypothesis, which stated that the Tutsi were conquerors originating from their 'Ethiopian-root stock'.[128] Ethiopia was noted to be closer to Europe. The Hutu were, according to Kagame's narrative, a conquered inferior tribe of local origin who had allowed themselves to be enslaved, further proving their inferiority.[129] At the same time, his book *The Triumphant Kalinga* brought widespread attention to the Kalinga, which was taken as a symbol of the Nyiginya dynasty – a dynasty praised for defeating and annexing small Hutu and Tutsi kingdoms to create Rwanda.[130]

The Kalinga is a mythical drum decorated with the testicles of defeated Hutu princes because, according to Alison Des Forges, historically, it was custom for the genital organs of defeated rulers to be cut off and attached to a drum.[131] According to a poem supposedly

---

[123] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton University Press 2014) 89.
[124] Ibid 90.
[125] Ibid 90.
[126] Aimable Twagilimana, *Historical dictionary of Rwanda* (Rowman & Littlefield 2015) 122-123.
[127] Mamdani 90.
[128] Ibid 90.
[129] Melson 328. Prunier 11. Craig and Mkhize, 43.
[130] Prunier 11.
[131] Kaufman, *Nationalist Passions 135.* Drawn from Alison Des Forges testimony to the International Criminal Tribunal for Rwanda, as reported in *Prosecutor v. Nahimana, Barayagwiza, & Ngeze* ICTR-99-52-T Trial Chamber of the International Criminal Tribunal for Rwanda, [183].

published in 1870, 'The Hutus becoming Tutsis by climbing from their social class which has no innate right, Were decimated by the lucky elected few, And Kalinga, was deprived of his genital organs or spoils'.[132] The book contained a mixture of Rwandan myths and Christian mythology. It emphasised the similarities between Christianity and Rwandan traditions, even though the European missionaries had sought to eliminate the latter. In his writing, it was clear that Kagame had embraced the European missionary's ideas about ethnic groups in Rwanda while simultaneously trying to counter them. This conditioning of the Rwandan population created the disquiet among Hutus that was instrumental in the genocide of 1994.

Hutu children were given what was considered an inferior education, taught in Kiswahili, to prepare them for manual labour and underline the fact that they were not destined for common citizenship. These racist ideals centred on the mythical imagery of kingship that claimed Rwandan's social identity was divinely ordained and the King was an incarnation of God.[133] Consequently, a rebellion was thought to be not only treason but also sacrilege. For example, the myth that came to be a symbol of the King's power and later came to be taken as emblematic of the problems associated with Tutsi domination was the Kalinga drum. Narratives like the Hamitic Hypothesis and myths like the Kalinga painted the Tutsi as evil and dangerous for years.[134] Historical narratives further effected the differences between groups by positioning them as separate families.[135] The widespread endogamy compounded this among the Twa and Tutsi elite that Melson suggests may account for the somatic differences between groups.[136]

After World War II, the Belgian authorities succumbed to pressure from the UN and reversed their feudal policies and introduced democratic institutions.[137] Additionally, more sympathetic clergymen offered education and access to the clerical press to ambitious Hutu. That enabled the March 1957 publication of the *Bahutu Manifesto* written by Gregoire Kayibanda, who would become the first President of Rwanda in 1961. The *Manifesto* denounced Tutsi domination and called for democracy and the promotion of opportunity for the Hutu. Political change was slow until 1959 when the Belgians announced plans to turn Rwanda into a constitutional monarchy and to hold elections. Political parties started forming, positioning die-hard royalists against Kayibanda's Party of Movement for Hutu Emancipation

---

[132] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze, [183].*
[133] Kaufman, *Nationalist Passions 125.*
[134] Ibid 135.
[135] Ibid 124.
[136] Ibid 125. Melson 328.
[137] Kaufman, *Nationalist Passions 123.*

(Parmehutu). Hutu leaders of the 'democratic revolution' accepted the Tutsi Rwandan ideology wholesale.[138] They inverted its sign to assert that the Tutsi were invaders from afar, aliens whose presence was itself illegitimate. Rather than demanding the removal of ethnic identity, Hutu led political movements called for them to be further entrenched through the use of identity papers.[139] That concretised the identities and made the identity papers useful as death warrants for hundreds of thousands if not millions of Tutsis in the genocide.[140] Indeed, identity papers were used by genocidal killers when in doubt about the identity of their victims.[141]

In his *Manifesto*, Kayibanda wrote 'In order to monitor this race monopoly we are strongly opposed at least for the time being, to removing the labels 'Mututsi', 'Muhutu' and 'Mutwa' from identity papers. Kayibanda claimed removal would create a risk of preventing the statistical law from establishing the reality of facts.'[142] Interestingly, as we shall see in Chapter 3, the post-genocide President of Rwanda, Paul Kagame, replaced the individual labels with the one all-encompassing label – Banyarwandan. Critics argue this is a way for the government to obscure the power structures in the country. The label does not obscure other primordial identifiers that were mentioned above. Hutus and Tutsis are also identified as Bantu and Hamite, respectively. So, the labels of Mututsi, Muhutu and Mutwa were just one of the markers of identity. Against this background, Hutu leaders perpetuated the view that traditional Tutsi rule was a cruel and oppressive tyranny that had enslaved the Hutus. A passage of the Bahutu Manifesto well illustrates that: 'The problem is basically that of the political monopoly of one race, the Mututsi . . . which condemns the desperate Bahutu to be forever subaltern workers'.[143] The Kalinga drum, with its decoration of Hutu testicles, was a remarkably effective symbol of what Tutsi rule meant, bloody emasculation. Accordingly, 'No more Kalinga' was a particularly effective speech act encapsulating the domination that was feared and encouraging the population to take steps to irrevocably prevent a repeat of what they considered to be their history.[144]

An emergent sense of ethnicity does not arise alone. It is crucial to see that it emerges in part from the historical processes of institutionalisation. The institutionalisation can intensify or weaken the importance or strength of ethnicity. The Tutsi, Hutu, and Twa ethnicities existed in pre-colonial Rwanda (perhaps not under that specific name), but there was fluidity between

---

[138] Ibid 126.
[139] Melson 330.
[140] Anthony Horvath, *The Bahutu Manifesto* (Suzeteo Enterprises 2018) abstract.
[141] Melson 330.
[142] Prunier 46.
[143] Kaufman, *Nationalist Passions 126.*
[144] Prunier 80 and 45.

them as the acquisition of wealth and cattle resulted in identification as a Tutsi. It was only until the colonialists institutionalised distinctions in specific sites that the ethnic groups envisioned themselves as different. For example, in schools, through segregated learning (Kiswahili for the Hutu and French for the Tutsi) and citizenship, because Tutsi's were first used to impose colonial domination and later were the only group permitted to serve in government.

1.4 Pathways to Violence

Ethnic conflict is said to stem from a vicious feedback loop, in which hostility, extremist symbolic appeals, and a security dilemma all reinforce each other and promote violence. Kaufman identifies historical myths and narratives, existential fears, and access to a territorial base as preconditions for violence. If these three preconditions are present, Kaufman asserts that there will be two pathways to violence: the mass-led and the elite-led pathway. Regarding the mass-led pathway, the causal chain begins with either the lifting of a previous barrier to ethnic self-expression (usually the coercive power of the State). Alternatively, the chain can begin with a galvanising event like a highly publicised murder. At this point, there are typically relatively high numbers of fanatics and true believers. Fanatics can be counted on to actively promote nationalist policies even in the face of inevitable repression, and true believers join in the movement once political repression decreases. As more people mobilize, a tipping process emerges as the safety and chances of success increase, thereby motivating more moderate nationalists to join. What follows is long-standing myths that justify group solidarity and identify threats to the group being circulated widely. Under the elite-led pathway, the causal chain begins with extreme mass hostility expressed in the media and in popular support of the political domination over ethnic rivals, on at least one side, or the resistance to that domination. What follows is chauvinistic elites using symbolic appeals to myths and tapping into and promoting fear and mass hostility to mobilize their groups for conflict. Chauvinist leaders typically claim to be driven by security motivations.[145] However, by nature of being ethnic chauvinists, they define their group's security as requiring dominance over rival groups, which is inherently threatening to other groups. If multiple groups seek dominance over a single area, the result is a security dilemma (or hostile security environment) where neither group feels secure unless its status needs are met, but each group's demands can only be satisfied to the exclusion of the other.[146] Therefore, this path is understood as involving predation.

[145] Kaufman, 'Symbolic Politics or Rational Choice? Testing Theories of Extreme Ethnic Violence', 54.
[146] Ibid, 54-55.

Under both pathways, the next step is a security dilemma that arises from one of three scenarios. One: elites in each group compete to establish ethnic bona fides and gain adherents by promoting 'genuine' nationalist goals, including the subordination of the other group when there is a fear of group extinction. Two: hostile masses reward the elites who propose chauvinist platforms, platforms that are inherently threatening to other groups. Three: masses participate in widespread unorganised violence, which creates a security dilemma and leads to the replacement of existing leaders with extremists committed to implementing chauvinist policies. Manipulative leaders typically claim to be driven by the same security motivations.[147] This ingredient list style of the unfolding of violence in SPT denies the complexity that can emerge prior to and during the outbreak of violence. It sets in stone the flow of violence, which inadvertently means that it can't apply to conflicts that diverge even slightly. This is another reason why SPT is more useful as an analytical tool rather than a predictive one. That is because the order of events leading up to the conflict can be opened further, and perhaps even reordered, to suit the unfolding of violence in the conflict situation in question.

According to Kaufman, the Rwandan genocide followed the elite-led pathway to violence. 1994 was not the first instance of Hutu-Tutsi conflict. Several previous conflicts had led to a substantial number of Tutsi refugees in neighbouring Uganda. Polarisation and violence set the context for the 1960 elections that the Parmehutu overwhelmingly won.[148] The abuses that came to characterise the Parmehutu leadership galvanised all the other parties into a communal front against what was seen as a racist and dictatorial regime. Royalists in exile also began launching terrorist attacks. Fearing the rising tide of a backlash against them, the Parmehutu initiated a coup and seized power to form a new government led by Kayibanda as prime minister. Kayibanda went on to win the 1961 national elections. In response to his victory, the royalists amplified their military efforts, vowing to be as numerous and difficult to stamp out as *inyenzi* (meaning 'cockroaches'). Opposition politicians in government were shot, which turned the government into a unilateral state.[149]

Under the guidance of Yoweri Museveni, the President of Uganda, and the leadership of Ugandan military officers, the Tutsi exiles were able to form the RPF in December 1987.[150] The continually growing number of Tutsi exiles functioned as the RPFs recruitment network. Parental narratives of Rwanda motivated younger exiles to join, while older business people in

[147] Ibid, 54..
[148] Kaufman, *Nationalist Passions 123.*
[149] Ibid 124.
[150] Kaufman, *Nationalist Passions 130.*

Europe and North America provided funding, despite the initial severe failures of the RPF. Tutsi soldiers also formed part of the RPF after being purged from the Ugandan army (some with their arms and equipment). According to Prunier, the RPF was the best-educated guerrilla force the world had ever seen.[151] The thirty-year-long refusals of Rwandan governments to allow Tutsi refugees to return home made an invasion the only solution for Tutsis seeking to return to their homeland. In 1990, the RPF leadership declared its right to return home by force if necessary and its intention to depose President Habyarimana in order to return Rwanda to a democracy.[152] Within the same year, President Museveni facilitated the RPF invasion into Rwanda.[153] When the RPF actualised its declaration in the form of its invasion, it provided validation to the Hutu extremist propaganda.[154] The propaganda that had drawn on the discourses of Hutu authenticity in lieu of the invading Tutsi aliens against whom the Hutu extremists called the whole population of Hutu to defend themselves. Kaufman posits that the 1994 genocide would not have happened had the Tutsi exiles been allowed to return to Rwanda because they would not have had the same resources and opportunity to mobilise as they had been given in Uganda.[155] In response to the invasion, the *akazu*, the Rwandan ruling elite formed of members of President Habyarimana's family, traded their subtle use of discriminatory code words for blatantly racist and dehumanising terms while reviving historical narratives and myths.[156] The frames utilised resonated with the symbolic predispositions of the Hutu, making them more agreeable to mobilisation, especially as the messages were repeated continuously.

Three symbols are of particular note—first, the symbol of the violent misdeeds of Tutsi elders in 1960.[157] Through publications in *Kangura*, a local newspaper founded by Hassan Ngeze in 1990, like 'A Cockroach Cannot Kill a Butterfly,' the extremists were able to connect the 'unspeakable crimes of the *Inyenzi* today' to the alleged pillaging, killing, and raping of girls and women in the 1960s. Second, the purported Tutsi goal of imposing feudalism resembling slavery, enforced with a whip. Radio Télévision Libre des Mille Collines (RTLM) poured out a flood of propaganda combining Tutsi feudalist enslavement with democracy and calls to action.[158] Last of all, the symbol of the Kalinga drum, the symbol of the ancient king's

[151] Prunier 116-7.
[152] Craig and Mkhize, 44.
[153] Prunier 116-7.
[154] Craig and Mkhize 44.
[155] Kaufman, *Nationalist Passions 130.*
[156] Ibid 134.
[157] Ibid 135.
[158] Ibid 136.

bloody emasculation of the Hutu.[159] Most notably, one cartoon portrayed slain President Ndadaye of Burundi being crucified with his genitals being cut off and hung on a Kalinga at the direction of future President Paul Kagame (an ethnic Tutsi). As time passed, an emboldened *Kangura* became more direct, asking the audience what weapon should be chosen to 'conquer' the *Inyenzi*.[160] The question was included beside a drawing of a machete. Together with RTLM, it voiced and distributed the extremist message of intense and ideologically sustained ethno-nationalist divisions in Rwanda, as well as a coordinated style of genocide that Mamdani identifies as the intimate affair of neighbour killing neighbour.[161] These symbols of historical narratives and myths played an important role in the genocide because they convinced the genocidaires of the existential threat posed by the Tutsi and provided justification for a final solution to that threat.[162]

The appeal of these extremist messages was a transparent exercise of symbolic politics featuring threats to the economic, physical, and symbolic. To the rational fear of losing one's privileges, they added a visceral fear of losing one's life and a mythical fear of losing control over one's world.[163] Thereby presenting the situation with near biblical urgency and providing a genocidal answer to a grossly misrepresented problem that was turned into a deliberate, organised, and brutal political programme for the final solution of pre-emptive genocide. The invasion also coincided with the pre-genocide governments growing dependence on foreign aid brought on by the sharp decline of coffee prices and droughts that caused a reduction in crop yields and the government's return of the *umuganda* service.[164] This foreign aid, in turn, made Habyarimana vulnerable to international pressure for democratic reforms and the signing and implementation of the Arusha Peace Accords.[165] The pressure for democratic reform led Habyarimana to allow the creation of opposition parties.[166] Three, led by southern Hutu elites discontented with the northern monopoly of power and more agreeable to the Tutsi plight, are of particular significance. This is because they inspired the creation of counter groups. One counter group – Coalition for the Défense of the Republic (CDR) – spearheaded the impetus for genocide under the leadership of northern extremists. At the same time, the ruling party was renamed National Revolutionary Movement for Development Democracy (MRNDD). It

[159] Ibid 135.
[160] Susan Benesch, 'Inciting Genocide, Pleading Free Speech' 21 World Policy Journal 62, 62.
[161] Craig and Mkhize 46. Mamdani 6.
[162] Kaufman, *Nationalist Passions 141.*
[163] Prunier 200-201.
[164] Kaufman, *Nationalist Passions 132.*
[165] Ibid 134.
[166] Ibid 133.

fortified the government monopoly of media outlets, specifically the radio, by refusing permits for the creation of an opposition radio station and began sponsoring violent attacks to intimidate the opposition.

In January 1992, Habyarimana changed tactics by agreeing to the opposition's demands for a power-sharing government. The agreement was designed to source a prime minister and members of the cabinet from the opposition while the MRNDD retained control over the Defence and Interior Ministries. CDR was not included in the agreement because it was not yet organised. Despite agreeing to the new government in public, the MRNDD created a network of death squads supervised by rehabilitated clandestine police. Still, the opposition was able to secure some reforms, including changing ethnic quotas in government hiring to fair civil service examinations. The new and more moderate Defence Minister removed the more extremist military officers, including close relatives to the Habyarimana family, which served to radicalise the *akazu,* who began contemplating a coup. To do the actual work of killing, the MRNDD created the *Interhamwe* militia in 1991 and aided the extremist CDR *Impuzamugambi* militia. Roadblocks were also set up on major roads to enable the inspection of identity cards to stop Tutsi and opposition party members from travelling across the country.[167] As the extremist government leaders closed in on their decision to commit genocide, they began to build the organisational capacity through sponsoring extremist media outlets like *Kangura* and RTLM to disseminate propaganda.

1.5 Precipitating Violence

We might pause for a moment here and distinguish between the pathways to violence and the mode by which the participants precipitate the violence itself. In practice, these are often difficult to distinguish, but nonetheless, it remains useful to see the medium-term deployment of symbolic politics and the short-term modalities, which actually led to the hard physical violence. In Rwanda, as the extremist government leaders closed in on their decision to commit genocide, they began to build the organisational capacity through extremist media outlets. RLTM, which translates to the 'free radio of the thousand hills', was a marker of its claim to provide an authentic voice from the countryside itself.[168] Radio was truly a mass medium in Rwanda because it was so pervasively accessible to listeners (especially in light of the 30 per cent literacy level). [169]

[167] Ibid 139.
[168] Craig and Mkhize, 40.
[169] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze, [488] and [235].*

RTLM's broad listening base and claim of authenticity enabled it to rise to prominence over and above *Kangura* and the more moderate state-run radio service that was initially its main competition. Additionally, it relied on popular music, colloquial speech and topical discussion, which led to a cult following among its loyal listener base who would tune in to listen to the allegedly honest information. Bikindi was the stations most notable musician. His music though popularised before the genocide, such as 'Twasezereye' translating to 'We said goodbye to the feudal regime' that was popular in 1987, made a comeback in the two years preceding the conflict, and in addition to other songs, like *Njyewe Nanga Abahutu* translating to 'I Hate the Hutu,' became part of a playlist that was repeated by RTLM up to fifteen times as day.[170] *Twasezere* was the anthem for the Hutus who were dissatisfied with the structures of the Arusha Accords, and *Njyewe Nanga Abahutu* has been credited for its encouragement of extremist Hutu's to have ill will towards moderate Hutus who were supporting Tutsis. Bikindi's oeuvre was woven around the mythologies. Thus, through his lyrics, Bikindi indirectly perpetrated colonial-era myths and stereotypes of Hutu/Tutsi identity to the *mbira ambuva* translating to 'those who understand'. These songs formed the core of the case against Bikindi at the ICTR, from which he was convicted. Finally, RLTM was propelled by the popularity of radio in the everyday lives of Rwandans.

Propaganda, particularly that which is disseminated over the radio, merits further examination due to its effectiveness at being directive of mass action. Ellul's work on propaganda, especially in *Propaganda: The Formation of Men's Attitud*e, is excellent in showcasing the problem posed by radio propaganda. Ellul elucidates how propaganda can be used to activate the listener.[171] Ethnic groupings are crucial to the effectiveness of propaganda because individuals are never really considered as an individual listener but in terms of what they have in common with others, such as their shared myths, feelings, and/or motivations. They are reduced to an average. Actions based on this average will virtually always be effectual. At the same time, the individual is considered as part of the mass in so far as they can be systematically integrated into it. This is because as part of the mass, their psychic defences are said to be weaker, their reactions easier to provoke, and the speaker profits from the process of transference of affect through the mass as well as the pressures that the individual feels when they are in a group. The characteristics of emotionalism, impulsiveness, excess, and so on are well documented when the individual is caught up in the mass. This vulnerability is

[170] Gregory S Gordon, 'Hate speech and persecution: A contextual approach' 46 Vand J Transnat'l L 303 341-6. Craig and Mkhize 42-3.
[171] Jacques Ellul, *Propaganda: The formation of men's attitudes* (Vintage books 1973) 7.

very helpful for the spread of propaganda. In this way, the individual is seen as both alone, like the solo listener of a radio broadcast, and at the same time aware of being part of a large group. Radio listeners, in particular, are said to exhibit that mass mentality. All are tied together and form a sort of society in which all individuals are accomplices and influence each other without necessarily being aware of this influence.

Ellul's work is useful because, through it, the speaker can be viewed as dealing with a singular individual that is submerged into an invisible crowd. A crowd composed of those who form a part of a mass – for our purposes, an ethnic group that shares similar ideas and lives by the same myth. The speaker is just one part of an organism, which can be a state, organisation, collective movement, or group seeking to activate the listeners to one common purpose or action. Those who are targeted as a member of the group become immersed in that sector of the population. The one that the speaker has in their sights. The listener is no longer an individual or 'Person X'. They are part of a current flowing in a specific direction. The current flows through the speaker, who is not in that moment speaking their own name or their own arguments, but instead is one segment of the organism - the State, organisation, collective movement, or group. When the speaker enters the listener's space (via a platform or media outlet like the radio, TV, or social media) to canvass the individual, the organism enters with him. No relationship exists between man and man. The organism exerts its attraction on an individual who is already a part of the mass because the individual has similar ideas and the same myths as the others who are being canvassed.

On the other hand, when propaganda is addressed to a crowd, it has to reach every individual in the crowd and the whole group. The individual has to feel like they are being looked at, like they are being addressed personally. Only then will they respond and stop being anonymous.[172] Ellul illustrates how all modern propaganda benefits from the structure of the mass while exploiting the individual's need for self-affirmation. These two actions need to be conducted simultaneously or jointly. Mass media of communication facilitates this operation because it enables the speaker to reach an entire group all at once while touching the individuals within the group. Propaganda cannot exist without the use of mass media, and the growth of social media has made it even easier to reach the mass.[173] Propaganda must be complete. By this, I mean propagandists – here, the Rwandan State – must utilise all technical means available to them, including press, radio, TV, social media, posters, meetings, and door-to-door

[172] Ibid, 8.
[173] Ibid, 9.

canvassing. Modern speakers of propaganda use all these methods of reaching the listener. It will not be effective if it does not resonate with the listener and is also received in a sporadic manner and at random. Each medium of communication has a precise way of penetration while simultaneously localised and limited.[174] Individual media cannot attack the listener, break down their resistance or make decisions for them.[175] Different media need to be used in their specific way, directed at producing the effect that is best productive and then attached to other media. Thus, each medium reaches the listener in a particular way that makes them react afresh to the same theme in the same direction, albeit differently. The media are oriented toward the public in a concerted fashion to reach the most considerable number possible.

Ellul argues that propaganda can be broken down into sociological propaganda, that is, the propaganda that infects the social climate. It is characterised by slow infiltration, progress inroads and overall integration of the mass. Alternatively, shock propaganda is intense but temporary and leads to immediate action. Different media of communication are more suited to different kinds of propaganda. Movies and human contacts are said to be better suited to sociological propaganda, whereas public meetings and posters are said to be better suited to shock propaganda. The latter undoubtedly benefitting from the transference of affect among the crowd. Sociological propaganda is a prerequisite for direct propaganda. It is slow, general, and seeks to create an environment that is favourable to initial attitudes.[176] Without this direct propaganda, which is directed at modifying opinions and attitudes, propaganda would not be effective. An analogy can be drawn with ploughing and sowing. Sociological propaganda can be compared to ploughing, while direct propaganda is compared to sowing. It is said that sociological propaganda on its own cannot induce an individual to change their actions. However, in combination with direct propaganda, it can.

To be effective, propaganda must construct a complete environment that the listener cannot escape, per Ellul.[177] If the listener is allowed an instant to reflect or meditate on themselves concerning the propagandist speaker, the listener is given a chance to escape the grasp of the organism. In that instant, the propaganda ceases to be continuous. Propaganda is then a constant action without interruption and failure. The individual is surrounded by propaganda through all possible routes. In their ideas and feelings, playing on their will and needs, and through their unconscious and conscious.[178] 'Assailing them in both their private

[174] Ibid, 9 - 10.
[175] Ibid, 10.
[176] Ibid, 15.
[177] Ibid, 18.
[178] Ibid, 11.

and public life'.[179] Propaganda should furnish them with a complete scheme for explaining the world with immediate incentives to action to be effective. Propaganda enforces a full range of intuitive knowledge that the listener should feel is susceptible to only one interpretation. An interpretation that is unique, one-sided and prevents any deviation. The myth or narrative then becomes so powerful it invades every area of consciousness, taking away any possibility of outside influence. For this to be the case, as mentioned above, there should be quasi-unanimity. The opposing side must either be negligible or stop being vocal. There cannot be any independence of the individual.[180]

The differences in sociological propaganda that creates an environment in which direct propaganda can flourish vividly illustrate how speech exists on a continuum. In a similar vein, Baker highlights how social orientations and material conditions that are not the equivalent of hate speech are essential to creating attitudes.[181] These attitudes are reflected in genocide and bitter racial discrimination. Speech exists on a continuum from the subtle to the most extreme. The extreme end of the continuum is what we term hate speech. It is argued that hate speech is rightfully outlawed for advocating violence against those perceived as the 'other,' or being so offensive it amounts to an affront against human dignity that can condition the population for violence. An illustration of the above point is the writings in *Kangura* that called on the audience to select which weapon should be used against the Tutsi. An example of the latter is *A Cockroach Cannot Give Birth to a Butterfly*, an article published in *Kangura*. The article called Tutsis' cockroaches and insisted that just like cockroaches, they would never change and claimed that they would forever remain wicked.[182]

Baker points out that for hate speech regulations to be effective in preventing a societal decline into unacceptable discrimination and prejudice, hate speech would have to be stopped early on when such speech is at the subtle end of the continuum.[183] Explicitly at a time when this type of subtle hate speech occurs daily, is coded, and to lots of people, seems inoffensive or, at a minimum, not 'seriously' offensive. Nonetheless, Baker highlights the impossibility of knowing when precisely these regulations would be meaningful in preventing the society from declining to significant levels of racism or be effective in reversing a culture that is directed that way.[184] The years before the Rwandan genocide, before racist groups like the *akazu* and

[179] Ibid, 11.
[180] Ibid, 12.
[181] C Edwin Baker, 'Autonomy and hate speech' in Hare and Weinstein, *Extreme Speech and Democracy, 147.*
[182] Jolyon Mitchell, 'Remembering the Rwandan genocide: Reconsidering the role of local and global media' 6 Global Media Journal.
[183] Baker, 148-149.
[184] Ibid, 148-9.

coordinators of RTLM: Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, had become well established, it would have been challenging to use hate speech regulations against them. Baker notes that enforcement of these regulations against these individuals would have been more likely to be blocked, created sympathy for them, or more likely used against those advancing counternarratives.[185] Bakers hypothesis is twofold. One: legal prohibitions will not cover or effectively be enforced against the people whose speech is relevant in the early stages. Two: in the later stages, legal bans are not enforced, or they are counter-productive because they create martyrs for a racist cause and/or focus on the wrong targets. In sum, 'official legal suppression of 'evil' speech could generate the very evil that motivates suppression.'[186]

Subtle hate speech is commonly associated with ethnic stereotyping, such as classifications of Tutsi women as Femme Fatales and seductive agents of the enemy.[187] In the *Hate Media Trial,* the ICTR acknowledged that coded words could condition people to perpetrate acts of violence that are independent of the words.[188] The speaker, often a chauvinist leader, generates fear, hate, and anger, which leads to a climate in which violence is considered a viable option — identifying subtle speech acts as hate speech becomes ever more difficult. Markedly, as we have seen in the context of the Rwandan genocide, the State can grasp onto symbols, those that are consistent with the historical hate narrative they have embraced, to create existential fears. Fears that they assert can only be prevented through the domination of the ethnic other. This context is not one in which hate speech, particularly that which exists on the more subtle end of the continuum, could be prevented, particularly not through the prosecution of those who contravene hate speech regulations.

While propaganda was being actively spread by the Rwandan political elite, there was a corresponding international mediation process going on. Habyarimana had agreed to open negotiations with the RPF and parties of the opposition to the exclusion of the northern extremists in March 1992, and by May, the negotiations began.[189] The RPF agreed to stop fighting and move to a wholly political struggle after meeting with the leaders of the opposition.[190] The MRNDD also signed a cease-fire with the RPF in July at the negotiations in Arusha, Tanzania. More negotiations continued for several months until the 'Broadened Base

[185] Ibid, 148.
[186] Ibid, 149.
[187] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze and 1078.*
[188] Ibid, para 1047.
[189] Kaufman, *Nationalist Passions.*
[190] Ibid 134.

Transitional Government' agreement that included the MRNDD, the Hutu opposition parties and the RPF. It is important to note that this power-sharing agreement was inherently threatening to the *akazu*.[191] There was a physical threat from the RPF troops having forty per cent of the army, and fifty per cent of the army corps, particularly as some of those troops were responsible for Hutu massacres. A symbolic and status threat was created by the need to abandon the ideology of Tutsi illegitimacy and inferiority. Lastly, a material interest threat was the result of the impending loss of power and economic gains. The left-out extremists responded with a massacre that resulted in the deaths of three hundred people in late January. The RPF retaliated with an offensive in February that resulted in the death of over two hundred civilians. The new offensive enabled the RPF to demonstrate its military superiority through an easy defeat of the Rwandan army. It also allowed it to conquer new territory before stopping north of the capital and declaring a new cease-fire. This, in turn, led members of the opposition to condemn the RPF and turn to the *akazu*.

Moderates managed to get the negotiations back under control and in the summer of 1993, leading to Habyarimana signing the Arusha Accords and thereby agreeing to a return of Tutsi refugees and an integration of the RPF into the Rwandan army. Unfortunately, by October 1993, these talks were derailed by extremist Tutsi military officers who murdered moderate Hutu President Melchior Ndadaye of Burundi and took power in a coup. That radicalised Rwandan politics and produced a chain of violence that ultimately led to the death of 50,000 in Burundi, and 150,000 Hutu refugees in Rwanda, what is more, previously moderate members of the opposition formed 'Hutu Power' factions allied with the CDR and sanctioned its genocidal ideas. En-route from Arusha, where Habyarimana made a promise to implement the Accords due to foreign pressure, his plane was shot down on approach to Kigali Airport. That was the trigger of the genocide. Shortly thereafter, Rwandan 'peasants' were called up to perform 'community service work' against the Tutsi.[192] Work that they had become socialised into a predisposition to accept. Even when it was clear from the special speakers and the military men that this was not the usual *umuganda*. The reason that a vast majority of the population participated in mass killings can be elucidated by a quote from an elderly participant who said, 'I am ashamed, but what would you have done if you had been in my place? Either you took part in the massacre, or else you were massacred yourself. So, I took weapons, and I defended the members of my tribe against the Tutsi'.[193] He pleads compulsion, the likes of

[191] Ibid 141.
[192] Ibid 143.
[193] Prunier 247.

which there is evidence that soldiers and militiamen indicated to refuse was to risk death. But, at the same time, he agrees with a propagandist view that he was aware was mistaken by mythifying the Tutsi as aggressive enemies, demonstrating how ideology, prejudice, fear and compulsion were crucial in getting mass participation in violence.[194]

Propaganda shows the manner in which mythic structures can be operationalised, not simply as a way to generate tension but to begin and direct cycles of violence. To facilitate their infection of the social climate through propaganda, the government monopolised control of media outlets, primarily the radio, through *inter alia* denial of licenses and by presenting RTLM as the only 'true' voice of the people in the countryside, accompanying it with propagandist materials in *Kangura*. For years, they began planting seeds of discord (sociological propaganda), thereby crystallising the Hutu myth-symbol complex. Sociological propaganda took the form of publications and broadcasts that dehumanised the Tutsi as cockroaches, asked what weapons should be used against them (suggesting a machete), drew on historical narratives, like the Tutsi feudal regime, and so on. As a result, three symbols were able to resonate and arouse intense emotions, namely the Kalinga, alleged misdeeds of Tutsi elders, and the supposed Tutsi goal of feudalism resembling slavery. Until one day, they were in receipt of calls to action to 'defend' the Hutu against the Tutsi 'cockroaches', 'aliens', 'feudalists' and other terms that had raised to prominence over the years (direct propaganda). The reason that the symbols were able to rouse extreme emotions will be assessed below by looking at the roots of symbolic attachment.

1.6 Symbolic Attachment

As a final point of introduction to SPT, it is perhaps useful to return to the myth-symbol complex, but this time to look at it from the opposite perspective. Instead of focusing on myths as we did in section 1.1 of this chapter, here let us explore the way symbols work. A symbol is an object used by people to index meanings that are not inherent in or discernible from the object itself.[195] Rothman points out that the use of symbols is driven by the human need to order the 'blooming, buzzing confusion of experience' and bestow the order with meaning.[196] Anything can be a symbol, a word, a phrase, a gesture, a person, a place, an event, or even a thing. The object becomes a symbol when people place meaning, value, or significance in it,

[194] Kaufman, *Nationalist Passions 143.*
[195] Roger W Cobb and Charles D Elder, *The Political Uses of Symbols* (Longman 1983), 29.
[196] Rothman 285.

which is not from or determined by the properties intrinsic in its physical form.[197] Regarding political symbols, they can revolve around the political community like the 'Constitution', or regime norms, structures, and roles like 'One Man, One Vote'. and situational symbols of current authorities, like the 'Kibaki Administration', non-governmental political actors, like the Kenya National Commission on Human Rights, and policies and policy issues, like the 'Right to Life'. Ethnic and national symbols are said to be more powerful because they allow politicians to reinterpret a conflict of interest as a struggle for security, status, and the future of the group.[198] These symbols assign meaning to events and actions by typically defining enemies and heroes and tying ideas of right and wrong to people's identity.[199] The ethnic warrior becomes epitomised as fighting for their identity for self-respect, material goods in self-interest, clan survival, and territory. If successful, the warrior is thought to be immortal, and in so being an everlasting symbol of the people. Symbols provide a crucial link between the individual and the larger social-political order and synchronise the various motivations of different individuals, thereby facilitating collective action.[200]

Symbols are held to derive their substance from myths and rituals that characterise popular culture.[201] Parties and other political symbols are shaped extensively by indoctrination into perceived truths and cultural understandings. Cyclically, myths contribute to the affective resonance of political parties and political symbols, which in turn reinforce the myths that make them so able to affect people. These rituals in the form of, for example, ceremonies and behavioural routines are useful in affirming or giving evidence of the accuracy of the myths. Myths represent pre-packaged symbolic orientations that are easily internalised. While myths represent inconsistent pieces of political culture, they provide lessons that are never fully integrated. They provide splintered opinion molecules. Accordingly, Elder and Cobb assert that myths provide an essential medium through which substantive content is added to affectively loaded symbolic orientations emerging through processes of political socialisation.

Kaufman claims that emotionally loaded symbols (like the Kalinga drum, violent misdeeds of Tutsi elders, and purported Tutsi goal of enslaving the Hutu) are generated by myths and historical memories.[202] However, in their research, Elder and Cobb demonstrate that symbols become imbued with either substantive or associational meaning through several

---

[197] Leslie White, *The Science of Culture: A Study of Man and Civilisation* (Grove Press 1949), 25.
[198] Kaufman, 'Symbolic Politics or Rational Choice? Testing Theories of Extreme Ethnic Violence', 52.
[199] Kaufman, *Modern hatreds: The symbolic politics of ethnic war, 16 and 20.*
[200] Cobb and Elder, 1 and 27.
[201] Ibid, 53-54.
[202] Kaufman, *Modern hatreds: The symbolic politics of ethnic war, 30.*

processes, not merely myths and historical memories. The power of the symbol either comes from its emotional charge, which is the same element that makes cognitions dissonant or consonant. Alternatively, their power may come from their associative meanings and the ambiguities that permit them.[203] These components determine the person's orientation toward a symbol and contribute to the way they use and react to it.[204] People tend to perceive and interpret political stimuli in such a way as to make it consistent with their existing predispositions.[205] Three biases, namely consistency, positivity and agreement, combine to contribute to relatively stable and substantially uncritical assessments of politics and the political system. The individual's orientation to a symbol derives from both the emotive and cognitive component that result in the emotional and cognitive effects, which make symbols so powerful.[206] The former is usually referred to as affect or the affective component. A person's affective orientation toward a symbol is the positive or negative sentiment they associate with the symbol and the intensity of that sentiment. Brennan distinguishes between this definition of affect as one deployed in feeling and discernment rather than physiological phenomena.[207] Feelings she maintains are different from affects. For instance, when someone feels angry, they feel the passage of anger through them; the difference is what they feel rather than what they feel with. A symbol also indexes the affect a person has on something else. Whether the symbol engages the affect is contingent on the way the object is used. Suppose the object is used in a way, situation, or context that is irrelevant to the symbolic meaning a person associates with it. In that case, it will not stimulate the affective sentiment of that individual.

The cognitive component refers to meanings indexed with the symbol; virtually all the person knows about it and what it represents.[208] 'Know' does not refer to objective knowledge. Instead, it refers to what the individual knows to be true, including uninformed opinion and vague associations of the object with things or persons. Through their research, Erikson, Luttbeg and Tedin have determined that widespread knowledge and public opinion are predicated on limited information and generally remain substantively weak.[209] Since a symbol has no intrinsic meaning, its meaning is derived from a reality external to the individual and

---

[203] Robert Edwards Lane, *Political thinking and consciousness: The private life of the political mind* (Markham Publishing Company 1969), 316.
[204] Ibid, 37-41.
[205] Cobb and Elder, 11.
[206] Lane, 37-46 and 58-62.
[207] Teresa Brennan, *The Transmission of Affect* (Cornell University Press 2004), 5.
[208] Cobb and Elder, 37 - 41.
[209] Robert S Erikson and Kent L Tedin, *American Public Opinion: Its Origins, Content and Impact* (Routledge 2015), 19-25.

the individual's interpretation and conception of that reality. The meaning given is then based on the ideas and information stored in their mind. New information rarely causes extensive changes as the individual's values and beliefs are stable over time. Thus, the individual may assign meaning to a symbol based on their self-conception and the groups or people that they do or do not identify with to locate themselves in the social order. Alternatively, the associational meaning is derived from the position the individual associates with groups or people they use as a reference. To the extent that they rely on that identification to give meaning to a symbol, they effectively suspend their own judgement and accept or reject the affective assessments of others based on who they are. With specific regard to political symbols, Elder and Cobb note that people rely heavily on social identifications to give cognitive meaning to their symbolic orientation. [210]

Those who are more involved in politics rely more prominently on substantive meanings than associational ones. Substantive meanings are said to add substance and thereby play a more prominent role by giving substance to politics and direction to public policy. The cache of substantive meanings that inform the individual's symbolic orientation represents the information acquired throughout their life experience and socialisation.[211] This information creates values and beliefs, and the meanings indexed with these values and beliefs establish their dispositional structure. The individual dispositional structure is the product of non-conscious learning and is still extensively unexamined. It represents a fundamental part of an individual's basic identity and supplies a basic frame of reference for relating to the outside world. The dispositional structure defines an individual's political worldview and gives substantive meanings to their symbolic orientations. Lane submits that the individual's dispositional structure is based on a set of primitive assumptions that they make about the world and the way it works. Assumptions about human nature, the nature of society and the physical world based on empirical, normative and political premises embedded in the dispositional structure. The assumptions that shape the individual's conception of their world are accepted by them as matters of fact despite being beyond proof. They are referred to as empirical premises. Empirical premises are, in turn, based on a set of ideas about what is important and the rules of conduct that should govern social life referred to as normative premises. Normative premises refer to matters of preference or value rather than of fact. Normative premises are taken as givens and accepted as self-evident. Political premises are closely related to normative

[210] Cobb and Elder, 42.
[211] Ibid, 43-47.

premises, and they are not embedded in the dispositional structure as deep as the other premises.

It is worth highlighting that symbols can take on different meanings for different people as a result of both differences in dispositional structures and differences in which the content domain is engaged. For example, a symbol may engage empirical premises and political prescriptions or no domain at all. The latter would render the symbol substantively meaningless. If the symbol is meaningless, the cognitive meaning will generally be associational, arising from positive or negative identifications from people or groups for whom the symbol has substantive meaning.[212] The potential to arouse the attention of an individual is greater the higher the number of content domains engaged. Therefore, meaning and potency vary from individual to individual according to the differences in the content domains engaged. There are also possibilities for growth and change in shifting circumstances because of differences in the dispositional structure. Sometimes content is integrated and interdependent; other times, it is disjointed and mutually inconsistent or lies somewhere in between. That will directly correlate with the complexity of meanings engaged by a symbol and the effect of new information.

Regarding the way the person's affective and cognitive domain connect, these linkages develop from the functioning needs of the individual, though not necessarily in a conscious manner, which is referred to as an active linkage. Contrastingly, passive linkages are formed when the affective and cognitive domains are connected through training received as part of basic socialisation. Smith, Bruner, and White identify three main functions that an individual orientation toward an object can serve, namely object appraisal, social adjustment, and externalisation.[213] Externalisation is said to account for more extreme views in politics, but object appraisal and social adjustment are the more common causes of self-activated symbolic attachments.[214] The functions correlate with various needs and psychological imperatives that an individual experiences and seeks to satisfy in relating to the outside world.

For the object appraisal, the affective component of the individual's orientation to the symbol follows logically from the cognitive component. The cognitive content comes from the individual's objective assessment of the objects or situations that the symbol is presumed to reference. This includes identifying relevant facts from referent information. Facts are then

[212] Ibid, 47-48.
[213] M Brewster Smith, Jerome S Bruner and Robert W White, 'Opinions and Personality' as cited in Cobb and Elder, 48.
[214] Cobb and Elder, 49-52.

interpreted with account of the individual's values and beliefs to create the cognitive content. An accurate account of reality is important, but there are plenty of uncertainties and intense informational costs that may lead to other factors like social relations and peace being considered more important. Social adjustment is an alternative method of linkage formation, in which cues are given by reference groups and authority figures and used as guides for people coming up with their own posture to the symbol. By orienting oneself to the symbol in a way that is consistent with how others view the symbol, the individual avoids the more taxing demands and potential risks of an independent appraisal. Additionally, in sharing one's views with others, the individual affirms identification with them and validates the claim to being like them. Thus, cognitive meanings associated with social adjustment are primarily associational. In externalisation, the cognitive and affective linkages are formed as a psychological defence mechanism used to soothe anxieties and cope with personal problems that individuals are afraid to confront directly. The symbolic object serves as a convenient focus for hostilities with little or nothing to do with the substantive content through which they are rationalised. The substantive meaning attributed to the symbol is liable to be of secondary importance to the affective sentiments it serves to focus.

Passive linkages are based on two assumptions, namely the primacy principle and the structuring principle. The former maintains that early learning, though subject to future modifications, tends to have an enduring effect on political orientations. The latter builds on the former and adds that basic orientations during childhood structure the later learning of specific issue beliefs. Children's early images of politics are characterised by orientations to political objects to which they barely have any substantial knowledge. The child's orientation towards these symbols are essentially affective in nature and tend to reflect culturally prescribed sentiments. They are filled with ill-defined associational meanings rather than cognitive content. The stronger the parents view, the more likely the child will adopt their views for themselves. Thus, the affective sentiments that dominate a child's early images of politics are likely to have a lasting effect and condition subsequent learning providing the foundations for identification and loyalties.[215] As the child matures, they may assign more substantive meaning to certain symbols. Nonetheless, this will be based on their dispositional structure, which is perpetually tainted by earlier affectively loaded symbolic identifications.

[215] David Easton and Jack Dennis, *Children in the Political System: Origins of Political Legitimacy* (McGraw-Hill Book Company 1980), 128-137.

1.7 The Rational Choice Critique of Symbolic Politics Theory

SPT provides a useful way into the PEV in Kenya. It helps us understand the reasons, emotions, environments and effects of the violence. However, this is not an uncritical adoption of SPT. It is useful to address two key critiques of SPT to clarify my use of the theory. One of the most prominent criticisms of SPT is from rational choice theory. The main point of contention is the way to conceive of the individual subject who is engaged in conflict. SPT views the subject as mostly irrational and driven by emotions and biases that are susceptible to manipulation by leaders through symbols. On the other hand, rational choice theory (RCT) views the subject as rational and as virtually always engaged in a value-maximising calculation such that when the benefit of conflict out ways the cost – conflict is said to result. RCT is based on neoclassical economic theories of conflict and became used to denote a rational choice perspective applied to social behaviour.[216] It uses the instrumentalist understanding of ethnic identity, which asserts that ethnicity is a tool used by individuals, groups or elites to gain some larger generally material interest.[217] It emerged during the 1990s, led by Hirsh Leifer and Grossman, when economic models of conflict based on methodological individualism and rational choice started to flourish, reflecting the encroachment into the social sciences by orthodox economics.[218] For Hirshleifer, people are faced with two choices, either producing or appropriating.[219] When the opportunity cost of violence is not prohibitive, he claims that violence will ensue. Grossman focuses on the risk versus payoff trade-off.[220] According to Grossman, if the payoff of conflict outweighs the calculated risk, then conflict is chosen, or more time is allocated to an insurgency. Models proposed by Grossman and Hirshleifer fail to explain what factors result in the choice of war. They fail to describe the factors that lead groups to develop mutually inconsistent opportunity sets that make fighting more profitable at the margin of exchange than peace.[221]

RCT uses and generalises four ingredients from its neoclassical economic counterpart, namely: methodological individualism, the principle of actor maximization, the concept of the

---

[216] Christopher Cramer, 'Homo Economicus Goes To War: Methodological Individualism, Rational Choice and the Political Economy of War' 30 World Development 1845, 1845. Gary Becker, 'Interview: Gary Becker' in Richard Swedberg (ed), *Economics and Sociology: Redefining Their Boundaries: Conversations with Economists and Sociologists* (Princeton University Press 1990).
[217] Kaufman, 'Symbolic Politics or Rational Choice? Testing Theories of Extreme Ethnic Violence', 49.
[218] Cramer, 1846.
[219] Jack Hirshleifer, *The Dark Side of The Force: Economic Foundations of Conflict Theory* (Cambridge University Press 2001). Cramer, 1847.
[220] Herschell I Grossman, 'A General Equilibrium Model of Insurrections' The American Economic Review 912. Cramer, 1847.
[221] Cramer, 1847.

social optimum and the notion of system equilibrium.[222] Theorists of RCT seek to rehabilitate the individual subject engaged in conflict as a 'generalized embodiment of the old, good fellow *homo economicus*'.[223] *Homo economicus* is described as a free man, unsocialised, self-interested, not constrained by norms. Instead, he is envisioned as only rationally calculating to further his own self-interest.[224] Therefore, under rational choice models, the individual is imagined as one who is wholly rational, the core assumption is all behaviour is best explained at an individual level and motivated by micro-rational concerns.[225]

The use of the *homo economicus* persona can be criticised as being based on an idea of the individual as inertial, absolute, disembodied, and independent, basically, as either a saint or an angel.[226] As much as this illusionary world of invariance occupied by saints and angels is convenient and parsimonious for RCT models, humans are no angels.[227] Instead, we are living, changing, dying creatures and entities implanted in time and constituted through changing relationships. Thus, the rational choice ecosphere boils down to a counter-utopian *Brave New World* which exists as an open prison populated by monads as happy slaves who are permitted, stimulated and subtly forced to engage in persistent and inconsistent utility maximisation or commodification while being denied individual liberties, and non-rational choices like intimacy, and human rights.[228] This world creates a contradictory bond of anarchy and abundance with social overcontrol infringing into private life.

RCT generalises the economic archetype of rational choice, so much so the model of competition in collective decisions is conceived in a similar manner to the way the free market is conceived in economic exchange.[229] Additionally, there is a focus on individual interest to the exclusion of the idea that is downgraded to the status of a by-product. Yet, this denies the individual commitment to nationalist ideals. [230] In relation to the individual concern for collective interests or attachment to religious, cultural or group identity, rational choice models either do not consider them or downplays them. It is assumed that individuals become part of

---

[222] Milan Zafirovski, 'The Rational Choice Generalization of Neoclassical Economics Reconsidered: Any Theoretical Legitimation for Economic Imperialism?' 18 Sociological Theory 448, 451.
[223] Ibid, 451.
[224] James Samuel Coleman, *Individual Interests and Collective Action: Selected Essays* (Cambridge University Press Cambridge 1986), 15.
[225] Chaim Kaufmann, 'Rational Choice and Progress in the Study of Ethnic Conflict: A Review Essay' 14 Security Studies 178, 181.
[226] Harrison C White, *Identity and Control: A Structural Theory of Social Action* (Princeton University Press 1992), 301.
[227] Margaret Somers, 'We're No Angels: Realism, Rational Choice, and Rationality in Social Science' Centre for Research on Social Organisation Working Paper, 34-35.
[228] Zafirovski, 465.
[229] Coleman, 33.
[230] Kaufmann, 180.

ethnic groups because of politicians who stimulate the formation of competitively aligned ethnic groups. These politicians are held to stimulate group formation because of the competition for power and for the benefits of modernity, in addition to the prestige the acquisition of power confers. At the same time, politicians are said to act like captives to forces they helped create.[231] For instance, Hardin proposes that self-interest promotes group identification by granting access to positions and benefits controlled by the group. Once group identifications have been granted in this way, individuals graduate from the belief that it is in their group's interest for them to dominate other groups to it's their group's right and moral duty to do so. Using psychological justifications, as Hardin does, distorts the distinction between socio-psychological explanations and rational choice ones. Kaufman asserts that this explanation allows emotional bases for attachment, thereby blurring the distinction between rational choice and traditional understandings of nationalism.[232] What is more, the existence of ethnic conflict contradicts RCTs core assumption because if people are purely motivated by individual interests, there is no reason they would be prepared to accept net losses of material welfare to support group identity. It also does not adequately explain the reason individuals do not switch between groups with more resources and higher chances of victory, particularly as models in RCT exclude purely psychic benefits as determinants of behaviour.

RCT is further divided into two models, explicitly the Pure Uncertainty Security Dilemma Model and the Elite Predation Model. The Pure Uncertainty Security Dilemma Model is built on Fearon's work around international conflict. Fearon argues that even when neither side wants war, it is still likely to occur due to insecurity and uncertainty.[233] The causal chain begins with leaders appreciating the cost of war and opting for a negotiated bargain.[234] However, they are said to encounter several problems, like what Lake and Rothchild describe as information failures that lead to both an overestimation of their rival's hostility and a miscalculation of the realistic outcome of the fighting.[235] Information failure is described as a scenario in which individuals and groups possess private information and incentives to misrepresent that information where competing group interests produce actual conflict. Lake and Rothchild assert that another problem is the difficulty with credible commitment, as at least one group cannot effectively reassure the other that they will not default the agreement or

[231] Donald Rothchild and Victor A Olorunsola, State *Versus Ethnic Claims: African Policy Dilemmas* (Westview Press 1983), 161.
[232] Kaufmann, 183.
[233] James D Fearon, 'Rationalist Explanations for War' 49 International Organization 379, 381-382.
[234] Kaufman, 'Symbolic Politics or Rational Choice? Testing Theories of Extreme Ethnic Violence', 57.
[235] David A Lake and Donald Rothchild, 'Containing Fear: The Origins and Management of Ethnic Conflict' 21 International Security 41, 46.

exploit it later.[236] Under this model, conflict is set to begin when one side to the conflict launches a pre-emptive attack in the pursuit of military advantage.

Alternatively, the Elite-Predation Model begins with the assertion that the Pure Uncertainty Security Dilemma is not in itself sufficient to explain conditions in which hawkish leaders or subgroups succeed in garnering the support of a reticent public audience that typically prefers peace over violence.[237] Therefore, Figueredo and Weingast seek to add two elements to the Pure Uncertainty Model. Accordingly, in the Elite-Predation model, predatory elites or mass uncertainty is held to lead to violence.[238] The logical chain begins with predatory elites opting for violence as a strategy to maintain power but not sharing this strategy with their followers.[239] The violent strategy is then identified as the best way for maintaining power in what Figueiredo and Weingast call *gambling for resurrection*. This is described as an attempt to maintain power by encouraging a massive change in the environment with only a slim chance of success.[240] Leaders resort to predation to change their environment. That is, the provocation of violence to change the agenda towards issues that favour the leader remaining in power.[241] Public support falls in favour of the leader's aggressive policy because the public is afraid of a possible attack by the opposition. Finally, members of the public who would ordinarily prefer peace become uncertain about sources of conflict and attribute violence to the opposition, even those for which their leaders may be responsible.

RCT and SPT are similar in the way they view the instrumental use of ethnicity. However, RCT posits that ethnicity is useful in as far as it furthers the self-interest of the leadership by galvanising supporters or factors into the pursuit of value-maximisation. In contrast, SPT views the use of ethnicity as fundamental in the construction of symbols and the ability for leaders to manipulate them. What is more, Kaufman insists that the instrumental use of ethnicity is limited by the cultural context in which these politicians operate.[242] RCT and SPT are also similar in the way that SPT acknowledges that there can be economic motivations for conflict. Kaufman argues that adequate theories of ethnic conflict must include insights from explanations of ethnic conflict that are centred on economic rivalry similar to RCT. However, SPT does not rely on individual interest as the main deliberation in ethnic conflict.

---

[236] Ibid, 48.
[237] Rui de Figueiredo and Barry Weingast, 'The Rationality of Fear: Political Opportunism and Ethnic Conflict' in Barbara F Walter, Jack L Snyder and Jack Snyder (eds), *Civil Wars, Insecurity and Intervention* (Columbia University Press 1999), 262.
[238] Ibid, 262-263.
[239] Ibid, 263-264.
[240] Ibid, 263.
[241] Kaufman, 'Symbolic Politics or Rational Choice? Testing Theories of Extreme Ethnic Violence', 50.
[242] Ibid, 51.

Indeed, SPT demonstrates that people seldom do the value-maximising cost-benefit analysis that rational choice theorists assume is the basis of their character.[243] Further, scientific data shows that emotions are dispositions to action in individuals, thereby contradicting rational choice theorists' reliance on the *homo economicus,* who is envisioned as entirely rational.[244] Thus, a suitable amount of emotion is held to be beneficial for many reasons, for example, stimulating rational decision making by helping in prioritising sensory data, helping sustain attention, and so on. For this reason, the inability of RCT to provide a framework for understanding violence in conflicts where ethnicity was more of a delineating factor than economic gain illustrates a more far-reaching problem. That is, RCT does not explain why groups divide along ethnic lines or why members don't switch to other groups when faced with the promise of more resources, like cash payments, rather than having to contribute towards violence with no personal benefit to be had.

RCT models are overly reductionist, highly speculative, and profoundly misleading.[245] They are abstract and remain wholly speculative until empirical content is added.[246] On top of that, as the social, the historical, and the cultural are left out of the initial framework when they are inevitably brought back later, their addition is arbitrarily selective. There is no basis for assuming that people everywhere experience a choice of conflict or co-operation as one defined solely in terms of profitability, especially when historical evidence demonstrates how conflict is generally institutionalised.[247] What is more, there is no solid basis for asserting that people cannot be mobilised by ideology or promises of change such as employment conditions or conditions of production due to time preference or leadership credibility problems. History and contemporary democratic politics are defined by political enthusiasm for numerous political pledges even when these pledges are unfulfilled.[248]

In sum, neoclassical economic principles do not offer a basis for the generalisation of rational choice to all social phenomena.[249] Therefore, for the neoclassical economists and their founders who accept the distinctiveness of non-economic phenomena, *homo economicus* is an abstraction of one aspect of human behaviour. Even in the market economy, they eventually realise that life is 'ontologically irrational'.[250] Contrastingly, SPT envisions the motivations of

---

[243] Kaufman, *Nationalist Passions, 12.*
[244] William J Long and Peter Brecke, *War and reconciliation: Reason and emotion in conflict resolution* (MIT Press 2003), 124.
[245] Cramer, 1849.
[246] Ibid, 1850.
[247] Ibid, 1850.
[248] Ibid, 1850.
[249] Ibid, 1855.
[250] Zafirovski, 453.

the human actor who engages in conflict as more 'irrational' based primarily on their biases and emotions encoded in the group's myth-symbol complex.[251] SPT paints a more accurate representation of conflict by using insights from explanations of ethnic conflict centred on manipulative leaders and 'ancient hatreds'. The difference in approaches results at least partly from the different views of ethnicity in the respective theories.

Fearon and Laitin reject the use of the myth-symbol complex, arguing that discursive and cultural systems at best create a disposition for extensive violence, and this discourse is too widespread to explain differences in levels of violence across cases.[252] Nonetheless, they have failed to prove that incompatible values do not contribute to violence, especially when these incompatible values have proven to be definitive in groups failing to arrive at a consensus because they see the domination of the opposition as the best or only route to group survival.[253] As seen in Kaufman's analysis of the Rwandan conflict that he asserts was driven by incompatible values as defined in the conflicting hostile Hutu and Tutsi mythologies. As we have seen, the Hutu's existential fear was derived from colonialist narratives that cast Tutsi as alien invaders. This became the basis for Hutu claims that the Tutsi had no legitimate right to be in the country. Conversely, the Tutsi diaspora, which had been prevented from returning to Rwanda by Hutu leadership, cast the RPF as liberators from the Hutu tyranny. [254] These narratives of hostility to the Tutsis became a core part of the Hutu identity and served to fuel the 1994 genocide.

1.8 The Non-Representational Theory Critique of Symbolic Politics Theory

Non-representation theory provides a useful counterpoint critique. Rather than studying the structure and symbolic meanings of objects and relations, non-representational theorists focus on becoming entangled in those objects and relations.[255] Non-representational theories are discontented with the structuralist heritage of the social sciences and apprehensive of their at times frantic search to uncover symbolic meaning where there are other more practical forms of meaning or no meaning at all.[256] Non-representational theorists feel a deep aversion for the hyper-empirical conservative tendencies, a convention of realism, and the manifestation of

[251] Kaufman, *Nationalist Passions, 5.*
[252] Fearon and Laitin, 863.
[253] Kaufman, 'Symbolic Politics or Rational Choice? Testing Theories of Extreme Ethnic Violence', 81.
[254] Ibid, 82.
[255] Phillip Vannini, 'Non-Representational Research Methodologies: An Introduction' in Phillip Vannini (ed), *Non-Representational Methodologies: Re-Envisioning Research* (Routledge 2015), 15.
[256] Ibid, 4.

positivism within the social sciences.[257] For example, virtually all reputable schools of psychological theory assume the subject is self-contained in relation to energy and affect.[258] However, non-representational theorists find that the subject is not affectively contained. These theorists are sceptical of the widespread methodological individualism, and the inclination to single out, bracket and narrow down phenomena, and the humanistic bias for conflating the cultural and social with human exceptionalism.[259] They point out that the foundational fantasy of psychoanalysis is the way it explains how individuals come to think of themselves as separate from others.[260] This does not account for the levels of energy, in which individuals are not separate from each other, the level at which the affect of one individual affects another and vice versa.

Instead, non-representational theorists suggest a relational view of the lifeworld that concentrates on the intersection between the metaphysical and the material.[261] A space where different things come together, not just deliberative humans, but a diverse range of actors and forces, which are both known and not known, and others are on the edge of awareness.[262] Non-representational research examines affective resonances.[263] Affect can be considered a pull and push, an intensity of feeling, a passion, a sensation, an atmosphere, an urge, a mood, a drive – all of the above or none of it. Affect is embodied but not limited to the body. Among the many concerns that spawned the growth of non-representation theory was the desire for more than the constructivist practices of 'reading' the human body and its perpetual representations in several media as if it were a text. Therefore, researchers of non-representational methodologies study affect as a capacity, specifically the body's capacity to be moved and be affected and the body's capacity to move and affect other people and things. The reliance on myth adopts a narrower view of the body overlooking its ability to affect and be affected by various forms of matter.[264] Affect theory illustrates that the body is in perpetual becoming through its encounters within itself and everyday matter. A body is as much outside itself as in itself, intertwined in its relations, until such rigid distinctions do not matter.[265] According to Seigworth and Gregg,

[257] Ibid, 5.
[258] Brennan, 2.
[259] Vannini, 8.
[260] Brennan, 13-4.
[261] Vannini, 8.
[262] Ben Anderson and Paul Harrison, 'The Promise of Non-Representational Theories' in Ben Anderson and Paul Harrison (eds), *Taking-Place: Non-Representational Theories and Geography* (Ashgate 2010), 11.
[263] Vannini, 8-9.
[264] Melissa Gregg and Gregory J Seigworth, *The Affect Theory Reader* (Duke University Press 2010), 3.
[265] Ibid, 3.

the body is always becoming otherwise, albeit at times slightly, from what it is.[266] Affect can be further understood as a gradient of bodily capacity. A flexible incrementalism of consistently changing force-relations. [267] Force relations that rise and fall not only along with various encounters but also through sensation and sensibility, and incrementalism that coincides with behaviour and matter of effectively any and every sort.

Latour contends that 'to have a body is to learn to be affected, meaning 'effectuated,' moved, put into motion by other entities, humans or nonhumans.'[268] In a similar vein, Massumi points out that affect is generally about the changing capacity of the body as it engages with the world and with its own complexity.[269] He views affect broadly as the power to affect and be affected. Affect as a 'series of forces that are in-between bodies, within bodies, and between bodies and world.'[270] That is, affects arise from within and without of a particular individual, from the individual's interaction with their environment.[271] They have a physiological impact. When someone affects something, they open themselves up to being affected in turn, and in a slightly different way than previously. [272] The transition, however slight, passes the individual over the threshold. Affect is this passing of a threshold that is seen from the perspective of the change in capacity, with every transition being joined by a feeling of the change in capacity.

Additionally, the emotions and affects of an individual, with the enhancing and depressing energies these affects entail, can enter into another through what Brennan calls transmission of affect.[273] When the individual picks up another's affect, their visual and linguistic content, namely the thoughts that they attach to the affect, remain their own.[274] They remain the product of a specific historical conjunction of words and experiences that they represent while remaining entangled in the affect. There are said to be two kinds of transmission of affect, namely transmission through which people become alike and the transmission in which they take on opposing affective threads like the lover and the loved.[275] In relation to the former, neuroscientists refer to the process as either chemical or electrical entrainment, which is a form of transmission whereby individuals or group's nervous and

---

[266] Ibid, 3.
[267] Ibid, 2.
[268]Bruno Latour, 'How to Talk About the Body? The Normative Dimension of Science Studies' 10 Body & Society 205, as cited in Gregg and Seigworth, 11.
[269] Adventures in Jutland, 'Affect- A Basic Summary of Approaches'.
[270] Ibid.
[271] Brennan, 3.
[272] Jutland.
[273] Brennan, 3.
[274] Ibid, 7.
[275] Ibid, 9.

hormonal systems are brought into alignment with another's. Chemical entrainment works mainly through smell, what is known as unconscious olfaction. Brennan suggests that smell is key to how individuals feel the atmosphere or pick up on or react to another's depression without having a conversation or visual queue from which the information could be conveyed. For instance, pheromones, airborne molecules that communicate chemical information, signal and generate reactions through an unnoticeable odour in various hormonal interactions, such as aggression.

Brennan also suggests that hormonal interactions account for the way the hormonal process situations people in similar and different emotional places like the abused and the abuser. It is not only smell, as Brennan notes, that people can feel alike and act alike because they not only imbibe each other through smell but also through observation.[276] She disputes that sight in itself can lead to this transmission. To say so would suggest that our boundaries stay intact. However, neuronal communication and smell are not 'respecters of persons'.[277] People are said to maintain a distinct identity through discerning to whom the transmission of affect belongs and having an ability to distance themselves and detach, dubbed an ability of self-containment.[278] Another way to maintain a distinct identity is through unconscious projection, where affects are directed outward without the individual acknowledging this is being done. Nonetheless, today people who may experience the transmission of affect are more approving of logical arguments for its existence.[279]

This presents a problem for SPT, which is overwhelmingly focused on the linguistic dynamics, the symbolism and their relation to mythic narratives. However, in very different ways, affect theory and SPT demonstrate how language, gestures, acts and objects can affect the actions of a group of people all at once. SPT would focus on a symbol as it originates a feeling of anger and hostility, while affect theory (at least in some forms) would explore the communication between bodies. In both cases, the end-product is a people united in their anger and hostility to those perceived as perpetrators of past violence or violence that is pre-ordained to occur in the future. While this thesis will primarily deploy SPT, it remains sensitive to the non-representational affective dynamics of the situations. The thesis will consider the energy excited by speech acts and how they can lead to acts of unspeakable violence.

[276] Ibid, 10.
[277] Ibid, 10.
[278] Ibid, 11.
[279] Ibid, 18.

2. The Regulation of Speech

This thesis sets out to explore the Kenyan 2007-08 PEV crisis. In particular, it explores the emergence of structures of identification that intensify and accelerate inter-group rivalries. While SPT is useful to explore the immediate deployment of the myth-symbol complex, it is less useful in showing the way that speech can be used by the State to contribute to the affective conditioning of a population. SPT's in-depth analysis of the particular mythic and symbolic dynamics of violence tends to eschew a macro-level analysis of how the State legitimises linguistic violence and injures, maims, or even kills those who do not abide by state-sanctioned narratives of identity, or those who oppose the cultural hegemony.[280] In order to explore this side of things, we turn to the work of Judith Butler, in particular, the elements of her work that explore hate speech regulation. This part of the chapter starts by analysing the (primarily) US-oriented free speech/hate speech debate before discussing Butler's theories. I argue that the regulation of speech is not bad, but it is dangerous. Speech posing a clear and present danger of substantive wrongdoing or is so offensive that it is an affront against human dignity, is rightfully outlawed. The danger arises from the selective use of normative frameworks to understand and evaluate frameworks that conveniently serve to impose the state's homogeneity, often against those voicing dissent. Finally, I consider how states legitimise linguistic violence before considering the limits of the Western discourses on hate speech.

2.1 Situating the Western Debates on Free Speech

Authors like Mari Matsuda, Patricia Williams, Richard Delgado, and Jeremy Waldron, who are in favour of hate speech regulations, connect current acts of hate speech to future physical acts of violence like bomb-throwing, even though no causal connection is located or very often is even capable of being located.[281] These proponents of hate speech regulations argue that hate speech has the effect of depriving citizens, particularly minorities, of full access to the benefits of citizenship. [282] These regulations are also thought to be a way to prevent these effects and violence that stems from the environment created. In *Words That Wound,* the authors claim

[280] Butler and Salih 217.

[281] Mari J Matsuda, *Words that wound: Critical race theory, assaultive speech, and the first amendment* (Westview Press 1993) 22. Patricia Williams, 'Spirit-murdering the messenger: The discourse of fingerpointing as the law's response to racism' 42 U Miami L Rev 127. Richard Delgado, 'Words that wound: A tort action for racial insults, epithets, and name-calling' 17 Harv CR-CLL Rev 133. Jeremy Waldron, *The harm in hate speech* (Harvard University Press 2012).

[282] Matsuda, 1.

that speech acts that amount to hate speech are intrinsically harmful.[283] Harm is thought to derive from actual injury inflicted just by being a target of speech, as targets are constructed as victims who must prove that they did not misunderstand the intent, distort the circumstances, or enjoy the experience.[284] Matsuda characterises the effects of hate messages as psychological symptoms and emotional distress ranging from fear to rapid pulse rate, difficulty breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis and suicide. Patricia Williams goes further describing the effect of racism, specifically racist speech, as a crime so painful and assaultive that it commits what she identifies as spirit murder that psychically destroys the target's experience.[285] According to Williams, these racist speech acts are similar to child abuse and mistreatment of women because they are an external intrusion into the being that dominating powers enact to prevent the self from seeing itself.[286]

Waldron emphasises the psychological complexity that targets feel when faced with hate messages. More than emotional distress, targets are said to be faced with an overabundance of thoughts and emotions that are not easily distinguishable, including fear.[287] Fear not just of running into the same message or a similar one, but also fear of the violence that may result, especially when there is a history of people with similar ascriptive characteristics (like race, religion, and ethnicity) being humiliated, hunted or punished for their words and beliefs. These emotions and ideas are said to be intensified when the message forms a visible part of the environment of the target, like those that are published, printed, pasted up, or posted on the Internet, because they become a semi-permanent or permanent part of the targets environment. A part that continuously exists in their lives, constantly reminding them of their vulnerable status and downgraded membership within the society.[288] When law steps in to prevent hateful messages, society is said to assure minorities of their membership to the society in good standing.

On the other hand, in instances when hate messaging is protected under free speech rights, the State is said to use two strategies that essentially delegitimise the complaints of victim groups.[289] First, by designating the speech inconsequential like the sticks and stones adage. Second, by acknowledging the grave consequences and rendering them inconsequential

---

[283] Ibid 15.
[284] Williams 130.
[285] Ibid, 129.
[286] Ibid 142.
[287] Waldron 5, 26, 113 and 115.
[288] Ibid 37.
[289] Stanley Fish, 'There's no such thing as free speech: And it's a good thing, too' in Paul Berman (ed), *Debating PC: The controversy over political correctness on college campuses* (Delta 1992) 242-243.

in the name of something more important that cannot be named. Particularly in instances, as Waldron asserts, where these hateful messages transcend offence to go onto undermine the person's dignity.[290] Laws proper place is said to be as a basic institution of a just society, one which encourages some ways of life and discourages others or excludes them altogether. He goes on to assert that the law should step in, regardless of whether or not the target is cognisant, to preserve the public good.[291] The public good is described as inclusiveness and security.[292] Inclusiveness leads to the recognition that one's society is not just for oneself but for all others who should have the assurance that they will not unnecessarily face violence, discrimination, or exclusion — security to exist in the social space without fear. The good is also said to be the background to which speech is exercised; speech is never an independent value.[293] When faced with a conflict between the good and speech – speech 'must yield'. Waldron concedes that free speech laws in the USA allow for 'constitutional untouchability' of speech espousing hatred, so it is not clear who would enforce the public good and what framework would be employed by the decisionmaker.[294] In '2.3 Legitimisation of Linguistic Violence' of this chapter, we will see how normative frameworks can be used to further political interests to the disadvantage of minorities. Furthermore, in Chapter 2, we will see how the public good/public interest in Kenya was used to further the political interests of the ruling elite.

Delgado highlights how values such as participation, knowledge, and self-fulfilment are sacrificed when hate speech is protected.[295] Regarding self-fulfilment, the internalisation of hate messaging is said to deny targets and perpetrators the ability to choose to live in harmony. Parekh adds that free speech is just one of many values to which society should ascribe.[296] Other values include dignity, equality, freedom to live without harassment and intimidation, social harmony, mutual respect, and protection of name and honour, which he identifies as central to a good life. What is at stake is identified as not actually freedom, but the freedom to use outrageous language, rightly limited, to stir up hatred against 'harmless people' for characteristics that they cannot help.[297] The interest is identified as one that authors seek to

[290] Dignity is described as the entitlement to be considered a member of the society in good standing, one whose membership to the minority should not lead to the disqualification from ordinary social interaction. Waldron 105.
[291] Ibid 106-116.
[292] Ibid 4-5.
[293] Fish 233.
[294] Waldron, 12.
[295] Delgado, 140-142, 175 and 176.
[296] Bhikhu Parekh, 'Is there a case for banning hate speech?' The content and context of hate speech: Rethinking regulation and responses 37, 43.
[297] Sir Frank Soskice in(Commons Daily Hansard, Volume 711, Page 938 3 May 1965).

spout sexist, racist, and homophobic epithets without the terrible inconvenience of having to feel bad about it.[298]

Waldron utilises Rawls idea of a well-ordered society, specifically the idea that a well-ordered society is one in which everything is published even when publications may question the basic principles of the society in question.[299] The idea is used to argue that a well-ordered society is effectively and fully governed by a conception of justice and equal respect. A conception that would be undermined by hate messages because the hatred these messages express and the hatred they are designed to spread are incompatible with the attitudes that are characteristic of a 'well-ordered society.' Thus, a society is said not to be well-ordered until these attitudes have died out and been replaced with sentiments of justice. While, a truly well-ordered society is one in which there would be no need for hate speech laws, as the impulse to hate messaging would no longer exist due to, for example, public education of targets, as suggested by Katharine Gelber.[300] Public education would make targets better equipped to engage with hate speech by empowering them to speak back.

Therefore, proponents of hate speech regulations perpetuate the idea that regulations create a cultural climate that in turn leads to the outlawing of hate speech and hateful practices, and this climate is enough to warrant the use of these laws without empirical evidence of their ability to limit the violence that is claimed to result.[301] However, it is important to note that it can take up to decades to override the moral aversion to killing and move the majority of a population to a position of tacit acceptance or participation.[302] This point is conceded by proponents of the regulation of speech, like Parekh, who point out that hatred of a group does not spring up overnight. It takes time to build up through isolated utterances and actions that might be trivial individually but are claimed to collectively lead to a decline in the community's sensibility, norms of civility and decency and result in the creation of a climate that makes it acceptable to target certain groups.[303] Furthermore, content-based proscriptions of hate speech

[298] Richard Perry and Patricia Williams, 'Freedom of hate speech' Debating PC: The Controversy over Political Correctness on College Campuses.
[299] John Rawls, *Political Liberalism* (Columbia University Press 1993) 195, 197, 292 and 293 Waldron 70-78.
[300] Waldron 79. Katharine Gelber, ''Speaking Back': The Likely Fate of Hate Speech Policy in the United States and Australia' Speech and Harm: Controversies over Free Speech 50, 52.
[301] Baker 148-149.
[302] Susan Benesch, 'Vile crime in inalienable right: Defining incitement to genocide' 48 Va J Int'l L 485, 499-500.
[303] Parekh 45.

are said to put the State in the business of censorship with no means of truly assessing what should be considered 'good' rather than 'bad' speech.[304]

There is also a risk of exploitation that stands as a barrier to the end of preventing violence sought after by the aforementioned authors. Exploitation leads to the proscription of speech that has a general tendency to cause social harm, harms that do not always consist of violence, such as volatile disagreement. Or worse, state-sanctioned exploitation of hate speech regulations being used to censor political dissent, political protest, to inhibit the efforts of the disenfranchised[305], such as queer people, who are prevented from being able to publish, document or publicise their desires.[306] So, even if we could concede that words may wound and there may be times that there is recourse to law, particularly when it arises to a clear and present danger of substantive wrong-doing far beyond public inconvenience, annoyance, or unrest.[307] These regulations are not bad per se, but because of the chance of exploitation, they are dangerous. Dangerousness is derived from the way the State can use them to censor parties who are dissenters, protestors or disenfranchised. It is for this reason that there should be a minimum requirement that speech acts have a causal relationship to empirical harms. Rather than abiding by the more commonly accepted bad tendency test that leads to outlawing speech that is declared unpatriotic or contrary to popular opinion. The bad tendency test allows for the restriction of speech that only has a 'tendency' to cause social harm, as opposed to requiring speech to have a causal connection to 'contingent empirical harms'.[308] Judith Butler's theory of linguistic agency demonstrates how the State meets the problem of an unprosecutable history by creating the subject retrospectively, so the speaker can be responsible for the citational chain of the words which precede and exceed the speaker.

2.2 Vulnerability & Speech Acts

Butler deploys Nietzsche, who wrote that 'there is no 'being' behind doing, acting, becoming, 'the doer' is merely a fiction imposed on the doing – the doing itself is everything.'[309] In the context of hate speech, the quote is said to mean that there is no hate speaker behind expressions

[304] Matsuda 33. Nadine Strossen, 'Hate speech and pornography: Do we have to choose between freedom of speech and equality' 46 Case W Res L Rev 449, 465-470.
[305] By which I mean those excluded from certain rights and privileges that others benefit from.
[306] Fish 244. Talal Asad and others, *Is Critique Secular?: Blasphemy, Injury, and Free Speech* (Oxford University Press 2013) 37.
[307] Ivan Hare and James Weinstein, *Extreme speech and democracy* (Oxford University Press 2010) 134.
[308] Stefan Sottiaux, ''Bad Tendencies' in the ECtHR's 'Hate Speech'Jurisprudence' 7 European Constitutional Law Review 40, 40. Robert Post, 'Hate Speech' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2010), 134.
[309] Judith Butler, *Excitable speech: A Politics of the Performative* (Routledge 1997) 45.

of hate speech, the identity of the hate speaker is constituted performatively by the expressions that are said to come from it. Once the court decides the relationship between the speech and conduct, it is considered to be unequivocal.[310] This being the case, Butler claims that there are no sovereign agents of language, and language itself is a citational chain preceding and exceeding subjects that language retroactively installs in discourse. This linguistic vulnerability of words is determined by their performativity and interpellation.

Butler builds on Austin's theory of performativity that is articulated in *How to Do Things with Words*.[311] In his pioneering book, Austin takes the view that conventions are put in place so that certain statements can be effective at actually doing something, what he calls a performative act and in so being an illocutionary act. As opposed to a perlocutionary act that merely leads to certain consequences. According to Austin, if an authorised person, in an authorised place, uses conventionally accepted words, then their words will be felicitous. That is, successful in enacting what they name, and thus, an illocutionary speech act. Through his example of naming a ship, Austin explains a ship can only be 'named' as such in the appropriate circumstances. Otherwise, it would be a mockery, such as a marriage to a monkey.[312]

Butler, on the other hand, contends that language is performative but not always felicitously so, even in the appropriate circumstances with the appropriate speaker. Even the power to injure that is present in injurious words is said to be distinct from the effectiveness of the power to be wielded by the speaker, or as Butler calls them, the interlocutor. Words are also not saturable in the Derridian sense so as to be bound to particular contexts, convention, or even a single forgone solution.[313] Butler maintains that they are a condensation of a past, present, and future of unforeseen meanings. Hence, speech is excitable and beyond the speaker's control and, at times, even the speaker's comprehension.[314] Thus, to use Austin's example, a ship named by an appropriate speaker in the appropriate circumstance can still fail to acquire the name it is designated. This is because Butler insists that words are not inextricably linked to either their context or the citation of existing convention that precedes them.[315] Thus, some statements are not successful in enacting what they name even in the appropriate context.[316] They are not, in the Derridean sense, saturable so as to be bound to a

[310] Sara Salih, *Judith Butler* (Routledge 2002) 104. Butler 39-40.

[311] John Langshaw Austin, *How to do Things with Words*, vol 88 (Oxford University Press 1975) 6.
[312] Ibid 23-24.
[313] Salih 99-100.
[314] Ibid 100.
[315] Butler, 33-4.
[316] Salih 99-100.

single forgone conclusion, convention, or particular context.[317] An utterance can exceed the moment it occasions.[318] In this way, utterances are excitable and beyond the speakers control. Butler takes the legal term 'excitable speech,' which refers to statements that are deemed beyond the utterer's control because they are made under duress, to argue that all speech is beyond the speaker's control.[319] The citational chain preceding the utterance demonstrates that the utterer is not the sole originator of their speech. This is the reason Butler rejects the idea of sovereign autonomy in speech because speakers are never fully in control of what they say. This lack of control does not absolve the speaker of responsibility, as sovereignty and responsibility are not synonymous.

Regarding the theory of interpellation, it is structured by the divine power of naming that takes into account the ideological constitution of the subject and its singularity in time and location.[320] It can only be accomplished with the readiness or anticipatory desire on the part of the one addressed.[321] Akin to the manner in which God names Peter, thereby establishing Himself as the origin of Peter. The name attaches to Peter permanently due to the implied and perpetual presence in the name of the One who named him and Peter's readiness and desire to be addressed. For the name to become the mechanism and instrument of discourses that are not irreducible to that moment of enunciation, interpellation must be disassociated from the figure of the voice of its creation.[322] In this regard, the vulnerability to being named constitutes a continuous condition of the speaking subject. What is more, the subject is founded by the other, in the Althusserian sense of the subject being brought into linguistic existence through the speech act, and derives its power from the structure of the address for linguistic vulnerability and exercise.[323] As subjects are dependent on this linguistic bearing to one another for existence, their linguistic vulnerability is essential to their social relations and is one of the principal forms that that relation takes.

Butler uses Althusser's scene of the policeman hailing a man to dispute the divine and sovereign power that Althusser ascribes to the speaker.[324] Butler argues that the act of hailing works partly due to the citational element of the speech act and the historicity of convention

---

[317] Butler 34.
[318] Ibid, 14.
[319] Ibid, 15.
[320] Judith Butler, 'Conscience doth make subjects of us all' Yale French Studies 6, 10. Butler, *Excitable speech: A Politics of the Performative 31.*
[321] Butler, 'Conscience doth make subjects of us all' 10.
[322] Butler, *Excitable speech: A Politics of the Performative 32.*
[323] Ibid 24 and 30.
[324] Salih 106.

that both exceeds and permits the enunciation.[325] When the police cite the convention of hailing, they are said to participate in an utterance that is 'indifferent to the one who speaks it'.[326] The impermanence of the act of hailing exceeds the time of the utterance in question. Therefore, hailing is an excitable utterance, one that exceeds the interpellator who is not in control of their speech.[327] Butler disagrees with Althusser about the subject having to turn and reflexively appropriate the term in order for hailing to become interpellation.[328] Rather, she takes the position that the subject can be constituted without the subject's knowledge or, indeed, even if the subject refuses the name. This is because the speaker indicates and establishes the subject in subjection and, in so doing, constitutes the subject's social identity.[329]

When the subject is named (even injuriously so), the subject comes into social being.[330] By way of the subject's inevitable attachment to that existence, because of what Butler identifies as a specific narcissism that takes hold of any term that bestows existence and leads the subject to embrace terms, even injurious ones, which constitute it socially. In this way, the subject is the effect of previous power, while also being created by power without which it could not exist as an agent and simultaneously caught up in power structures.[331] The subject's agency is a purpose that is unintended by power and unexpected, thereby allowing the subject to operate 'in relation of contingency and reversal to power that makes it possible,' to which it still belongs. Power that is not invested in a single divine subject, like the policeman, or in a name, so the diffused sovereign power that enables the interpellation cannot be traced back to a clear originator or end.[332] The speaker is said to appeal to the sovereign performative in the context of a political situation in which power is no longer controlled by the sovereign form of the State.[333] Thus, in accordance with Foucault's conception of present-day power relations emanating from various possible sites, Butler declares that power is no longer constrained by the limits of sovereignty.

This being the case, the historical loss of the sovereign organisation of power is thought to occasion the fantasy of its recurrence in language in the guise of the performative. The attention given to the performative in turn phantasmatically revives the performative in language, thereby installing language as the dislocated site for politics and specifying that

---

[325] Butler, *Excitable speech: A Politics of the Performative 33.*
[326] Ibid 33.
[327] Salih 106.
[328] Butler, *Excitable speech: A Politics of the Performative 33.*
[329] Ibid 34. Salih 106.
[330] Judith Butler, *The psychic life of power: Theories in subjection* (Stanford University Press 1997) 104.
[331] Ibid 15.
[332] Butler, *Excitable speech: A Politics of the Performative 33-34.*
[333] Ibid 78.

dislocation as a desire to go back to easier, more comforting maps of power where the assumption of sovereignty remains safe. The power of this discursive domain creates what is and is not speech while regulating the political field of contestation through the implicit manipulation of the distinction. The court can also be understood as proclaiming its state-sanctioned linguistic power to decide what will and will not be considered speech and, in so doing, enact a possibly injurious form of juridical speech. Legal interpretation is thought to be a kind of violence enacted by judges who are deployed as instruments of the modern nation-state.[334] This is because judges deal pain and death through punishments distributed according to their interpretation of the law and through their agents restrain, hurt, render helpless or kill the accused. For this reason, Butler states that the judiciary enacts violence through speech.[335] So, proponents of hate speech regulations had to shift their analysis of hate speech to recognise that agents other than governments and their actors have the power to injure through words. A parallel is thus drawn between State action and citizen action, from which both actions are conceived of as having the power to deny rights and liberties.[336] In this parallel, it is not just citizens that are said to act like states, but also the power of the State that is refigured as a power-wielded by the citizen-subject.[337] Thus, proponents believe the citizen-subject speaks akin to the way the person who names the ship speaks or, like the judge or other representative of the law, namely in speaking, performs what they speak.

The subject-effect is the result of the citation, derived from the effect of the belated metalepsis, by which the summoned legacy of interpellations is concealed as the subject and origin of the utterance.[338] If the performative provisionally succeeds, and Butler insists that it can only do so provisionally, it is because the act echoes prior actions and accumulates the 'force of authority through the repetition or citation of a prior and authoritative set of practices'.[339] Success then is contingent on drawing and covering the constitutive conventions that mobilise the act. For instance, when the speaker utters a racial slur, they are citing the slur and, in so doing, invoking convention, making linguistic community with a history of speakers.[340] A history that is implicitly summoned and reconsolidated at the point of utterance

[334] Robert M Cover, 'Violence and the Word' 95 Yale Law School 1601 1601, and 1608-9. Butler and Salih 217.
[335] Butler and Salih 217.
[336] Ibid 217-218.
[337] Ibid 218.
[338] Belated metalepsis refers to the manner in which the law identifies a subject that it creates in order to prosecute because it needs someone to blame in hate speech and obscenity cases. Butler, *Excitable speech: A Politics of the Performative 18, 49 and 50.* Salih 105.
[339] Butler and Salih 221.
[340] Butler, *Excitable speech: A Politics of the Performative 34.* Butler and Salih 221.

far beyond its prior contexts, purposes, or uses.[341] The history is fixed and arrested by and in the name through its historicity, a history that becomes internal to the name and constitutes the modern meaning of it. Butler explains that sedimentation of its uses become part of the name and its repetition solidifies the sedimentation to give the name its force. This iterability that enables the performativity of the utterance to injure, establishes an everlasting difficulty in locating ultimate accountability for the injury in a solitary subject and its acts.

The function of locating the subject is considered to be to obstruct the genealogy that forms the subject and to assume the burden of responsibility for the same history that the subject conceals. The juridicisation of that history is accomplished through the hunt for subjects to prosecute, who can be held accountable, and thus, solve the problem of an ultimately unprosecutable history.[342] To meet the problem of power emanating from a number of centres, the law resuscitates power in the language of injury that is given the status of an act, one which can be traced from the specific conduct of a subject to the psychic constitution of the one who hears the term or is its target.[343] This reconceptualization of injury regarding the culpable subject resurrects the subject to answer the demand to seek accountability for the injury and casts it as the only agent of power. The institutions of racism, in keeping with the example of the racist slur, is condensed to the scene of the utterance. The utterance is, in turn, stripped of its sedimentation from the prior institution and used to instead wield power to create and maintain the subordination of the people who are addressed. The relocation of injury onto the speaking subject is considered to allow people to seek recourse to the law, which is envisioned as neutral, with the aim of controlling the outpour of hateful words. This reduction of the agency of power to the traceable acts of the subject attempt to compensate for the problems and anxieties amassed in the course of living in the modern cultural quandary where neither hate speech nor the law is uttered exclusively by a single subject. Furthermore, in *Excitable Speech*, Butler explains that utterances may always exceed the moment they occasion.[344] In this way, there can never be a sole originator of an utterance. However, Butler does not find that this lack of sovereign autonomy should absolve the speaker of responsibility for words that wound because speakers are created by language.[345] Rather, it showcases how the State meets the problem of an inability to prosecute discourse and ideology by attributing agency to

[341] Butler, *Excitable speech: A Politics of the Performative 36.*
[342] Butler and Salih 219.
[343] Butler, *Excitable speech: A Politics of the Performative 78-80.*
[344] Ibid 14.
[345] Salih 100.

a sovereign subject, which is created for the purpose of prosecution.[346] Butler dismantles the 'moral causality' between subject and act that the law takes for granted in its creation of a sovereign subject. This is done through her argument that the subject is a belated metalepsis. In essence, the need for someone or something to blame compels the State to create a subject to be prosecuted.[347]

In line with Austin's performativity theory, the one who speaks and, in so doing, performs what they speak is the judge or other representative of the law. In pronouncing a sentence, the sentence becomes binding as the conditions of felicity are met by the judge being a legitimate judge. In this fashion, whoever speaks the performative is understood as operating with uncontested power.[348] This is well illustrated by the manner in which the subject is perpetually 'raced,' transitively racialized by regulatory agencies from birth.[349] Similar to the power to race, the power to gender precedes the speaker of such power, but the speaker is still said to wield the power. The subject who utters socially injurious words is also said to be mobilised by an extensive string of injurious interpellations, through which the subject achieves a transient status in citing the utterance, and in so doing, performing itself as the origin of the utterance.

2.3 Legitimisation of Linguistic Violence

Through examples of arbitrary uses of power to depict homosexuality as nonthematic and salacious (imagined as sensuousness without meaning), and a cross-burning outside an African American home as within the protection afforded by the right to freedom of expression (even though the message of racial hatred was acknowledged), Butler exhibits how precedents can be used to promote conservative political goals and frustrate progressive efforts.[350] Evidently, courts employ strategic and contradictory uses of speech acts or the injurious power of speech to serve their own agendas. The court also exercises power to injure because it is endowed with the authority to adjudicate on the injurious power of speech. The reversal and shift of injury under the name of 'adjudication' underline the violence of the decision, which is concealed and enshrined when it turns into the word of law.

Butler's work enables us to see how states go about legitimising linguistic violence. It is well illustrated through the Danish cartoon controversy. The controversy stemmed from a

[346] Ibid 102.
[347] Ibid 105.
[348] Butler and Salih 218-219.
[349] Ibid 219.
[350] Ibid 229-230.

number of cartoons satirising the Prophet Muhammad, which were published in the Danish newspaper *Jyllands-Posten* and sparked global protests and debates.[351] Butler demonstrates how this is done by the State investing in its cultural homogeneity as a way to use exclusionary, discriminatory, and coercive policies.[352] We see how western representations of freedom are interpreted under a normative framework that regulates and constrains the semantic fields in which terms like freedom, and other terms, like injury and divisionism, operate.[353] Depending on which normative framework is employed (for the Danish cartoon affair,[354] the juridical framework centred on conceptions of 'liberal' and 'secular'), the phenomenon in question will become a specific 'sort of thing'.[355] Nonetheless, adjudicators effectively decide that there is one normative framework to both evaluate and understand the phenomenon in question (such as secular and liberal), and the phenomenon is understood well within that framework. They (the adjudicators) rely on beliefs about the breath and cultural sufficiency of their own knowledge.[356] Supporters of the normative framework assert that the framework, which they operate, is not only necessary to understand the meaning of events but also that it is predominant. Questions about the monolithic nature of the framework are met with accusations that the questioner is covertly taking up the framework and rejecting a position within it. That, Butler asserts, is proof of the monolith hegemony of the framework. Further, the framework is often indifferent to questions about social history and cultural complexity that have the potential to reframe the character of the phenomenon entirely. These frameworks are used to legitimate criticisms of others but not the State itself, thereby creating a situation in which speech against the State is censored, implicitly or explicitly. [357] Freedom then does not belong to the individual as much as it does to the State, which becomes freedoms origin and meaning. This reliance, in turn, creates the augmentation of State power.[358] This is why Butler suggests a critical conception of freedom of expression as one where the freedom will legitimate itself outside of State power and where expressions are able to criticise State power as part of freedom. Butler contends that, when there are converging and competing moral discourses, it becomes necessary to engage in a cultural (maybe even anthropological) analysis, one which

[351] Wendy Brown, 'Introduction' in Talal Asad and others (eds), *Is Critique Secular?: Blasphemy, Injury, and Free Speech* (Oxford University Press 2013) 7-8.
[352] Judith Butler, 'The Sensibility of Critique: Response to Asad and Mahmood' in Talal Asad and others (eds), *Is Critique Secular?: Blasphemy, Injury, and Free Speech* (Oxford University Press 2013) 133.
[353] Brown 18.
[354]
[355] Butler, 'The Sensibility of Critique: Response to Asad and Mahmood', 102 - 103.
[356] Ibid, 102.
[357] Ibid 133.
[358] Ibid 129.

constantly accounts for the cultural difference to rectify absolutist and monolithic conceptions of normativity.[359] Normativity implicitly or explicitly acts as 'cultural ignorance, racism, conquest, and domination'. [360] In the case of the Danish cartoons, normativity was emblematic of 'European revulsion against Muslim immigrants and Islam'. [361]

When the State chooses whose freedom will be protected and whose will not, the State can and often does use categories to qualify its decision, such as personal liberty.[362] In view of this, when freedom belongs to the individual, the State will determine what social forms of individuality lead to the recognition as individuals for some and not for others. Correspondingly, as individual liberty exists by virtue of its protection by the State, the State has the opportunity to utilise its prerogative to protect in some cases and not to protect in others. This modern version of libertarianism, in which the individual coincides with a particular version of State power and economic property, is distinguishable from traditional versions of libertarianism where the State was meant to remain nominal so as to maximise economic freedom. These traditional conceptions of libertarianism cannot exist in instances where the State picks and chooses to protect or retract protection of rights, and whom to protect and retract rights from, and if the protection suits its national aspirations that take account of its national understanding of itself as it relates to those outside of its coveted cultural hegemony. In lieu of the State acting as both protector and adjudicator, there is also a presupposition that there will not be open criticism of the State, and the State will not act inconsistently or in a biased manner. There is also an implication that the expressions the State chooses to protect will, in turn, protect the state, except when open criticism of the State's biased and inconsistent expressions is explicitly safeguarded. Conversely, in instances where the State is permitted to defend rights differentially and does so, typically under the guise of specific policy considerations, the right to freedom of expression is itself suspect.

When freedom of expression comes to mean the freedom to express an unwillingness to change in light of contact with that which it considers outside of its cultural homogeneity or model of cultural pluralism, freedom of expression becomes the means for inflexible conceptions of culture that become the prerequisite of citizenship itself. The same State that is relied on to protect freedom of expression becomes the State that refuses entry and participation to those that it does not want to hear and those whose speech is unwelcome within its borders.

---

[359] Ibid, 105 - 106.
[360] Ibid, 106.
[361] Ibid, 106.
[362] Ibid 130-4.

This demonstrates how the framework of freedom of expression can be construed as depending on the suppression of dynamic and contestatory understandings of cultural difference. This suppression, in turn, illustrates how State violence invests in cultural homogeneity while employing exclusionary policies to rationalise coercive and discriminatory policies against those it conceives of as outsiders. In these instances, the actions of one or numerous members of the group are taken to be beliefs and defining actions of the entire group, in what Butler asserts is not only an unjustified generalisation but also racism.

The juridical discursive domain where speech is decidedly protected or unprotected is also often criticised for regulating the political field of contestation by tactically manipulating the distinction between what will and will not be considered speech. Butler says that is the foremost manner in which individuals get around liability surrounding messages that may be held to spread hatred. That is to say, by manipulating the distinction between speech and action that forms the distinction between consequential and inconsequential behaviour.[363] Theoretical positions are typically deployed or appropriated in political landscapes, which exposes how they are used strategically. Speech acts appear in these landscapes in a manner that illustrates the substantial disagreement on what is considered speech at all. When something is considered speech rather than, for example, conduct, there becomes no need for State intervention. Whereas, in instances where speech is considered conduct, it strengthens the case for State regulation. Clearly, the law appears to be ill-equipped to decide whether saying is really doing or if doing is saying, and there are ideological agendas and political aims that guide the inconsistent treatment of expressions.[364] Consequently, what is designated as speech as opposed to conduct is decided as such, not in the field of law but in the field of politics.[365] In cases like these, when political discourse is dropped into juridical discourse, Butler reveals how the meaning of political opposition may be reduced to the act of prosecution.[366]

Evidently, it is clear that what is and is not protected rests not on firm doctrine or principle but on the ability of people and groups to operate and arguably manipulate the political process, so that the speech they support is labelled protected while conflicting speech is within the remit of speech that must be penalised. There is actually no class of utterances that can be separated from the world of conduct, no purely cognitive expressions whose effects can be confined to the 'prophylactically sealed area of public discourse'.[367] Generally, one

[363] Matsuda 33. Strossen 465-470.
[364] Butler, *Excitable speech: A Politics of the Performative 39-40.* Salih 110.
[365] Fish 242.
[366] Butler and Salih 220.
[367] Fish 244.

exception leads to another, and another, until the dominant class decides to suppress their opposition to defend their position under the guise of protecting democratic ideals, which renders freedom of expression again suspect. This has been the case historically, with hate speech regulations being used as a means for the government to exert social regulation over either opponents or critics instead of a means to address real issues of intimidation and incitement.[368]

This is an important point because it highlights a key contradiction within State regulation of speech. That is, incumbent regimes, as evidenced by all the cases adjudicated at the ad hoc Tribunals and the ICC to date, play a role in perpetrating widespread or systematic attacks against their populations, often using propaganda aimed at creating discrimination, hatred and often first amounting to indirect incitement and then direct incitement. At the same time, these same states are relied on to be wholly responsible for preventing these types of attack by regulating speech, which becomes yet another instrument in the coordinated attack on the targeted civilian population. [369] Particularly as those who regulate speech had media control that they used to disable the ability of minority or victim groups to voice their dissent, which, if allowed, would have the effect of countering the success of state-sponsored propaganda. As the *Nahimana* Trial Chamber explain, the State can claim hate speech (even when it amounts to incitement to violence) is a defence of its national security rather than a threat to national security.[370] Alternatively, as we shall see in Chapter 3, the executive branch of the state can claim that dissenting voices threaten national security and, thus, merit adjudication.

Governmental access to broadcasting and other media distribution is not the kind of access that would be possible for a person with a soapbox or even a website.[371] Even though it is this latter person on the soapbox whose prosecution is often thought to prevent violence. The judgements of the ICTR demonstrate that nearly all of the Rwandan institutions were involved in the genocide, *inter alia* the government, the clergy, the military, the media, political parties, economic institutions, and even musicians, like Simon Bikindi, whose 1994 fame partly stemmed from his inflammatory lyrics.[372] Muna, the ICTR Deputy Prosecutor, points out that in order for the killing of a staggering five hundred thousand to a million people in the one

---

[368] Michael Herz and Péter Molnár, *The content and context of hate speech: rethinking regulation and responses* (Cambridge University Press 2012) 81.
[369] Gordon, 348.
[370] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze 109.*
[371] Benesch, 'Vile crime in inalienable right: Defining incitement to genocide' 496.
[372] Dominik Steiger, 'A Steady Race Towards Better Compliance with International Humanitarian Law? The ICTR 1995–2012' 14 International Criminal Law Review 969, 976.

hundred days of the genocide, about five to ten thousand a day, it took more than the one hundred and twenty thousand people eventually prosecuted by the post-genocide government.[373] All the structures of the government were present, and still, the wholesale killing took place largely *because of* government participation. [374] The Tribunal addressed this involvement by indicting, trying, and sentencing members from all institutions, including a prime minister, four ministers from the government, two prefects, five mayors, military commanders and media leaders.[375]

Moreover, as power is productive rather than probative, as Foucault states, society's censors can be implicated in the generation and proliferation of the same discourses that they seek to ban.[376] This is well illustrated by the prosecution of John Ng'ang'a for a Kikuyu song (*Year of the Hyena*) that was identified as incendiary towards the Luo community (discussed further in chapter 3). The prosecution resulted in an increase in sales for the musician as people sought to listen to the prohibited music. Similarly, regulatory bids to outlaw speech inevitably wind up citing the problematic speech at length through numerous examples, codifying the speech for monitoring purposes, or rehearsing it in order to teach others about the injuries that have been received from such expressions.[377] There is said to be no way to better the effects of hate speech other than through recirculating it, even when that recirculation occurs in the context of the censorship of such expressions. The censor is thereby compelled to repeat the same expressions that it would prohibit. Expressions that may be vehemently opposed but whose trauma is inescapably reproduced. As a result, the adjudication of hate speech also disperses the problematic expressions because they are recited and rehearsed by the same legislators who are attempting to proscribe them. Thus, Butler asserts that the ritual chain of hateful speech cannot be effectively countered by hate speech regulations.[378] Not only due to the vivid anomalies and violence present in the law but also because censorship is a very 'simplified response to the complex workings of discourse and the law'.[379] One aspect of this complexity can be viewed in the production and preservation of that which is apparently prohibited and proscribed.

---

[373] Bernard Muna, Navanethem Pillay and Theogene Rudasingwa, 'The Rwanda Tribunal and its relationship to national trials in Rwanda' 13 American University International Law Review 1469 1481.
[374] Ibid 1481.
[375] Butler, *Excitable speech: A Politics of the Performative 50.*
[376] Salih 99.
[377] Butler, *Excitable speech: A Politics of the Performative 37.*
[378] Ibid 102.
[379] Salih

The irresolute relationship between the speech act and its future effects is the reason that Butler posits resignification and repetition as ways to attain affirmative recontextualisations and subversive deployments that are more effective than legal measures.[380] Particularly as the law is not the objective arbiter that it claims to be.[381] Butler emphasises the performative power of appropriating the terms that one has been abused by, and in so doing, depleting the degradation of the terms by turning them into an affirmation. [382] This is done through the political promise of the performative that operates at the centre of a politics of hegemony, one which offers an unforeseen political future and enables deconstructive thinking.[383] Examples that Butler gives of successful appropriation are the terms black, queer and woman. Butler also suggests the more difficult course of action of reading the texts that would otherwise be censored against themselves while surrendering that the 'performativity of the text is not under sovereign control'.[384] Butler maintains that there is no way that language can be expunged of its traumatic residue and no way that the trauma can be worked through, other than through the laborious effort of directing the course of its repetition.[385] This is because no one has ever overcome an injury without repeating it, repetition may effectuate the continuation of the trauma that marks a self-distance within that same traumatic structure, but this self-distance marks the constitutive possibility of being otherwise. So, there is no possibility of overcoming without repeating.[386]

Butler's theory has been criticised for providing a series of open-ended questions without also providing clarity on how radical resignification can be effected.[387] Salih contends that Butler's failure to resignify the word 'nigger' is emblematic of her hesitation with finally deciding whether words wound and how resignification can be effected.[388] Particularly in instances where the subject may choose not to recognise itself in the interpellation, but the interlocutor may be in disagreement and still deploy the call with the same performative force to subject and subjectivate, especially when the call is wounding and insulting. Salih goes on to take the unpopular approach of designating *Excitable Speech,* a failed performative that does not enact the theory that is described. Nonetheless, Butler's theory is efficacious in illustrating not just the linguistic vulnerability of words but also how they are manipulated through state-

[380] Butler, *Excitable speech: A Politics of the Performative 15.* Salih 103.
[381] Salih 102.
[382] Butler, *Excitable speech: A Politics of the Performative 158.*
[383] Ibid.
[384] Ibid 69.
[385] Ibid 38.
[386] Ibid 102.
[387] Salih 115-6.
[388] Ibid 116.

sanctioned linguistic power. The adjudication of what will and will not count as protected speech is also a kind of speech that implicates the State in the same problem of discursive power which it is vested to control, authorise, and limit.[389] Since, as we have seen, power cannot be localised or personified, and interpellative calls at times fail, linguistic terms that have open-ended futures can be resignified through the subject's agency.[390] Indeed, the subordination of the subject by the speaker can be repeated for another purpose with an open future.[391]

In closing, it is important to note that the Western free speech debate – that Butler, Matsuda and all of the theorists discussed above take part in, has its distinct limitations. This is particularly the case with the American free speech debate, where the issues are heavily influenced by America's political history. While there appears to be a growing international consensus that principles of free speech are not absolute and can be overridden when the subject matter being expressed is racial, ethnic or, religious hatred. This can be seen clearly in the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD) and the International Covenant on Civil and Political Rights 1966 (ICCPR). But the US continually rejects these provisions.[378] Schauer points out that the First Amendment is a recalcitrant outlier to the growing international understanding of what free speech entails and what it ought to entail.[379] The dignity focused approach of international understandings of free speech are relied on by many nations, such as Germany, Canada, and South Africa. American judgments on free speech are typically characterised by ever-present fears that unclear or overbroad boundaries would result in a censoring regime.[380] It is not a debate that is easily transferable to other socio-political contexts around the world. Nevertheless, there is something important and useful in the debate that we have just seen around Butler's work and hate speech more generally. As we have seen, Butler, in particular, helps us understand the contours of speech regulation in a different way.

3. Conclusion

There are a number of continuities that can be drawn between the analyses of hate speech, Butler's ideas of excitable speech and the SPT analyses. The first continuity is that hateful speech gets its significance from meanings acquired over an extended period (the citational chain of the words). The significance of hate speech is derived from the history that the words

[389] Butler and Salih 223.
[390] Salih 107.
[391] Butler, *Excitable speech: A Politics of the Performative 38.*

carry. The ability of hate speech to create a culture of hatred towards groups identified as the 'other' is of particular significance for this study. The speech identifies an existential threat and activates the listener to act against another. The complexity of hate speech is evident from the history that is embedded in and the words that enable them to have emotional and affective resonance with the listener. SPT is useful in illustrating how ethnic identity is formed through shared narratives and myths that become encoded in symbols through the myth-symbol complex. The identification of the in-group stems from the identification of an out-group, which renders the out-group easily identifiable as the ethnic 'other' with responsibilities for evils that are then attributed to them. When chauvinistic leaders select the out-group as the source of an existential threat and manipulate the ethnic symbol, those in the in-group are more susceptible to receiving the messaging because of the emotional and affective resonance of ethnic symbols. Propagandist messages, particularly those that intersect with myth-symbol complexes, are markedly effective at directing the action of the listener who is viewed as submerged in an invisible crowd. These messages are especially effective in the absence of counternarratives. Continuous uncontested repetition enables the words to penetrate the psyche of the listener. This point about the history that words carry is seemingly shared by Butler, in particular, with her assertion that words, especially hate speech acts, have a citational chain. Such that when the speaker says, for example, a racial slur, they are invoking convention and making linguistic community with a history of speakers.

It is accepted that the US debate is heavily influenced by the geosocial context. Nonetheless, America is a useful illustration of how even in a State with a well-established reputation for protecting free speech, normative juridical frameworks are employed in a way that imposes the cultural homogeneity of those with political power. That is done through *inter alia* manipulation of what is and is not speech. All the authors, who were both for and against the regulation of speech, agree that speech can create a climate that can shift the population from tacit acceptance to participation in mass violence. SPT begins with looking at the ethnic identity and how it creates a culture of distrust between ethnic groups, particularly when there's a historical narrative advancing an idea that one ethnic group poses an existential threat. Proponents of regulation say that not only do the words wound, they create a culture in which people feel that enacting violence on minorities is somehow permissible. Even those who argue against the regulation of speech don't dispute that words can lead to violence. They focus on the fact that regulation of speech is often manipulated by the State to target minorities rather than protect them. The argument is that subtle hate speech that is on the opposite end of the continuum to the extreme is the one that conditions the population. However, it is considered

seemingly inoffensive, occurs daily, and is coded, which leaves it outside the realms in which the regulations operate. It can take up to decades to override the societies moral aversion to killing, and these regulations won't change society from embarking on that path. Instead, they can create sympathy for those who are prosecuted for hate speech, which others think is seemingly inoffensive because it exists on the subtle end of the continuum.

CHAPTER 2 - Post-Election Violence

The story of PEV is complex and difficult to unpick. This chapter tells its story. In particular, it explores both the conditions that gave rise to the 2007 Kenyan EV and the events themselves. To explore the gradual emergence of the conditions that gave rise to EV, the chapter begins much earlier, with pre-independence Kenyan history. The chapter deploys SPT to understand these conditions. Political elites – primarily from the Kikuyu, Kalenjin and Luo – manipulated symbols to mobilise their ethnic communities for 'war' as a response to disappointment at the general election polls. It is important to see the different mythic and symbolic structures at play in each of these communities. The chapter explores the gradual escalation of tensions and the outbreak of violence. Once the violence had begun, the framing shifted, and increasingly, communities were mobilised under the guise of self-defence and revenge. The chapter closes with an initial sketch of the international responses to the violence.

In short, in Chapter 2, my main contribution to knowledge is applying the version of SPT set out in Chapter 1 to PEV in Kenya. The existing literature and reports on PEV will be used to paint a picture of the violence. International media's rudimentary designation of the violence as a battle between barbarians (mentioned in the introduction) is disentangled by looking at the history of Kenya and the identities of the Kalenjin, Kikuyu, and Luo communities through which the chapter will showcase the long process of conditioning that led to EV. The construction and institutionalisation of these identities and the Kenyan political landscape are intimately assessed using various authors, such as Branch, Jenkins, Lonsdale, Lynch, Hornsby, and Ogot. Another key contribution is the exploration of the symbolic politics of majimboism and circumcision to illustrate how they gained their political purchase and were employed to operationalise the mythic structures of the aforementioned ethnic communities in sometimes violent ways, such as forcible circumcision of males. Other symbols are considered, such as host/guests and how they feed into political discourses.

1. Institutionalisation of Ethnic Identities

SPT points to the importance of institutionalisation in the emergence of ethnic identities. In this section, we will focus on three of the largest ethnic groups in Kenya – the Kikuyu, Kalenjin, and Luo. In particular, we will see the aspects of the myth-symbol complex that are going to be important in the 2007 EV.

1.1 The Colonial Period

Colonisation played a large part in shaping the history and current status of Kenya and its ethnic communities.[392] In pre-colonial Kenya, members of various ethnicities co-existed, traded and even intermarried in a 'symbiotic relationship between pastoralist and agricultural communities'.[393] Though Kenya was not wholly homogenous, ethnic divisions in the contemporary forms were largely unknown. It was only with colonisation that they began to emerge. German missionaries and Arab traders had infiltrated the territory in search of ivory.[394] Full modern colonisation began in the nineteenth century with Britain, France, Germany, Belgium, Portugal and Spain recklessly dividing the continent between 1874 and 1902 through a series of 'international' conferences.[395] These delineations of territory did not follow ethnic or cultural spheres. Consequently, each colonial territory was made up of an assortment of people not related by history, social institutions, language or culture. This left future leaders with the problem of creating a nation out of the remnants of colonialism. What is more, as Serequeberhan emphasises, colonialism not only destroyed the previous modes-of-life but also demolished pre-colonial Africa. It created 'Africa as a dependent and servile appendage of the West.'[396]

The fate of Kenya was determined by the events that took place in 1885. That is when Germany took steps to expand its Empire into Africa under the guise of fighting slavery and the slave trade. The German government announced that it had granted an imperial charter to

---

[392] William Robert Ochieng and Bethwell A. Ogot, *Decolonization and Independence in Kenya* (Ohio State University Press 1995), xiv.
[393] Yieke, 9.
[394] History World, 'History of Kenya' (*http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad21*) accessed 4 April 2015..
[395] Exploring Africa, 'Unit Two: Studying Africa Through the Social Studies' accessed 30 April 2015
Adu Boahen, 'Conclusion: The Colonial Era: Conquest to Independence' in Lewis H Gann and Peter Duignan (eds), *Colonialism in Africa 1870-1960*, vol 2 (CUP Archive 1969), 503 and 521.
[396] Tsenay Serequeberhan, 'Africa in a Changing World: An Inventory' (*https://natna.wordpress.com/africa-in-a-changing-world%E2%80%A8/*) accessed 30 May 2015..

Carl Peter's company to establish a protectorate in the Great Lakes Region of Africa[397].[398] When the Sultan of Zanzibar protested the encroachment into the area that had been until that point subject to his sole control, the German Chancellor sent five warships that arrived on 7 August 1885. As their weapons were set on the Sultan's palace, the German envoy demanded the Sultan give up control over the mainland territories 'or else'. [399] During the same period, Britain was eager to expand its control into the region without upsetting the German government, so British representatives suggested a compromise. That is, they would divide the country solely on geographical lines. According to the proposal, Germany would control the south, Britain would control the north, and the Sultan would be left with ten miles along the coast. The line dividing the north from the south is still today the border between Kenya and Tanzania. Colonialists also continued to re-shape the country; for instance, certain areas (like Nyanza, which has a majority Luo ethnic community) were transferred from Buganda (the modern-day central region of Uganda) into Kenya.[400]

The initial reluctance of the British government to take responsibility for the region of East Africa resulted in the delegation of the responsibility to a commercial company, the Imperial British East Africa Company (IBEAC), in 1888.[401] IBEAC was faced with some problems, chiefly in Buganda, where civil war broke out. The British government took this as an indication that the company was not operating effectively. Two years later, in 1894, the British government declared a protectorate over Buganda. It extended its control to cover other Kingdoms in East Africa, namely Ankole, Toro and Bunyoro and combined them with Buganda to form the Uganda Protectorate (modern-day Uganda). To ensure access to the sea, the British government took control over Kenya and compensated IBEAC. Lonsdale writes that the British used violence on an 'unprecedented scale' with 'unprecedented singleness' to usher Kenya into the British version of the twentieth century.[402]

Colonialists developed the Kenyan Protectorate under the guise of coexistence to cultivate their control over the country. The colonial State grew from a simple administrative system of control to an 'increasingly differentiated complex of institutions of social control

[397] Countries within the African Great Lakes Region include Kenya, Burundi, the Democratic Republic of Congo, Rwanda, Tanzania and Uganda.
[398] Jan-Georg Deutsch, *Emancipation without abolition in German East Africa, c. 1884-1914* (James Currey Publishers 2006).
[399] World
[400] Bruce Berman, *Control and Crisis in Colonial Kenya: The Dialectic of Domination* (James Currey Limited 1990), 53.
[401] World
[402] Ochieng and Ogot, xiv.

and economic management in the post-1945 era'.[403] Berman notes that pre-colonial East Africa lacked anything that could be termed as a system of land tenure. Thus, he argues that regions in East Africa were not states. Incidentally, the regions did well without having to create those formal borders because they did not have to contend with dominant social classes manipulating the State apparatus to 'hold coercive power over other classes that it looks to 'rule, dominate and oppress'.[404] Moreover, the European-inspired conception of the nation-state where citizens are linked together by common culture, language, and genetic heritage had a detrimental influence on many African countries whose citizens seldom shared these characteristics.[405] Within several newly defined African nation-states, minority communities, especially those without access to State power, were treated with suspicion by colonial subjects because they were viewed as disloyal since their relatives were supposedly just across the border.

In the first years of the century, the 'colonial State existed primarily as an engine of African conquest' through the gradual process of diplomacy and force.[406] The shift of responsibility for the Protectorate from the Foreign Office to the Colonial Office in 1905 brought it under the control of an agency more systematically concerned with the creation of an effective colonial State apparatus. This apparatus was constructed through the Colonial Offices strict adherence with the doctrine of colonial monetary self-sufficiency, which would be accomplished through the use of the colonial territory as a network of imperial trade. Additionally, the Colonial offices consolidated and prolonged their use of District officers and Provincial Commissioners. The change in emphasis to internal administration resulted in the replacement of the 'mixed bag of pioneer officials' with people carefully recruited from public schools and Oxbridge who were sent to the colony in increasing numbers between 1905 and 1914.[407]

The change in colonial administration had a number of effects. Unlike other colonies, the British saw their colonies as separate entities as opposed to an extension of provinces of the metropolitan country, like the French, or a form of association, like the Portuguese.[408] Therefore, the British set up a central government system in each territory which consisted of nominated executive and legislative councils. They also eliminated the military from the administrative field and clearly separated the army from the police. The colonies were

[403] Berman, 1 - 2.
[404] Ibid, 50. Ochieng and Ogot, xv.
[405] Bryan S Turner, *Bronwen Manby, Struggles for Citizenship in Africa* (Springer 2010), 31.
[406] Berman, 52.
[407] Ibid, 52.
[408] Boahen, 504 - 508.

controlled through the 'Lugardian model of Indirect Rule'. That is, the system of British rule was realised through African intermediaries, who were watched over by British officials. British officials were tasked with instituting what Berry terms 'hegemony on a shoestring'.[409] Due to the high costs of military expenditure (up to a third of the overall budget) and the fact that the cost of conquering the Kenyan populous surpassed the local revenue, military domination was unviable.[410] The colonial authorities recognised that their military might would have to be converted into civil power, through which British domination would be met with the consent (active or passive) of the colonial subjects.

Civil power was achieved through the appropriation of African resources from defiant subjects, such as livestock, which would be redistributed to more amenable subjects.[411] Access to seized British resources was more sought-after because, in the 1890s, an ecological crisis resulted in smallpox and cattle plagues that eliminated around a quarter of the population in central Kenya, with the survivors left fighting over the remaining resources. The fact that the British were also conquerors was concealed, at least initially. As they increased their allies, the British accumulated more power that enabled them to drive down the price of East African assistance while retaining more and more of the appropriated resources. The means of coercion was then bureaucratised through, for example, the reliance on uniformed police to keep order rather than military contractors. Colonial policy subsequently changed structurally from coexistence to control, which meant that 'rewards of collaboration' were given to civilians not only to satisfy the colonised subjects but also to give them the means to pay 'hut tax'. [412] Berman contends that the African payment of hut tax was the 'sacrament of submission' signifying the African populations' acceptance of British control. According to him, it signified the 'legitimacy of the state'.[413] Hut tax eventually contributed as much as 29 per cent to the Protectorate's domestic revenues. It explains why the imposition of heavy taxes was often the first thing that colonial authorities would do.

The need for labour was resolved through the use of labour and economic colonial laws. Taxes vastly limited the amount of the profits accrued by native farmers by denying them access to profitable cash-crop production and commercial credits.[414] Percy Girouard, one of

---

[409] Sara Berry, 'Hegemony on a Shoestring: Indirect Rule and Access to Agricultural Land' Africa: Journal of the International African Institute 327, 355. Katherine Luongo, *Witchcraft and Colonial Rule in Kenya, 1900–1955*, vol 116 (Cambridge University Press 2011), 345.
[410] Berman, 52.
[411] Ibid, 53.
[412] Ibid, 53.
[413] Ibid, 53.
[414] Ochieng and Ogot, xv-xvi.

the colonial governors of Kenya, said taxes were 'the only possible method of compelling the native to leave his reserve for the purpose of seeking work'.[415] The pressure on land in combination with rural poverty and the need for money created 'voluntary' labour.[416] Thus, refusal to pay taxes became a form of resistance that was classified as rebellion. The colonial authorities took any form of resistance (even refusal to have crops inspected for tax purposes) as a declaration of war from the 'natives'.[417] Collection of taxes was, thus, presented as an attempt to stop rebellion and lawlessness, even in areas that were largely pacified. It became a crucial part of police duties within the colonies.

The colonial authorities also secured 'consent' by converting inconsistent African collaboration into a somewhat permanent 'subordinate administrative cadre', which became agents of local control under the supervision and authority of white prefects.[418] Collaborators were allowed a degree of autonomy concerning their native supporters if they agreed with the monopoly of power of the administrators.[419] So, British officers would informally appoint subordinates until the practice was formalised by the Native Authorities Ordinance of 1912.[420] For instance, colonial administrators would appoint chiefs, especially those who had already amassed wealth and power, who would in turn recruit bodies of 'retainers'.[421] Retainers were armed with traditional spears and swords, and they acted as henchmen for the chiefs.[422] This is the system of domination that Jomo Kenyatta inherited and then entrenched.

Colonialists further strengthened their civil power by dividing the country along ethnic lines as part of their 'divide-and-rule policies.[423] Ethnic division was considered a 'useful administrative instrument' because joining ethnic 'units' was thought to lessen the costs of European administration.[424] So, colonialists encouraged ethnic self-consciousness to strengthen their administrative hold over the country.[425] The colonialists profoundly transformed the complicated and dynamic social landscape in which territorial attachment and

---

[415] Colin Leys, *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism* (University of California Press 1975)
[416] Ochieng and Ogot, xvi..
[417] Mark Neocleous, *War Power, Police Power* (Edinburgh University Press 2014), 145-152.
[418] Berman, 53.
[419] Ibid, 53 - 54.
[420] Ibid, 54.
[421] Ibid, 54.
[422] Ibid, 70.
[423] Raphael J Njoroge, *Education for Renaissance in Africa* (Trafford Publishing 2004), 120.
[424] Ibid, 120.
[425] Hon. Mr Justice A. M. Akiwumi, Hon. Mr Justice S.E.O Bosire and Hon. Lady Justice S.C Ondeyo, *Report of the Judicial Commission Appointed to Inquire Into Tribal Clashes in Kenya (Akiwumi Report)* (31 July 1999), 66.

ethnic identity were both fluid and unstable.[426] British colonialism in Kenya created ethnic groups where loose communities had predominated.[427] They often took substantial parts of historically separate and distinct communities and declared them a single people.[428] This had the effect of heightening the differences between ethnic groups.[429] Reconstituted ethnic communities were settled into one of eight provinces, and every province had a different ethnic group as a majority.[430] The 'colonizing bureaucracy' further complicated the situation by creating tribal boundaries and reserves.[431] The reserves functioned as ethno-spatial boundaries that were easier to police. At the same time, the brutal land alienation of the natives facilitated the distribution of land to the European minority, who generated the most taxable incomes through commercial farming.[432]

By 1952, certain ethnic groups, like the Kikuyu, had settled in parts of the country where they established themselves as a cohesive group and, more significantly, an easily identifiable one. [433] Notably, the colonial authorities gave the Kikuyu community more financial aid allowing them to become more economically developed than other ethnicities. The community was known for moving away from their native districts as early as 1950.[434] By the time independence beckoned, they were more economically prosperous and politically conscious than the average pastoralists. Consequently, wherever Kikuyu's settled, natives of the area were suspicious, a feeling fostered by the settlers for their developmental agendas (discussed further later in this chapter). That created the potential for 'irredentism', which Njoroge defines as 'the political desire of separated peoples to be reunited, leading to possible redrawing of the boundaries of African countries, and, in the process, often creating chaos and even bloodshed'.[435] Once communities were reconstituted, they would be labelled 'tribes'. Davidson argues that 'tribe' was a label applied in the African context by officials educated in the classical tradition of Caesar's Gallic Wars.[436] According to Mafeje, the label reconstructed

[426] Jenkins, 579.
[427] Njoroge and Kirori, 358.
[428] Njoroge, 120.
[429] Akiwumi, Bosire and Ondeyo, 66.
[430] Njoroge and Kirori, 358.
[431] Ochieng and Ogot, xv.
[432]Ambreena Manji, 'Land Rights and the Rule of Law' in Nic Cheeseman, Karuti Kanyinga and Gabrielle Lynch (eds), *The Oxford Handbook of Kenyan Politics* (Oxford University Press 2020), 406.
[433] Akiwumi, Bosire and Ondeyo, 66.
[434] Ibid, 66.
[435] Njoroge, 120.
[436] Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (James Currey London 1992), 100.

the African reality as 'tribal'.[437] It produced 'certain blinkers or ideological predispositions which made it difficult for those associated with the system' to see the complexity within the ethnic communities'.[438]

Citizenship laws and practices were enacted, ensuring that every colonial subject was subordinate in status and rights to the white-skinned citizens.[439] Hall notes that black people were subjected and positioned in dominant regimes of representation through the exercise of cultural power and normalisation.[440] The economic, political and social hierarchy further entrenched the ethnic divides. Europeans were, of course, placed at the top of the hierarchy, followed by the Asians (Indians, Pakistanis, Goans, and so on), with Kenyans at the bottom.[441] Though Kenyans were at the bottom of the hierarchy, some ethnic groups were allowed to climb up higher than others at the lowest level. That was because some ethnic communities were designated cooks and watchmen, or gardeners, while others were given administrative duties. Education was a means of ensuring that specific communities would fare better than others.[442] Colonial education was also used to remove communities from their indigenous learning so some would be 'useful' and 'qualified personnel' for economic development while simultaneously converting them to Christianity.[443]

1.2 Kikuyu, Kalenjin and Luo Identity

At the outset, it's important to draw on Habermas's work on identity that was elucidated in Chapter 1. Every ethnic group has its own language (and even when two ethnic groups share a language, subtle differences in pronunciation can differentiate between groups, for example, Serbian and Croatian that were discussed in Chapter 1). Kikuyu, Luo, and Kalenjin ethnic communities have their own language. It played a central role in the construction of their identities, particularly the Kalenjin, who came together to form a larger ethnic community due to the linguistic similarity of their members. Thus, language clearly forms a part of the myth-symbol complexes of the ethnic groups. It is a traditional symbolic code. Languages

[437] Archie Mafeje, 'The Ideology of 'Tribalism'' 9 The journal of modern African studies 253 as cited in Keith Somerville, 'British Media Coverage of the Post-Election Violence in Kenya, 2007–08' 3 Journal of Eastern African Studies 526, 536.
[438] Mafeje as cited in Somerville, 536.
[439] Bronwen Manby, *Citizenship Law in Africa* (Open Society Institute 2009), 26.
[440] Stuart Hall, 'Cultural Identity and Diaspora' in Jonathan Rutherford (ed), *Identity: community, culture, difference* (Lawrence & Wishart 1990), 225.
[441] Njoroge and Kirori, 358.
[442] Cagri Tugrui Mart, 'British Colonial Education Policy in Africa' 2 International Journal of English and Literature 190, 194.
[443] Ibid, 194.

importance to identity also explains why regulation of speech is such a crucial subject. Attempts to stymie what people can say has a fundamental impact on the performance of their identity. We will return to the problems associated with the regulation of speech in Chapter 3. For now, let us explore three key Kenyan ethnic identities as they emerged: the Kikuyu, Kalenjin, and Luo. This section focuses on the particular elements of the myth-symbol complex that would become particularly important in relation to EV.

1.2.1 Kikuyu

Kikuyu tradition holds that the origin of all Kikuyu people was at Mukume wa Gathanga, where God was responsible for settling Gikuyu and his wife, Mumbi.[444] The mythical couple is said to be the parents of Kikuyus, who are referred to as the 'children of Mumbi' or the 'House of Mumbi'.[445] The myth is widely circulated as a symbol of unity and subsequently functions as a primordial symbolic code as explained in Chapter 1. Unlike the Luo and the Kalenjin, members of the community were known for migrating to other areas as far back as colonial era, thereby arousing suspicion among indigenous communities. The tale of one monolithic people is intended to obscure diversity within the ethnic group. One of the stereotypes attributed to the community is that they are wealth conscious. The stereotype is based on the fact that many members of the community often link wealth to virtue and virtue to a sense of history that regarded goat and land ownership as a trust even prior to the colonial era.[446] Thus, the sub-groups were divided between land-owning families and landless ones in pre-colonial Kenya, and the landless ones were often dependent on the former.[447] As the British settlers arrived, 30 to 70 per cent of Kikuyus lost their native land.[448] Colonialists would settle on indigenous lands of the Kikuyu and essentially turn the community into squatters. Squatters would be further dispossessed when the white settlers declared that they were are a nuisance and/or opted to make more exhaustive use of the land. With official sanction, numerous members of the Kikuyu community migrated to the Rift Valley, where life was less difficult, at least temporarily. Until after the 1937 Resident Labourers Ordinance, which removed the

[444] Godfrey Muriuki, *A History of the Kikuyu, 1500-1900*, vol Oxford University Press (Nairobi, Kenya and London, England 1974), 63. Hannah W Kinoti, 'Some Principles of Man-Woman Relationships in Traditional Gikuyu Society' 3 WAJIBU 2, 2.
[445] Kinoti, 2.
[446] Atieno-Odhiambo, 234.
[447] Bruce J Berman, 'Nationalism, Ethnicity, and Modernity: The Paradox of Mau Mau' 25 Canadian Journal of African Studies/La Revue canadienne des études africaines 181, 196.
[448] Muriuki, 173. Beth Maina Ahlberg and Kezia Muthoni Njoroge, ''Not Men Enough to Rule!': Politicization of Ethnicities and Forcible Circumcision of Luo Men During the Postelection Violence in Kenya' 18 Ethnicity & Health 454, 462.

sense of security among the squatters and their hope to reclaim property rights. Squatters stood against settlers asserting their rights to Kikuyu labour, time and accumulation of sheep, goats, and wives.[449] Stolen lands became the fundamental issue in their struggle against colonial authority. The reclamation of this land came to be championed by Kenyatta, who organised the Mau Mau rebellion against the colonial state.[450] The Mau Mau rebellion failed, but not their argument for land resettlement of Kikuyu communities (discussed further below).

A central part of the Kikuyu ethnic identity centres on the practice of circumcision, which President Kenyatta, who was a historian by trade and educated at the London School of Economics, wrote about in shining terms.[451] It is a traditional symbolic code. Male circumcision was not seen as mutilation but as an important rite of passage for males in the community, one in which norms and values of Kikuyu cultural traditions would be transmitted to the new generation of community members.[452] Once circumcised, the individual would become a full member of the group with a new frame of reference to relate to society and identify themselves with its values and symbols.[453] As the practice is so fundamental to how the community views itself in relation to other communities, especially those that do not engage in the practice, it merits further investigation. Circumcision signifies the acquisition of full citizenship within the ethnic community and can be viewed as a maturation myth.[454] It is said to be the making of men through which manhood and adulthood with its related responsibilities and expectations of masculinity are conferred to the next generation. It signals the turning point of a boy from a *kihii*, a big uncircumcised boy[455], to an adult man.[456] Once circumcised, the male does not assume the same responsibilities as he had in the past. *Kihii* has developed to

---

[449] Atieno-Odhiambo, 234.
[450] Ibid, 235-6.
[451], Wanjiru Kamau-Rutenberg, ''Watu Wazima: A Gender Analysis of Forced Male Circumcisions During Kenya's Post-Election Violence' ' (*http://africanarguments.org/2009/07/17/watu-wazima-a-gender-analysis-of-forced-male-circumcisions-during-kenyas-post-election-violence/*) accessed 15 January 2017
[452] Kikuyu custom dictates that women in the community also undergo a version of circumcision, a clitoridectomy, to acquire full citizenship within the community and become more 'beautiful'. Sidney H Fazan, *Colonial Kenya Observed: British Rule, Mau Mau and the Wind of Change* (Bloomsbury Publishing 2014), xvi. Atieno-Odhiambo, 243. It is said to mark the woman's readiness for marriage and motherhood. Fazan, xvi. The thesis does not elaborate on the practice of 'female circumcision' because it was not a feature of 2007 election violence.
[453] Godfrey Muriuki, 'A History of the Kikuyu to 1904' (University of London 1969), 172. Michael N Mbito and Julia A Malia, 'Transfer of the Kenyan Kikuyu Male Circumcision Ritual to Future Generations Living in the United States' 32 Journal of adolescence 39, 40.
[454] Ahlberg and Njoroge, 455. Stephen N Ndegwa, 'Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics' American Political Science Review 599. Muriuki, 'A History of the Kikuyu to 1904', 172.
[455] Other ethnic groups that practice circumcision have similar terminology to uncircumcised men as immature, for example, the Luhya use omusinde. Mark Lamont, 'Forced male circumcision and the politics of foreskin in Kenya' 77 African Studies 293, 303.
[456] Ahlberg and Njoroge, 458.

become one of the most derogatory and demeaning terms as it insinuates that uncircumcised males have no manners and are of little value. To return to the myth-symbol complex set out in chapter 1, the myth of Gikuyu and Mumbi and the maturation myths form key parts of what binds the Kikuyu ethnic community and set them apart from the 'other' ethnic groups, especially those who do not practice circumcision and, according to Kikuyu tradition, are 'less valuable'.

It is worth noting that during 1950-1957 before independence, Kikuyu people were told that prominent Luo leaders, specifically those involved in the struggle for independence, were circumcised. This was in order to encourage the Kikuyu people to accept Luo leaders as legitimate.[457] Consequently, the willingness to attach the emotive symbol of circumcision to certain groups during specific periods seems to be motivated by political opportunism. This is demonstrated by Kenyatta's infamous rebuke of Bildad Kaggia (a Kikuyu) during the mid-1960s after Kenya had gained its independence. Kenyatta asked Kaggia why he behaved like a *kihii* because Kaggia had refused to amass land or wealth for himself. Kaggia had joined an opposition political party led by Odinga, who is part of the Luo ethnic community that does not customarily practice circumcision. Thus, Odinga was viewed as a *kihii*.[458] It was in the Kenyatta-era that the growing political elite continued entrenching the process through which male circumcision was appropriated to mean someone of wealth and power, which further entrenched ethnic chauvinism. Kenyatta wrote about circumcision in shining terms, ridiculing those communities that did not make 'men out of their boys'.[459] Contemporary political discourses on circumcision (assessed in the *Pathways to Violence* section of the chapter) furthered the use of male circumcision as a politicised ethnic tool and a status symbol among the Kikuyu political elite.[460] These political discourses coincided with an emerging health discourse of the 2000s that popularised male circumcision as a public health strategy for the prevention of HIV transmission in Africa. [461] Experts of Kenyan customs and tradition foreshadowed how the health discourses would further the stigma of the uncircumcised communities, most notably the Luo community (discussed further below). The discourses were

[457] Ibid, 461.
[458] Ibid, 463.
[459] Kamau-Rutenberg
[460] Ahlberg and Njoroge, 454.
[461] Ibid, 455. Those emerging health discourses relied on studies that were constrained by their experimental conditions and terminated after a short period time rendering their results inconclusive. What is more, evidence suggests that in certain areas, circumcision led to higher infection rates because circumcised men would have multiple sexual partners under the mistaken assumption that they could not get infected. And even in parts of the country, like central Kenya, with the highest rates of circumcision, the HIV infection rates steadily increased during certain periods, like 2003 to 2007.

furthered by new medicalised spaces of morality that emphasised the cleanliness and hygiene of excised men.[462]

1.2.2 Kalenjin

The Kalenjin ethnic community is not as unified as the Kikuyu. During the colonial era, they were referred to as 'Southern Nilo-Hamites' or 'Nandi Speaking People'.[463] The latter refers to the linguistic similarity of its members, even with the differences in dialect.[464] Indeed, the literal translation of the word Kalenjin is 'I say to you'. This perpetuated the notion of the group members as 'sons of the soil' or autochthony. Those understood as the Kalenjin ethnic community today consist of several major dialectic subgroups: Nandi, Tugen, Marakwet, Pokot, Sabaot, Kipsigis, Keiyo and Terik, which are identifiable within the larger ethnic group.[465] Beyond language, there are other similarities among the subgroups, such as rituals and social institutions – traditional symbolic codes.[466] For instance, the duty of protecting the community from 'external aggressors' (as well as raiding other ethnic communities) is bestowed on 'men' in the community, and manhood is derived from age and initiation that is accompanied by circumcision for all the subgroups except the Pokot who generally do not practice it.[467] The inclusion of the Pokot subgroup in the larger ethnic identity highlights the difference in approaches to circumcision between the Kikuyu and the Kalenjin. Although, uncircumcised men were barred from participating in certain aspects of the community, for example, they cannot participate in the assembly of male elders.[468] Still, the Kalenjin are more tolerant of members of the community not engaging in the practice. That is also evidenced by a substantial number of the community supporting a 2007 Presidential candidate (Raila) from an ethnic group that does not historically circumcise.

The Kalenjin moniker did not exist until a conscious effort was made in the 1940s to highlight the similarities of oral history, harmonise the language, create social welfare associations, and thereby, unite the Kalenjin (a more popular moniker than others suggested,

---

[462] Lamont, 295.
[463] Florence J Chelimo and Kiplagat Chelelgo, 'Pre-Colonial Political Organization of the Kalenjin of Kenya: An Overview' International Journal of Innovative Research & Development, 6.
[464] Gabrielle Lynch, *I Say to You: Ethnic Politics and the Kalenjin in Kenya* (University of Chicago Press 2011), 8.
[465] Chelimo and Chelelgo, 6. Lynch, 39.
[466] Lynch, 39.
[467] Chelimo and Chelelgo
[468] Henrietta L Moore, 'Democracy and the Ethical Imagination' in Joanna Cook, Nicholas J. Long and Henrietta L. Moore (eds), *The State We're In: Reflecting on Democracy's Troubles* (Berghahn Books 2016), 58.

like Mnandi and Mlumbwa) as a precise ethnic group.[469] A sense of common ethnicity was promoted by the dominant narratives of shared history and associated historical and moral community.[470] According to the narratives, the Kalenjin community migrated from the north and first settled in Mount Elgon. That is, until searches for water, food, and pasture led to members of the community spreading across the area.[471] The narrative has elements of truth.[472] Historians believe that members of the subgroups migrated from south-east Khartoum (in modern-day Sudan) guided by the River Nile until they first settled in Mount Elgon.[473] During the migration, some members of the subgroups are said to have interacted with Cushitic peoples from whom they picked up the practice of circumcision.[474] A traditional symbolic code, albeit one that is not integral to the community's sense of identity, given some subgroups (like the Pokot) generally don't engage in it. Lynch notes that narratives of a common history among the Kalenjin overlook oral traditions and the individual histories of the subgroups, which indicate a more nuanced history that is characterised by assimilation, absorption, intermarriage, and social interaction.[475] Two emotive, interconnected, and synergetic factors contributed to the unification of the subgroups. Lynch identifies those factors as the perceived opportunities and advantages of more voting power and broadened territorial association, and the fear of marginalisation (political and economic) by the more cohesive and 'advanced' ethnic groups.[476] As members of the group interacted with other groups and the colonial State, they realised how important their territorial association and group size was to the advancement of their interests.[477] There was a realisation that a united group with a common purpose would enable the ethnic sections to form a powerful entity that could not easily be disregarded.[478] United as the Kalenjin, the subgroups had the best chance of safeguarding their interests, especially their interest over indigenous lands. Colonialists, in turn, supported the growth of 'a strong united Nandi-speaking block' as they believed it would be useful to have a 'Third Force'

[469] Lynch, 31 and 35.
[470] Ibid, 31 and 35.
[471] Ibid, 40.
[472] Ibid, 40.
[473] Chelimo and Chelelgo, 6.
[474] Ibid, 6.
[475] Lynch, 40.
[476] Ibid, 31.
[477] openDemocracy, 'Militias, Gangs and Vigilantes in Kenya: The Consequences of Abandoning the Reform Agenda' (*https://www.opendemocracy.net/article/email/militias-gangs-and-vigilantes-in-kenya-the-consequences-of-abandoning-the-reform-agenda*) accessed 18th March 2017
[478] Lynch, 36.

in the country that would hold the balance of power between the bigger and vocal Kikuyu and Kavirondos (now Luhya) communities.[479]

Other than the narrative of a shared history, the community bond over their collective claim to the Rift Valley and the right they claim to owning and controlling their homeland.[480] This is a primordial symbolic code because it is considered innate, unchangeable and exempt from communication. What is more, as we saw through Jenkin's work, land is a key part of the myth-symbol complex of ethnic communities in Kenya – it binds the group to a specific territory. The Rift Valley was annexed by the colonial authority to form the majority of the 'White Highlands' (discussed further below).[481] The Kalenjin community acutely feared being dominated by the Kikuyu during the independence period and thus, asserted their claim to the areas that bordered Kalenjin native reserves.[482] As if to confirm the fears of the community, after independence, poor and landless Kikuyus were resettled into the Rift Valley on land that Kalenjin's view as their homeland. The non-indigenous settlement fostered an antagonistic relationship because they had competing claims to the same land. Kalenjin sought to benefit from their enlarged community and understandings of land and territory (propelled by the colonial authority) to claim the White Highlands.[483] Conversely, the Kikuyu claimed the same land based on squatting, agricultural development, and the Kikuyu-led fight for independence. Lynch highlights how the tensions between the Kalenjin and Kikuyu resulted from colonialist's contradictory policy of encouraging economic migration (by using exorbitant taxes to create a 'voluntary' labour market) and, at the same time, creating ethnic 'units' attached to geographic locations for ease of administration.[484] To make matters worse, in 1971, a large-scale Kikuyu settlement into 150,000 acres of the Rift Valley was effected under Kenyatta's tenure as President to consolidate his Kikuyu power base.[485] The antagonism has been part of Kalenjin ethnic identity because of narratives of territoriality, opportunity, and threat, which have been mixed with a view of the community's marginality and vulnerability in relation to ethnic 'others', chiefly the Kikuyu. The belief in ownership of the Rift Valley has proliferated such that when Kalenjin males undergo circumcision, they are taught a vernacular rich in the language of warfare and the need to defend the community.[486]

---

[479] Ibid, 33.
[480] Ibid. Ahlberg and Njoroge, 462. Chelimo and Chelelgo, 6.
[481] Ahlberg and Njoroge, 462.
[482] Akiwumi, Bosire and Ondeyo, 66.
[483] Lynch, 36 - 37.
[484] Ibid, 36 - 37.
[485] Daniel Branch, *Kenya: Between Hope and Despair, 1963-2010* (Yale University Press 2011), 96.
[486] openDemocracy.

1.2.3 Luo

Luo tradition holds that the forefather of the community is Ramogi. He is believed to have travelled to Kenya from Southern Sudan (through Uganda) before entering modern-day Kenya and stopping at Ramogi Hill.[487] Both available written history and memory of the community insist that all Luo groups descended from Ramogi – a primordial symbolic code.[488] Ramogi Hill (the first stop of the father of the community) has accordingly been given social and cultural significance.[489] The Luo community was first connected through their use of the Dholuo language (they are referred to as Jii-speakers) and their shared inhabitancy of important regions in the Western Province.[490] Those understood as the Luo ethnic community today consist of several major subgroups: the Shilluk, Luo of Wau, Anuak, Naath, Acholi, Alur, Jonam, Jo Padhola, Langi, Pari, Labwor and JoPaLuo.[491] They do not practice circumcision, a point that will come to fruition further down in this section. It was only when the Luo Union came forward as an umbrella association for the smaller clan- and local-based associations that the Luo identity emerged.

The Luo community preserved their relative autonomy from the colonial state.[492] They managed to retain their indigenous lands (unlike the Kikuyu and Kalenjin) because they were less desirable to the colonial regime. The indigenous lands of the Luo in the Western province of Kenya were not suitable for European settlement because of the malaria-prone shores and the lack of agricultural profitability.[493] Additionally, efforts to mould the Luo community into cash-crop cotton growers had failed. The colonial regime had no other developmental agendas for the community, so their province became a labour reserve, and members of the community were labelled and categorised as 'Kavirondo labour'.[494] Though they were poor, they were generally free people, which was a source of pride, with many Luo's proclaiming that the District Commission did not 'close my gate for me'.[495] From the early 19th century, tens of thousands of workers migrated to various parts of the county due to taxation and coercion

[487] Elizabeth A Odhiambo and Fredrick Z Odede, 'Cultural Heritage and the Socialization Process: A Study of Ramogi Hill' 2 International Journal of Business and Social Research 87, 87.
[488] James Ogude, 'The vernacular press and the articulation of Luo ethnic citizenship: the case of Achieng'Oneko's Ramogi' 13 Current Writing: Text and Reception in Southern Africa 42, 43.
[489] Odhiambo and Odede, 87 - 88.
[490] Matthew Carotenuto, 'Riwruok E Teko: Cultivating Identity in Colonial and Postcolonial Kenya' Africa Today 53, 57. Atieno-Odhiambo, 231.
[491] Atieno-Odhiambo, 231.
[492] Ibid, 233.
[493] Carotenuto, 56.
[494] Ibid, 57. Atieno-Odhiambo, 233.
[495] Atieno-Odhiambo, 233.

policies of the colonial regime. These migrant workers assembled with others from their homelands to create social networks. In these networks, welfare associations were formed to provide economic and social safety nets while also providing communication networks that helped to spread Luo focused news. *Ramogi* (established by Achieng' Oneko in 1944) was a community centred newspaper that is noteworthy. It is said to have united the community by giving them a sense of being a bounded community through weekly representations of locality and popularising newly-created cultural and economic movements.[496] The newspaper provided the first network of identity among the Luo.[497] It created the space in which members of the community (who were dispersed across the country and in East Africa generally) could absorb the shock of colonialism by forming a sense of community through the performance of the 'Ramogi identity'.[498]

Between 1918 and 1939, major concerns stimulated the unification of the aforementioned sub-groups. These concerns stemmed from the uneven opportunities in licensing and trading as local Indian merchants were given inequitable shares, thereby affecting the Luo communities' economic gains. In the late 1940s, a common cause for continued opposition to colonialism emerged due to a bench terracing controversy[499]. The lack of economic opportunities led to calls for the community to unite against economic barriers.[500] 'Persistence Is Strength. Unity Is Strength' became the slogan for the movement; Odinga was the leader.[501] He galvanised the Luo sub-groups that turned the opposition into an expression of a colony-wide anti-colonial movement. Theirs was in part a struggle to accumulate power in their locality to fuel the 'subsistence peasant economy' in which surpluses of products (ghee, sorghum, maise, hides, skins and millet) would be traded to the economic benefit of the community to secure an acceptable standard of living.[502] Odinga was elected paramount leader of the Luo Union and entered nationalist politics in 1957. He declared Kenyatta, leader of the Mau Mau rebellion, the 'true leader' of Kenyan Africans, thereby securing Kenyatta's place 'at the apex of Kenyan African political leadership'.[503]

---

[496] Ogude, 42 - 44.
[497] Ibid, 43 - 44.
[498] ibid, 46 - 47. ibid, 90.
[499] The controversy surrounded a colonial government program instituted towards the end of the 1940s, in which men and women were forced to work (bench terracing) two mornings a week without pay to combat soil erosion. Kathy Santilli, 'Kikuyu Women in the Mau Mau Revolt: A Closer Look' 8 Ufahamu: A Journal of African Studies, 144 - 145.Those who did not attend the mandatory morning terracing sessions would be forced to pay a fine.
[500] Atieno-Odhiambo, 233.
[501] Ibid, 233.
[502] Ibid, 233.
[503] Ibid, 233 - 234.

Kenyatta and Odinga were united in their belief that securing land was the paramount concern.[504] However, they had significant ideological differences.[505] Odinga wanted to govern with a populist platform that sought to ensure that the common person (Mau Mau fighters, landless Kenyans, entrepreneurs like shopkeepers, and so on) would be uplifted. Kenyatta wanted to govern for the benefit of the 'big man'.[506] This led to the struggle for the political future of the country being reformulated into a Kikuyu-Luo rivalry because, as we shall see later in this chapter, Kenyatta wanted to protect property through the use of power consolidated in the Kikuyu community.[507] Members of the community were made to take oaths (physically standing on the flag) to secure their commitment to making sure the symbolic Kenyan flag would not leave the House of Mumbi.[508] After the first post-independence election secured Kenyatta's victory, the rivalry led the Luo community to be associated with opposition politics.[509] Luos attempted to claim positions of political power, but the Kenyatta-led State prevented Luos from getting into the highest offices. Though they had citizenship legally, they were subjected to numerous classificatory schemes and ethnocultural markers in the economic and political spheres.[510] They were branded foreigners from the West. The patrimonial climate of post-colonial Kenyan politics and the marginalisation experienced by Luos in their opposition led to the notion of a Luo-ness within the diaspora and the desire for a 'Big Man' to promote their interests.[511]

Circumcision, the aforementioned Kikuyu rite of passage conferring entry into civil society, was brought into the political arena by Kenyatta between 1966 and 1969.[512] That is when members of the oppositional party (led by Odinga) were castigated for not being part of civil society, which was based on the assumption that they were uncircumcised. The natural conclusion of the assumption is that Odinga (and his community) were also not truly a part of the Kenyatta-led state. The maturation myth was revived again in 1992 when Kibaki and Kenneth Matiba (both Kikuyus) ran against Odinga. Kibaki and Matiba made the fact that Odinga was not circumcised a prominent feature of their campaigns. It led to Odinga supporters being ridiculed for supporting 'a boy' for the position of President. The politics of the State

[504] Ibid, 240 - 241.
[505] Ibid, 240 - 241.
[506] Ibid, 240 - 241.
[507] Ibid, 241.
[508] Ibid, 242 - 243.
[509] Matthew Carotenuto and Katherine Luongo, 'Dala or diaspora? Obama and the Luo community of Kenya' 108 African Affairs 197, 205.
[510] Atieno-Odhiambo, 241.
[511] Carotenuto and Luongo, 205.
[512] Atieno-Odhiambo, 243.

became interlaced with the ritual of circumcision. It established a hierarchy of power within the communities that practice it (none more so than the Kikuyu), which was combined with icons of power and status in the contemporary State (Kenyatta and his inner circle, like Charles Njonjo and Mbiyu Koinange), and enabled elites to mobilise their ethnic communities to the benefit of the incumbent administration. Foreskin (specifically the politics of it) became the symbol of political masculinity, indexed as a sign of maturity and intelligence that defines whether the individual has the capacity to govern the Republic.[513] Many voters from circumcising communities have internalised the politicisation of foreskin and often declare that they would never vote for an uncircumcised contender. Regardless of the policies espoused by the politician. To return to SPT in Chapter 1, the effect of the discourse around circumcision illustrates how the maturation myth gained its affective, emotional, psychosocial resonance. It went from the myth-symbol complex of the Kikuyu to the political arena with the help of Kenyatta.

The internalisation of the politics of foreskin has had other effects, specifically forcible circumcision, particularly during 'circumcision season' in certain communities (especially the Bukusu, Teso, and Luhya communities), which is the result of the 'great pageant of ethnicity and manhood'.[514] That pageantry was derived from discourses that can be directly traced to Kenyatta's imposition of Kikuyu myth-symbol complexes into the workings of the State (that resonated with like-minded communities) to disempower Odinga and other opposition politicians. Since then, ethnic demagogues have instrumentalised the discourses to intimidate and 'feminise' uncircumcised men, like the Luo, by turning circumcision into a 'language of argument about a supra-ethnic masculinity'.[515] Those discourses also married questions of circumcision to questions of citizenship, so full rights to citizenship were only bestowed on circumcised 'men' whether or not they consented to the procedure. Indeed, government administrators and security actors of the State do not view forcible circumcision as a violent crime, which has resulted in survivors seldom reporting it.[516] Lamont argues that that ambivalence to extra-judicial violence is based on cultural practices that discipline those

[513] Lamont, 295 and 306.
[514] Ibid, 293 and 295. The article generally discuses incidents of forcible circumcision among the aforementioned communities, which it argues are a confluence of ethnic morality, cultural politics, citizenship and violence designed to impose a brand of hyper-masculined, ethnic bigotry on the nation. A brand claiming that only circumcised men can lead.
[515] Ibid, 295.
[516] Ibid, 299.

suspected of customary offences (here, the offence of retaining one's foreskin) outside the scope of the protection of legal authorities.[517]

1.3 Independence, Land, and the Rise of *Majimboism*

Colonial rule was increasingly challenged by its subjects and within the international realm. From the *Mau Mau* rebellion to the popularity of ideals of democracy, freedom and self-determination, and the establishment of the UN after the Second World War, the process of decolonisation gradually began to gather momentum.[518] According to Wasserman, decolonisation began as a reaction by colonial political and economic interests to the 'political ascendency' of the nationalist elite in combination with the threat of interference by colonial subjects.[519] Collective native dissent came in the 1930s, led by Kenyatta through campaigns on a number of policies which included land rights, access to education, respect for traditional African customs and the need for African representation in the legislative council.[520] The campaigns were peaceful but warned that lack of progress would be met with a 'dangerous explosion'.[521] Progress was only made after World War II, specifically in 1952, when the independence movement was at full speed, and *Mau Mau* made its presence and motives clear. The rebellion was principally operated by Kikuyus in protest of the massive land grabbing by white settlers, although several members of other ethnicities also participated.[522] Land was (and still to this day is) the key fault line of the nation.[523] The colonialists used their media organisations to spread propaganda through bulletins and analyses, which obscured the legitimate political grievances and economic hardships endured by natives on the native reserves and in urban areas.[524] *Mau Mau* was born out of the desire of the working class to live on their own land on which they could farm and enjoy the same prosperity as those who neighboured them.[525] Instead, colonialist propaganda painted the movement as arising out of

---

[517] Ibid, 299 - 300.
[518] Boahen, 512.
[519] Gary Wasserman, *Politics of Decolonization: Kenya Europeans and the Land Issue 1960-1965* (Cambridge University Press 1976), 1.
[520] -, World.
[521] -, ibid.
[522] Walter O Oyugi, 'Politicised Ethnic Conflict in Kenya: A Periodic Phenomenon' African Conflicts: Their Management, Resolution, and Post-Conflict Reconstruction, Addis Ababa: DPMF/OSSREA. *Robert Buijtenhuijs, Mau Mau–Twenty Years After: The Myth and the Survivors, vol 4 (Walter de Gruyter GmbH & Co KG 2016), 47.*
[523] Charles Hornsby, *Kenya: A History Since Independence* (IB Tauris 2013), 787 as cited in Ambreena Manji, 'The Politics of Land Reform in Kenya 2012' 57 African Studies Review 115, 116 and in Manji, 'Land Rights and the Rule of Law', 299.
[524] Wunyabari O Maloba, *Mau Mau and Kenya: An Analysis of a Peasant Revolt* (East African Publishers 1994), 1 - 2. Buijtenhuijs, 44.
[525] Maloba, 4.

'profound mental instability' supposedly induced by the 'abrupt collision of two civilisations'.[526] The colonialists also attributed atrocities to the movement and highlighted its 'dark side', specifically what they referred to as 'atavistic' oaths, maiming of cattle and killings in rural areas, which were used as evidence of the movements repugnancy. [527] Without an authoritative counter-argument, most people only had the official explanation that precluded them from sympathising with it.[528] Indeed, the first victory that the colonial State claimed over the *Mau Mau* rebellion was the war of propaganda.

The majority of rebels were Kikuyu, which resulted in the movement being viewed as a Kikuyu struggle for independence rather than a collective struggle. The same year there were outbreaks of sabotage and assassination within Kenya.[529] After the administration declared a State of emergency, Kenyatta was sentenced to seven years in prison for planning the Mau Mau uprising along with Dedan Kimathi. Kimathi coordinated Kikuyu anti-colonial forces most often in the forests where they were shielded from colonial aircrafts. Kimathi was hanged while in detention. Kenyatta's arrest and Kimathi's death did not lessen the 'campaign of terror'.[530] It resulted in the death of approximately 100 Europeans and 200 marginalised Kikuyus who refused to support the cause.[531] In 1955, the post-Mau Mau leadership emerged and created the nationalist goals that would lead the country to independence in 1963.[532] Following the worst of the violence in 1956, the State of emergency was lifted in 1960, where a conference was held in London, giving Africans the majority of seats in the legislative council. The African parties who became a part of the legislative council became the first to take part in the developing political processes on the continent.[533] Although Kenyatta was still in detention in 1960, he was declared President of the newly formed political party Kenya African National Union (KANU), which was an alliance between the Kikuyu, Luo, and Kamba ethnic communities that were the biggest and most politically established.[534] After his release in 1962, he led Kenya's delegation in negotiations for the independence of the new nation. It was during the independence deliberations that the symbol of *majimboism* came to the forefront. It created polarised views among the Kikuyu and their supporters who favoured a

[526] Ibid, 4. Buijtenhuijs, 44.
[527] Maloba, 9 - 10. Buijtenhuijs, 48.
[528] Maloba, 10.
[529] -, World.
[530] Melissa Tully, 'All's Well in the Colony: Newspaper Coverage of the Mau Mau Movement, 1952–1956' in Solimar Otero (ed), *Narrating War and Peace in Africa* (University Rochester Press 2010), 66.
[531] -, World.
[532] Atieno-Odhiambo, 235-236.
[533] -, World.
[534] Ibid. Buijtenhuijs, 22.

centralist constitution that enabled them to have complete control from what would be designated the centre of the Republic – the capital city of Nairobi.

Sanger and Nottingham traced the origins of *majimboism* to the first white settlers in what was then known as the East African Protectorate of the British Empire, like Lord Lugard and Lord Altrincham.[535] The settlers wanted to prevent the Kikuyu from returning to their farms by devising ethnic rights to land for the as yet largely tractable ethnic groups.[536] Leaders, such as future President Moi, were persuaded to fear Kikuyu domination more than they had feared the centuries-old slave-based aristocracies on the Indian Ocean coast. That was because Lugard and others wanted to develop an 'old white island', which was supposed to be a slice of a small territory in the Rift Valley. The area was restricted to a broad belt of farmland stretching from near Nairobi to Mount Elgon around the size of Wales nicknamed the – 'White Highlands' or scheduled areas.[537] They envisioned the country as a federation of about four states in which they would exercise local and political control and self-government over the White Highlands. Meanwhile, citizens of the Protectorate would exercise local governance over other areas.

Sanger and Nottingham also point to the Federal Independence Party (FIP) as a source of *majimboism*. FIP was formed in 1954 by white colonial farmers and was known for its emphatic racism. Members of FIP correctly predicted that political control would one day return to natives and endeavoured to seal off the White Highlands from the central government. Their goal was to keep the wealth of the White Highlands to those they saw as being responsible for developing it. By 1958, FIP reformed into the Progressive Local Government Party, which was not as virulently racist. Despite the difference in name, the agenda was virtually the same. They sought to achieve regionalism by strengthening the local government in the White Highlands by giving them the power to, for example, decide what taxes should be raised for government expenditure. Members of the Kenya African Democratic Union (KADU) embraced regionalism because it overlapped with their claims to ownership and control of areas that they considered their indigenous lands. Competition for land among the ethnic groups, and the perceived favouritism of the Kikuyu, were key reasons that members of KADU wanted the constitution to be founded on a regional structure referred to as *majimboism*, in which federal states would be divided according to ethno-regional boundaries. KADU was formed as a

[535] Clyde Sanger and John Nottingham, 'The Kenya General Election of 1963' 2 The Journal of Modern African Studies 1, 9.
[536] Atieno-Odhiambo, 238.
[537] Clyde Sanger and John Nottingham, 'The Kenya General Election of 1963' 2 The Journal of Modern African Studies 1, 9-10 Akiwumi, Bosire and Ondeyo, 61.

reaction to KANU from smaller and less politically established communities, such as the Kalenjin and the Coastal people, which repelled against the 'menace of domination' by the Kikuyu, Luo and Kamba communities.[538]

Under the federalist structure, each State was envisioned as having autonomy over their affairs, and the colonial-era provinces were envisioned as semi-autonomous regions with their own Presidents and parliaments, thereby weakening the powers of the central government and its control over indigenous lands.[539] This is elucidated through statements of leaders in KADU leadership, like John Konchellah, who said that *majimbo* meant land 'we now have will be controlled by us, and… all the injustices of the past would be rectified and… land… would never again be taken away from us'.[540] *Majimboism*, as alluded to above, had the support of the white settlers and colonial rulers in addition to some Asian and European minorities.[541] The independence constitution was eventually agreed upon in 1962. It followed the *majimboism* structure, not least because members of KADU's delegation gave assurances that they would negotiate for their proposed structure even if the cost was bloodshed. Nonetheless, the federal structure did not stop KANU from continuing to pursue its centralist agenda after it won the first general election. In fact, members of KANU had not negotiated in good faith, instead deciding to forgo the argument of centralism over federalism altogether because they understood that once in government, they could change the constitution.[542] Leaders in KANU explicitly told American diplomats that the independence constitution was 'a temporary document only'.[543]

We might pause here to revisit our earlier discussion of symbolic attachment. From the construction of the independence document, majimboism became associated with the reclamation of lost lands for those indigenous to the Rift Valley. Meanwhile, elites in KANU sought to frustrate all attempts at regionalism, fearing decentralisation of the state. Thus, regionalism simultaneously became a symbol of what representatives in KANU feared – the decentralisation of state resources away from the centre of the country and the loss of the lucrative Whtie Highlands to the indigenous communities. It resonated differently depending on the context and the speaker. The subsequent election (the first in the newly independent Republic) was characterised by tribalism and phobia of big 'tribe' domination. The smaller

[538] Buijtenhuijs, 22.
[539] Sosteness Francis Materu, *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (T.M.C. Asser Press 2015), 20. Branch, 14.
[540] Branch, 13.
[541] Buijtenhuijs, 51.
[542] Branch, 14.
[543] Ibid, 14.

ethnic groups did not trust Kenyatta as a candidate for President. They claimed that he had taken the side of Kikuyu elites. Elites whom they alleged had planned how the Kikuyu community would receive awards commensurate with their suffering during the *Mau Mau* rebellion against the colonialists and moderate members of the Kikuyu community. Other ethnic communities, including the: Coastal people, Luo, Luhya, and Kalenjin, stood as bystanders refusing to rally behind Kikuyu leadership largely due to colonialist propaganda.[544] Nonetheless, Kenyatta had political prestige and legitimacy derived from 40 years in politics, much of which was spent in opposition to colonial rule, which made him the 'father of independence'.[545] In the end, KANU triumphed over KADU, the main opposition party.

Still, Ogot and Ochieng point out that independent Kenya never made an ideological or structural break from the colonial state. Instead, what followed independence was an extension of the 'former colonial administrative and economic infrastructures' that were left in the control of the Kenyan leadership.[546] KANU's victory did not prevent the newly independent Kenya from suffering through the 'cancer of ethnicity that has eaten the social fabric of a culturally rich society'.[547] This cancer has thrived under leaders who rely on the members of their ethnic groups to suppress other ethnic groups who pose a threat to their political stranglehold. [548] Somerville contends that ethnicity and tribalism play a part in Kenyan politics through the language used by politicians, which often contain a reference to 'tribe,' alleged outsiders, usurped rights or property of local communities.[549] KANU shifted focus from establishing ideological differentiation from KADU to the politics of nation-building.[550] They used their significant parliamentary majority to take apart *majimboism*. They advanced the argument that the priorities of an infant nation could not be realised if the country relied on the Westminster-style of confrontational politics inherited from the outgoing colonialists. *Majimboism* also became so diluted in several constitutional conferences that it became unviable politically and economically.[551] Accordingly, *majimboism* was replaced by *harambee*, which in the context means 'working together'. [552]

---

[544] David Throup and Charles Hornsby, *Multi-Party politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Election* (James Currey Publishers 1998), 7 - 8.
[545] Ibid, 27.
[546] Ochieng and Ogot, xiii.
[547] Oucho, xi.
[548] Ibid, 9.
[549] Somerville, 528.
[550] Materu, 20 - 21.
[551] Susanne D. Mueller, 'The Political Economy of Kenya's Crisis' 2 Journal of Eastern African Studies 185, 189.
[552] Materu, 20 - 21.

1.4 Post-Independence Political Leadership

It is useful to explore the different ways that the post-independence Presidents utilised symbolic politics in order to scaffold their power bases. Again, we will pay close attention to the ways in which these intensify the particular tensions between the myth-symbol complex of each of the ethnic groups explored above.

1.4.1 Jomo Kenyatta

Kenyatta's commitment to nationhood was seemingly demonstrated through the establishment of KANU's first parliamentary cabinet, wherein Kenyatta established a broad coalition that included a cross-section of ethnic groups. Kenyatta appointed his long-standing political rivals: Tom Mboya and Odinga (both ethnic Luos and former members of KADU),[553] giving them the Ministries of Justice and Constitutional Affairs, and Home Affairs, respectively. All regions were assigned a minister, and every ethnic group was given a dedicated member in the government. Thus, KANU successfully quelled fears of big 'tribe' domination and made calls for *majimboism* redundant.[554] The ethno- regional balance of the first cabinet, in combination with the perception that competitive party politics was harmful to the nation's development, posed an existential threat to other political parties, especially KADU.[555] KADU collapsed through the loss of fervent supporters of *majimbo* and members being lured to KANU with promises of development for their communities and more funding. Among the defectors was Daniel Arap Moi, and ethnic Kalenjin, who would become the next President. KADU voluntarily dissolved itself in December 1964. Consequently, Kenya briefly became a *de facto* single-party state.

Kenyatta subsequently mobilised the Kikuyu elite and connected them to local and international capitalist allies after that.[556] He appeased the Kikuyu land hunger of former participants in the Mau Mau rebellion by resettling them under *inter alia* the Million-Acre Scheme created by the colonial government.[557] To facilitate the resettlement, Kenyatta formed a pragmatic alliance with Moi (who following independence was presumably not as burdened by the fears the settlers sought to stoke) to enable Kikuyus to settle in the White Highlands as freeholders.[558] Kenyatta continued the colonial-era practice of alienating land from certain

[553] Sanger and Nottingham, 37.
[554] Materu, 21 - 22.
[555] Ibid, 22.
[556] Atieno-Odhiambo, 241.
[557] Ochieng and Ogot, xiii.
[558] Atieno-Odhiambo, 241.

communities to redistribute among favoured communities (the colonialists favoured the European settlers similar to the manner in which Kenyatta favoured the Kikuyu).[559] The Kikuyu elites justified the mass land acquisition by citing their role in leading the Mau Mau rebellion. The Kikuyu community internalised the idea that their struggles for independence entitled them to land, such as the White Highlands, over and above indigenous communities like the Kalenjin. Conversely, as we saw earlier in the chapter, the members of the Kalenjin community have their 'birth right' to the Rift Valley encoded in their myth-symbol complex. This tension will be revisited below. Kenyatta went on to consolidate power and marginalise opposition groups. Odinga and Kenyatta focused on the problems associated with land. However, as mentioned above, Kenyatta thought that land was best protected within the Kikuyu nation. The Kikuyu-Luo rivalry (elucidated earlier in the chapter at '1.2.3 Luo') resulted in ethnicity winning over ideology, particularly Kenyatta's Kikuyu ethnicity.[560] Consequently, the Luo community were excluded from the 'common good,' access to power, and access to developmental resources.[561]

After radical members of the reconstituted KANU (like Odinga) were expelled, Kenya became a de jure multi-party state. Under the leadership of Odinga, radical members banded together to form Kenya's People's Union (KPU).[562] Odinga had lost his seat to Moi. Moi was considered to be a much more moderate politician.[563] The newly constituted KPU was at odds with KANU's strategy of remaining the sole political party in Kenya. Meanwhile, radicals and moderates who joined KANU from KADU consolidated the existing ideological differences within KANU, thereby threatening its internal stability. Conversely, those deemed to be radicals (like Odinga) mostly wanted socialist policies rather than the capitalist economic policies inherited from the colonialists. While those considered moderates, mainly wanted to keep the status quo (like Kenyatta and Moi). A deliberate campaign to eliminate followers of the party's radical faction was accomplished through rigged elections orchestrated by President Kenyatta, with the help of his moderate allies. Between 1966 to 1982, KANU enacted its plan of remaining the sole political party in the country. First, by making members of KPU recontest their seats. Only six managed to be re-elected. Then they suppressed KPU's political activities altogether. KANU went further by enacting constitutional amendments and laws that targeted

[559] Manji, 'Land Rights and the Rule of Law', 406.
[560] Atieno-Odhiambo, 241.
[561] Ibid, 242.
[562] Materu, 23.
[563] Throup and Hornsby, 12.

the opposition.[564] Those laws, among other things, banned independent candidates and gave the President the powers to order preventative detentions, which were used to detain leaders like Oginga without trial. Following the assassination of Tom Mboya in July 1969, the ban on KPU, and the detention of Odinga, Kenyatta's hegemonic enterprise was free to pursue his agenda.[565]

Kenyatta used the uncontested political space to create a centralised, authoritarian republic reminiscent of the colonial State.[566] He surrounded himself with Kikuyu political elite who acquired significant political power.[567] A complicated neo-patrimonial system was in operation instead of a party state.[568] Kenyatta governed through district 'barons' who had their spheres of operation in a similar way to the departed colonialists.[569] His leadership depended on the flow of patronage from himself to influential local bosses to their constituents in exchange for political support. Commissioners, Provincial and District Administrators, and Chiefs were given a similar role to that of KANU.[570] They became extensions of the State. Notably, Provincial and District Administrators continued to exert virtually the same political power as they had before independence.[571] Additionally, the pre-colonial Government Lands Act enacted in 1915 and born out of the Crown Lands Ordinance of 1902 gave the President discretionary powers to allocate land.[572] This power extended to the Commissioner of Lands, who is appointed by the President and can lease land in townships for a maximum of 99 years and agricultural areas for a total of 999 years. The Commissioner also had powers to convert leaseholds into freeholds. It is worth noting that Kenya is a largely agrarian society with an ever-growing population, making land a vital issue.[573] Plus, 80% of land in Kenya is either arid or semi-arid, and over 75% of the population is concentrated in the remaining high potential

[564] Materu, 23.
[565] Atieno-Odhiambo, 242.
[566] Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya' 23 Hum Rts Q 96, 97.
[567] Ibid, 97. Yieke, 2.
[568] Throup and Hornsby, 17.
[569] Ibid, 27.
[570] Karuti Kanyinga, 'Limitations Of Political Liberalization: Parties and Electoral Politics in Kenya, 1992-2002' in Walter O. Oyugi, Peter Wanyande and C. Odhiambo-Mbai (eds), *The Politics of Transition in Kenya* (Heinrich Böll Foundation 2003), 103. Materu, 24.
[571] Throup and Hornsby, 11.
[572] United Nations Office of the High Commissioner for Human Rights, *Report from OHCHR Fact-finding Mission to Kenya, 6–28 February 2008* (2008), 6.
[573] Anne Cussac, '"Kibaki Tena?" The Challenges of a Campaign' in Jérôme Lafargue (ed), *The General Elections in Kenya 2007* (Mkuki na Nyota Publishers Ltd and IFRA 2009), 43.

agricultural areas, with 60% of the workforce engaged in agriculture.[574] Land, specifically arable land, is viewed as the most important kind of wealth and source of political power and is continuously used to award patronage, build alliances, and solidify support.[575] From the 1980s, the ruling elite engaged in a process of land accumulation that was paired with 'progressive immiseration of the ordinary farmers, pastoralists, the rural landless, and the urban poor'.[576]

This was the genesis of the understanding among local-level actors that economic prosperity and development was directly linked to having a member of the same ethnic group in power.[577] So, in addition to macro-scale development prospects, individual material benefits were thought to be accrued by the ethnic group of the incumbent. Material benefits in the form of access to land, loans, localised development projects, and employment opportunities. Most Kenyans believed that if one of theirs holds a high political office, it is held in trust for the benefit of the entire community.[578] Ultimately, Kenyatta linked the position of head of State with access to resources. So much so, it has become inconceivable for any opposition leader to agree to give up even a slim chance at the presidency and settle for the certainty of exclusion in its shadow. That exclusion was exemplified by the treatment of Odinga.[579] For other local-level actors, it was not a matter of economics but rather a matter of ethnic pride. Kenyatta's leadership though repressive, tolerated the exercise of civil and political rights. For instance, a criticism levelled at the State was tolerated provided it did not include criticisms of Kenyatta personally.[580] Kenyatta's regime also had a higher tolerance for dissent, independence of the judiciary, and freedom of expression than Moi. In the middle years of Kenyatta's tenure, Parliamentarians were both more outspoken than ever before, and they also acted as a useful check on the executive.[581] When Kenyatta died in August 1978, his Vice President, Moi, took over the Presidency.

---

[574] Peter Kagwanja and Roger Southall, 'Introduction: Kenya–A Democracy in Retreat' 27 Journal of Contemporary African Studies 259, 264. Catherine Boone and others, 'Land Politics under Kenya's New Constitution: Counties, Devolution, and the National Land Commission' International Development, Working Paper Series 2016 66, 2.
[575] Rights, 3 and 6.
[576] Boone and others, 2.
[577] Jenkins, 586 - 587.
[578] Njoroge and Kirori, 361.
[579] Stephen N Ndegwa, 'Kenya: Third Time Lucky?' 14 Journal of Democracy 145, 154.
[580] Throup and Hornsby, 15.
[581] Ibid, 17.

1.4.2 Daniel Arap Moi

Before Kenyatta's death, jitters resulted in several of his inner circle banding together to oppose Moi. This was called the Gikuyu, Embu and Meru Association (GEMA). Nevertheless, Moi won the election and power was transferred to him smoothly.[582] Initially, Moi was considered not to be politically aggressive and soft-spoken.[583] Moi promised to follow the '*nyayo',* meaning footsteps, of Kenyatta. However, shortly thereafter, Moi ditched Kenyatta's system of ruling.[584] He bypassed the established political structures in the districts to strengthen his position by populist appeal to the rural masses. He also appointed his own nominees to parastatal boards and Ministerial posts, who depended on him for their position and authority.[585] Unlike Kenyatta, who worked with leaders who had already secured local political legitimacy, Moi favoured the reverse approach in which politicians were centrally appointed representatives of the State.[586] This was done to ensure the will of the central government (Moi) was enacted in the regions.

After finding his footing with the help of prominent Kikuyus (Vice President Kibaki and Attorney General (AG) Charles Njonjo), Kikuyu infighting allowed Moi to create distance between himself and high-ranking Kikuyu officials in his government.[587] Eventually, this led him to take deliberate steps to minimise the control of the Kikuyu elite in public, parastatal boards, and civil service by replacing the Kenyatta-era appointees with his loyalists.[588] As elites in GEMA feared, the attention of the State turned from Kikuyus, whose communities had relatively benefitted under Kenyatta's tenure, to the Kalenjin (Moi's ethnic group).[589] Moi disallowed national welfare organisations that advanced the ethnic interests of other communities, like the Kikuyu, Meru, Luhya, Luo and Embu.[590] Where Kenyatta dampened the power of KANU, Moi sought to reinvigorate it.[591] KANU was given administrative and political powers that matched those of the Provincial Administration, thereby muddying the distinction between KANU and the government. The Provincial Administration was hastily subordinated to KANU along with other parts of the government. Accordingly, the principle

[582] Materu, 23. Elizbeth Kimundi, 'Post-Election Crisis in Kenya and the Implications for the International Criminal Court's Development as a Legitimate Institution' 7 Eyes on the ICC 85, 87.
[583] Materu, 23.
[584] Throup and Hornsby, 27.
[585] Ibid, 27 and 30.
[586] Ibid, 45.
[587] Ibid, 28 and 30.
[588] Kanyinga, 104.
[589] Materu, 24.
[590] Kanyinga, 103.
[591] Ibid, 103.

of separation of powers was eroded. The judiciary and parliament were said to be 'mere 'appendages' of the all-powerful Executive'.[592]

The State actively sought to infiltrate civil society so Moi could build a base to support his patron-client networks.[593] Maverick politicians and opposition groups were silenced through the use of patronage and arbitrary detentions. Thus, organisations opposed to Moi's style of governance were demobilised by the State. People who opposed Moi faced grave consequences, including forcible exile, arbitrary detention, political assassination or extra-judicial killings.[594] Nonetheless, the most proffered means of subduing and eliminating dissent was arbitrary detention for both Moi and Kenyatta before him. Evident by Raila, who was the longest-serving political prisoner in Kenya, having spent nine years in detention without trial under Moi. Similar to Kenyatta's tenure, Materu rightly points out that the Moi administration showed all the signs of authoritarian tendencies and concentration of powers in the Presidency.[595] In June 1982, there were widespread calls for an open political system.[596] Moi responded with a motion proposed by his then Vice President – Kibaki.[597] The motion introduced section 2A to the Kenyan Constitution, which made Kenya a *de jure* one-party state. After an attempted coup d'etat in August of the same year, allegedly masterminded by senior Kikuyu members of KANU and carried out by low-ranking members of the Air Force, the Moi administration became ever more repressive.[598] Within the same year, GEMA was prohibited.[599] Political repression became worse than it was in Kenyatta's era. KANU became the principal focus of authority; it was both the sole political party and the State.[600] The progressive centralisation of power in the Presidency, which started under Kenyatta's tenure, was furthered under Moi until it produced an all-powerful ''imperial' presidency' along with a constitutional structure that lacked fundamental checks and balances.[601] Moi consolidated Kenyatta's authoritarian rule by being less tolerant of freedom of expression, criticism, dissent, and independence of the judiciary.[602] According to the 2003 Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, Moi had an open policy of

[592] Musila, 3.
[593] Kanyinga, 104.
[594] Kimundi, 88.
[595] Materu, 24.
[596] Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', 98.
[597] Kimundi, 87 - 88.
[598] Materu, 24.
[599] Kimundi, 87 - 88.
[600] Materu, 25. Kimundi, 88.
[601] Musila, 3.
[602] Materu, 24.

naked State violence. Not only to suppress pro-democracy campaigners and political opposition but also to vanquish them along with all real or imagined political dissenters.[603]

1.4.3.1 The Return to Multi-Party Politics

Political pluralism returned in December 1991 because of mounting pressure from the international community, especially international donors. This pressure resulted in financial sanctions, including suspension of aid from the World Bank, the International Monetary Fund, and bilateral donors subject to human rights and macro-economic reforms.[604] The aid in question accounted for 30% of the government's expenditure.[605] Alongside this, there was also mounting pressure from below.[606] A feeling of injustice had been stirring among ethnic communities since independence.[607] Materu notes that that feeling of injustice gave rise to historical fears and grievances and numerous issues regarding political, social, and economic relations, mostly regarding land.[608] Thus, in December 1991, the constitutional section proposed by then-Vice President Kibaki that had turned Kenya into a mono-party State was repealed.[609] Additionally, a two five-year term restriction was introduced. This prospective limit allowed Moi to have only two further terms as President.

The new election rules for the 1992 election, brought on by the return to multi-party politics, led KANU to take drastic measures to ensure their victory at all costs.[610] Moi detested the idea of multi-partyism because he wanted to maintain power. [611] He had resorted to the use of violence to displace and kill his opposition in key electoral areas. In the words of Mueller, 'Dead and displaced people don't vote'.[612] Moi himself prophesied that multi-party politics would 'only' end up stoking 'tribal animosity,' thereby polarising the country and destroying the prevalent peaceful coexistence.[613] Yet, it was officials in Moi controlled KANU that brought about the fulfilment of the prophecy by aiding its fulfilment through their

---

[603] Justice and Reconciliation Commission Task Force on the Establishment of a Truth, *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission* (2003), 31.
[604] Mueller, 189. Binaifer Nowrojee, Bronwen Manby and Abdullahi An-Na'im, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya* (1993), 1. Throup and Hornsby, 85.
[605] Throup and Hornsby, 74.
[606] Materu, 26.
[607] Ibid, 15.
[608] Ibid, 15 - 16.
[609] Ibid, 26.
[610] Mueller, 190.
[611] Ibid, 189.
[612] Ibid, 189.
[613] Patrick Kiage, 'Prosecutions: A Panacea for Kenya's Past Atrocities' 2 E African J Hum Rts & Democracy 104, 106. Nowrojee, Manby and An-Na'im, 1. Throup and Hornsby, 72.

operatives.[614] Moi's operatives harnessed ethnic divides in the country to deploy, use, and exploit them for the attainment of their purely political ambitions. In the words of Kiage, 'The germinal seeds of what was to be a baleful harvest of mayhem, blood and death were planted by none other than President Moi himself,' when Moi predicted multiparty politics resulted in ethnic violence in 1991.[615]

Similarly, Yieke notes that once the system of using ethnicity to justify violence was in place, it became self-perpetuating.[616] It, therefore, increased the 'likelihood of future conflict by sharpening ethnic identity and chauvinism' in addition to promoting the doctrine that certain regions 'belonged' to indigenous groups and non-indigenous groups should return to their native lands or face forcible expulsion. Often, in autochthonous discourses, majimboism was used as a symbol representing an existential threat for non-indigenous communities, such as the Kikuyu. Whereas, to the Kalenjin, the failure of groups to depart their indigenous lands, which their myth symbol complex designates key to their identity, was an existential threat because, without *majimboism*, the 'foreigners' would continue to be deprived of their greatest source of wealth (land) and continue to live on the fringes of the society. These competing land interests and territorialisation of identity also explains why land is a fault line in Kenyan politics; it is an easy way to distinguish the indigenous ethnic community from the ethnic 'other' – the non-indigenous 'foreigners'. These myth-symbol complexes are re-articulated strategically during election cycles through speeches of politicians, which will be visited in Chapter 3.

Moi's primary political concern going into the 1992 election was the acquisition of 25 per cent of ballots cast in five out of the eight Kenyan provinces, which was essential to winning the election. [617] He was particularly concerned about his home province – the Rift Valley, which had the largest allocation of Parliamentary seats.[618] The Rift Valley had experienced a pre-independence influx of people from Luo, Luhya, and Kikuyu communities.[619] This was in large part due to the 1962 resettlement of Africans into the White Highlands through, among other things, the purchase of large farms with single block titles using loans from various sources, such as the Land Bank.[620] The vast majority of farm buying companies were established in the Central Province and refused to sell to indigenous people,

[614] Kiage, 106.
[615] Ibid
[616]Yieke, 9.
[617] Mueller, 190.
[618] Akiwumi, Bosire and Ondeyo, 56. Nowrojee, Manby and An-Na'im, 3.
[619] Akiwumi, Bosire and Ondeyo, 56.
[620] Ibid, 62 - 63.

like the Kalenjin, even where they were willing and able to buy such farms.[621] Instead, they sold to companies from the Central Province. For example, the sale of significant pieces of land to centralised State enterprises, such as the Agricultural Development Corporation. They managed some of the farms for a profit before subdividing them and selling them to ameliorate landlessness.[622] Most of the Agricultural Development Corporation controlled farms were located in a belt that bordered the former Kalenjin reserves. Thus, the Kalenjin came to view these farms as part of their 'traditional homelands' and resented the 'foreigners/immigrants' living in their midst, often referring to them as '*madoadoa',* meaning stains.[623] There was a strong view that foreigners/immigrants were dealing with stolen goods, which should, therefore, be returned to their rightful owners.[624] At the same time, the foreigners/immigrants felt like legitimate owners of the land.[625] Similar terminology existed in other parts of the country, such as the Coast Province, where foreigners/immigrants were referred to as '*watu wa bara*,' meaning barbarians from up-country.[626]

At this juncture, we should recall that colonialism had resulted in many indigenous people, not just the Kalenjin but others, like the Masaai and Mijikenda, losing their traditional lands to the colonial government for the benefit of white settlers, leaving them landless.[627] By the end of the colonisation period, white settlers who made up less than one per cent of the population owned twenty per cent of the arable land, produced eighty-five per cent of agricultural exports and generated most of the taxable income.[628] Indigenous communities resented how members of other ethnicities had settled on land that they believed had belonged to their forebears. Worse still, virtually all of the new owners of farms occupied the most fertile rain-fed land in the area, enabling them to enjoy a higher standard of living. Meanwhile, indigenous communities lived in striking poverty. Moreover, the poorly regulated land settlement schemes did not account for the competing land interests among the different ethnicities. The people who bought the farms came from other communities.[629] For instance, the Maasai ethnic group valued land for the grazing of their livestock, while the Kikuyu

---

[621] Ibid, 55 - 56. Jenkins, 576.
[622] Akiwumi, Bosire and Ondeyo, 62 - 63.
[623] Ibid, 65 and 77.
[624] Thomas Markussen and Kitavi Mbuvi, *When Does Ethnic Diversity Lead to Violence? Evidence from the 2007 Elections in Kenya* (2011), 8.
[625] Materu, 51.
[626] Akiwumi, Bosire and Ondeyo, 55. C Odegi-Awuondo, 'Kenya 1945–1963: A Study in (sic) African National Movements' 10 Transafrican Journal of History 178, 179.
[627] Akiwumi, Bosire and Ondeyo, 56.
[628] Wasserman, 2.
[629] Akiwumi, Bosire and Ondeyo, 65 and 77.

treasured land for arable farming.[630] So, indigenous communities never accepted that the holders of the title deeds had a more legitimate right to the farms than they did. After some time, though, the different communities built a harmonious and peaceful coexistence because they jointly engaged in educational, social, and economic activities.[631] There were even several cases of intermarriage between ethnic groups.

After 1991, Moi was worried that people from these non-Kalenjin communities would vote for an opposition politician resulting in him not getting the votes he needed.[632] Moi's secondary concern was the loss of parliamentary seats to opposition politicians, which would have had the effect of reducing his parliamentary majority. To alleviate these concerns, Moi controlled KANU is said to have authored the practice of creating, aiding, and abetting existent criminal gangs and paramilitary forces to achieve political ends through violence around elections. To return to precipitating violence in Chapter 1, when Moi decided to use pre-election violence to secure electoral victory, the gangs and paramilitary forces effectively functioned as the short-term modality by which he could commit the hard physical violence. Violence was the tool through which the Moi administration stamped its dominance on Kenyan society.[633] Thus, Moi is credited with starting the pre-election violence trend shortly after the 1992 election.[634] According to Cussac, ethnic confrontations, land battles, livestock theft, border clashes and banditry, which occur in a local framework of deep conflict, have a hidden agenda of terrorising the populations suspected of supporting the opposing party to prevent them from voting.[635] For example, in the run-up to the 1992 and 1997 elections, groups loyal to former President Moi, particularly in the Rift Valley, used violence to prevent opposition voters from casting their ballots.[636] Again, Moi furthered the colonial-era practice of alienating land from certain communities to the benefit of favoured communities.[637] This time it was to the benefit of the Kalenjin. Landless Kalenjin and Maasai youths were financed and incited into forcing out opposition voters. Moi was increasingly accustomed to using land allocation and land restitution as tools to 'forge a cohesive ethno-political constituency out of the Kalenjin groups and the other ethnocultural groups' that claimed to be natives of the Rift Valley.[638] The

[630] Ibid, 55.
[631] Ibid, 65 and 77.
[632] Mueller, 190.
[633] Cussac, 28.
[634] Ibid, 28.
[635] Ibid, 28.
[636] Markussen and Mbuvi, 6.
[637] Manji, 'Land Rights and the Rule of Law', 406.
[638] Ibid, 406 – 407.

government defended the 1992 violence as a means to restore the land to its original owners when in reality, it was a form of voter suppression directed primarily at Kikuyus.[639]

The gangs that were created and proliferated under Moi, in turn, challenged and diminished the State's monopoly of legitimate force.[640] They were state-directed but not wholly state-controlled, reflecting a 'gang for hire' nature.[641] They were not a permanent wing of KANU or other future political parties. Instead, they were semi-autonomous bodies that were hired by political leaders during election seasons. Alliances between different distinctive factions of the political elite and urban gangs resulted in rival politicians fighting proxy wars through other gangs. This did not bode well for Kenyans who, as a result of the large social bases of these gangs and their rapid expansion, were plunged into a world of political violence. What is more, struggles within the political elite served to facilitate the incorporation of these gangs into the internal logic of the political system, thereby concretising the short-term modality as one that could be drawn on in the future. This is an important point because when we turn to 2007 EV, we will see how gangs were employed by the State to attack specific communities, and the diffusion of violence outside the State apparatus resulted in the executive not having control over the outpourings of violence. Key KANU politicians were mentioned by name in human rights reports and the report of the Judicial Commission Appointed to Inquire Into Tribal Clashes in Kenya (Akiwumi report) for their role in organising gangs of youth to enact violence.[642] Politicians issued overt warnings. For instance, Member of Parliament William Ntimama warned residents in the Rift Valley to 'lie low like envelopes,' a warning that was echoed by other politicians.

Multi-partyism was widely viewed among the Kalenjin community as a campaign to remove 'their own' as President in favour of someone who was not Kalenjin.[643] The general sense in the Kalenjin community was if Moi lost, the community as a whole would lose a great deal.[644] Additionally, multi-partyism was seen as a further attempt to dispossess indigenous communities of their land.[645] The reintroduction of multi-party politics ultimately undermined

---

[639] Jérôme Lafargue and Musambayi Katumanga, 'Kenya in turmoil: Post-Election Violence and Precarious Pacification' in Jérôme Lafargue (ed), *The General Elections in Kenya 2007* (Mkuki na Nyota Publishers Ltd and IFRA 2009), 20.
[640] Mueller, 194. Lisa Misol, Joost R Hiltermann and Ernst Jan Hogendoorn, *Playing With Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya* (2002), 2.
[641] Daniel Branch and Nic Cheeseman, 'Democratization, Sequencing, and State Failure in Africa: Lessons from Kenya' 108 African Affairs 1, 15 - 16.
[642] The Commission was tasked with the investigation and generation of recommendations regarding the 1992 and 1997 election violence.
[643] Akiwumi, Bosire and Ondeyo, 77 - 78.
[644] Ibid, 77 -78.
[645] Ibid, 55.

the once harmonious coexistence among the communities. The equilibrium was also destabilised by the increased population of the new farm owners. Multi-party democracy called for a system of one person, one vote, which meant that so-called foreigners/immigrants could represent the indigenous people in both local authorities and parliament. Given the ethnic trend to politics in Kenya, it was believed that the foreigners/immigrants would vote with their 'kith and kin' in support of candidates from their ethnicities.[646] Similar to the manner in which the Kalenjin generally tended to accept and follow their leaders on political issues.[647]

Accordingly, the presence of foreigners/immigrants in Provinces to which they were not indigenous was seen as tipping the balance in favour of their candidate's acquisition of the 25% of votes from one out of the five of the Provinces needed to win the Presidential election.[648] So, Kalenjin politicians manipulated *majimboism* to counter the campaign for multi-partyism.[649] Moi controlled KANU stereotyped, totalised, and essentialised the non-indigenous communities of the Rift Valley as both exploitative and dangerous, even deserving of death.[650] He intertwined the symbol of *majimboism* with the historical narratives of Kalenjin disenfranchisement and posed loss of the election as a return to exclusion from state power, and thus, an existential threat. It was a clear exercise of symbolic politics. One utilising the rational fear of losing resources and the mythical fear of losing control over one's world and subsequently a repeat of the colonial past and post-independence struggle of the community. Multi-partyism was constructed as the antithesis of *majimboism*. The former was a symbolic status and material interest threat. It was used to confirm the existential threat that was allegedly being posed to the Kalenjin, and it was the non-indigenous communities of the Rift Valley, in particular, who were painted as a threat to the political hegemony enjoyed by Moi and by extension his ethnic community.

Majimboism, as a political symbol, was wielded by Kalenjin politicians not to refer to federalism in the real sense of the word. Instead, it was perverted to mean that each community would be required to return to their ancestral land. The failure to return would result in forcible expulsion by any means. Even where local elites appropriated land from their co-ethnics by manipulating their influence over the Provincial Administration and control over land committees, it was easier for them to direct resentment towards the foreigners/immigrants.[651]

---

[646] Ibid, 56.
[647] Ibid, 78.
[648] Ibid, 56.
[649] Ibid, 77 -78.
[650] Kiage, 106.
[651] Mueller, 190.

The administration of land was the fertile ground in which the promotion of inter-ethnic violence was easily achievable by politicians for political self-interest regardless of the cost.[652] The Luo, Kisii and Kikuyu communities were targeted, in particular, and referred to as *madoadoa* for their perceived support or sympathy for multi-partyism and opposition of Moi.[653]

When areas of the Rift Valley faced some of the most severe inter-ethnic clashes during the 1992 and 1997 elections, many testified to the Akiwumi Commission that they were shocked as there was no apparent prior warning. [654] Some of the people who were branded foreigners/immigrants had inhabited the area for generations.[655] Some younger family members had never even visited their 'traditional homelands'. The Akiwumi Commission noted that resentment had been building among the Kalenjin towards non-Kalenjins.[656] Jenkins, however, paints a more nuanced picture of the conflicts that ensued in Kenya's election history.[657] Namely, that the existence of 'immigrants' in itself was not the main issue for the indigenous population, which is evident from the fact that population movements continued and violent conflict has not been ever-present. Nonetheless, Jenkins points out that there is an immigrant-guest metaphor embedded in the autochthonous discourses of the Kalenjin.[658] 'Immigrant' is just one term used to refer to these ethnic 'others'; they are also referred to as foreigners, invaders, grabbers, outsiders, and so on.[659]

During political tension or transition, the metaphor of immigrant-guest is extended.[660] It is extended both by political elites and local-level actors to conceptualise the immigrant as a guest expected to follow specific rules of hospitality. [661] The rule being conformity with the political wishes of the host community. If the rule is followed, the immigrant is a welcome guest, and their political participation is widely approved. Alternatively, non-conformity results in the right of guests to engage in local politics being hotly contested and viewed as an abuse of hospitality. [662] The immigrant element of the narrative is enduring and constant. However, the guest aspect is said to be extremely flexible and open to negotiation. Thus, the

[652] Akiwumi, Bosire and Ondeyo, 56.
[653] Ibid, 62 - 63 and 87. Jenkins, 591. Materu, 37.
[654] Akiwumi, Bosire and Ondeyo, 65 and 77.
[655] Mueller, 190. Jenkins, 579.
[656] Akiwumi, Bosire and Ondeyo, 65.
[657] Jenkins, 583.
[658] Ibid, 577.
[659] Materu, 37. Misol, Hiltermann and Hogendoorn, 4.
[660] Jenkins, 577 and 584.
[661] Ibid, 577.
[662] Ibid, 577 and 584.

boundaries of who is considered welcome are continuously raised and debated. Political activity in opposition to the native community takes the immigrant from welcome guest to unwelcome occupier deserving of forcible expulsion and even death.[663] Jenkins situates the dichotomy between native/indigenous and foreigner/immigrant as a geospatial imaginary and territorialised identity pervading the Kenyan consciousness, which it is asserted assisted in the creation and maintenance of oppositional identities and exclusionary citizenship discourses.[664] Territorialised identity refers to the fact that ethnicity and territory are inextricably linked.[665] It goes back to the colonial authorities reconstituting ethnic identities for ease of administration and then settling ethnic 'units' in one of eight provinces. The territory that the ethnic community was located became inextricably linked with the ethnicity itself. So, in Kenya, there is a conflation of ethnicity and territory to the extent that if you ask someone where they are from, you are asking them to tell you their ethnicity. Jenkins discusses how the discourses are performed among indigenous communities, such as the Kalenjin, to create this dichotomy that becomes weaponised against the 'immigrant community'.[666] We can see how territory is embedded in ethnic communities' myth-symbol complexes. It binds the group together and forms a key part of their identity.

The creation and maintenance of oppositional identities were done primarily through a narrative of ethnic 'others' as immigrants.[667] Ethnic divides are used to create distinctions between 'them' and 'us', thereby propelling the opposition as the 'Other' for leaders of conflict-ridden states to manipulate the psyche of the ruled.[668] Ethnicity has also been useful in the protection from the loss of attained privilege or as a scapegoat in the transformation of dissatisfaction with the government into complaints about the ethnic group or groups in power.[669] Othering refers to any action by which an individual or group becomes classified as 'not one of us', often to the extent that this individual or group (the other) is seen as less human and less worthy of respect and dignity.[670] This process is utilised for the obliteration of the identity of the 'other'. Identity as a professional, a citizen, a member of the family, or for our purposes – member of an ethnic group. It is used anywhere from the terraces of a football match to the confines of a police custody suite.[671] Subsequently, this 'metaphorical murder' of people

[663] Ibid, 584. Yieke, 6.
[664] Jenkins, 577.
[665] Ibid, 578 - 579.
[666] Ibid, 584.
[667] Ibid, 576.
[668] Oucho, 5.
[669] Atieno-Odhiambo, 232.
[670] Others.
[671] Barbier, Deschamps and Prum, 1..

who are marginalised boils down to an exclusion that is felt by the victim as 'complete annihilation, and understood by other potential offenders as a call for bloodshed'.[672] Classification as the 'other' deprives the group of the rights that are granted to ordinary citizens—thereby legitimising acts of violence that had been previously considered ethically and morally unacceptable.

In *Collective Identities,* Eder, Giesen and Tambini highlight that interaction processes produce ethnicisation, namely the identification in which collective identities like ethnicity are constructed according to symbolic codes.[673] Interaction processes refer to the social interaction that leads to the acknowledgement of the 'us' versus 'them' divide.[674] Without being reproduced in everyday interactions and public communication, ethnicisation will have little effect.[675] Jenkins focuses on how two dynamics interact: top-down incitement and manipulation by political elites and bottom-up politicisation of ethnicity by local actors.[676] The latter is said to not only facilitate but also enable elite mobilisation at a local level. This territorialised identity narrative is performed among local actors through *inter alia* burial customs and the creation of ethnic enclaves.[677] For example, regarding the former, burying the dead in their 'ancestral homeland' is said to embed the immigrant metaphor in everyday life. No matter where an individual lives, custom dictates that they must be buried in the land of their ancestors – their 'true home'.[678] Additionally, burial location is also employed to authenticate and justify exclusionary citizenship discourses. [679] That is to say, the presence of ancestral graves has been used to substantiate claims of belonging and, consequently, citizenship rights (like the right to farm the land). Burial location and custom are one of an extensive group of practices, such as the use of specific spaces for cultural events, for instance, circumcision rites, through which territorialised identity is performed. Nonetheless, burial practices are central to the performance of identity within a specific space, and they are used as justification of ownership claims in that territory. Burial practices reflect the continued attachment to the rural home, which is at the core of understandings of citizenship and belonging in Kenya.[680]

---

[672] Ibid, 1.
[673] Eder, Giesen and Tambini, 7 - 25.
[674] Ibid, 4.
[675] Ibid, 162.
[676] Jenkins, 577 - 578.
[677] Ibid, 580.
[678] Ibid, 580.
[679] Ibid, 580 - 581.
[680] Ibid, 580 - 581. Carola Lentz, ''Tribalism' and Ethnicity in Africa: A Region of Four Decades of Anglophone Research' 31 Cahiers des Sciences Humaines 303, 323.

Ethnic enclaves also play a critical role in the performance of identity. Similar to other parts of the world, like Chinatown or Little Italy in the United States, in Kenya, ethnic enclaves have a name representing the dominant community.[681] Take just two examples: Kisumu Ndogo represents the dominant Luo community in Kibera but are the traditional lands of the Nubian community; and Kiambaa, which represents the dominant Kikuyu community in the Rift Valley but are the traditional lands of the Kalenjin. The ethnicised contemporary re-naming of these areas was a reflection of the affective attachment of the immigrants to their 'traditional homelands' while simultaneously enhancing the visibility of the community itself. The renaming of the respective areas was seen as a prominent symbol signifying a challenge to native claims to land, adding another layer of tension.[682] It combines with other tension enhancing factors, such as the view that immigrants are dominating the limited economic resources of the area. These enclaves form part of what Appadurai refers to as a broader 'production of locality,' through which the reproduction of the traditional home is effected.[683] The more expansive production can also be effected through music, customary ceremonies, dress, food, use of vernacular languages, occasional burial within the space, and so on. Nonetheless, ethnic enclaves, in particular, reinforce the macro-level attachment of immigrants to their traditional homeland while also acting as the symbolic appropriation of space and reinforcing the permanency of 'immigrant' occupation.[684] Appropriation and permanency are frequently seen as threatening to the indigenous community. Thus, immigrant communities are assigned the role of 'strangers' and subjected to secondary citizenship status. They are 'allowed' to stay by the indigenous community, thereby echoing the native-immigrant dichotomy that can be situated in the larger meta-narrative.

Returning to our discussion of ethnicity in Chapter 1, we saw how being classified as the 'other' deprives the group of rights granted to other citizens. We see that operationalised in autochthonous discourses because attaching the label of the ethnic 'other' represented the individual or community as an immigrant or stranger, thereby contesting their citizenship status. The label is a method of defining their relation to State power and their access to benefit from State resources.[685] The economic benefits that are thought to be accrued from having an incumbent from the same ethnicity (mentioned above) produce a competition among ethnic

[681] Jenkins, 582.
[682] Ibid, 584.
[683] Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalisation* (Cambridge University Press 2000), 180.
[684] Jenkins, 582 - 584.
[685] Ibid, 585 - 586.

communities to put one of 'their own' into power. When combined with the prominent ethnic voting patterns, it results in fear. The exit polls from the 2007 election illustrate ethnic voting patterns well. They show that 94% of Kikuyu voters voted for Kibaki (a Kikuyu), 98% of Luo voters voted for Raila (a Luo), and 86% of Kamba voters voted for the third candidate Kalonzo Musyoka (a Kamba).[686] Fear stems from the belief that if immigrant numbers grow too rapidly, they would dominate politically and, thus, economically. These instrumental considerations also interact with the affective matters of pride, inferiority, and superiority.[687] Namely, the presumed immigrant attempts to dominate the native community are viewed as an indication of a superior attitude among the immigrants. The notion of immigrants ruling the indigenous 'homeland' is considered an insult to the ethnic pride of the indigenous community, particularly when immigrants are viewed as having their own traditional lands to dominate. It is clear that territoriality and exclusionary citizenship discourses are based on the material and instrumental as well as the affective and non-rational. Both factors had a substantial impact on the participation in election-related violence and the dynamics of such violence.

Turning back to the top-down incitement and manipulation by political elites.[688] The State security apparatus assisted gangs during the 1992 and 1997 elections to ensure KANU victory.[689] In one instance, shops were burnt in two Trading Centres in broad daylight.[690] The Akiwumi Commission found the incident indicated the arsonist had some backing from an individual or group of individuals in high authority. Violence through gangs and paramilitary forces was used against Moi's real and perceived political opponents and supporters of the opposition to eliminate them.[691] Youth groups involved in the violence, such as the burning of Kisii and Kikuyu homes in the Rift Valley, were promised pieces of land that they never received. [692] Similarly, in mid-1997 in the Coastal Province, heavily armed and highly organised paramilitary forces, usually comprising disgruntled young men, referred to as raiders, carried out brazen and lethal attacks on immigrant communities around parts of Mombasa. The parts of Mombasa that were the traditional homeland of the Digo ethnic group.[693] Local KANU politicians and supporters mobilised the marginalised Digo youth to join the raiders with the help of higher-level government officials and politicians at the behest

[686] Takashi Yamano, Raphael Gitau and Yuki Tanaka, *Haki Yetu (It's Our Right): Determinants of Post-Election Violence in Kenya* (GRIPS Policy Research Center 2010), 5.
[687] Jenkins, 580 - 581.
[688] Ibid, 587.
[689] Mueller, 190 - 191.
[690] Akiwumi, Bosire and Ondeyo, 88.
[691] Mueller, 190 - 191.
[692] Akiwumi, Bosire and Ondeyo, 88.
[693] Misol, Hiltermann and Hogendoorn, 2.

of Moi.[694] Like youth groups in the Rift Valley, the young men comprising the raiders were given the impression that driving away immigrants would result in them gaining access to jobs, educational opportunities, and, importantly, land that was never received.[695] In interviews with Human Rights Watch (HRW), members of the raiders voiced how they felt betrayed, manipulated, and used because of how they were discarded after they drove away the 'immigrants'.

Those targeted by the raiders had voted against KANU in the 1992 elections resulting in the party losing two out of four parliamentary seats for the party. After the 'immigrants' were forced to flee because of the coordinated attacks, KANU won three out of the four parliamentary seats in the 1997 election. Elites acted through their proxy – a spiritual leader (known for making the raiders take an oath binding them to secrecy and promising to make them immune to bullets). KANU members of parliament secured the spiritual leader's release and subsequently supplied him with significant amounts of money from their party's funds. In a similar way to the spiritual leader, other political elites and their co-conspirators with responsibility for the violence were shielded from accountability, thereby spreading the culture of impunity. This was a symbiotic relationship between political elites and their supporters that fuelled impunity. It transcended the shift to a multi-party system, straddling Moi's different regimes.[696] Thus, we can see the pattern whereby politicians rely on their supporters to enforce immunity. Meanwhile, supporters 'who are handmaidens of the violence, get protection from the political godfathers.'[697]

HRW draws a thought-provoking parallel between the tactic of exploiting ethnic divisions to preserve and expand power in pre-genocide Rwanda to Kenya, *albeit* on a smaller scale.[698] Two factors, in particular, are similar: the politically motivated manipulation of ethnic division into ethnic hatred and the organisation and armament of willing and able supporters to orchestrate widespread killings. Politicians in Kenya exploited ethnic divisions to preserve and expand their power by blaming a group of perceived outsiders, whose identity alone was taken as an indication of their support for the political opposition. Then they relied on the ethnic hatred (they themselves had stirred up) to mobilise supporters to carry out acts of targeted violence with immunity echoing Rwanda.

---

[694] Ibid, 2 - 3.
[695] Ibid, 2 - 3.
[696] Philip Waki and others, *Report from the Commission of Inquiry into Post-Election Violence (The Waki Report)* (2008), 457.
[697] Ibid, 457.
[698] Misol, Hiltermann and Hogendoorn, 4.

The Moi government made Kenya feel like a country indifferent or complicit in the commission of serious crimes.[699] Even when steps were taken to investigate human rights abuses, political violence, election violence, and so on, they were hampered by inaction or the labelling of such violence as 'ordinary insecurity'.[700] The Akiwumi Commission mentioned above is an example of a body created by the State to investigate election violence in response to public outcry. The Commission identified several individuals with criminal culpability (including high-profile politicians and government officials). It also made many findings and recommendations regarding the 1992 and 1997 election violence. No political or criminal accountability followed from the identifications, findings, or recommendations of the Akiwumi Commission, much like the other 24 commissions that were created before it.[701] Despite several people being arrested in connection with instances of violence, they were released unconditionally shortly thereafter.[702] Most of the politicians identified enjoyed State protection and had the audacity to continue to serve in Moi's administration and later on in Kibaki's administration.[703] The continuation of public service without apology, even after their identification in such reports, served as a show of a lack of remorse to the populous and signalled that future contributions to political violence had not been halted. Consequently, Commissions are emblematic of a lack of accountability and a culture of impunity in Kenya. They were viewed by citizens of the State as 'toothless dogs that do not bite'.[704]

The tactics of political elites extended beyond physical violence to the use of legal measures, like the right of eminent domain to reclaim land and evict residents who were perceived as supporters of the opposition (based on their ethnicity).[705] In this way, land was used to enact structural violence against the foreigners/immigrants.[706] Indeed, the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land found that most illegal allocations of public lands occurred before or soon after the multiparty general elections of 1992, 1997, and 2002.[707] At least 200,000 illegal titles were created between 1962 and 2002,

[699] Materu, 39.
[700] Ibid, 39.
[701] Ibid, 39 - 40.
[702] Rights, 6.
[703] Materu, 39 - 40.
[704] Ibid, 40.
[705] Mueller, 191.
[706] Mara J Roberts, 'Conflict Analysis of the 2007 Post-Election Violence in Kenya' in Akanmu G. Adebayo (ed), *Managing Conflicts in Africa's Democratic Transitions* (2012), 9 - 10.
[707] Paul Ndiritu Ndungu and Michael Aronson, *Report of the Commission of Inquiry into the Irregular Allocation of Public Land (Ndungu Report)* (2004) 82 - 83.

of which 98% were issued between 1986 and 2002.[708] The key beneficiaries of illegal allocation of land (notably families of Kenyatta and Moi, ex-ministers, members of parliament, civil servants and members of the judiciary and the military) profited from the perversion of the doctrine that public land should be administered and allocated in the 'public interest'.[709] Kenyatta and Moi were found not to have even attempted to make reference to the public interest when arbitrarily allocating unalienated land under their Presidential powers, even though the powers should not be used without consideration of the public interest. According to Africog, illegal allocation of land is among the most evident manifestations of corruption and political patronage.[710] Central figures in the illegal allocation of land (chiefly legal professionals who facilitated and actively participated but also surveyors, valuers, physical planners, engineers, architects, land registrars, estate agents and bankers) have never faced any legal or disciplinary action for their part in land grabbing.[711] Indeed, even as elections post-2002 approached, illegal and irregular land allocations were used to raise electoral finance, bolster political support, and consolidate personal gain before potential losses of political office.[712] They had the effect of depriving communities of land that should be available for the public good, for example, the building of medical clinics, schools, public parks, and public transport facilities.[713] It also had deleterious effects on the welfare of the nation because certain State bodies, such as the National Social Security Fund's workers' pension scheme, were coerced into buying the stolen lands at grossly inflated prices.[714] So, instead of the pension scheme meeting its function of paying benefits to provide social protection against death, incapacitating physical or mental disability, or old age, it was used as a vehicle for offloading the stolen lands.

These non-violent tactics of allocating land in suspicious ways were also instrumental in preventing those targeted from voting and driving them away, particularly in the Rift Valley.[715] The totality of the aforementioned violent and non-violent tactics resulted in the death of over 2,000 and displacement of around 500,000 accrued over the 1992 and 1997

---

[708] Ambreena Manji, 'The Grabbed State: Lawyers, Politics and Public Land in Kenya' 50 The Journal of Modern African Studies 467, 471.
[709] Ibid, 467. - 468.
[710] Africog, *Mission Impossible? Implementing the Ndung'u report.* (2009), 11 as cited in Manji, 'The Grabbed State: Lawyers, Politics and Public Land in Kenya', 471.
[711] Manji, 'The Grabbed State: Lawyers, Politics and Public Land in Kenya', 469. John Harrington and Ambreena Manji, 'Satire and the Politics of Corruption in Kenya' 22 Social & Legal Studies 3, 3.
[712] Manji, 'The Grabbed State: Lawyers, Politics and Public Land in Kenya', 470.
[713] Ibid, 475.
[714] Manji, 'Land Rights and the Rule of Law', 404.
[715] Mueller, 191

election cycles. Small arms proliferation in Kenya resulted in the violence being more lethal. During the 1992 and 1997 elections, HRW indicates that the proliferation of small arms fuelled growing insecurity and the growing militarisation of the society.[716] The proliferation of small arms resulted from the country being a channel for weapons destined for its nearby conflict-ridden neighbours, such as Sudan and Somalia. Small arms proliferation intensified the existing conflicts by turning long-standing ethnic competition (manifested in cattle theft and rustling) with traditional weapons, like bows and arrows, into more deadly political violence. Thereby enabling attackers with machetes, clubs, and crude weapons to loot, maim, burn, and kill with impunity.

Unlike Moi, Kibaki saw the reintroduction of multi-party politics as a way to get more political power, so he left KANU and joined an opposition party.[717] Internal strife among the different opposition groups rendered them broadly too weak and divided to triumph over KANU in the 1992 and 1997 elections. Nevertheless, that was not the only barrier to their success.[718] The critical obstacle was Moi in his role as the incumbent President. Moi had loyalists acting as State agents as well as the machinery of the State. He used the power of the State to manipulate the process. Materu argues that it was anticipatable since the State was structured in such a way that the President had the discretionary appointing and sacking authority of the very people who were tasked with managing the election.[719]

The opposition had to wait until 2002, when Moi was constitutionally barred from seeking re-election. Even the use of gangs, such as Mungiki, which were invited into a patron-client relationship with KANU, was not enough for KANU to secure the election as it had done previously.[720] It is important to note that the violence was not solely state-sponsored because clashes between different sections of the population had been ongoing in specific segments of the country. For instance, in a town called Molo, there were clashes between different ethnic groups for many months before the elections.[721] Moi left the Office of the President after serving 24 years as Kenya's second President.[722] KANU and Uhuru, its Presidential candidate, were defeated by National Rainbow Coalition (NARC), with former Vice President Kibaki at the helm. Kibaki stood as a change candidate promising significant economic and political

[716] Misol, Hiltermann and Hogendoorn, 1 - 2.
[717] Materu, 24.
[718] Ibid, 26 -27.
[719] Ibid, 27 - 28.
[720] Peter Mwangi Kagwanja, ''Power to Uhuru': Youth Identity and Generational Politics in Kenya's 2002 Elections' 105 African Affairs 51, 59. Materu, 35.
[721] Human Rights Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance* (2008), 45.
[722] Kiage, 105.

reforms following Moi's 'lacklustre performance [on reforms] throughout the 1980s and 1990s'.[723]

1.4.4 Mwai Kibaki

News of Moi's selection of Uhuru as the Presidential candidate led to the formation of a faction of New KANU called the Rainbow Alliance, which became the Liberal Democratic Party (LDP). The Alliance eventually became NARC due to the unification between the National Alliance Party of Kenya (the result of a merger between the Kibaki led Democratic Party, the Charity Ngilu led National Party of Kenya (NPK), and the Michael Wamalwa led Forum for Restoration of Democratic – Kenya) and LDP. This time the opposition learnt from their lack of unity and the role disunity played in losses accrued during the 1992 and 1997 elections. NARC won both the parliamentary and Presidential election by a significant majority and thereby took KANU out of power for the first time in the history of Kenya. NARC was formed based on two agreements, referred to as Memorandums of Understanding, signed on 21 October 2002.[724] The Memorandums were dependent on *bona fide* implementation. This was significant because when Kibaki became the President, he postponed proposed policies, power-sharing agreements (such as the equitable division of cabinet positions), the creation of a new position of Prime Minister, and the creation and adoption of a new constitution[725]. The latter was arguably the policy issue that most bound NARC. The proposed amendments would have had the effect of diminishing the powers that had at that point been compressed into the Office of the President. This, of course, created dissatisfaction and led to criticisms of the Kibaki administration. Kibaki responded by creating several 'impenetrable aids' that were known as the 'Mount Kenya Mafia'. Members of the 'mafia' insisted that Kibaki had been exercising his legitimate constitutional powers, which would not be curtailed by 'secret agreements among power-hungry leaders'.[726]

The constitution became the issue that marked the irreversible end of NARC.[727] The constitutional structure, which was agreed before Kibaki took Office, known as the 'Bomas draft' because it was endorsed at Bomas of Kenya in Nairobi by all the members of NARC, was one in which the powers of the President were to be curtailed. In it, there was to be a new

[723] Clark C Gibson and James D Long, 'The Presidential and Parliamentary Elections in Kenya, December 2007' 28 Electoral studies 1, 1.
[724] Materu, 31.
[725] The new constution was the proposal of the Constitution of Kenya Review Commission (CKRC), a statutory body that recommended the adoption of a new constitution following a survey they conducted. Ibid, 32 - 33.
[726] Ibid, 32 - 33.
[727] Ibid, 33 - 34.

position of Prime Minister that was to be the Head of the Government, accountable to the parliament, and most importantly endowed with executive powers. While, the President was to be the Head of the State, thereby demoted to a ceremonial post. The Bomas draft also proposed a bicameral legislature in which there would be an Upper House (Senate) and Lower House (National Assembly).

After taking Office and stalling on the creation of a new constitution, Kibaki proposed what was known as the Amos Draft because it was endorsed through Amos Wako, Kibaki's AG. The Amos Draft preserved the existing Presidential system in which the President was the Head of the State and the Head of the Government. Eventually, the Amos Draft was put to a national Yes/No referendum in 2005. Raila led the No campaign that came to be symbolised by an orange. The Oranges assembled the LDP part of the NARC government, a faction of KANU under Ruto, and NPK under Ngilu. At the same time, Kibaki led the Yes campaign, which came to be symbolised by a banana. The Oranges triumphed over the Bananas. These two camps subsequently reformed themselves into the Orange Democratic Movement (ODM) and the Party of National Unity (PNU), respectively. These are the two main political parties that went head to head in the fateful 2007 election.

In contrast to the jubilation that surrounded the 2002 election, when the 2007 elections arrived, Kenya had become acutely polarised.[728] There were two main opposition parties in the 2007 election. First, ODM perceived to be Luo, Luhya, and Kalenjin dominated and led by Raila, an ethnic Luo. Second, PNU was viewed as being dominated by the Kikuyu, Embu and Meru and led by Kibaki, an ethnic Kikuyu.[729] Tensions began before voting started. As with previous years, politicians used the pre-election period as an opportunity to flush the 'outsiders' from 'their' land while at the same time serving as a method of eliminating the 'hostile' vote.[730] The 2007 election was characterised by exclusionary ethnicity and a reckoning with who would not receive control and power over the State's resources, as much as who would receive it.[731] Certain local leaders declared 'war' before the election results were announced, claiming that an unfavourable outcome could only be the result of rigging. Others, mainly Kikuyus, contended that there was an imminent attack from the opposition and enacted various forms of

[728] Jenkins, 576.
[729] Marcel Rutten and Sam Owuor, 'Weapons of Mass Destruction: Land, Ethnicity and the 2007 Elections in Kenya' 27 Journal of Contemporary African Studies 305, 316.
[730] Kenya National Human Rights Commission, *Still Behaving Badly: Second Periodic Report of the Election Monitoring Project* (Kenya National Human Rights Commission 2007).
[731] Mueller, 201.

violence in what they claimed was self-defence. As Lonsdale notes, the chaos is not easily explained by reference to old 'tribal' rivalries or cynical political calculations.[732]

2. Election-Related Violence (2007)

There is a history of election-related violence in Kenya.[733] However, the violence that ensued as a result of the 2007 election was different. This is evident from the scale of the destruction of property, sexual crimes[734], and the widespread parts of the country that were affected. It also differed from previous elections because the most intense period of violence occurred after the elections rather than before.[735] In this section, we will explore the immediate process that lead up to the violence, drawing in particular on SPT and the insights gleaned from looking closely at the colonial institutionalisation and post-colonial development of ethnicity in Kenya. We will also see that 2007 was the first time that Kenyan EV dominated international attention. To end the bloodshed, Kofi Annan and his AU-appointed team convinced the opposition parties to sign the National Dialogue and Reconciliation Agreement, which created a government of national unity.[736] It was also the first time that the ICC intervened in an attempt to bring about criminal accountability and repair the culture of impunity in the country.

2.1 Pathways to Violence

Before the election, Raila (the ODM Presidential candidate) played a critical role in the othering of Kikuyus to consolidate ethnic support in the non-Kikuyu regions.[737] Raila utilised the suspicions against Kibaki, namely that he was ruling for the benefit of the Mount Kenya Mafia mentioned above.[738] He appealed to young and poor Kenyans who felt that they had gained nothing from economic growth or the Kenyan decades of independence. Developing on

[732] John Lonsdale, 'Kenya's Four Ages of Ethnicity' in Hiroyuki Hino and others (eds), *From Divided Pasts to Cohesive Futures* (Cambridge University Press 2019), 22. John Lonsdale, 'Kenya: Ethnicity, Tribe and State' (*https://www.opendemocracy.net/article/kenya_ethnicity_tribe_and_state*) accessed 16 June 2016.
[733] Waki and others, 305. L Muthoni Wanyeki, 'Lessons from Kenya: Women and the Post-Election Violence' 10 Feminist Africa 91, 91. Branch and Cheeseman, 2.
[734] Despite a reluctance to report, there were about 322 women and girls who sought treatment in hospital for rape and sexual assault between 6 and 28 February 2008, many of whom had been displaced. Rights, 3.
[735] Markussen and Mbuvi, 15.
[736] Stephen Brown and Chandra Lekha Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya' 111 African Affairs 244, 244.
[737] Michael Chege, 'Kenya: Back from the Brink?' 19 Journal of Democracy 125, 130.
[738] The new constution was the proposal of the Constitution of Kenya Review Commission (CKRC), a statutory body that recommended the adoption of a new constitution following a survey they conducted. Materu, 32 - 33.

the rhetoric of the 2005 referendum, the 2007 ODM campaign turned the election into a contest of forty-one 'tribes' against one: 'Kenya against the Kikuyu'.[739] Raila appealed to politically and economically marginalised people offering a 'populist platform,' which unsurprisingly the Kikuyu feared would risk their favourable business environment.[740] Drawing on the theories in Chapter 1, we can see how ODM's campaign sought to conjure up rational fears of losing access to state resources and state power. The ODM campaign positioned the entire Kikuyu community as an existential threat to other communities. That positioning was incidentally a symbolic, status, and economic threat to the Kikuyu. The ODM campaign highlighted Kikuyu control over 'banking, trade, out-migration, education, and commercial farming' and proceeded to blame Kikuyu success for the marginalisation of other groups. ODM set up the Kikuyu for resentment and retaliation by pointing to the preferential treatment that the community had received as a result of the aforementioned government-financed settlement schemes in the Rift Valley. [741]

ODM revived symbolic politics in the form of *majimboism*.[742] Symbols often resurface as the environment demands (as we saw in Chapter 1). Thus, *majimboism* resurfaced as the environment demanded it. ODM reformulated the meaning closer to that proposed by KADU over half a century earlier. That is the political devolution of power to different regions of the country to counteract the centralised form of government focused on the capital.[743] But, during the 2007 election campaign, *majimboism* came to thrive on divisive binaries of 'natives' and 'settlers,' and 'indigenous' and 'foreigners'.[744] Thereby exacerbating ideas of ethnic citizenship over State citizenship and calling for those condemned as 'foreigners' to be stripped of their rights. This set foreigners/immigrants up for violent expulsion and displacement from their land. *Majimboism* alarmed many Kikuyus' because it reminded them of their bloody experience in the 1990s and the threats of violence from the 1960s mentioned in the previous section. Kikuyu church leaders responded to the resurrection of *majimboism* in the 2007 election by describing it as a 'monster that the devil would use to cause bloodshed in the nation'.[745] Nonetheless, on its own, the fear of devolution was not enough to unify the existent divisions among the Kikuyu community due to splits along the lines of class, gender and region. These divisions weakened Kibaki's bid for the presidency. PNU consequently played

[739] Chege, 130.
[740] Ibid, 135.
[741] Ibid, 134 - 138.
[742] Branch, 167 - 168.
[743] Your Dictionary, 'Majimboism' (*http://www.yourdictionary.com/majimboism*) accessed 04 June 2016..
[744] Ibid, 269.
[745] Branch, 268.

on ethnic fears with rumours that the United States and Britain were backing Raila as revenge against Kibaki for reducing Kenya's dependence on these two countries for aid. There was the distribution of anti-Kikuyu leaflets in the Rift Valley and threats of residential property seizure in and around Nairobi. Additionally, rumours were spread suggesting that if ODM were to win elections, they planned to perpetrate a Kikuyu genocide and consequently amplified the existential fears of members of the Kikuyu community, thereby ratcheting up the tension in the security environment (discussed in Chapter 1). Consequently, voter turnout among Kikuyus in the Mount Kenya region and the Kikuyu living outside of their homelands increased due to fear of the threats. Kibaki's two-pronged strategy for re-election in 2007 had a real impact on election-related violence. Firstly, the galvanisation of Kikuyu voters and closely linked ethnic communities such as the Embu and the Meru. Secondly, the confrontation of Mungiki to win the overwhelming backing of Kikuyus, who had become weary of the groups increasingly violent activities. [746] The revival of *majimboism* greatly helped the first strategy.[747]

Concerning Kibaki's second strategy to deal with the Mungiki, the group were previously a vigilante group known as the Kikuyu Mungiki. It is worth noting that some victims often mislabel any group of violent Kikuyu youths as the 'Mungiki'. [748] The name serves the attackers well because it instils terror. The Kikuyu Mungiki had taken part in confrontations with the Luo Taliban, another militia group. [749] These confrontations resulted in a ban of all militia groups in March 2002. Nonetheless, the Kikuyu Mungiki still supported Uhuru during his unsuccessful campaign for President in December 2002. Primarily because of then-President Moi, who made use of the gang to boost Uhuru's run for the KANU Presidential nomination in 2002 but had no further use for it in his last weeks of office.[750] The same gangs and paramilitary forces, we discussed as precipitating the 1992 EV, as the short-term modality through which Moi enacted violence and secured electoral victory, were excluded from the political machinery of the executive and forced to fend for themselves. So, they reconstituted in a way that ensured their political viability and longevity. After Uhuru's failure, the group, mainly comprising of unemployed youth, felt abandoned by the Kikuyu elite.[751] So, they reconverted into a local gang that controlled residential areas that were neglected by the government.

---

[746] Ibid, 267.
[747] Ibid, 167 - 168.
[748] Watch, 44.
[749] Branch, 268.
[750] Ibid, 268.
[751] Cussac, 42.

Under Kibaki's first term in office, the police had moved against the group in the first months of 2003, arresting some of its leaders. [752] An uneasy truce had held over for the following four years. However, the group's dominion in the poorest neighbourhoods of Nairobi and other urban centres across the White Highlands remained unchecked. Even though they had supported Kibaki in his campaign to introduce a new constitution in 2005, their increasingly violent acts had led to their increasing unpopularity among Kikuyu middle class, causing divides. As the 2007 elections approached, the gang's position posed a more significant threat. The group specialised in clandestine economic activities and settling scores.[753] They became well established in Nairobi, spreading into the society and the State, thereby posing a real challenge for the authorities. Additionally, the previous leader of the sect, Maina Njenga, had planned to introduce several Mungiki candidates in the 2007 elections, thereby posing a threat to Kibaki, who needed to control his voting base during his Presidential campaign. In June 2006, Kibaki launched an attack against the sect which resulted in confrontations between Mungiki and the police in Mathare slums and some rural areas in the Central Province. The Police made little allowance for due process or human rights. Internal Security Minister John Michuki announced: 'We will pulverise and finish them off'.[754] KNHCR described the killings as part of an 'official policy sanctioned by the political leadership'.[755] Branch noted that the police death squads were designed to destroy the Mungiki as a credible voice of dissent against Kibaki's Presidential bid and to rally support from the Kikuyu's who had grown tired of the group's intimidation, violence and criminality.

After the arrest of Njenga in February 2007, Mungiki members increased their extremely violent activities that the police responded to ruthlessly. The Kikuyu elite needed control over not just their voting bases but also the Mungiki, even if the price of control was the sacrifice of some of the Mungiki members. In the battle, hundreds of Mungiki adherents were killed mercilessly, mostly by the police. The KNCHR reported that Kenyan Police were implicated in the deaths of more than 500 young men, mainly ethnic Kikuyus, between June and October 2007.[756] The majority of these young men were suspected members of the Mungiki.[757] In their report, KNCHR condemned the police use 'of extra-judicial killing of

[752] Branch, 268.
[753] Cussac, 43.
[754] Branch, 268.
[755] Ibid, 268.
[756] Kenya National Commission on Human Rights, *'The Cry of Blood': Report on Extra-Judicial Killings and Disappearances* (Kenya National Commission on Human Rights 2008), 3.
[757] Cussac, 42 - 46.

suspected members as a strategy to deal with the illegal group'.[758] As mentioned above, the pre-election violence trend began during the Moi era, before the reintroduction of pluralistic politics in 1992. Pre-election violence became the dominant way for the incumbent to control his voting bases. Political violence was a tool also used by the opposition in the 2007 election. Namely, ODM mobilisers planned to retaliate for losses at the polls with violence and built up their own short-term modalities to carry out hard physical violence. There were about two hundred deaths and 70,000 people displaced during the pre-election period. [759]

2.2 The Run-Up to the Election

From August 2007 to December 2007, violence began as political candidates started vying for nominations within parties.[760] Generally, the election campaign was virulently divisive, with politicians on both sides characterising their opponents in derogatory terms connected to their ethnicity.[761] Raila was forced to address questions of his circumcision at multiple points of his 2007 Presidential campaign (akin to his 1997 bid for President) because members of the political party of the incumbent administration insisted that he was unfit to lead on that basis.[762] Raila's 2007 campaign response was to say he was 'circumcised upstairs' meaning he was a capable leader because he was educated and knowledgeable about the world.[763] What is more, Raila has been recorded as being circumcised, but it has done little to quell the criticisms of him as a *kihii*.[764] As we saw in our discussion in the pre-independence deployment of circumcision to make Luo leaders palatable to Kikuyu voters, circumcision is attached selectively based on political opportunism. It was a clear exercise of symbolic politics by the ODM campaign, one that drew on the myth-symbol complex of the Kikuyu in an attempt to expand their voting base. PNU were not immune to the politics of manhood, as opposition party members said that Kibaki could not lead because he supposedly did not have control over his 'household and woman'.[765] What is more, SMSs that circulated demonstrated that

[758] Ibid, 42 - 46.
[759] Watch, 4.
[760] Ibid, 19.
[761] Ibid, 20.
[762] Atieno-Odhiambo, 243.
[763] Moore, 58.
[764] BBC News, 'Kenyan MPs Admit to Circumcision' (*http://news.bbc.co.uk/2/hi/africa/7584269.stm*) accessed 18 January 2017.
[765] Miriam van Baalen, 'Beyond Bullets and Ballots: A Theoretical Inquiry on Sexualised Election Violence' (Uppsala University 2019), 40. Without wishing to go into too much detail on the salacious reporting around the first lady, the opposition campaigns were alluding to incidents in which the First Lady's infamous temper overtook her. For example, she slapped a master of ceremony for mistakenly referring to her by the name of Kibaki's second

circumcision had evolved past ethnic bias to include classism. One message encouraged people to go out and vote for Kibaki so that people were not 'ruled by an uncircumcised man who will make us wear shorts and plunder all the wealth'.[766] The idea of putting on shorts is related to boyhood since the speaker insinuates that boys are the only ones who wear shorts.

According to a European Union Election Observers Mission (EUOEM), the campaign was characterised by '…strong ethno-political polarization between the two main contenders'.[767] Human rights organisations denounced instances of intimidation and murder.[768] EUOEM noted that there were reports of thirty-four pre-election-related deaths and one-hundred and ninety intense incidents ranging from intimidation to murder. Most of these incidents occurred in Western, Nyanza and Rift Valley Provinces. As campaigns continued and the election approached, in Eldoret, local ODM mobilisers and other prominent individuals called meetings to urge violence if Kibaki was declared the winner. They claimed that Kibaki's victory could only be the result of rigging, and as such, the leaders would respond by declaring 'war' against local Kikuyu residents.[769] They told community attendees that a PNU victory should be viewed as conclusive proof of electoral fraud, and all Kikuyu were complicit in it.[770] Attendees described how 'war' was used extensively to urge a violent reaction to discontent at the polls.

Less than two months before the election, Kibaki replaced the majority of the members of the Electoral Commission of Kenya (ECK), which is responsible for the coordination of the 2007 election. He appointed his former lawyer as the Commission's Vice-Chairman. Of the twenty-two members of the ECK, Kibaki appointed nineteen members of his choice. Nine of these nineteen were branded by Samuel Kivutu, the chairperson of the ECK, as 'the riggers'.[771] Similarly, Ranneberger stated that the break into the tallying centre the night before the announcement of the election result was presumably an inside job because of the heavy police security at the building. This was later used by supporters of ODM as ammunition to claim that

---

wife, and there was an occasion where she stormed the Nation Media Group's newsroom for publishing a dispute between her and her neighbour. Xan Rice, 'Second Wife Slip Prompts Slap From First Lady' *The Guardian* (https://www.theguardian.com/world/2007/dec/13/kenya.xanrice). During the newsroom raid, Mrs Kibaki slapped a cameraman who was filming her tirade. Attorney-General Wako saw to it that the assault charges were swiftly dropped. The Associated Press, 'Kenyan First Lady's Slap Later Erased from Video' *NBC News* (https://www.nbcnews.com/id/wbna22261894).

[766] James Ogola Onyango, 'Ethnic Discourse on Contentious Issues in the Kenyan Press after the 2007 General Elections' CODESRIA 12th General Assembly

[767] European Union Elections Observation Mission, *Preliminary Statement: Doubts about the Credibility of the Presidential Results Hamper Kenya's Democratic Progress* (2008), as cited in Watch, 20.

[768] Lafargue and Katumanga, 12.

[769] Watch, 4.

[770] Ibid, 37.

[771] Branch, 271.

Kibaki doctored the election results.[772] The government also started assigning administrative police to ODM strongholds in Western Kenya.[773] Five police officers were subsequently murdered, and several buses owned by Kikuyu companies were set on fire in the Rift Valley, Kisii and Nairobi. There were also isolated reports of looting and displacement of families. Additionally, people were encouraged to donate resources to cover the costs of anti-Kikuyu violence. For instance, one man from Kiplome told HRW that he was forced to pay 1,000 Kshs (£6.99[774]) and a bag of maize to elders in his community to help cover the costs of violence. Since he was not young enough to directly participate, he was coerced into contributing. In other areas, levies were significantly higher to cover the costs of utilities like firearms and ammunition. People who were reluctant to join the meetings were threatened with the destruction of their homes. This atmosphere made it challenging to speak out against planned violence. Leaders in the ODM movement committed to violence in the event of electoral defeat, and thus in meetings they forced attendees to contribute funds for the acquisition of firearms and ammunition enabling ODM supporters to collect weapons. Stock piling of weapons was part of the organisational capacity to commit violence. It was the short-term modality by which they would commit the violence.

2.3 The Election[775]

Voting commenced on December 27 2007. Individuals had to vote for a President, two Members of Parliament, and a local councillor.[776] Voting itself went relatively 'smoothly and peacefully'. [777] On 28 of December 2007, the International Republican Institute gave the election its provisional approval. However, as the period of counting extended beyond the norm, feelings of confusion and frustration began to intensify. As the delay continued, so did the suspicion of government misconduct. Government supporters and those suspected of supporting the government, who lived in areas dominated by people of similar ethnicity to the opposition, began to fear that they would be the target of protests against vote-rigging. On the 28 and 29 of December 2007 in Busia, local opposition activists warned Kikuyu residents that they were going to be evicted imminently.

---

[772] Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Springer 2015), 49.
[773] Chege, 136.
[774] Per the conversion rate on 14 June 2016.
[775] The election refers to the voting period, which started on Thursday 27th December 2007, until the announcement of Kibaki's swearing on Sunday 30th December 2007.
[776] Bernard Calas, 'From Rigging to Violence: Mapping of Political Regression' in Jérôme Lafargue (ed), *The General Elections in Kenya 2007* (Mkuki na Nyota Publishers Ltd and and IFRA 2009), 171.
[777] Branch, 269.

Despite the suspicions of misconduct, expectations of Raila's victory were also growing. After the initial declaration of results from ODM strongholds, Raila's supporters thought that he was on his way to the office of the Presidency. Local newspapers published stories that Raila was on his way to becoming President on December 29th. However, by the afternoon, the situation had changed as Samuel Kivutu, the Chairman of the ECK, began to announce a series of results from Kibaki's 'heartlands'.[778] ODM leaders quickly challenged these results at the tallying centre. They claimed to have concrete evidence of rigging from the constituencies being announced. Similarly, EUOEM reported irregularities from those constituencies. It transpired that there were severe problems in vote counting, with some constituencies reporting a turnout rate substantially higher than 100%. Kivutu decided to postpone the announcement until the following day and initiate an overnight investigation of the results. Protests began shortly after in Kisumu, Mombasa and Nairobi.

On 30 December 2007, just before the proclamation of Kibaki's second term, Raila announced his victory in a public briefing.[779] A security barrier was placed around key government buildings and the building where results were initially scheduled to be announced. ODM members made one last attempt to block the announcement of results. Nevertheless, Kibaki was controversially declared the winner of the election poll by a slender margin.[780] Instead of announcing the results at the Kenyatta International Conference Centre as planned, Kivutu was taken to a secure room with only a handful of guests and the State broadcaster present. Kivutu announced that Kibaki won by 200,000 votes. Then he rushed to State House to deliver the certificate declaring the result to the new President. Kibaki entered his second term after a hastily arranged ceremony at State House with the election result being announced just the hour before and only the State broadcaster present. Within the hour that Kibaki was hastily sworn in, rioting began. There were extensive attacks on Kikuyu and Kisii residents and their properties.[781] Within Kericho and the northern Rift Valley, perpetrators continued attacks on Kikuyu communities with intentions to cleanse the area of the *madoadoa*. NTV, a local television station, reported on Thursday 10 January, that ODM's victory was inflated in at least ten constituencies.[782] It is worth noting that while both parties appear to be implicated in electoral fraud, the electoral manipulation was most widespread in locations loyal to PNU. The

[778] Ibid, 269.
[779] Maarit Mäkinen and Mary Wangu Kuira, 'Social Media and Post-Election Crisis in Kenya' 13 The International Journal of Press/Politics 328, 329.
[780] Branch and Cheeseman, 2.
[781] Chege, 137.
[782] Nic Cheeseman, 'The Kenya Elections of 2007: An Introduction' 2 Journal of Eastern African Studies 166, 177.

most reliable evidence of the actual result is the IRI exit polls, which indicate that Raila won the election by about 7%.[783] They predicted Raila's victory would have come about even if calculations included voter turnout from official ECK figures, from which Raila would have won by 2.7%.

Shortly after the announcement, John Michuki, the Internal Security Minister, ordered a media blackout in what he claimed to be 'the interest of public safety and tranquillity'.[784] This led to an escalation in tensions as citizens continued to speculate and spread innuendo and gossip via mobile phones and social media. Under the pathways to violence in Chapter 1, the suspected fraudulent election result in combination with the media blackout is the galvanising event that sparked the widescale outpouring of violence. Raila did not want to challenge the election through the courts because he claimed Kibaki controlled them.[785] Kibaki's nomination of six senior judges a few days before the election only served to perpetuate the accusations. After amending their earlier report of Raila's victory, print media went silent for the duration of a five-day ban. Social media, including blogs, Facebook, Flickr, YouTube, and Twitter, functioned as an alternative medium for citizen communication and participatory journalism.[786] Given the lack of information, Kenyans turned to alternatives such as text messaging services (SMS) which allowed them to circumvent the blackout and remain involved in the turbulence unfolding in the country. Reliance on alternate forms of media also stemmed from the scepticism towards traditional press thought to be in control of the government. Although soon, the ability to send mass SMS was disabled by the government to prevent people from sending what they termed 'proactive messages'. The popularity of SMS was partly driven due to the difficulty of getting internet access for the vast majority of the population. Makinen and Kuria assert that only 3.2% of the population had access to the internet compared to the widespread access to mobile phones for Kenyans.[787]

The government banned public gatherings setting the stage for violent confrontations between police and angry opposition supporters. [788] Enforcement of the ban, which held doubtful constitutional authority, led to numerous deaths and was connected to extensive police abuses. It was officially lifted on 8 February 2008. The number of people affected by the fraudulent elections increased after the election announcement. Shortly after the declaration,

[783] Ibid, 178. Branch, 71.
[784] Nichols, 49.
[785] Kagwanja and Southall, 263.
[786] Mäkinen and Wangu Kuira, 328.
[787] The vast majority of mobile in question did not have internet connectivity.
[788] Watch, 63.

Kivutu admitted that he had been subjected to undue pressure.[789] He added that he was unable to confirm whether Kibaki had indeed won the election. The result was also entirely contrary to the parliamentary vote from which ODM won 99 seats in comparison to PNU's 43.

2.4 Post-Election Violence

PEV refers to violence that occurred in the wake of the 2007 election in Kenya, and in particular from the inauguration of Kibaki on 30 December 2007 until a peace agreement was brokered on 28 February 2008. PEV can be viewed in four phases: protests and responses to protest, planned attacks, reprisal attacks, and violence attributable to police. The violence took place in areas with high population density.[790] Accordingly, 66% of the deaths occurred in the Rift Valley, 12% in Nyanza, and 11% in Nairobi, with the remainder scattered across the country.[791] The people who suffered the greatest were the 'disadvantaged fringes of the population, from the urban proletariat to the rural dispossessed'.[792] In the days after the announcement, various NGOs such as the Kenya National Human Rights Commission and domestic observer groups such as Kenya Elections Domestic Observation Forum held conferences to express concerns over the Presidential result, which inflamed tensions. [793] EUOEM reported that they were not allowed to monitor the vote count in eight Central Province constituencies. In the limited number of the constituencies that the EUEOM were allowed to monitor, they reported inflation of figures released by the ECK.

Other official election observers (both domestic and international) noted that the Presidential vote counting and tallying were flawed or had been doctored. Consequently, the public viewed the election as dishonest.[794] ODM used these reports to propagate the idea that their victory was stolen. Due to their mistrust in the judiciary, ODM resorted to a strategy of mass action with countrywide demonstrations and protests. They also threatened to swear in Raila as the 'People's President.'[795] The violence was set in motion by planned attacks and subsequent retaliatory attacks. People (and their property) were attacked based on real or perceived political inclination. The initial violence followed a trend: mobilisation, acquisition,

---

[789] Kagwanja and Southall, 263. Human Rights House Network, ''I acted under pressure', says Electoral Commission Chairman Kivuitu' (*http://humanrightshouse.org/Articles/870.html*) accessed accessed 11 June 2016.
[790] Calas, 181.
[791] Materu, 50.
[792] Lafargue and Katumanga, 26.
[793] Cheeseman, 176 - 177.
[794] Materu, 50.
[795] Ibid, 50 - 51.

transportation and distribution of weapons, barricading of roads used to identify, attack or kill travellers from 'enemy' communities, and oaths administered by ethnic elders.[796] The oath called on the audience of youth gangs to defend their community and its resources against the ethnic 'other', thereby constructing the ethnic 'other' as an existential threat. The oath crystallised the myth-symbol complexes to direct violence at the 'foreigners'/'immigrants'/'enemy' to seek redress for decades of socio-economic marginalisation that had been denied in the election result that was believed stolen.

2.4.1 Protests

ODM and their supporters protested the robbery of what they claimed was their victory. Kibaki responded with his newly reacquired powers rendering peaceful protest illegal in an alleged attempt to prevent violence in response to the polls.[797] As a result, efforts to peacefully protest were met by police action, often to disproportionate levels of brutality, effectively stopping people from further peaceful assembly.[798] Demonstrations quickly disintegrated into riots involving looting. Police would use live ammunition to deter protestors.[799] According to Lafargue and Katumanga, most of the rioters were unemployed youth who believed that Raila was the only candidate who understood their predicament, and they were not all Luo.[800]

Unlike President Kenyatta and Moi, the State monopoly on violence had diminished to the extent that the State was unable to control out fluxes of violence in the majority of areas around the country.[801] Kibaki had failed to demolish the architecture of informal violence that emerged in the last years of Moi's long tenure. Additionally, election manipulation and weakness of the State in channelling the violence only served to encourage gangs.[802] It was not just the Mungiki or the Luo Taliban that the government had failed to dismantle as groups like the Chinkororo (Kisii) and other transient gangs like the Kamjesh and Baghdad Boys (Luo), Kalenjin gangs were rehabilitated and contributed to PEV at different levels. This gang violence quickly diffused after the disorder that erupted following the announcement of the election result.[803]

---

[796] Ibid, 51.
[797] Roberts, 9. Watch, 24.
[798] Hervé Maupeu, 'Revisiting Post-Election Violence' in Jérôme Lafargue (ed), *The General Elections in Kenya 2007* (Mkuki na Nyota Publishers Ltd and IFRA 2009), 220 - 221.
[799] Watch, 24.
[800] Lafargue and Katumanga, 14.
[801] Kagwanja and Southall, 271.
[802] Lafargue and Katumanga, 24.
[803] Kagwanja and Southall, 271.

ODM supporters also launched violent protests in various areas, including Nairobi, Kisumu, Eldoret and Mombasa.[804] Mobs targeted Kikuyus based on their presumed support for Kibaki. In under 24 hours' hundreds of people in these areas were killed.[805] Property belonging to the Kikuyu people was burned, looted and vandalised, and thousands were forced to flee their homes. Between 31 December 2007 to 1 January 2008, Kikuyus were attacked by Kalenjins, and the police were powerless. So, the army was deployed to those areas and advised residents to flee to local police stations. In Eldoret and the surrounding countryside lay the epicentre of post-election violence. Targets of the violence were non-Kalenjins, mostly Kikuyu. Within five days of the election, over ninety people had been killed, and 50,000 people had been displaced. In addition, the roads were blocked, and unofficial Kalenjin checkpoints were set up in the area. Displaced people sought refuge in communal buildings like churches, schools, administrative posts and police stations.

2.4.2 Planned Attacks

People were warned to leave their homes or face impending attacks.[806] For instance, a Kikuyu merchant recounted to HRW how his children came home and told him that their friends said their family would have to go away from their property. The police assured him that there was nothing to worry about, only for his house and business to be attacked hours later. In some areas, there were reports of prior identification of specific homes and premises belonging to non-Kalenjins.[807] This was to ensure that the following attacks would only be directed at the property of those considered part of 'enemy' communities.[808] The myth-symbol complexes of the Kalenjin were crystallised so that *majimboism* (that had been denied through the ballot box) could become a reality even if it was effected by the forcible expulsion or even death of the ethnic 'other'. What is more, *majimboism* achieved through physical violence was simultaneously attainable for other communities that had been historically dispossessed by ethnic 'foreigners'. Thus, throughout January 2008, there were organised ethnic attacks to redress not only the fraudulent election but also long-standing grievances over land and access to resources.[809] The organisation of the attacks by political elites and their proxies is reminiscent of the election violence that surrounded the elections in the 1990s after the re-

[804] Nichols, 49.
[805] Branch, 27.
[806] Watch, 40.
[807] Materu, 51.
[808] Ibid, 51.
[809] Ibid, 51.

introduction of multi-party politics. Opportunistic elites from other ethnic communities used the election controversy to mobilise their ethnic groups and incite violence against rival ethnic groups.[810]

Politicians, businesspersons, religious leaders, and ethnic elders would hold meetings in town halls to organise attacks, promising cash payments to those who participated in the violence. They took advantage of the high rate of youth unemployment. Even free educational programs introduced by the Kibaki administration had not done much to reduce poverty.[811] One of the interviewees of HRW described how 'the big people at the [bus stage], namely the businessmen, would call the jobless for meetings insisting that the jobless attack Luos.'[812] CIPEV established to investigate PEV found evidence that some of the perpetrators of violence were paid a piece-rate fee for each hut that they burned down.[813] The initial violence was targeted at mainly the Kikuyu and other ethnic groups such as the Turbo, Kurinet and Soy for their real or perceived support of PNU.[814] Violence followed a similar pattern in various areas. Kikuyu residents would see their neighbour's houses being set alight, flee their homes into towns or nearby forests, only to come back and find their own homes destroyed or looted.[815] Groups of a minimum of fifteen people, frequently originating from community meetings where they were encouraged to drive out all the Kikuyu, would be assigned to specific homesteads where they would loot corn and belongings. Meetings were also convenient spaces in which the transference of affects (discussed in Chapter 1), such as anger and aggression, could take hold and create a frenzy of anger that can be directed at the ethnic 'other'. When the young people would disperse, the old would remain. Whenever these groups would encounter someone from the 'enemy' ethnicity, they would use mob justice and beat them with arrows, machetes or crude tools. There is also evidence that the groups would select soft targets like pregnant women, newly born babies, disabled people and children to spread terror by delivering the message that nothing was off-limits.[816]

Throughout the Rift Valley, Kalenjin youths wielding machetes, bows and poisonous arrows attacked non-Kalenjins and their properties.[817] HRW notes that the residents who attempted to defend their homes were mostly unsuccessful.[818] Most of the Kalenjin attackers came in large groups and were organised, making it easy to overwhelm the small number of

[810] Nichols, 49.
[811] Lafargue and Katumanga, 26.
[812] Watch, 45 - 46.
[813] Waki and others, 87.
[814] Ibid, 87. Watch, 42.
[815] Watch, 40.
[816] Lafargue and Katumanga, 15.
[817] Nichols, 50.
[818] Watch, 42.

Kikuyu farmers who tried to resist them.[819] The most infamous attack happened on a Kiamba church in which 35 unsuspecting victims were burnt alive while seeking refuge. Those who wanted to escape were hacked to death.[820] This event was described by one of the youths present at the attack as a demonstration to Kibaki that because they could not get him, they would 'work on his ethnic group'.[821] There are other well-documented incidents of a similar nature involving shocking civilian-to-civilian violence. There was also intimidation of ethnic groups. Verbal warnings and leaflets were circulated to non-Kikuyu residents of Central Province, including Thika, Juja, Nyeri, informing residents that they should leave or incur a debt of 200 heads. Those who did not move to police stations for protection would be visited by a masked man who would threaten to behead them. One survivor described what the man said: 'Get out tonight, or we'll come for your heads.'[822]

As with previous elections, land was linked to violence. As mentioned in Chapter 1, ethnic identity in Kenya is territorialised such that to ask where someone is from is to ask their ethnicity. In each ethnic group, there is an idea encoded about where their native lands are. It explains why land is the fault line that politicians manipulate to spur violence. It's the easiest way to galvanise ethnic groups who were first dispossessed by the colonialists then by the Kikuyu political elite. Conversely, the reclamation of land is an existential threat to communities that reside in non-indigenous lands, which can also be manipulated by ethnic chauvinists who present themselves as the 'protector' against indigenous communities. Thus, issues of land pressure and related land grabbing are pertinent issues, which over time have become abused by politicians as a campaign tool, causing intensified hatred by indigenous communities towards those who own what they consider their land.[823] Subsequently, displacement was a prominent feature of the electoral crisis (as it had been in previous elections mentioned above), inextricably connected to land issues made more crucial by way of the extensive population growth and the resurrection of ethnicity layered with class and political manipulation.[824] Moi, for instance, used the discretionary powers afforded to him under the Government Lands Act (mentioned above) to give the Kalenjin community permission to settle in the Mau Forest.[825] Kibaki used the same executive power to expel Kalenjins from the Forest. This expulsion formed the basis of Kalenjin bands militantly evicting Kikuyu's from their

[819] Ibid, 42.
[820] Nichols, 50.
[821] Materu, 53.
[822] Watch, 55.
[823] Materu, 37.
[824] Kagwanja and Southall, 270.
[825] Roberts, 10.

homes during PEV, destroying Kikuyu dwellings and even murdering Kikuyus resisting these actions. After the executive order, Kalenjins lobbied Raila for assistance, which was initially granted. [826] However, as the main river feeding the hydroelectric plant began to dry up, Raila reassessed his position and denied any further assistance. Due to this denial of support from Raila, threats against Luo by Kalenjins increased after the 2007 election.

The International Crisis Group have described how violence in the North Rift Valley region, though sparked by the disputed elections, has roots in 'deeply entrenched, long-festering anti-Kikuyu sentiments within certain segments of the Kalenjin' as it had during the elections in the 90s.[827] These segments continue to feel aggrieved because of the ever-increasing Kikuyu settlement in their indigenous areas after independence. They view Kikuyu communities as 'unscrupulous and greedy land grabbers, who have historically manipulated the political system to ensure their dominance in commerce and politics'. Local political and traditional leaders within the region were implicated for their extensive involvement in trying to settle long-standing grievances about land and other real or perceived discrimination from non-indigenous targets.[828] These entrenched acts of misusing executive power have fuelled the all or nothing approach to elections, so people from the same ethnicity as candidates for the presidency feel that once their candidate is in office, it will be their 'turn to eat'.[829] For example, many Kalenjin supporters of ODM believed that once Raila was elected, he would find a way to redistribute most or all land owned by Kikuyu to them.[830] Conversely, election fraud is considered by supporters of the opposition to rob them of their chance to have a piece of the socio-economic resource pie. Many Kalenjins who participated in anti-Kikuyu violence said they were merely doing by force what they were denied a chance to do through the ballot box.[831] In an area called Molo, resentment had been building among Kalenjins who viewed Kikuyus as illegitimate holders of the land. Kalenjin leaders played on this resentment inciting the rural poor in their community to expel their Kikuyu neighbours promising to award the abandoned lands. Frequently in more rural areas, like Molo, attackers were known to the people targeted.[832] The leaders also described these evictions as a response to 'livestock theft'. Ultimately, the expulsions were not only targeted at Kikuyus but also, to a lesser extent, other ethnic groups perceived to be supporting Kibaki, such as the Kisii. This violence also served to prevent members of the Kisii community from taking part in the election. Authorities were later blamed for passivity in the face of serious problems faced in not just Molo but also Mount

[826] Ibid, 10.
[827] International Crisis Group, *Rwanda at the End of the Transition: a Necessary Political Liberalization* (2002), 11.
[828] Materu, 51.
[829] Ibid, 51.
[830] Watch, 36.
[831] Ibid, 64.
[832] Calas, 183.

Elgon. Leaders were also accused of focusing on fights against Mungiki in the capital city and neglecting the violence elsewhere in the country.

2.4.3 Reprisal Attacks

As supporters of PNU fled towards towns in the Southern Rift Valley, they spread stories of burning, looting, rape and murder.[833] In response to these stories of horrendous attacks on 'their' people, there were are several reprisal attacks organised particularly by Kikuyus in areas including Nairobi, parts of the Rift Valley and Central Kenya against the Luo, Luhya and Kalenjin groups.[834] Kibaki's inner circle turned to Mungiki to fight back.[835] Mungiki members who were just a year before the target of State repression (mentioned above) now became soldiers for hire. Credible rumours of Mungiki crushing protests in Nairobi's most impoverished neighbourhoods were circulated from the very first days of the crisis.[836] There is clear evidence of the State's complicity in Mungiki's violence. According to BBC's Karen Allen, meetings were hosted at the official residence of the President between the 'banned' Mungiki members and various senior government officials. [837] Allen's sources told her that Mungiki members were given a 'duty' to defend the Kikuyu in the Rift Valley. The group began the new 2008 year with the slogan 'the time for revenge is now.' Moreover, Africa Report noted that Kikuyu politicians and businesspersons hired group members for reprisal killings in Nakuru and Naivasha at the height of PEV with 300 Kshs. (£2.03[838]) paid to individuals in gangs of as many as fifty people. Perpetrators, local human rights activists, human rights NGOs like HRW note that young men were offered 7,000 Kshs. (£48.46[839]) for their participation and 10-15,000 Kshs. (£69.23 - £103.85[840]) for every Luo man beheaded.[841] Additionally, there are reports of recruitment drives for as many as three hundred new members into Mungiki for the task.[842] Fund-raising was utilised to make money for financing the revenge attacks against the Luo, Luhya and Kalenjins. Elites would hire Mungiki to wreak revenge on Kalenjin youth gangs that had driven tens of thousands of Kikuyu families from their farms in the Rift Valley.[843] However, the main targets of Mungiki were not simply rival gangs but also Kalenjin and Luo residents in the towns of Naivasha and Nakuru.[844]From 24 to 28 January 2008, it was reported that

[833] Watch, 43.
[834] Kagwanja and Southall, 260.
[835] Branch, 275.
[836] Nichols, 50.
[837] Lafargue and Katumanga, 25.
[838] Per the exchange rate on 12th June 2016.
[839] Per the exchange rate on 17th June 2016.
[840] Per the exchange rate on 17th June 2016.
[841] Watch, 48.
[842] Materu, 52.
[843] Branch, 275.
[844] Ibid, 275-6.

several Kikuyus attacked the Rift Valley towns of Nakuru and Naivasha, targeting persons of Kalenjin ethnicity and others for their real or perceived association with ODM and by extension with the violence against Kikuyu elsewhere in the country.[845] For example, in Naivasha, nineteen Luos were attacked then trapped inside their burning homes. Like many other attacks in the Rift Valley, that incident was organised by Kikuyu politicians and businesspeople who sponsored and incited members of Mungiki to carry out the attacks. In Nakuru, Luo men (and other real or perceived supporters of ODM) were beheaded. Alternatively, they were forcefully circumcised using machetes or broken bottle in a perverted bid to make a 'man' out of them.[846] The perversion of circumcision from a ritual that was elevating and masculinising into one that was degrading and castrative embodied the idea that political participation was qualified within the community.[847] Forcible male circumcision was used as a reversal of its cultural meaning.[848] It was an extremely violent exercise of symbolic politics. It was used to traumatise, humiliate, and intimidate communities perceived to be supporting the opposition and to emasculate them and shame them into neither voting again nor returning to their land. Men who were already circumcised were forced to join the militias and watch as others were forcibly circumcised.[849] Acts of circumcision and castration by militia groups were accompanied by vernacular radio stations ridiculing men in the Luo community for being 'mere boys'.[850]

In response to these retaliatory attacks, ODM supporters targeted Kikuyu's and other suspected supporters of PNU. They mobilised gangs like the Taliban, formerly the Luo Taliban, and enacted various forms of violence in retaliation against real and perceived supporters of PNU.[851] In Nakuru specifically, attacks started a succession of Kalenjin counter-attacks. There are multitudes of reports of brutal acts of violence in various areas. What is clear is the level of organisation and coordination of these attacks. In the week ending on 3 January 2008, hundreds of people died, thousands were displaced, and the army was called in to disperse violent gangs in Naivasha and Nakuru. There are reports of police participation in the conflict. Their conduct oscillated between praiseworthy and blameworthy.[852] This conflicts with reports that PEV was only citizen-to-citizen violence.

---

[845] Ibid, 275 - 276. Watch, 43.
[846] Materu, 51 - 52.
[847] van Baalen, 40.
[848] Ahlberg and Njoroge, 455.
[849] Watch, 51.
[850] Kamau-Rutenberg.
[851] Kagwanja and Southall, 271. Watch, 45.
[852] Materu, 52.

2.4.4 Police Violence

There are three branches of the police in Kenya: the regular Kenya Police, the General Service Unit (GSU), a specialist unit trained in riot control, and the Administration Police established to protect the administration but utilised to help the regular police whenever necessary.[853] Officers in different parts of the country responded to the violence in vastly different ways.[854] For instance, in Nakuru town, police defended Kalenjins and Luos, who sought refuge in the residence of a local leader. Police were witnessed chasing groups of armed men coming out of a neighbouring house owned by a former Member of Parliament.[855] On the other hand, members of the police were accused of participating directly in the commission of crimes during the violence by using, for example, excessive force. They also allegedly contributed by omission, indirectly encouraging civilian perpetrators to commit the atrocities. The initial wave of police killings was met with outrage from media and human rights bodies but did not lead to any amendment in police tactics. The ODM initiated protests from 14 to 18 January 2008 resulted in more clashes with police that resulted in more civilian deaths.

When it became apparent that the announcement of Kibaki as President had sparked trouble, police appeared to be using a strategy of containing protesters in the slum areas, not just in Kisumu but also in Nairobi in slum areas of Mathare, Kibera, Dandora, Kariobangi and elsewhere to control them.[856] Witnesses and victims confirmed to HRW that they were unable to leave the slum area because of police intervention, which was often brutal and sometimes fatal. The police claimed that they used the force that was necessary under the circumstances.[857] However, this claim was discredited by reports that the police would allegedly drive into the slum areas and, without querying any of the residents, shoot first, directly at males, occasionally hitting female and children in the area. According to the medical superintendent of Nyaza General Provincial Hospital, the police appeared to be shooting to kill males while stray bullets caught female and child victims.

In Kisumu, for example, a stronghold of ODM, on 19 December 2007, protests began in all neighbourhoods as local youth set tires on fire and erected roadblocks. Some protestors reached the city centre and almost instantly began looting. Police and provincial and district authorities reported that they tried but failed to disperse looters with non-lethal force. The Provincial Police Officer for Nyanza province acknowledged to HRW that she ordered her

[853] Watch, 24.
[854] Ibid, 25 - 26.
[855] Ibid, 50.
[856] Ibid, 32.
[857] Materu, 52.

officers to utilise live ammunition to disperse the looters because the police were 'overwhelmed' and 'caught off guard by the 'ferocity and size of the violent crowds'.[858] The Provincial Police Officer and district commissioner acknowledged that the crowds were unarmed but claimed the shootings were justified due to the prevention of looting. However, HRW reports indicate that majority of people shot in Kisumu died in the residential slum areas far from the shops in the commercial centre. The district commissioner confirmed the police strategy was to keep the people out of the town, push them into the slums and 'prevent them from returning'.[859]

There have been three serious allegations against the police levied by CIPEV. Firstly, there was an unofficial 'shoot to kill' policy in implementation. Secondly, politicised commands involved, for instance, non-interference with pro-government mobs in the process of committing crimes against opposition supporters. This suggests that the leadership of the police was pro-PNU. And thirdly, there was inaction on the part of the police whenever complaints from victims in Molo, Naivasha and Eldoret were received even though the police were available and present. The violence persisted until late February 2008 when a peace agreement was brokered between Kibaki and Raila, it is known as the National Accord and Reconciliation Act agreement (NARA).

CIPEV recorded that 405 of 1,133 reported deaths that occurred after the election were caused by gunshot wounds attributable to State police.[860] CIPEV reported that a staggering 80% of all gunshot wounds in PEV were attributable to police.[861] The majority of police killings recorded by HRW occurred in slums in which police believed residents would try to join demonstrations. Thus the effort to manage the slums included shooting protesters and bystanders, frequently women and children, without any initial attempt to use non-lethal force and in circumstances where there was no apparent threat to life or property.[862] HRW witnessed first-hand the use of live ammunition by the police to disperse protesters during the protests on 16 and 17 January 2008.[863] There is also evidence that security forces, namely police, military

---

[858] Watch, 28.
[859] Ibid, 28.
[860] Waki and others, 331. A suit was initiated against the Kenyan government by families of seven victims claiming police brutality. Tom Odula, 'Kenyan Government Sued for Police Brutality during Post-Election Violence Five Years Ago' (*http://globalnews.ca/news/393443/kenyan-government-sued-for-police-brutality-during-post-election-violence-5-years-ago/*) accessed 29 July 2015.
[861] Materu, 52.
[862] Watch, 24 - 25.
[863] Ibid, 25.

and paramilitary forces, were responsible for looting, gang rapes and inciting violence during the conflict period.[864]

2.5 The International Response

As mentioned above, the 2007 EV was unique because it attracted an international intervention that will be discussed below. It is important because, as we shall see in the next chapter, the ICC prosecutions were politicised. Instead of ensuring accountability for the grave crimes that were committed, the international response entrenched ethnic divides even further. The NARA was brokered by the AU, under the chairmanship of Kofi Annan, the previous Secretary-General of the UN and the Panel of Eminent African Personalities (the Panel).[865] By the time the agreement was signed, there were official reports of 1,133 people dead and over 700,000 displaced.[866] It was at that point clear that the violence was less about opportunistic assaults and more about organised and coordinated attacks on civilians based on not just their ethnicity but also their political leanings. Annan remarked that international actors would not accept political violence taking place 'every five years or so and no one is held to account' because it would mean a return to the country to address further violence 'after three or four years'.[867]

The international response to PEV was swift, unlike previous elections. Secretary-General Ban Ki-moon was quick to promote an urgent political settlement between Kibaki and Raila.[868] Ki-moon met with Kibaki on 31 January 2008 at the AU summit in Addis Ababa. Then he went to Kenya on 1 February 2008, where he met with Kofi Annan and Raila. Ki-moon called on both parties to the conflict to find an acceptable solution, to return to what he classified as a 'peaceful and democratic path'. The United Nations Security Council (UNSC) took a completely different approach than the one taken to Rwanda. Namely, they acknowledged that a substantial part of the population was being 'killed, subjected to sexual and gender-based violence and displaced from their homes' in a Presidential Statement on 6

[864] David Anderson and Emma Lochery, 'Violence and Exodus in Kenya's Rift Valley, 2008: Predictable or Preventable?' 2 Journal of Eastern African Studies 328, 328.
[865] The Panel included Benjamin Mkapa, ex-President of Tanzania and Chair of the African Union and Graça Machel, ex-First Lady of Mozambique. Materu, 56.
[866] Nic Cheeseman, Gabrielle Lynch and Justin Willis, *Voting for the Devil You Know: Kenya's 2017 Election* (<http://roape.net/2017/08/14/voting-devil-know-kenyas-2017-election/> 2017).
[867] Serena Sharma, *The Responsibility to Protect and the International Criminal Court: Protection and Prosecution in Kenya (Kindle Sample)* (Routledge 2015).
[868] United Nations Department of Public Information, 'The United Nations and Kenya: A Briefing Note (7 February 2008)' (*https://archive.unric.org/html/english/pdf/Kenya_briefing_note.pdf*, 2008) accessed 21 August 2020, 2.

February 2008.[869] The UNSC went further by requesting Ki-moon report on how the UN could further support Annan's mediation efforts and the impact of the crisis. Moreover, the UNSC backed the decisions of Louise Arbour, the High Commissioner for Human Rights, and Francis Deng, the Special Adviser for the Prevention of Genocide of the Secretary-General, to send investigative missions to Kenya. Both missions had been devised in consultation with the Kenyan Government.

2.5.1 Mediation Process

The secretariat of the Panel worked industriously behind closed doors during the first week of their arrival in Kenya.[870] The result of which was an agenda referred to as a 'Road Map' for the talks created in consultation with the negotiation teams of ODM and PNU. After a public handshake on 24 January 2008 between Raila and Kibaki, there was a rapid acceptance of the Road Map. The Road Map entailed a four-part agreement between the parties. Firstly, there would be immediate action to stop the violence and restore rights and liberties. Secondly, there would be immediate measures to address the resultant humanitarian crisis and promote healing and reconciliation. Thirdly, overcoming the political crisis. Lastly, addressing long-term issues, including land reform.

On 29 January 2008, the Panel succeeded in engaging PNU and ODM in the mediation process that was conducted within a framework called the Kenya National Dialogue and Reconciliation (KNDR).[871] KNDR required the negotiations and agreements to be, in particular, directed at an urgent ceasefire before turning to the creation of a long-term programme to secure justice, reconciliation, stability, and peace. It took 41 days of intense negotiation for both parties to agree to share power on 28 February 2008. Power would be shared within a Grand Coalition Government.[872] The Coalition government was a political compromise in which both parties agreed to put the past behind them and 'seek to enable Kenya's political leaders to look beyond partisan considerations to promote the greater interests of the nation'. Despite the controversy that surrounded the election, Kibaki would remain President, and Raila would become the Prime Minister through a constitutional amendment brought about by the National Accord and Reconciliation Act of 2008.[873] Both parties agreed

[869] *UNSC Statement by the President of the Security Council 5831* S/PRST/2008/4 UNSC, 1 - 2.
[870] Elisabeth Lindenmayer and Josie Lianna Kaye, *A Choice for Peace?: The Story of Forty-One Days of Mediation in Kenya* (International Peace Institute New York 2009), 9 - 10.
[871] Materu, 56.
[872] Sharma.
[873] *Acting Together For Kenya: Agreement on the Principles of Partnership of the Coalition Government* (28 February 2008), 1.

that the power-sharing agreement was a temporary measure with the ultimate aim of creating a favourable environment for other approved mechanisms that were designed to achieve lasting healing, justice, and reconciliation.[874]

One of those mechanisms was the formation of CIPEV.[875] In fact, during the mediation process, it was broadly agreed that the issues with criminal accountability would be determined following the recommendations of the Commission.[876] The formation of CIPEV was agreed on 4 March 2008 as part of the KNDR negotiations. Its mandate included the recommendation of measures intended to bring to justice those who committed criminal acts of violence. The Commission officially began its work on 3 June 2008.[877] It recommended the rapid creation of a Special Tribunal for Kenya (SPK) to ensure domestic prosecutions of those it found to have planned, organised or directly perpetrated PEV.[878] The SPK was envisioned as a hybridised tribunal in which non-Kenyans would have senior investigative and prosecutorial positions in addition to judges.[879] Rather than publishing the names of those who were identified as the most responsible for EV, an envelope with the names and supporting evidence was given to the Panel. [880] Accordingly, the Panel was given the power to decide whether to forward the names of the perpetrators. The names would be released if the government failed to establish a Special Tribunal before the set deadline.

The Commission was explicit in saying, if the agreement to establish the SPK was not signed, the SPK Statute not enacted, or SPK had not commenced stipulated action, in a certain amount of time – 'a list containing names of and relevant information on those suspected … shall be forwarded to the Special Prosecutor of the International Criminal Court'.[881] The Commission entrusted the Panel with the envelope in a bid to put pressure on the government to take action, in full view of the fact that Commission reports were historically treated closer to museum exhibits than authoritative findings warranting government action.[882] When given the option between accountability (both political and criminal) and impunity, the government would, in all likelihood, choose the latter.[883] The AG, in particular, was seen as unable to deal

[874] Ibid, 1 - 2. Materu, 57.
[875] Materu, 57.
[876] Ibid, 64.
[877] Ibid, 58.
[878] Waki and others, ix.
[879] Materu, 65.
[880] Waki and others, 18. Materu, 64.
[881] Waki and others, 473.
[882] Materu, 65.
[883] Waki and others, 453.

with perpetrators of politically motivated violence. The Commission felt that the AG's inaction stimulated the sense of impunity, thereby emboldening violence peddlers during elections.

The Daily Nation, a national newspaper, commended the Commission for its 'astonishing ingenuity' in sealing and anticipating possible loopholes that could have acted as an escape hatch for political elites. [884] The comment seemingly underestimated the 'ingenuity' of political elites when faced with the prospect of criminal accountability. [885] The agreement for the implementation of the Commission's recommendations was signed on 16 December 2008 and bound the Kenyan government to a commitment to justice made during the mediation process. The government predictably failed to construct the SPK despite three attempts to do so, which triggered the ICC intervention in Kenya.[886] The ICC selected six individuals (including Uhuru and Ruto) out of an extensive list of perpetrators.[887] A significant number of perpetrators had been identified as either direct or indirect perpetrators of PEV. They were identified as such not only in the CIPEV report but also in the report generated by the Kenya National Commission on Human Rights[888]. Despite publicly committing to cooperate with the ICC, the Kenyan government campaigned to thwart the ICC's efforts.[889] The government's case was the ongoing ICC case that threatened to destabilise the country in the period preceding the 2013 General Elections. Even though the 'ICC factor' was lauded as a stabilising influence that served to deter incidents of hate speech and acts of violence. It is important to note that Uhuru and Ruto had ascended to the positions of President and Deputy President at the time their cases were before the ICC. Their administration attempted to pull out of the Rome Statute, challenged the admissibility of the case, and engaged in concentrated lobbying to have the cases deferred.

The cases subsequently collapsed because of the governments non-cooperation with the Prosecutor, the withdrawal and recantation of witnesses, and failures to provide documentary evidence.[890] The Prosecutor consistently called attention to the fact that witnesses were intimidated or killed by those acting in the apparent interests of high-ranking government

[884] Ibid, 473.
[885] Materu, 66.
[886] Sharma.
[887] Materu, 71.
[888] Kenya National Human Rights Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence* (2008).
[889] Sharma.
[890] Daniel M Mburu, 'The Lost Kenyan Duel: The Role of Politics in the Collapse of the International Criminal Court Cases against Ruto and Kenyatta' 18 International Criminal Law Review 1015, 1015 and 1039.

officials, which had significant effects on the proceedings.[891] The Trial Chamber found that the government's approach to cooperation fell below the standard of good faith cooperation required under Article 93 of the Rome Statute.[892] Still, it refused to refer the matter to the Assembly of State Parties until the Prosecutor successfully appealed the decision.[893] On 13 March 2015, the proceedings against Uhuru were terminated without prejudice.[894] On 23 October 2015, in response to a Ruto defence team request for dismissal of the prosecution's case, the Trial Chamber judges vacated the charges against Ruto without prejudice.[895]

2.5.2 The Aftermath

The quick and well-coordinated AU intervention backed by the UN and foreign governments was seen as an exemplar of diplomatic action. Action that was based on the Responsibility to Protect principles that the UN had adopted when Annan was Secretary-General.[896] In the words of Ki-moon: 'As demonstrated by the successful bilateral, regional and global efforts … if the international community acts early', the choice need not be between force and inaction.[897] Nonetheless, the intervention has come under criticisms. These criticisms are based on the fact that foreign governments took diminutive action when faced with undeniable evidence of chronic corruption and impunity in the Moi and Kibaki administrations (highlighted earlier in the chapter). Foreign governments concluded development assistance while simultaneously acknowledging massive looting of funds by the government. HRW poignantly notes that decades of overlooking impunity, corruption, and general mismanagement of governance contributed to the crisis in the first place.

Sharma levies another criticism but at the NARA itself. That is, it undermined future efforts to prosecute perpetrators of PEV.[898] Once politicians with responsibility for PEV secured positions of power, in a desperate attempt to benefit from State immunity or the embedded culture of impunity, they set out to actively block prosecutions internationally and

---

[891] Robert Cryer, 'Witness Tampering and International Criminal Tribunals' 27 Leiden Journal of International Law 191, 197.
[892] *Prosecutor v. Kenyatta: Decision on Prosecution's Application for a Finding of Non-Compliance Under Article 87(7)* ICC-01/09-02/11-982 International Criminal Court, [78].
[893] Ibid, [90]. *Prosecutor v. Kenyatta: Second Decision on Prosecution's Application for a Finding of Non-Compliance Under Article 87(7)* ICC-01/09-02/11-1037 International Criminal Court.
[894] *Prosecutor v. Kenyatta: Decision on Withdrawal of Charges Against Mr. Kenyatta* ICC-01/09-02/11-1005 International Criminal Court, [9].
[895] *Prosecutor v. Ruto and Sang: Decision on Defence Applications for Judgments of Acquittal* ICC-01/09-01/11-2027-Red-Corr International Criminal Court, [8] - [9].
[896] Sharma.
[897] *UNGA Report of the Secretary-General: Implementing the Responsibility to Protect* A/63/677 United Nations General Assembly, [9].
[898] Sharma.

domestically. Thus, sovereignty was used as a shield to protect those with responsibility for *inter alia* death, sexual assault, and displacement, which ironically was precisely what Responsibility to Protect was designed to prevent. It led to the 'alliance of the accused,' prompting Uhuru to join forces with Ruto in their successful 2013 bid for President and Deputy President, respectively. Their campaign was a concerted effort to deflect the court and insulate themselves.[899] They attacked the ICC as a tool of the West motivated by an undervaluation of African states.[900] Indeed, Ruto and Uhuru used the ICC prosecutions to help them get elected.[901] Thereby forever interlocking the Government of Kenya with the alleged perpetrators of 2007 election-related violence.

3. Conclusion

This chapter has introduced the symbolic politics of Kenyan EV. It identified how the colonial era was central to the creation of oppositional ethnic identities (looking specifically at the Kikuyu, Kalenjin, and Luo) for ease of administration. The identities were connected to specific territories. So, someone's ethnicity is also their indigenous land. In that way, it is easy to portray non-indigenous communities as 'immigrants', 'foreigners', 'strangers' and so on. Being labelled an ethnic 'other' also defines the relationship to State power and entitlement to State resources. Territorialised oppositional identities engendered zero-sum politics wherein only one group could be successful, and success was tied to the domination of the ethnic 'other', especially in land and politics. The focus on top-down incitement and manipulation of ethnicity in the study was extended to look at bottom-up politicisation of ethnicity by local actors, which facilitates elite mobilisation.

The permeation of zero-sum politics was evident as far back as the negotiations for the first Constitution of Kenya, which resulted in the rise of *majimboism*. Members of KADU (formed of marginalised communities, like the Kalenjin) thought *majimboism* would enable them to reclaim land and keep it in the community. Whereas, members of KANU (formed of more economically and politically well-established communities, like the Kikuyu and Luo) saw *majimboism* as a threat to their ability to control the Rift Valley and the Republic more generally, for which they felt entitled. Though Odinga and Kenyatta were united in their pursuit of *centralism*, which the Kenyan Constitution was updated to enshrine, Kenyatta sought to

[899] Susanne D Mueller, 'Kenya and the International Criminal Court (ICC): Politics, The Election and the Law' 8 Journal of Eastern African Studies 25, 25.
[900] Ibid, 25.
[901] Mburu, 1015.

protect land through the use of political power that was consolidated in the Kikuyu community. Other communities were marginalised as a result of the consolidation of power around the Kikuyu, left out of the benefits of the State and without the ability to access State power. The greatest of all the benefits was, of course, land. Communities that were bestowed with land had a better quality of life and more access to State capital. Additionally, as ethnic identity was territorialised by the colonial administration, every ethnic community has a homeland that forms a key part of their myth-symbol complex. It was during the Kenyatta-era that circumcision became the symbol of manhood, wealth, and power for the entire nation to the disadvantage of those communities that do not have circumcision as a key social value.

Moi took office in 1978 and reversed the flow of State patronage to the benefit of the Kalenjin. When Kibaki took office in 2002, he reversed the flow of stage patronage again to the benefit of the Kikuyu. Suppression of dissenting voices was evident during the lead up to the 2007 elections, which we will turn to shortly regarding post-conflict Kenya. In a bid to secure political prosperity, especially through the Kikuyu ethnic majority, Kibaki launched a full-scale crackdown of Mungiki after its leadership came up with a plan to introduce Mungiki members into the 2007 election. It did not matter that Mungiki had been an ally to the Kikuyu ruling elite, for instance, during Uhuru's 2002 bid for the Presidency or Kibaki's Yes campaign in 2005. All that mattered was they were a threat to a Kibaki victory, and that type of opposition was impermissible, particularly from within the Kikuyu community.

Majimboism had resurged during the 1992 elections when Kalenjin politicians used it in reference to the violent expulsion of non-indigenous communities to counter calls for the re-introduction of multiparty politics. Moi authored the practice of pre-election violence (which is how EV usually unfolded until the 2007 election) to dominate the society and ensure that only his supporters had an easy way to vote. During the 2007 election, *majimboism* was generally used as a call for federalism in the real sense of the word, and consequently, it was hoped, equitable distribution of resources for marginalised communities, such as the Kalenjin. Nonetheless, incumbent supporters (mostly Kikuyu, Meru and Embu communities) took it as a call for their expulsion on the basis of their experiences during the 1992 elections. Thus, the symbol of *majimboism* had a completely different symbolic resonance for those communities. Consequently, moving from a regional system of governance was taken as tantamount to losing their homes (a status and material interst threat) and maybe even their lives (a physical threat). It was the epitome of zero-sum politics, through which only one group could win, and as a result, everybody lost.

Another symbol that resurged was circumcision, specifically the politics of foreskin, which became a prominent political symbol used to cast aspersions on the ability of Raila (and by extension members of non-circumcising communities) to lead. The emerging health discourses of the 2000s had further stigmatised communities, like the Luo, who do not have circumcision as a key social value. The cultural meaning of circumcision was perverted during retaliatory attacks as a way to 'make a man' out of the supporters of the opposition – the *kihii*. It served to intimidate, humiliate, and traumatise communities into never voting again and never returning to their lands.

CHAPTER 3 - Speech Regulation as a Response to Violence

During the 2007 election, hate speech from politicians and media outlets fostered a 'climate of hatred' that contributed to violence echoing what happened during the Rwandan genocide. Following the genocide, there was a huge appetite for understanding moments of intense violence through the question of hate speech because of precipitating violence (as we saw in Chapter 1), particularly the use of mass media to facilitate widespread violence. Thus, media outlets, such as RLTM, could be inextricably linked to violence. However, the post-genocide Rwandan government's manipulation of speech regulations to impose its cultural homogeneity on the population of Rwanda, in increasingly authoritarian ways, did not garner as much attention. This latter point can be glimpsed through the post-genocide Rwandan government's use of speech regulation to criminalise government detractors and those who referred to documented Tutsi acts of violence against the Hutu during the genocide. The Rwandan government used the pretext of protecting national security and preserving public order as reasons for criminalising those speech acts.

That potential for state manipulation of speech regulations was overlooked during the diplomatic intervention into Kenya. So, speech regulations formed a part of the recommendations of the OHCHR and the Peace Agreement that was signed by the parties to the conflict. As mentioned in the introduction, my methodological choices meant I could not trace which group suggested speech regulations. I do not know whether it was civil society, other domestic actors, or international actors. CIPEV cautioned against proposals for governmental monitoring of the media to facilitate the implementation of speech regulations. CIPEV based its warning on the country's history with state-controlled media. Nonetheless, the regulations were put in place, and the Kenyan government proceeded to outlaw speech under the pretext of hate speech, then hate speech as well as undermining the authority of the President, and finally, national security.

In a nutshell, this Chapter first looks at the connection between inflammatory speech and PEV using the reports from various bodies and secondary commentary. It explores the speech legislation and unpicks their weaknesses while drawing on iHub's research and my ideas to suggest improvements in the structure of section 13 of the National Cohesion and Integration Act 2008. I track the other iterations of speech regulation and then focus on the impact of speech laws (officially recommended in the Peace Agreement and by the OHCHR) on the individual and the political space. I will consider how these laws are employed in Kenya to outlaw counter-hegemonic voices through numerous case studies and the discrepancies in the treatment of politicians accused of hate speech to journalists and bloggers. For the first time, there will be an exploration of how national security frameworks (adopted in light of the specific PEV context) became generalised into everyday life. I will further consider how dissent on new media platforms became conceptualised as a national security threat through state attempts to repair social media's evolution as a site of dislocation in which previously suppressed alternative discourses could be circulated. My second original contribution to knowledge in the Chapter is the post-post election violence use of speech laws and in-depth analysis of those laws in the broader context of ethnic conflict and governance in Kenya and Rwanda.

1. Understanding Speech, Propaganda, and Mythic Structures in the Context of the Rwandan Genocide

In the first section of this chapter, we turn back to the events in Rwanda. The argument here is that the understanding of mass medias link to violence pervaded discourses on ethnic violence. This chapter more closely evaluates the ground-breaking decision of the ICTR, which explicity drew that link. However, not much attention was placed on the subsequent uses of speech laws. That is the key contribution of this chapter. It tracks how the laws were constructed and then applied. We will see how accepted international standards of speech regulation (touched on in Chapter 1) were perverted, such as genocide ideology, in a state attempt to justify the criminalisation of those who challenged government narratives of the Rwandan genocide, or the governance of the Kagame-led government. To echo some of my concerns in Chapter 1, we will see how propaganda operationalises mythic structures to generate tension and direct cycles of violence.

1.1 Mass Violence is Inextricably Linked to the Media

Following the UN failure to address the genocide, they addressed it in hindsight with the ICTR.[902] International actors started talking about the need for justice while the genocide was ongoing. It was an idea fuelled by their sense of guilt and the enormity of the crimes that were committed.[903] Since the International Criminal Tribunal for the former Yugoslavia had been established, it made a tribunal the obvious choice to administer justice in Rwanda.

A key insight that the international community drew from Rwanda was the inextricable connection between the media and mass violence. There were several reasons that this was driven home, but of particular importance was the decision of the ICTR, in *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*[904].[905] It was a historic judgment in hate speech jurisprudence, which defined the connection between speech, genocide, and mass media.[906] Mackinnon illustrates that the major conceptual breakthrough of the case was the media committed genocide by instigating it, and the media leaders (Jean-Bosco Barayagwiza, Ferdinand Nahimana, and Hassan Ngeze) were thus held criminally responsible.[907] Ngeze, founder, owner and editor-in-chief of the inflammatory newspaper *Kangura*, and Barayagwiza, lawyer and broadcast executive of RTLM (aptly nicknamed 'Radio Machete'), were held to be criminally accountable for not just the crime of what they said (which constituted ethnic hatred) but also the crimes that their words did. The latter refers to the genocidal acts that were the result of the Ngeze and Barayagwiza's speech acts and the speech acts of others that were nonetheless attributable to them.[908] Nahimana was the founder of RTLM.[909] He was its mastermind, credited for weaponising radio broadcasts that he described as a 'compliment to

---

[902] Roméo Dallaire, 'The Media Dichotomy' in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press; Fountain Publishers; International Development Reserch Centre 2007), 18.

[903] Alison Liebhafsky Des Forges and Timothy Longman, 'Legal Responses to Genocide in Rwanda' in Eric Ed Stover and Harvey M Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press 2004), 51. Nicholas Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2010), 9.

[904] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze.* The *Nahimana* judgement was the first to consider the boundary between free speech and incitement in international law since the International Military Tribunals decision following the end of World War Two in The Nurnberg Trial, 6 F.R.D. 69, 161-63 (International Military Tribunal, 1946) (the *Streicher* case). Erik Mose, 'The ICTR: Experiences and Challenges' 12 New Eng J Int'l & Comp L 1, 5. Gregory S Gordon, 'The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law' 75 Ohio St LJ 571, 573. Jean-Marie Kamatali, 'From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans' 12 New Eng J Int'l & Comp L 89, 89 - 90.

[905] Mose, 5.

[906] Gregory S Gordon, 'A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech' 45 Va J Int'l L 139, 183.

[907] Catharine A MacKinnon, 'Prosecutor v. Nahimana, Barayagwiza, & Ngeze. Case No. ICTR 99-52-T' 98 American Journal of International Law 325, 329.

[908] Ibid, 328 - 329.

[909] Ibid, 325.

bullets'.[910] The Trial Chamber of the ICTR said that RTLM was Nahimana's weapon of choice, which he wielded to instigate the death of Tutsis. [911] The 'words broadcast were intended to kill on the basis of ethnicity, and that is what they did'.[912] Together *Kangura* and RTLM were held to be a 'common media front', the partners of a Hutu coalition to which CDR was also part.[913] *Kangura* and RTLM were said to be the 'media mouthpiece' for the CDR's fusion of politics with ethnicity and civilians with combatants.[914] So, in the end, political interest was made to equate to ethnic identity, and the enemy was defined as the entire Tutsi ethnic community.[915] The ultimate goal was the mobilisation of the Hutu majority against the Tutsi minority.[916] It was a concerted effort, one that was years in the making.

The writings of *Kangura* and broadcasts of RTLM proliferated the myths, symbols, and narratives that were central to the Tutsi and Hutu ethnic identities elucidated in '*Chapter 1 – An Introduction to Symbolic Politics Theory and How States Legitimise Linguistic Violence'*. Most revolved around the Hamitic Hypothesis and the presumed Tutsi goal of ethnic domination of the Hutu. However, the myths, symbols, and narratives were co-opted and recast in ways that were far more incendiary and inflammatory towards the Tutsi. Accordingly, looking specifically at *Kangura*, the ICTR said that the ethnic hatred in the imagery and writings had the 'effect of poison', which perpetually called for action by Hutu readers against the Tutsi.[917] Individuals who criticised the newspaper would face reprisal, often losing their jobs, or worse – their lives.[918] Writings in *Kangura* specifically described Tutsi as 'hypocrites, thieves, and killers', 'marked by malice and dishonesty', and 'inherently evil'.[919] Meanwhile, editorials painted the Hutu as 'generous and naïve' in contrast to the Tutsi, who were 'devious and aggressive'.[920] Snakes became the symbol of the Tutsi.[921] The Kalinga drum (the mythical drum decorated with the testicles of defeated Hutu princes symbolising the bloody emasculation of the Hutu) were alluded to in articles published in *Kangura*. For example, an article published in July 1993 said: 'They [the Tutsi] caught a Hutu, cut his genitals and requested the wife to carry them and at times asked her to eat them.… escapees shall never

[910] Ibid, 327. *Prosecutor v. Nahimana, Barayagwiza, & Ngeze, [966].*
[911] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze, [974] and [310].*
[912] Ibid, [966].
[913] Ibid, [943].
[914] Ibid, [301] and [404].
[915] Ibid, [301] and [404].
[916] Ibid, [301] and [404].
[917] Ibid, [243].
[918] Ibid, [238].
[919] Ibid, [172].
[920] Ibid, [176].
[921] Ibid, [183].

forget the scenes of horror which they witnessed'.[922] Thus, the ICTR held that through 'fear-mongering and hate propaganda, *Kangura* paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy.'

The ICTR held that RTLM broadcasts 'engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population and called on listeners to seek out and take up arms against the enemy'.[923] The enemy had been identified in numerous broadcasts as the RPF, *Inkotanyi* ('fierce warriors'), *Inyenzi* ('cockroaches'), and their accomplices, who were all effectively equated with the Tutsi ethnic community.[924] Broadcasts relentlessly told listeners that the Tutsi were the enemy that had to be 'eliminated' for good. They actively exploited the history of Hutu disenfranchisement and the fear of armed insurrection to mobilise the population.[925] The ICTR held that the effect of the broadcasts on the public was 'heating up heads'.[926] As I said earlier in the thesis, radio propaganda is particularly effective at being directive of action, especially in societies where literacy levels are low, inadvertently rendering other forms of media, like newspapers, inaccessible. Alternative forms of media can also be inaccessible for other reasons, such as cost or use of languages that are not commonly used within certain ethnic communities, since as we have seen through Habermas's work, language naturally separates people into groups (this point will be discussed further below in the context of EV). The media leaders were found guilty of genocide, direct and public incitement to genocide, and crimes against humanity of persecution and extermination. Mackinnon astutely notes that Nahimana, Ngeze, and Barayagwiza were 'purveyors of genocidal journalism and hate radio', who were convicted for 'deploying speech as a lethal weapon, as guilty of genocide as if they had personally wielded the machetes.'[927]

Legal developments in Rwanda are said to ascribe their influence from the ICTR, with several Rwandan statutes including crimes from the ICTR statute verbatim, like direct and public incitement and the crime against humanity of persecution.[928] The recognition of the 'most atrocious genocide in the recent history of mankind' has also served as justification for the post-genocide governments legal measures. The measures often include speech regulations that are claimed to 'promote social cohesion and accordance among Rwandans and to prevent

[922] Ibid, [182].
[923] Ibid, [949].
[924] Ibid, [486].
[925] Ibid, [488].
[926] Ibid, [370].
[927] MacKinnon, 329.
[928] Nwoye 175. ibid 183-4.

violence' even at the expense of other human rights.[929] The key measures the government has used is the criminalisation of speech acts that are identified as 'divisionism' and 'genocide ideology', usually when the speaker has criticised the government and/or pointed to documented criminal acts committed by the RPF during the Rwandan genocide. According to reports, like the report of the Commissioner of Experts, there were widespread RPF massacres of Hutus.[930] The report illustrates that considerable parts of certain areas in Rwanda had seen arbitrary arrests, physical abuse and systematic and sustained indiscriminate mass killings and persecution of civilian Hutu populations, including men, women, children, and sick and elderly people, by the Rwandan Patriotic Army between April and July 1994.[931] The killings amounted to what the report terms as 'an unmistakable pattern of systematic RPA conduct.'[932] Some of those killed were targeted out of sheer happenstance. There was no vetting process or attempt to establish any form of complicity in the massacre of Tutsis. Others, mainly males, were targeted under claims that they were a part of militia elements associated with the former Hutu government. Indeed, in Des Forges book[933], she records extensive massacres by well-disciplined RPF soldiers that contradict the claims of isolated deaths. Des Forges notes that 'the unintentional killings of civilians in a combat situation could never account for the thousands of persons killed by the RPF between April and late July 1994'.[934] There is also evidence that the acts of the RPF amounted to war crimes and occurred even after the genocide officially ended. RPF crimes included the willful killing of civilians and the widespread terror of the Hutu who stayed in the country.[935] Yet, the government claims that the Hutu victims were the cause of their own persecution, disappearance and death and criminalises anyone who even alludes to RPF crimes.[936]

---

[929] *Ingabire Victoire Umuhoza v Rwanda* Application 003/2014 African Court on Human and Peoples' Rights para 147.

[930] Victor Peskin, 'Victor's Justice Revisited: Rwandan Patriotic Front Crimes and the Prosecutorial Endgame at the ICTR' in Scott Straus and Lars Waldorf (eds), *Remaking Rwanda: State building and human rights after mass violence* (University of Wisconsin Press 2011) 173.

[931] United Nations High Commissioner for Refugees (UNHCR), *Summary of UNHCR Presentation before Commission of Experts* (11 October 1994) 4,6, 8, and 11.

[932] Ibid 4, 6, 8, 11.

[933] Alison Liebhafsky Des Forges, Human Rights Watch and International Federation of Human Rights, *"Leave None to Tell the Story": Genocide in Rwanda* (Human Rights Watch 1999).

[934] Ibid 175.

[935] Flávia Saldanha Kroetz, 'Post-genocide Identity Politics in Rwanda and Bosnia and Herzegovina and their Compatibility with International Human Rights Law' 23 International Journal on Minority and Group Rights 328, 350-351. Nwoye, 122.

[936] Helen Hintjens, 'Post-genocide identity politics in Rwanda' 8 Ethnicities 5, 26.

1.2 Post-Genocide Government Manipulation of Speech Regulations

We now turn to examine how the post-genocide government used speech laws to impose its cultural hegemony on the Rwandan people, even going as far as to outlaw any expressions that identified individuals as 'Hutu', 'Tutsi' and 'Twa'. Members of each group were subsumed into the government constructed Banyarwandan identity without being consulted. The Rwandan government's use of speech-related laws exemplifies Butler's view that states use freedom of expression under the guise of policy considerations to suppress those that contradict its cultural hegemony. A point reinforced by the fact that the Rwandan speech-related laws have fallen far below standards set out in international criminal law and human rights standards. Paul Kagame, President of Rwanda since April 2000, is the head of the post-genocide government. Since Kagame took office, the Rwandan government has introduced laws that criminalise what they term genocide ideology and divisionism, hereby referred to as 'the laws,' by claiming national security. Speech regulation was used in the specific post-genocide context to introduce particular normative frameworks of 'security' and 'threat' which were attached to interpretations of freedom of expression, and then as we shall see below became generalised into the every day such that the performance of Hutu, Tutsi and Twa identities was impeded. National security is, of course, an essential factor when considering the vitality of the State, especially when the State has been affected by mass atrocity like genocide. The government does have a legitimate concern that failing to identify and act on legitimate threats has the potential to rekindle violence.[937] Members of the government, like the Minister of Information, stated that 'the spectre of 1994… [demonstrates that] the means of information must not become vectors for germs of discord.' Likewise, Louise Mushikiwabo, the Rwandan Foreign Minister, claims that the laws are the choice of Rwandans, one that makes sense to them and may not make sense abroad.[938] Mushikiwabo said that Rwandans having made that choice should not be rushed into a discourse that takes them back to sixteen years ago. Part of her statement is as follows:

> We've been working on so many competing priorities in the last 16 years to rebuild the country, to make sure people live peacefully together, to reconcile after genocide… We do as a government welcome dissenting voices and different views, but we have a

[937] Jennifer M Allen and George H Norris, 'Is Genocide Different-Dealing with Hate Speech in a Post-Genocide Society' 7 J Int'l L & Int'l Rel 146, 148.

[938] Ryan Tracy for Newsweek, 'Louise Mushikiwabo Defends 'Genocide Ideology' Law' <http://wwwnewsweekcom/louise-mushikiwabo-defends-genocide-ideology-law-74831> accessed 13 June 2018.

> responsibility to preserve the kind of stability, the kind of unity, we've been working on very hard for the last 16 years.[939]

However, as mentioned above, RLTM and *Kangura* are more a testament to the dangers of government control rather than a cautionary tale of too much press freedom and private media that the Rwandan government uses as justification for its censorship.[940] The post-genocide government has effected even less freedom and media pluralism than the previous government that had supported private media outlets to create the appearance of media pluralism. For the new administration, independent media outlets were a problem they sought to address through either suppression, co-option or, as we will see, through accusations of divisionism and/or genocide ideology. The governmental manipulation of media outlets is not surprising because Kagame was in charge of military intelligence for Yoweri Museveni's National Resistance Movement army that had been victorious during the Ugandan civil war.[941]

Shortly after the RPF assumed governmental office, the regime allowed the press to restart its activities liberally. However, over time, the government severely restricted media freedoms, as we shall see below. Waldorf claims that the RPF's successful distribution of its propaganda could not have been possible without its control and suppression of competing narratives, alternative voices, and independent media within Rwanda.[942] This propaganda was exacerbated by the Western (Anglophone) journalists whom Pottier claims failed to see through the RPF's veneer of saviour and the international community's designation as the guilty bystander.[943]A failure brought on by the urgency of the genocide situation that led to handling the refugee crisis, talking diplomacy, and reporting to the world, which led to the Anglophone world accepting the model of Rwandan society produced by the RPF; one that simplifies complex relations and clouds relevant contexts. The model can also be said to have depicted the reality and history of the conflict in a favourable light for the RPF that has since formed political visions and ideas instead of empirical study.

Laws regulating speech formed a cornerstone of the government's political vision and its national unity programme, together with the international and domestic trials, commemorations, memorial sites, public speeches, education initiatives and solidarity camps, which constructed a collective memory along the lines of the Rwandan government's official

---

[939] Athan Tashobya for New Times, '[PHOTOS]: Kwibuka22: Govt to engage diaspora on Genocide ideology' (2016) accessed 3 June 2018..
[940] Lars Waldorf, 'Censorship and Propaganda in Post-Genocide Rwanda' in Allan Thompson (ed), *The Media and the Rwandan Genocide* (Pluto Press 2007) 404.
[941] Johan Pottier, 'Re-imagining Rwanda' Conflict, Survival and Disinformaation in the late 20th Century 405.
[942] Waldorf 405.
[943] Pottier 202-203.

truth.[944] Sectarianism, now known as divisionism, formed the first legal basis for charges against those challenging the RPF's official truth. This truth can be gleaned through statements made by a Rwandan official at a scholarly debate in 2004.[945] When one of the presenters was faced with remarks by an academic expert on the value of discussing different truths, the official demanded the floor and insisted on the 'one truth', what is essentially a series of truths.[946] First, the Catholic Church and the colonial administration created divisions among Rwandan's that led to genocide. Accordingly, both are responsible for the subsequent violence against Tutsis.[947] It is worth noting that the official failed to mention violence against Hutus. Second, Hutu political leaders organised genocide of the Tutsi minority and Hutu population, and they misled both into following their evil plan. Lastly, deaths attributable to RPA soldiers were either occasional acts of revenge or an unfortunate result of the wartime effort that has been punished.

In reality, of the forty-two Rwandan government-led investigations into crimes committed by RPF soldiers, nineteen were for crimes consistent with the ICTR statute, and twenty-three were for post-genocide crimes. Among the nineteen soldiers who were prosecuted, twelve were convicted to numerous terms of imprisonment, five were acquitted, and the remaining two prosecutions were not able to proceed due to the absence of the accused. In particular, Nwoye uses the prosecution of RPF soldiers for the massacre of several clergies in Kabgayi to demonstrate that cases transferred to the national courts were supervised by monitors from the Office of the Prosecutor of the ICTR. The monitors indicated that the trials observed fair trial standards.[948] Still, the prosecution of RPF crimes was considered to pay more lip service to justice rather than rendering it.[949] Cases (like the one about the Kabgayi incident) typically steered clear of senior RPF officials, and in some cases, led to lesser charges of war crimes rather than more appropriate but also more serious crimes, like crimes against humanity.[950] The Kabgayi case concluded with light sentences for two junior RPF officers who confessed and acquittals for two high-ranking officers.[951] The light sentences and acquittals were in the face of substantial evidence suggesting that the massacre constituted a crime against humanity rather than a war crime and the RPF commanders ordered it. The trial was also used

---

[944] Kroetz 342.
[945] Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda* (2008) 1.
[946] Ibid 1.
[947] Ibid 2.
[948] Nwoye 174-5. United Nations, *Security Council 6134th Meeting* (S/PV.6134 4 June 2009) 33.
[949] Steiger 979.
[950] Peskin 180.
[951] Human Rights Watch, 'Letter to ICTR Chief Prosecutor Hassan Jallow in Response to His Letter on the Prosecution of RPF Crimes' (*Human Rights Watch*, 2009) accessed 15 August 2018.

to bolster the government's enduring claim that the massacre was a spontaneous act of revenge. It reinforces Des Forges report that says 'political considerations make it virtually impossible for victims of crimes by RPF soldiers to receive justice'.[952] What is more, the national courts and *Gacaca*[953] courts, which effectively failed to investigate acts committed by the RPF and perpetuated the idea that the Tutsi were the only victims in the 1994 genocide, were viewed as a victor's court.[954]

Sectarianism was made a crime in 2001, as defined by Article 3 of Law No. 47/2001. It criminalised any act of division, generating conflict or causing an uprising. A conviction carried an imprisonment term of up to five years and loss of national rights listed in the Rwandan Penal Code. By May 2005, quite a few judges had adjudicated and convicted people based on the 2001 law, but none could define it. Instead, opting for an 'I know it when I see it' approach. One of the Rwandan judges used the example of a person convicted for saying the government had paid people to go to Arusha and lie, i.e. to give false testimony at the ICTR. The example was designed to exhibit what speech acts counted as sectarianism under the 2001 Law. It illustrates Butler's point about the hate speaker being installed retrospectively. Still, in the Rwandan context, this retrospective installation lacks the safeguards afforded by the government having to draw a nexus between the speaker and the speaker's intended harms. Even though such a link may well have been constructed for the government's self-interested aims, the government did not seek to establish even a strenuous connection. What is more, the government used hate speech regulations to eradicate the speech of those who sought to challenge its cultural hegemony. The 2001 laws can also be criticised for having an overly broad definition and giving speakers little to no foresight on the standard meriting prosecution, especially when judges themselves were unable to determine what would come under the offence before the speech act. As sectarianism could be anything, principally if it was critical of the government, speakers were taught not to question the government, thereby robbing would-be critics of their ability to voice their dissent in a manner akin to the pre-genocide government. That created an environment of self-censorship that has continued with subsequent Rwandan speech-related laws. Genocide ideology had also started gaining traction though it was not isolated and instead subsumed in the crime of genocide. [955] It was referred to

[952] Watch, *Law and Reality: Progress in Judicial Reform in Rwanda 4.*
[953] Gacaca is Kiryawandan for lawn or lawn-justice, derived from the place where members of the local community traditionally met to settle disputes between members of the family, between members of different families or between inhabitants of the same hill. Amnesty International, *Rwanda: Gacaca: A Question of Justice* (2002) 1.
[954] Watch, *Law and Reality: Progress in Judicial Reform in Rwanda 4.*
[955] Ibid 1.

by the Kiryarwandan phrase 'Ibengabyitekerezo bya jenocide' that translates to 'ideas that lead to genocide'.

In 2003 the Rwandan government enshrined a constitution that codified the laws. Sectarianism could be found in Article 9, where it was officially dubbed divisionism and was initially used to stop public identification of individual ethnic groups.[956] The official dogma in Rwanda is there is no Hutu, Tutsi or Twa[957], only one overarching identity of Banyarwanda.[958] The new Banyarwandan identity has prevented the bottom-up development of new arrangements of political identification, thereby preventing the emergence of more inclusive conceptions of citizenship and political participation.[959] That, as Moshman demonstrates, is not a good way to address genocide, which is a crime of identity. A crime better addressed through multidimensional identities rooted in the coordination of various affiliations and commitments rather than the post-genocide governments approach, which constituted the imposition of Banyarwandan identity that did not address the additional identifiers between the Hutu and Tutsi or reference to them as Bantus and Hamites, respectively.[960] The multidimensional identities proposed by Moshman are virtually impossible in that context. Thus, Moshman states the acceptance of the current abusive regime will not help to heal society. Instead, it is more likely to contribute to the consolidation of indifference that leads to mass atrocity, particularly when justice for systemic acts attacks on Hutus is denied, and even discussion of them leads to criminal sanction and ostracisation from the community thereafter.[961]

The State-imposed Banyarwandan identity was undermined by the official post-genocide narrative, which consisted of a reading of Rwandan history depicting constant persecutions of Tutsis', thereby perpetuating their eternal victimisation and making them different from other Rwandans. This official history overlooks the fact that not all Hutu benefitted under the first two Hutu controlled post-independence governments.[962] The use of Banyarwandan identity also doesn't obscure the fact that, as Rudasingwa points out,

---

[956] Phil Clark, *The Gacaca courts, post-genocide justice and reconciliation in Rwanda: Justice without lawyers* (Cambridge University Press 2010) 310.
[957] The only three ethnic identities identified to exist since the inception of the nation.
[958] Kroetz 343.
[959] Ibid, 346.
[960] David Moshman, 'Us and them: Identity and genocide' 7 Identity: An International Journal of Theory and Research 115, 132. The Economist, 'Paul Kagame, Feted and Feared: Rwanda is a More Prosperous Country than Ever Before, It is Also a Repressed One' accessed 4 May 2018.
[961] Daniela Kroslak, *The role of France in the Rwandan genocide* (Hurst & Co. 2007) 279.
[962] Kroetz 343.

representatives in government are almost entirely Tutsi, especially in the military.[963] Thus, the Kagame-led government have used the defence of Banyarwandan identification to mask the 'Tutsification' of power in Rwanda.[964] The Twa are also affected by the Banyarwandan identity because they are no longer legally recognised.[965] So, programs and policies designed to tackle their disenfranchisement and poor socio-economic conditions have been hampered.

Article 9 of the 2003 Constitution further included a commitment to the eradication of ethnic, regional and other divisions and the promotion of national unity, and Article 33 outlawed propagation of division including ethnic, racial or regional discrimination. Article 9 also included a commitment to fighting the ideology of genocide and all its manifestations.[966] It founded the prosecution of accused for genocide ideology even though the crime was not defined by law until 2008.[967] Article 13 of the 2003 Constitution specifies that revisionism, negationism (also known as denial), and minimisation of genocide are punishable by law. These laws were instrumental in government bans of opposition parties before the 2003 elections. [968] The government based its ban on unsubstantiated accusations of separatism and divisionism against its political opponents, which the official and pro-government media were content with distributing.

Many prominent opponents feared worse fates than imprisonment.[969] Between 1995 and 2007, over forty opponents were assassinated, imprisoned, disappeared or forced into exile. For example, RPF Interior Minister Seth Sendashonga was assassinated in Nairobi in 1998 after attempting to create an opposition movement while in exile. According to Theogene Rudasingwa, a former officer of the RPF and Rwandan ex-ambassador to Washington now living in exile in the USA, if anyone strongly disagrees with Kagame and makes their views known on the inside 'you will be made to pay the price, and very often that price is your life.'[970] A similar assault was launched on opposition parties that were either co-opted or banned before the 2003 elections. This assault consisted of the RPF levying several unsubstantiated accusations of divisionism. It is well illustrated by the parliamentary commission that called for the ban of the political party Mouvement Démocratique Républicain (MDR), the leading

[963] Newsweek, 'The Case against Rwanda's President Paul Kagame' accessed 04 May 2018.
[964] Niamh Barry, 'A View of the Impact of Genocide Denial Laws in Rwanda' in (Taylor & Francis 2017) 126.
[965] Kroetz, 334.
[966] It is worth noting that not even the Genocide Convention places an obligation on states to outlaw genocide ideology. Additionally, in the subsequent years of the Holocaust genocide ideology was not a concept considered a matter for international law.
[967] Allen and Norris
[968] Waldorf 406.
[969] Ibid 405.
[970] Newsweek.

opposition party and accused forty-six individuals of collaborating with MDR to promote genocide ideology.[971] It is also well illustrated by the banning of the Liberal Party for ethnic divisionism because it advocated on behalf of Tutsi genocide survivors.

Kagame eventually wound up winning the election with a staggering ninety-five per cent of the vote that is said to have been marred by intimidation, fraud, a vivid lack of transparency, and an absence of pluralism. This victory led to the expansion of RPF control over the media and civil society. Control that was aided by the passing of Law No. 33 bis/2003 later the same year. Article 44 of the law prohibited denial and gross minimisation, attempts to justify or approve the genocide, and any destruction of evidence of the genocide. A conviction under this law carried between ten and twenty years in prison. Addedly, the government formed a 2004 Parliamentary Commission for the investigation of the alleged persistence of genocide ideology in Rwanda.[972] The Commission, in turn, sought to include any criticism of the RPF policies as genocide ideology, an accusation it launched at numerous media and civil society actors, like the BBC and CARE International.

In 2008, the Rwandan government brought worldwide attention to itself with another statute, namely Law No. 18/2008. Academics, non-governmental organisations, foreign governments, and media outlets condemned the 2008 laws for their overly broad and imprecise definition of genocide ideology, in addition to the severe punishments of those found guilty.[973] These punishments included punishments of children who would face twelve years in a rehabilitation centre for contravention. Under Article 3 of the 2008 Law, genocide ideology is defined as any behaviour aimed at dehumanising people with similar characteristics by *inter alia* defamatory speeches aimed at propounding wickedness, laughing at one's misfortune and stirring up ill feelings. Kabatsi attempts to normalise the regulations by pointing out that the laws followed the fourth parliamentary commission's report. [974] So, the Commission must have found that on the ground people were, for example, laughing at each other's pain, and thus the government chose to include these acts verbatim. No evidence is provided in Kabatsi's chapter to support this assumption.

Despite Kabatsi's favourable assumptions, there is evidence to show that the 2008 parliamentary commission and its predecessors, which were established between 2003 and

[971] Waldorf 406.
[972] Ibid 406.
[973] Sejal Parmar, 'Reckoning with the Past: Rwanda's Revisted Genocide Ideology Law and International Human Rights Law on Freedom of Expression' in (Taylor & Francis 2017) 94-95.
[974] Freda Kabatsi, 'Confronting Genocide Denial: Using the Law as a Tool in Combating Genocide Denial Rwanda' in (Taylor & Francis 2017) 138.

2008, have been used to tighten control over the media and civil society. For example, the 2004 parliamentary commission that, as noted above, was formed to investigate an alleged persistence of genocide ideology.[975] The report of the commission contained allegations of promoting genocide ideology levied at various civil society actors, including Voice of America and the BBC, and human rights non-governmental organizations, like LIPRODHOR. What followed was the dismantling of those organisations and the disappearance of independent sources on the human rights conditions in the country. The reports of those parliamentary commissions are useful in setting out what expressions are considered to attach criminal culpability. Those expressions included expressing dismay at land reform, showing support for opposition candidates, discussing detentions of Hutu without proof, and talking about crimes of the Rwandan Patriotic Army. [976] Concerning the latter, criminal sanctions were derived from the investigations into people caught talking about the army's crimes and any reference to unpunished crimes.

Supporters of the laws, like Kabatsi, also claim that they are useful in dealing with those who have denied, negated, minimised and or justified the genocide.[977] Be that as it may, they concede that there must be a delicate balance drawn between laws on denial and inviolable human rights like freedom of expression. They just believe that the government should be the one to decide where the balance is to be drawn rather than 'foreigners' who within months of the genocide were said to have pressured Rwandans to move on from the disaster and 'quit dwelling on the past.'[978] Drawing on the RPF's construction of itself as saviour and the international community as guilty bystanders (discussed earlier in the chapter). The intimation that Kabatsi draws is those not native to Rwanda were attempting to dictate to Rwandans how they should feel and behave concerning a tragedy, the reality of which they must live with every day. Killers and survivors have had no option but to live side-by-side and live with the trauma of their past.[979] Kabatsi further insists on the good intentions of the lawmakers who were said to be attempting to prevent and punish the crime of genocide ideology and ensure no genocide recurs.[980] Nevertheless, these claims have been disputed by several jurists, who admitted that the broad and ill-defined charges of divisionism or genocide ideology were used

[975] Waldorf 406.
[976] Watch, *Law and Reality: Progress in Judicial Reform in Rwanda 2.*
[977] Kabatsi 132.
[978] Gerald Caplan, 'Rwanda: Walking the Road to Genocide' in Allan Thompson (ed), *The Media and the Rwanda genocide* (Pluto Press 2007) 30.
[979] Ibid 29.
[980] Kabatsi 138.

to serve personal or political interests.[981] Citing the European concept of margin of appreciation, Kabatsi claims that Rwanda should be given more deference to impose more restrictive speech laws due to the impact of the genocide.[982] This is a mischaracterisation of the Rwandan laws because genocide denial is, of course, quite different from genocide ideology and divisionism.

Genocide denial is a crime that is based on denying well-documented historical research. That research, according to the *Nahimana*[983] Trial Chamber, has a *bona fide* purpose. A view shared by the HRC when they held the laws penalising expression of opinions about a historical fact is incompatible with the obligation on states to respect freedom of opinion and expression.[984] Moreover, genocide ideology is used in a way that targets expressions about the culpability of the RPA for acts of violence in the 1994 genocide, despite the overwhelming evidence of members of the RPA attacking Hutu civilians during and after the genocide. Equally, in *Faurisson*, the HRC used the 'well documented historical fact' of gas chambers to find that the author could not benefit from free speech protections. Similarly, the government viz. RPF acts of violence, which are again well documented, should not indict people for drawing attention to those acts.

Divisionism is an even more all-encompassing term that is used to target any manner of expression that is thought to create division, which generally means anything that disfavours the Kagame-led government. Furthermore, under the ICCPR, it is clear that the Rwandan laws cannot be justified on the grounds of Article 20(2) of the ICCPR, and the Rwandan government's restriction on free expression would violate Article 19(2) and (3). The former is because the laws do not contain any element of incitement, thereby falling short of Article 20(2). Regarding the latter, the government could claim to satisfy the requirements that the laws are provided by law in Article 19(3) and claim the rights of others not to be discriminated against as a legal basis. But, it would have a much harder time locating the 'precise nature of the threat' and the 'the necessity and proportionality of the specific action taken' as elucidated by the HRC.

The Rwandan government reformed the laws again with its 2012 revision of its Penal Code that further entrenched the crimes of denial and minimisation of genocide and genocide ideology. It is interesting to note that while the 2012 revision includes definitions of crimes

[981] Watch, *Law and Reality: Progress in Judicial Reform in Rwanda 3.*
[982] Kabatsi 143.
[983] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze, [1001].*
[984] *General Comment No. 34* CCPR/C/GC/34 Human Rights Committee

like rebellion, it did not seek to elaborate on genocide ideology. The 2012 revision of the code was criticised by the African Court of Human and Peoples' Rights, particularly Article 116 on negation and minimisation, for being couched in broad terms open to various interpretations.[985] The court also criticised the later amendment to genocide ideology in Law No. 84/2013 along the same lines, i.e. for being too broad and general. Still, numerous commentators considered Law. 84 an improvement.[986] Specific improvements include the narrowing of the scope of genocide ideology to deliberate acts, the addition of a public element that could be satisfied with two people receiving the expression other than the speaker, and the limitation of the law to cover only those expressions characterised by hatred on four grounds, specifically ethnicity, nationality, religion, or race. Finally, these expressions must have either the aim of advocating for the commission of genocide or support the genocide. The penalties for contravening the law were also softened significantly. The maximum prison sentence was reduced from twenty-five years to nine years, and children were no longer held criminally culpable.

Although, those found to be contravening these laws could still face social isolation and exclusion from education and employment discussed further below.[987] There was also clarification of what constitutes specific offences. For example, Article 5 negation of genocide includes specific acts of supporting a double genocide theory and deliberately misconstruing the facts to mislead the public, among others. The more specific definition of Article 5 was a key contributor to the landscape in which it was virtually impossible to have critical discussions on the genocide or have academic inquiry and research into its causes.[988] Other than that, the new law's inclusion of 'Support for genocide' is still overly broad and open to interpretation that does not seek to clarify what would count as support.[989] What is more, the government included 'Chapter IV: Genocide Related Offences.' These include incitement to genocide and justifying, minimising or negating the genocide.

The laws fall below the standard required for culpability set by the ICTR in the *Akayesu*[990] and *Nahimana*[991] trial decisions as they relate to DPIG and CAHP. Regarding DPIG, the court at para 652 and footnote 1658 found that the crime should be found when the speech constitutes a direct appeal rather than a vague or indirect suggestion and may be

[985] *Ingabire Victoire Umuhoza v Rwanda paragraph 137.*
[986] Parmar 100.
[987] Ibid 102.
[988] Ibid 101.
[989] Ibid 101.
[990] *Prosecutor v. Jean-Paul Akayesu* ICTR-96-4-T Trial Chamber of the International Criminal Tribunal for Rwanda.
[991] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze.*

preceded or accompanied by hate speech or distinct from it.[992] The Rwandan laws are written in much broader terms than even the laws banning incitement to racial hatred.[993] There is no requirement that the incitement is a foreseeable and imminent result of those words. Even more worryingly, the laws, particularly the ones on divisionism, are used as a pretext for silencing government opposition, like the imprisonment of the person who said the government paid people to go and lie in Arusha.[994] The *Nahimana*[995] Trial Chamber also held that there should be more, not less, protection given to political views or criticisms of the government. In a similar vein, the Chamber was explicit in saying historical information, political analysis and advocacy of ethnic consciousness should not attach criminal culpability. Nonetheless, the post-genocidal Rwandan government has chosen to include double genocide theory, laughing at one's pain, and supporting the genocide, and others, within the ambit of its laws. Thus, the laws are far beyond the scope set out in the *Akayesu*[996] and *Nahimana*[997] trial judgments and contemporary human rights standards set out therein. The Rwandan laws allow for the prosecution of something as unspecific as stirring up ill will or laughing at one's pain. Even the 2013 edition of the laws still assign criminal culpability for 'supporting the genocide,' without a definition of exactly what 'support' would entail. The 2013 Laws also assign criminal culpability for supporting a 'double genocide theory' despite clear evidence that the RPF bears some responsibility for the death of Hutus in the 1994 genocide.

According to organisations like Amnesty International, HRW and The Economist, the government has demonstrated its ability to reduce the official statistics of the number of times the laws have been used.[998] This makes it difficult to assess the full extent and impact of the laws. Still, cases like the case of Agnes Nkusi-Uwimana, Saidati Mukakibibi, and Victoire Ingabire are telling. Their cases further disprove the point that Mushikiwabo makes about the welcoming of dissenting voices and demonstrates how the laws are used for politically motivated indictments. Agnes Nkusi-Uwimana and Saidati Mukakibibi were the editor and

---

[992] Ibid, [1658]. *Prosecutor v. Jean-Paul Akayesu, [652].*
[993] Watch, *Law and Reality: Progress in Judicial Reform in Rwanda.*
[994] Alleging that the witness at the ICTR were lying on behalf of the RPF.
[995] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze, discussed between [1004] and [1006].*
[996] *Prosecutor v. Jean-Paul Akayesu.*
[997] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze.*
[998] Amnesty International, *Rwanda: Safer to Stay Silent: The Chilling Effect of Rwanda's Laws on 'Genocide Ideology' and 'Sectarianism'* (2010). The Economist, 'The Difficulty of Trying to Stop It Happening Ever Again ' (*https://www.economist.com/middle-east-and-africa/2009/04/08/the-difficulty-of-trying-to-stop-it-happening-ever-again* 2009) accessed 2 June 2018. Watch, *Law and Reality: Progress in Judicial Reform in Rwanda.*

deputy editor of the Kinyarwanda newspaper *Umurabyo*, respectively.[999] They published a letter from a reader and several articles that criticised government policies, alleged corruption against senior government officials (including Kagame) and made comments about the feelings of insecurity ahead of the 2010 Rwandan election.[1000] They specifically equated revenge killings by the RPF at the end of the genocide to the genocide itself.[1001] Consequently, Nkusi-Uwimana was sentenced to seventeen years imprisonment for genocide ideology, divisionism and defamation.[1002] Mukakibibi was sentenced to seven years for threatening state security. The Supreme Court later reduced their sentences.[1003]

Ingabire had just returned from Rwanda that year, after sixteen years in exile, and she was preparing to run for President as a candidate in the United Democratic Front, a political party opposing the Kagame-led government. During one of her speeches outside the Genocide Memorial in Rwanda, she drew attention to the fact that Hutu moderates who died in the genocide were not mentioned alongside Hutu victims and called for an investigation of Tutsi war crimes. Shortly after, Ingabire was charged with grossly minimising the genocide, propagation of the theory of double genocide, spreading rumours that undermine the authority of the government, and conspiracy to harm the government and constitutional principles using terrorism and violence under Law No. 33/2003, Law No. 84/2013 and 2012 of the Rwandan Penal Code.[1004] Her case is illustrative of the government's use of the laws to crack down on opposition voices.[1005] Initially, she was sentenced to eight years. However, when faced with Ingabire's lawyer's questions on appeal about the flaws in the initial trial, the reliability of evidence, and the statements used to convict her, the Supreme Court increased her sentence to fifteen years. [1006] The Court also found Ingabire guilty of spreading lies to incite the population to revolt against the established authorities. A conviction that the African Court of Human and Peoples' Rights (ACHPR) found to have violated Ingabire's rights under its Convention.[1007]

---

[999] Amnesty International, *Unsafe to Speak Out: Restrictions on Freedom of Expression in Rwanda* (2012), 5. Jennifer Melvin, 'Beyond the Veneer of Reconciliation: Human Rights and Democracy in Rwanda' Commonwealth Opinion 3, 4.
[1000] International, *Unsafe to Speak Out: Restrictions on Freedom of Expression in Rwanda, 5.* Allen and Norris, 157. Melvin, 4.
[1001] Allen and Norris, 157.
[1002] Melvin, 4.
[1003] Twagilimana, xliii.
[1004] Parmar 114. Allen and Norris 174. Amnesty International, *Setting the Scene for Elections: Two Decades of Silencing Dissent in Rwanda* (2017) 13.
[1005] Allen and Norris, 148.
[1006] International, *Setting the Scene for Elections: Two Decades of Silencing Dissent in Rwanda 13-14.*
[1007] *Ingabire Victoire Umuhoza v Rwanda.*

The African Charter on Human and People's Rights takes account of the regulation of speech that is elaborated on in Article 9(2). It was Article 9(2) that Ingabire claimed the government had violated with her conviction and sentence. The ACHPR found that the Rwandan laws that Ingabire was prosecuted under satisfied a legitimate interest of protecting national security and public order as set out in Article 9 of its Charter. However, the ACHPR had taken issue with whether the laws were necessary and proportionate. In the end, the ACHPR held that the speech that Ingabire made at the memorial neither constituted a denial of genocide nor did it constitute the propagation of the theory of double genocide because Ingabire had never claimed genocide was perpetrated against the Hutu.[1008] The courts in Rwanda had found that the context of the speech, namely that the speech was made outside the Genocide Memorial more than the content of the speech, was enough to conclude that Ingabire spread the theory of double genocide. Conversely, ACHPR held that that context was not enough to put severe restrictions, like criminal sanctions, on Ingabire in light of how unequivocally clear her speech was.

Concerning Ingabire's other remarks, such as the criticisms that were made of the government, that is that political power is dominated by a small clique with parallel power structures around President Kagame, and she was ready to fight the yoke of torture. [1009] The ACHPR thought the comments could be seen as offensive with an added possibility of discrediting public officials and institutions. Still, they could not be held to have incited strife, as claimed by the Rwandan government. A point reinforced by the fact that there was no evidence to show the statement actually caused strife, public outrage or any identifiable threat to the State's security or public order. [1010] The Court also said the statements were of the kind, which are to be expected in a democratic society and should therefore be tolerated precisely when they come from a public figure, like Ingabire. Further, the court noted that a higher degree of tolerance was to be expected when criticisms are lodged at opposition figures. The ACHPR concluded with a finding that the conviction and sentence were not necessary and not proportionate.

Beyond the prosecutions and punishments, the laws have had a broader social impact by fostering a culture of fear surrounding the law and its penalties, which have led to self-censorship.[1011] According to the US State Department, the laws have deterred viewpoints that

[1008] Ibid, [159].
[1009] Ibid, [160].
[1010] Ibid, [161].
[1011] Parmar 116.

could be construed as promoting social divisions, debate, or criticism of the government.[1012] The harmful effects of such laws are only made worse by the Rwandan government's use of intimidation and harassment of the media and political opponents.[1013] This has contributed to a sharp decline of the political space, at odds with the social progress that the country was credited for, like 'rapid growth, sharp poverty reduction and reduced inequality.'[1014] There are allegations that the government has also exported its campaign against genocide ideology abroad, primarily to Rwandans in the diaspora leading to problems with the laws elsewhere.[1015] There are reports of dissidents and critics outside the country being attacked and threatened.[1016]

Exclusion from education and unemployment are also broader social impacts that were briefly touched on in the discussion of the laws. The report of the fourth parliamentary commission illustrates the extra-judicial consequences of being found to have committed genocide ideology. The 2007 report found genocide ideology in twenty-six of the thirty-two schools considered. [1017] These findings were based on information from State security agents, without verification or any judicial process, leading to the names of hundreds of people being released in the reports, on the radio and at public meetings. Those named faced unemployment, expulsion from school and social isolation. One Rwandan noted that 'Everyone distances himself from the accused. We all know 'better not to walk near that one.'[1018] The government has sought to 're-educate' thousands on the official reading of Rwandan history using 'solidarity camps' to provide intensive ideological training to prisoners, refugees, students, teachers and government officials for up to three months.[1019]

As evidenced by the Rwandan cases against Nkusi-Uwimana and Victoire Ingabire, the laws neither look for the speaker to be intentionally inciting the audience or for any impact of the speech acts. Moreover, the laws are disconnected from the crime of genocide or any act of violence.[1020] The perpetrator is not required to intend to assist or facilitate genocide or even be aware of planned or actual attacks. Therefore, they fall below the standard required in international law. The Rwandan post-genocidal government is prohibiting speech that is protected under international conventions even in light of its ratification of all the treaties

---

[1012] Bureau of Democracy US Department of State, Human Rights and Labor, 'Human Rights Reports on Human Rights Practices in Rwanda' (2011) accessed accessed 07 July 2018. as cited in Parmar 116. Barry 126.
[1013] Parmar 116.
[1014] Paul Collier for Social Europe, 'The Economics Of Isolation And The Role Of Aid' accessed 3 June 2018.
[1015] Times.
[1016] Parmar 117.
[1017] Watch, *Law and Reality: Progress in Judicial Reform in Rwanda 2.*
[1018] Ibid 3.
[1019] Ibid 2. Kroetz, 343.
[1020] Watch, *Law and Reality: Progress in Judicial Reform in Rwanda 4.*

mentioned in this thesis.[1021] The Rwandan government ostensibly has difficulty with differentiating between speech constituting legitimate dissent and speech rising to the level of incitement that can actually undermine the nation's stability.[1022] As a former aide to the RPF government put it, Kagame has created a repressive totalitarian regime with multiple tools to control every aspect of national life, like accusations of genocide ideology and divisionism, enforced disappearance, or death.[1023] Also, as Allen and Norris point out, the 'overly-repressive genocide ideology laws' threaten Rwanda's 'fragile peace' just as much as freedom of speech, but differently.[1024] Not to mention, the 'benevolent censorship,' which the government claims to be a barrier to those who would seek to call for mass violence, ignore a number of the factors that incontrovertibly contributed to the outbreak of mass violence.[1025]

The laws pose the risk of reifying an uneven global standard for those who control free speech, in addition to how and when it is acceptable for it to be controlled.[1026] The simplistic solution of Banyarwandan identity is representative of the government not seeking to amend, negate or replace, the negotiations of meaning and creations of ideology that could be found with the broadcasts of the RTLM or the writings of *Kangura*.[1027] Instead, the Kagame-led government has repositioned the divided society as 'Rwandans' against 'Divisionists' along the same line as the 'Hutu power' and the 'alien Tutsis.' Therefore, the fear of Rwandans during the genocide has been concretised into a post-genocide policy that exacerbates popular media's potential as the root of re-destabilisation.

2. Post-Conflict Regulation of Speech in Kenya

The experience of state manipulation of speech offences to impose hegemonic structures of the dominant political class in Rwanda has not been as widely explored. The potential of speech regulations, which are used in a specific post-conflict context, to introduce particular normative frameworks of 'security' and 'threat' that become attached to interpretations of freedom of expression, and then generalised into the everyday (as we saw earlier in our discussion of

[1021] Allen and Norris, 168.
[1022] Ibid 158.
[1023] Economist, 'Paul Kagame, Feted and Feared: Rwanda is a More Prosperous Country than Ever Before, It is Also a Repressed One'.
[1024] Allen and Norris 169.
[1025] Craig and Mkhize, 49.
[1026] Ibid, 40.
[1027] Ibid 49.

Rwandan speech laws), is overlooked. Once these frameworks permeate the everyday, they result in anything threatening to the dominant hegemonic structure being labelled a threat to national security. We will see how these frameworks operate in the Kenyan context after looking at how proposals from the OHCHR and the Peace Agreement turned into law.

'Finalise the Hate Speech Bill' was included in the Peace Agreement that Raila and Kibaki signed in 2008. The United Nation's Office of the High Commissioner also recommended the establishment of a regulatory framework against hate speech. Similar to the experience of the Rwandan state's manipulation of speech offences, in Kenya, the laws have been used as a way to impose the hegemonic structure of the dominant classes. The Kenyan speech regulations criminalised those who would dare to stand in opposition to the government or question governmental attempts to curtail the rights of citizens. There were two tiers of justice meted out to government detractors. Politicians in opposition to the incumbent claimed they had a 'right' to conciliate, i.e. they should be released from criminal accountability if they apologised. That 'right' to conciliation was upheld by the courts but not afforded to citizens who were not a part of the political elite. Citizens who did not have the benefit of political power were held criminally accountable for speech acts (and received terms of imprisonment), even for political commentary, or forced to challenge the constitutionality of the laws altogether. In the next section, we will explore the deployment of hate speech regulation in Kenya in the years following the 2007 PEV.

2.1 Hate Speech as a Recommendation

KNDR [1028] included a commitment to: 'Finalise the Hate Speech Bill and review the Media Act to control incitement attempts'.[1029] The Agreement proposed the introduction of legislation to fight discrimination and ensure all people would have equal opportunities to consolidate national cohesion and unity.[1030] It also proposed a 'National Ethnic and Race Relations Commission'.[1031] What is more, in their report, the OHCHR identified hate speech as an area of concern.[1032] Thus, the OHCHR recommended the establishment of a regulatory framework specifically against hate speech. The report said in part, 'the Government of Kenya should consider establishing a regulatory framework against hate-speech by drafting a law for

[1028] The peace agreement signed by Raila and Kibaki that created a coalition government.
[1029] Kofi Annan and Chair of the Panel of Eminent African Personalities, *Kenya National Dialogue and Reconciliation: Statement of Principles on Long-Term Issues and Solutions* (23 May 2008), 8.
[1030] Ibid, 3.
[1031] Ibid, 3.
[1032] Rights, 17 - 18.

parliament's consideration'.[1033] In contrast, CIPEV took a different position with regards to the monitoring and control of media bodies due to the history of State oppression of the media. Philip Waki, Chair of the commission and a judge in the Kenyan Court of Appeal, was intimately aware of the history of State control and warned that monitoring of the media could return the country to the draconian days of Moi. CIPEV stated that they did not recommend 'free for all monitoring of the press and other media' by the State.[1034] This highlights the problem with conflict interventions and subsequent recommendations that are designed to stymie a recurrence of violence. They're often constructed with specific contexts in mind, without thorough consideration of the medium to long term consequences, if the history is considered at all. Sometimes recommendations give the dominant sections of the society an internationally rubber-stamped mechanism to fortify its hegemonic structure. The executive is given the ability to control or oppress the populace in a way that is acceptable to the international community or even condoned by it. Moreover, it is evident from the intervention in Somalia and late intervention in Rwanda that there are occasions where race plays a part in the consideration of conflict among international actors.[1035]

There was a racial element to the decision not to intervene in Rwanda or even label the violence 'genocide'. The discussions around labelling the violence focused on how countries, like the US, would look if they declared genocide and then did nothing.[1036] Rather than how they would look pretending the genocide did not exist, doing nothing, and actively obstructing other countries from taking any meaningful action.[1037] That is, in contrast to conflicts in, for example, Bosnia that was populated by white victims and white perpetrators, the conflicts in Somalia and Rwanda were not. Boutros Boutros-Ghali, Secretary-General of the UN, made cutting remarks about the UN's response to the Bosnian crisis saying it was a 'rich man's war' as opposed to the UN's reaction to the Somalian crisis and alleged indifference to the collapse of the country.[1038] Policymakers seemed to be incapable of dissociating the Rwandan genocide from the conflict in Somalia[1039], even though the two had almost no points of comparison

---

[1033] Ibid, 18.
[1034] Waki and others, 303.
[1035] That is not to say those dynamics were present during the consideration of PEV.
[1036] Darren C Brunk, 'Curing the Somalia Syndrome: Analogy, Foreign Policy Decision Making, and the Rwandan Genocide' 4 Foreign Policy Analysis 301, 312.
[1037] Ibid, 316.
[1038] Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books Ltd. 2009), 130.
[1039] On 3rd October 1993, US forces attempted to apprehend Aideed, a Somalian warlord, for the death of 23 Pakistani peacekeepers in the region. Ibid, 194. The Pakistani peacekeepers were on a weapons inspection mission that was not shared or coordinated with the UN. Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books Ltd. 2000), 78. The US force's helicopter was shot down, and 18 US rangers

beyond their location on the African continent.[1040] Both countries were framed and viewed through what Brunk calls a common 'African' schema.[1041] The Western schema of 'hopeless' African conflicts is most commonly composed of images of State failure, inter-tribal civil war, and anarchy. Brunk argues that that schema of 'African' conflicts reordered the readings of and meanings ascribed to the Rwandan conflict. The Western press was equally culpable for transmitting the impression that Rwanda was just another failing African nation that suffered from centuries of tribal warfare and a deep distrust of international intervention, essentially portraying international intervention as doomed to fail.[1042] The images were used as a representational framework that legitimised a policy of inaction for members of the UNSC, especially the US.[1043] An international inquiry by the Joint Evaluation of Emergency Assistance to Rwanda found that the characterisation of the genocide as tribal anarchy was 'fundamentally irresponsible.'[1044]

The Rwandan genocide was wholly unique. It was not the failed intervention or failed State scenario envisioned in Somalia. It was the conclusion of a long-running state-sponsored plan to carry out genocide.[1045] One was the expression of State organisation, the other an expression of the absence of a centralised government. Nonetheless, the utilisation of the Western schema of 'Africa' in representations of Rwanda along with the analogy that was drawn to Somalia influenced the decisions and perceptions of policymakers, especially before evidence of the genocide became overwhelming.[1046] Alison Des Forges, an American expert on Rwanda, presented an image of the genocide at odds with the prevailing civil war/state failure schema, from which Colin Keating, President of the Security Council, threatened a draft resolution. The resolution would have had the effect of exposing the positions of each country

---

died. Some saw it as the most significant American military humiliation since Vietnam. The image broadcast around the world was of a US soldier's body being dragged behind a vehicle by his feet through dusty streets Mogadishu to a cheering crowd. Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide, 92 - 93.* Clarke illustrates that Somalia became a syndrome, thought by many to have been 'a naïve attempt to implement benevolent interventionism in a marginal Third World State and doomed to failure.' Walter Clarke, 'Failed Visions and Uncertain Mandates in Somalia' in Walter Clarke and Jeffrey Herbst (eds), *Learning From Somalia: The Lessons Of Armed Humanitarian Intervention* (Routledge 2018), (Kindle Edition). Nevermind that the inability and unwillingness of the states involved in Somalia to discern the indispensable political dynamics of the country or to effect remedial measures to promote civil society (either out of naïve neutrality, disintrest, or expedience) were fundamental to their failure. Ibid, (Kindle Edition). Or the fact that the US-led Unified Task Force took an adversarial approach to the UN force that was set to relieve them.

[1040] Des Forges, Watch and Rights, 21.

[1041] Brunk, 304 - 306.

[1042] Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide, 167.*

[1043] Brunk, 307.

[1044] John Eriksson and others, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience (Synthesis Report)* (1996) 72.

[1045] Brunk, 303.

[1046] Ibid, 314.

to public scrutiny. As a result of this pressure, the UNSC agreed to a watered-down resolution recognising that the massacres had been systematic and defenceless civilians were being attacked, which is the definition of genocide without the actual label.[1047] Aside from the fact that explicitly mentioning genocide engaged the members' duty to act to stop it, it was also crucial because it countered the representational force of the Western schema of 'Africa.'[1048] Ultimately, when the RPF was poised to defeat the Rwandan army, France launched its distrusted humanitarian operation called Opération Turquoise (OT).[1049] OT was triggered by concern for the Tutsi, but many suspect that the French military implemented it to help the Hutu, although this allegation is highly contested. As if to recognise the role of French troops in the Rwandan genocide, on 27 May 2021, French President Emmanuel Macron recognised France's responsibility for the genocide for 'valuing silence over the examination of the truth'.[1050] He alluded to former French President Francois Mitterrand's support of Habyarimana. Kigali finally fell on 4 July 1994 when the last Rwandan army soldiers abandoned their posts.[1051]

Turning back to the intervention in PEV in Kenya, the recommendations of KNDR were instrumental in the creation of the National Cohesion and Integration Act 2008 (NCIA). The 2008 Act was not the country's first attempt at creating an Act to outlaw hate speech. There had been a Bill proposed to specifically outlaw hate speech before the 2007 elections called the Prohibition of Hate Speech Bill. It would have criminalised both incitement to hatred and incitement to violence. However, due to widespread criticism, the Bill failed to be passed into law.[1052] Criticisms were levied at the draft law because, for instance, it did not require the promotion of hatred to be intentional.[1053] It also reversed the burden of proof so the Defendant would have to prove their lack of intention. Despite being included in the title, the Bill did not

---

[1047] *UNSC Presidential Statement 3371* S/PRST/1994/21 UNSC.
[1048] Brunk, 316.
[1049] Alan J Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings Institution Press 2001), 44. The French government armed the Rwandan government with weapons and actively supported it. Weapons that were supplied with instructions that they should be distributed among the militias. President François Mitterrand, leader of France at the time, considered a military occupation of Rwanda to block a victory by the rebels he saw as representing only the Tutsi minority until he was told it was unfeasible. , 38. Ultimately, French public outcry over continuing reports of anti-Tutsi massacres compelled the French government to intervene in the genocide
[1050] Al Jazeera, 'Macron Recognises French 'Responsibility' in Rwanda Genocide' *Al Jazeera* (https://www.aljazeera.com/news/2021/5/27/macron-recognises-french-responsibility-in-rwanda-genocide). Clement Uwiringiyimana, 'France's Macron Seeks Forgiveness Over Rwandan Genocide' *Reuters* (https://www.reuters.com/world/frances-macron-rwanda-reset-ties-survivors-expect-apology-2021-05-26/).
[1051] Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide, 241.*
[1052] Andrea Scheffler, *The Inherent Danger of Hate Speech Legislation: A Case Study from Rwanda and Kenya on the Failure of a Preventative Measure* (2015), 63..
[1053] Article 19, *Comment on Prohibition of Hate Speech Bill, 2007 Kenya* (November 2009), 2 and 6.

even define the concept of hate speech.[1054] International instruments also suffer from problems with obscure definitions due to a lack of consensus on the definition of hate speech. Thus, the duty to construct clear, narrowly defined and workable laws is said to be transferred to the national level, particularly because hate speech depends on both historical and cultural factors.[1055]

NCIA created specific criminal offences for people who commit speech acts that are considered hate speech. Under Section 13 of the NCIA, a person who uses 'threatening, abusive, or insulting words or behaviour, or displays any written material…' commits an offence if they intend to 'stir up ethnic hatred or having regard to all circumstances, ethnic hatred is likely to be stirred up. Unlike the proposed Prohibition of Hate Speech Bill, under section 13(1), hate speech is defined as 'threatening, abusive or insulting words or behaviour' intended or likely to stir up ethnic hatred. Ethnic hatred is further defined in section 13(3) as hatred against a group in reference to a protected characteristic, namely race, colour, nationality, ethnic or national origins. The definition is wide enough to capture legitimate forms of expression.[1056] Similarly, section 62 says, 'any person who utters words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community based on ethnicity or race, commits an offence.' The offences carry a maximum of one million Kenyan shillings fine (£7,147), and a term of imprisonment, or both. Section 13 carries a three-year term of imprisonment, while section 62 carries a five-year term of imprisonment.

Other speech regulations can be found in the 2010 Constitution. Under Article 33 of the 2010 Kenyan Constitution, free speech protections explicitly do not extend to propaganda for war, incitement to violence, hate speech, and advocacy of hatred. Advocacy of hatred is further defined in Article 33(2)(d)(i) as ethnic 'incitement' and 'vilification of others'. These twin concepts are neither defined nor does the Constitution include any limits between them.[1057] It is worth highlighting that the vilification of others is vastly broader than incitement to hatred or violence. It falls below the standard outlined in international law. Other provisions exist directly concerning hate speech, like Section 25 of the Media Act No. 3 of 2007 (Revised in 2009). The Media Act states that derogatory remarks based on ethnicity, among others,

---

[1054] Ibid, 5 - 6.
[1055] Scheffler, 63.
[1056] Juma Kwayera, 'Of Rwandan Case and Loopholes in Hate Speech Law' *The Standard* (https://www.standardmedia.co.ke/commentary/article/2000012086/of-rwandan-case-and-loopholes-in-hate-speech-law).
[1057] 19.

should be avoided. Accordingly, Nyanjom observes that the vast number of regulations are confusing and reflects the desire of the government to over-regulate the media.[1058]

NCIA was crafted rapidly to tackle the problems that arose in the aftermath of PEV without having a narrow enough definition of hate speech to guide the conduct of the individual or enable the executive to sustain a conviction (discussed further below). The broad definition also illustrates how even the outer limits of hate speech regulations are unable to outlaw ethnic and racial ideology espoused through stereotypes that are historically fortified by the leadership.[1059] For example, the prevailing Kenyan ethnic stereotype that Luhya ethnic community 'can only be cooks and watchmen'.[1060] It was an idea fostered by Joseph Kamotho, a KANU-era Minister for various departments (such as Education and Natural Resources), which led to acts of ethnic discrimination against the entire Luhya community.

The Kenyan government failed in its duty to create clear, narrowly defined, and workable laws because offences in the 2008 Act and Article 33 of the Constitution have a broader scope than has been set out in international law. Thus, the new and old laws failed to fill in a vital lacuna. They are so broad that they can be interpreted to encompass even legitimate forms of expression. Plus, as commentator Muthoni Wanyeki put it: the regulations did not even account for the new platforms on which hate speech is mainly produced – blogs, email, internet discussion groups, and mobile phones.[1061] They stand in stark contrast to the rule of law. That is because regulations should enable the citizen of the State to be able to guide their conduct to prevent themselves from falling foul of the law, which they do not.[1062]

Creating a specific definition is a difficult task, one in which the international community has not managed to tackle (mentioned above). Still, organisations like iHub, have crafted more specific guidelines that would enable the line between hate speech and free speech to be clear cut.[1063] According to iHub, for an utterance to be considered hate speech, it must first be targeted at a specific group (not at an individual), which I would add should be a group identifiable based on a protected characteristic. It must then do one of three things, one, compare the 'other' group to animal, insect, or vermin. Two, suggest that the 'other' group is an existential threat to the listener, for which the listener must pre-emptively attack in self-

---

[1058] Othieno Nyanjom, *Factually True, Legally Untrue: Political Media Ownership in Kenya* (Nairobi, 2012), 73.
[1059] Alice Wairimu Nderitu, *On Hate Speech* (Awaaz Magazine 27 October 2012).
[1060] Ibid.
[1061] Alice Wairimu Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration* (Mdahalo Bridging Divides Limited 2018), 172 - 173.
[1062] Lilian Aluanga-Delvaux, 'Why Hate Speech Law Craves a Fresh Breath' *The Standard* (https://www.standardmedia.co.ke/kenya/article/2000126312/why-hate-speech-law-craves-a-fresh-breath).
[1063] Nanjira Sambuli, 'Defining the Hate Speech Crime' (*iHub*, 2015) accessed 25 September 2020.

defence. Alternatively, three, it may suggest that the 'other' group is somehow ruining the purity or integrity of the listener's group. This chapter includes the definition not because it is the gold standard but to demonstrate that it is possible to craft hate speech regulations that are workable and can sustain a conviction. To revisit the argument that I advanced in Chapter 1, hate speech regulations are not bad, but they are dangerous. Speech can legitimately be criminalised if it amounts to a clear and present danger of substantive wrongdoing or is so offensive that it is an affront against human dignity. However, the lack of clarity (and the prosecution of government detractors discussed below) has resulted in Kenyans believing that hate speech includes personal insults, critiques of government officials, and rumour. It has a chilling effect and fosters a climate of self-censorship.[1064] A clear definition would counter obscurity and facilitate harmony and cohesion in the country. Unity and cohesion of the nation was an objective of the Commission created as a result of the NCIA, namely the National Cohesion and Integration Commission (NCIC).

NCIC was one of several Agenda 4 Commissions. The Agenda 4 Commissions were set out in KNDR, and they were intended to address 'long-term issues and violations'.[1065] The only one specifically tasked with addressing hate speech was NCIC. The Commission was vested with the power to investigate complaints of hate speech or investigate such incidents on its own accord under section 25(2) of NCIA. It had a conspicuously wide and unclear mandate allowing it to do everything from mediation, conciliation and arbitration to recommending prosecution when faced with complaints of hate speech.[1066] Nonetheless, the Commission that the Kenyan government created was not what the Peace Agreement had prescribed. The Agreement had specified a National Ethnic and Race Relations Commission (mentioned above) to address ethnic and racial equality. Conversely, NCIC's mandate focused on equality of opportunity, the confrontation of hate speech, and the promotion of ethnic harmony.[1067] The public was not involved in the discussion or debate about the expectations of the commission or its mandate. Accordingly, Chuman and Ojielo noted that the commission was not fully grounded in the Kenyan experience, and it was not vested with the power to make binding decisions.[1068] Commissioners could interpret their mandate, and from NCIC's inception,

[1064] Ibid.
[1065] Annan and Personalities. Martin Nkosi Ndlela, 'Social Media and Elections in Kenya' in *The Routledge Companion to Social Media and Politics* (Routledge 2015), 486. *Report of the Special Rapporteur on minority issues, Rita Izsák* A/HRC/28/64 Human Rights Council, [86].
[1066] National Cohesion and Integration Act, section 25(2)(g) to (i).
[1067] Aeneas Chuma and Ozonnia Ojielo, 'Building a Standing National Capacity for Conflict Prevention and Resolution in Kenya' 7 Journal of Peacebuilding & Development 25, 31.
[1068] Ibid, 31.

Commissioners chose to focus on peacebuilding and conflict prevention. Focusing on peacebuilding and conflict prevention brought NCIC squarely in the purview of the National Steering Committee on Peacebuilding and Conflict Management. Indeed, the Steering Committee took steps to remove NCIC through a draft peace policy submitted to the government, from which Chuman and Ojielo assert the assumption was the Commission would be dissolved, but NCIC persisted.[1069]

The NCIC spearheaded some initiatives that promoted cohesion and integration of the different ethnic communities in Kenya. For this research, the focus of the next section will be NCIC's investigative function regarding speech offences. It will also focus on how the Penal Code and NCIA were applied more generally. NCIC came to be defined by its approach to hate speech rather than the approach to, for instance, peacebuilding and conflict prevention. Even though the former accounted for about 15% of its mandate.[1070] Alice Wairimu Nderitu, a Commissioner in NCIC, compared the electorate's perception of NCIC to the famous Kenyan beer Tusker and its holding company East African Breweries Limited. Accordingly, 'East African Breweries has a lot of brands, but the one that defines them is Tusker… Hate speech is NCIC's Tusker.'[1071] The Commission was created with the impression that it would finally address hate speech and future acts of incitement to prevent a recurrence of PEV.[1072] However, even the Judicial Service Commission (JSC) has admitted that the 'common public perception' is that there are no convictions for hate speech, particularly hate speech attributable to politicians.[1073]

The recommendations for speech regulation overlooked the fact that Kenya already had several speech regulations in place during EV. Since 1958, Kenyan regulations outlawed incitement to violence. Namely, section 96 and section 77 of the Penal Code. Section 96 says: anyone who 'utters, prints or publishes any words or does any act or thing…which is calculated – to bring death or physical injury to any person or to any class… is guilty of an offence.' The offence was punishable by up to five years in prison. Section 77 of the Kenyan Penal Code[1074] criminalised 'any act with a subversive intention, or utter[ance of] … any words with a subversive intention' whether complete or inchoate. Section 77(3)(b) includes inciting

[1069] Ibid, 32.
[1070] Nderitu, *On Hate Speech.*
[1071] Ibid
[1072] Ndlela, 486.
[1073] Judicial Service Commission, *Memorandum of the Judicial Service Commission to the Building Bridges to Unity Advisory Taskforce* (2019), 57.
[1074] The Kenyan Penal Code came into force in 1930. Since then it has undergone various amendments. But section 77 has been a constant.

violence, disorder, or crime within the meaning of subversive. The offence was punishable by up to seven years in prison. Other laws include Section 29 of the Kenya Information and Communication Act 1998, which creates the offence of sending messages that are 'grossly offensive or of an indecent, obscene or menacing character' or knowingly false 'for the purpose of causing annoyance, inconvenience or needless anxiety to another person'. The offence carries an imprisonment term of three months and a fine of up to 50,000/= Kenyan shillings (£361).

It is worth noting that the sections capture incitement to violence rather than the more encompassing incitement to ethnic hatred. The Penal Code failed to prevent the dissemination of hate speech during PEV partly because of political interference. Indeed, before the election even took place, the National Security Intelligence Service predicted that if cases of 'incitement' were not legally addressed, 'violence could engulf different parts of the country'.[1075] CIPEV noted that neither the provincial administration nor the police investigated claims of incitement by politicians or media stations.[1076] CIPEV consequently called for the 'cowardice and pious sense of self-preservation in public service' to end'.[1077] It is clear the problem was not a lack of regulation before and after the election but a lack of political will coupled with a lack of independence.

The point is well illustrated by an investigating officer's testimony to NCIC. The officer said he and his colleagues went to campaign rallies and heard ethnic hatred, ethnic slurs, and incitement to violence.[1078] Police officers had heard it during previous elections and seen 'ethnic communities that [had] previously coexisted peacefully rising against each other' until the conclusion of the election period.[1079] Violence would restart when politicians returned in another election year. The investigating officer said that they could do nothing with the information that they had because politicians would use their political power to find out the name of the investigating officer. Once identified, the officer would be posted to North Eastern Province (known for insecurity due to the proximity to the Somalian border) or fired over a previous offence or a made-up one. To address the lack of independence among the police and to end the culture of impunity, the international intervention of 2008 stipulated several police

[1075] Waki and others, 58.
[1076] Ibid, 460.
[1077] Ibid, 460.
[1078] The officer was speaking to the National Cohesion and Integration Commission (discussed further below) during a meeting. Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 173.*
[1079] Ibid, 173.

reforms following the KNDR.[1080] However, five years later (with the new 2010 Constitution promulgated into law), plans to recreate the police were 'delayed'.[1081]

2.2 Hate Speech Surrounding 2007 Election Violence

Hate speech in the lead up to and during 2007 EV will be analysed in this section because various bodies identified it as a contributing factor to 2007 EV. Kofi Annan and the Panel identified hate speech and ethnic polarisation as contributing factors to the outbreak of 2007 election violence.[1082] The New Humanitarian also identified inflammatory language as a trigger of the violence.[1083] As mentioned in the previous chapter, the OHCHR led a fact-finding mission to address PEV, resulting in a report on the 2007 Kenyan EV.[1084] An alarm was raised about how the violence had parallels with the genocide in Rwanda, particularly the use of media tools to incite hatred and violence against certain groups.[1085] According to CIPEV, incendiary remarks and hate speech by politicians, FM local media stations, and the public heightened tensions in various parts of the country.[1086] In areas where political parties were faced with losing the election, political elites used inflammatory speech to provoke violence and persuade their group members to do so on their behalf to achieve victory.[1087] The section starts with mainstream media before looking more closely at local language media (utilising a case study on the Kalenjin radio station KASS FM). It finishes by looking at new forms of media, such as Facebook and Twitter. The analysis of hate speech will be useful when considering how speech is regulated differentially depending on the way the speech is transmitted and by whom. The difference between utterances classed as hate speech during political rallies and utterances classed as hate speech on new media will be addressed. The latter has been treated as a threat to national security even though evidence shows that speeches of politicians at political rallies can be causally connected to outpourings of violence.

[1080] Justice Truth, and Reconciliation Commission, 'KNDR Documents - Statement of Principles on Long-term Issues and Solutions Updated with Implementation Matrix' (2008), 2.
[1081] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 419.*
[1082] Annan and Personalities, as cited in Kenya Human Rights Commission, *Alternative Report to the UN Human Rights Committee in Consideration of Kenya's Third Periodic Report* (15 June 2012), 41.
[1083] The New Humanitarian, 'Taming Hate Speech in Kenya' *The New Humanitarian* (https://www.thenewhumanitarian.org/fr/node/252434).
[1084] Rights
[1085] Ndlela, 468.
[1086] Waki and others, 41 - 42. Jacqueline M Klopp, 'Kenya's Unfinished Agendas' 62 Journal of International Affairs 143, 5.
[1087] Susan Benesch, 'Countering dangerous speech: New ideas for genocide prevention' Washington, DC: United States Holocaust Memorial Museum, 390.

The KNCHR was among governmental and non-governmental organisations whose investigations revealed that incitement to ethnic hatred and violence had begun throughout the Presidential campaigns up to PEV.[1088] Indeed, hate messages were more common after the election but so were individual pleas for reconciliation.[1089] The Special Rapporteur on Minority Issues illustrated that hate speech and incitement to hatred by political and religious leaders in the media triggered violence.[1090] Various commentators have also insisted the same – incitement to ethnic hatred and incitement to violence were key contributors to the violence.[1091] Those identified as most culpable were: politicians, vernacular radio stations, religious leaders, as well as emboldened individuals. The manner in which hate speech was transmitted included political rallies, radio broadcasts, leaflets, pamphlets, SMS, blogs, and emails.[1092] Similarly, hate speech was directed at the ethnic 'other', often framing them as a 'foreigner', 'immigrant,' and as such an existential threat to both life and resources because of their real or perceived political leanings.

Evidence from PEV indicates that politicians and their proxies used media tools, including social media platforms (Twitter, Facebook, YouTube, and so on). However, they primarily relied on face-to-face platforms, such as public meetings or rallies and vernacular radio to disseminate their messages.[1093] That was because most Kenyans understand neither Swahili nor English, which are the country's official languages and are predominantly used in mainstream media. A significant majority of the population only has a basic understanding of Swahili and virtually none of English.[1094] They are secondary languages used as what the BBC World Service Trust refers to as a *lingua franca*, not as a preferred means of communication.[1095] For most, the preferred language is the language of their ethnic community.

[1088] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 148.*
[1089] Cheeseman, 169.
[1090] *Report of the Special Rapporteur on minority issues, Rita Izsák, [86].*
[1091] Initiative-Africa and Nairobi Peace Initiative Africa, 'Conflict Management and Disaster Risk Reduction' Africa Portal, 38. Commission, 41.
[1092] Cheeseman, 169. Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 123.*
[1093] Ndlela, 466 and 468.
[1094] BBC World Service Trust, *The Kenyan 2007 Elections and Their Aftermath: The Role of Media and Communication* (1 April 2008), 3.
[1095] Ibid, 3.

2.2.1 Mainstream Media

Mainstream media (mostly TV, newspapers, and national radio) are not aimed at viewers or listeners from a specific ethnic group or region. Materu contends that they were absolved of any negative role in the violence.[1096] Contrastingly, Fackler, Obonyo, Terpstra, and Okaalet, indicate that particularly newspapers (the authors' analysis focuses on three newspapers with the widest readership in the country) contained stories that dichotomised the political race and resultant ethnic conflict.[1097] Stories essentially ran along the lines of: 'You are for [the Party of National Unity] PNU and against [the Orange Democratic Movement] ODM, *or* you are against PNU and for ODM'.[1098] The BBC World Trust Service noted that media played a substantial part in fostering fear and enhancing division.[1099] Media outlets also uncritically reproduced careless statements made by politicians.[1100] They did not hold the politicians to account for their utterances or actions. Instead, they covered political leaders as if they were covering 'an electrifying football match' rather than framing the reportage in the broader concern for the wellbeing of the nation.[1101] Large media outlets became contested spaces for the leading parties, making it, in some instances, difficult to distinguish between the media house's position and that of the party, politicians, political analysts, or commentators.[1102] Political parties found surrogate voices among commentators, correspondents, and journalists.[1103] Investigations by CIPEV revealed that the media was politically co-opted. They became 'pawns in the political game'.[1104] A tool manipulated mainly by the government.[1105] Accordingly, Scheffler highlights that there was no independent public service broadcaster during PEV.[1106] There was significant political interference in all kinds of media outlets. Nyanjom also noted Presidential candidates Kibaki and Raila had known links with the leading media houses.[1107]

[1096] Materu, 54.
[1097] P Mark Fackler, 'Media and Post-Election Violence in Kenya' in Levi Obonyo, Mitchell Terpstra and Emmanuel Okaalet (eds), *The Handbook of Global Communication and Media Ethics*, vol 2 (2011), 633 - 634.
[1098] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 29 - 30.*
[1099] Trust, 15.
[1100] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 29.*
[1101] Fackler, 633 - 634.
[1102] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 29.*
[1103] George Ogola, 'The Political Economy of the Media in Kenya: From Kenyatta's Nation-Building Press to Kibaki's Local-Language FM Radio' 57 Africa Today 77, 88.
[1104] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 29.* Trust, 3.
[1105] Scheffler, 21.
[1106] Ibid, 21.
[1107] Nyanjom, VII.

The news stories omitted the historical context of which the reporters were keenly aware. The dichotomy that was produced erased the middle ground and framed the conflict and political race as a zero-sum game reinforcing the idea that political problems were problems endemic to the entire ethnic community. It diminished the possibility of cooperation and compromise because compromise was framed as disloyalty and weakness. Thus, violent conflict became more attractive. Though they aggravated the situation by initially pitting competing groups against each other, mainstream media was not implicated for acts of hate speech beyond the unfiltered airing of political rallies. It is worth noting that political rallies were not aired as much as they were in other forms of media. Plus, mainstream media, at times, attempted to calm tensions.[1108] Indeed, at the beginning of January 2008, they came together to run the headline 'Save Our Beloved Country,' which called on the nation to unite.[1109]

International media was also culpable. Some specific international media outlets are said to have generally affected the way the violence unfolded by exaggerating the scale of the violence and, thereby, increasing fear and tension. News reports reduced the history and politics of the conflict to a simple battle of barbarians: the Luos and their allies against the Kikuyu and their allies, and in so doing, perpetuated the Western schema of Africa (discussed earlier) which we saw the Joint Evaluation of Emergency Assistance to Rwanda said was an irresponsible form of journalism that can contribute to violence. Examples of irresponsible journalism can be seen from a *New York Times*'s article describing the violence as 'Tribal Rivalry.'[1110] Other international media outlets inappropriately labelled the violence. For instance, it was labelled 'tribalism,' 'genocide', and 'ethnic cleansing', which shaped international perceptions of PEV and influenced the national public debate.[1111] One Kenyan journalist said that they watched CNN play the same clip from an outbreak of violence in Kibera in Nairobi (the largest slum in Africa). The journalist said that the clip was played as if it was a commercial. It was sensational and fostered a climate of fear in Kenya. What is more, the mere presence of camera crews became a catalyst for violence. Acts of violence were done for the benefit of the cameras.

CNN and BBC were both implicated in erroneously reporting that the violence was a 'clear conflict' between Kikuyu and Luo communities.[1112] Meanwhile, national media refrained from mentioning ethnic communities, which in the end did not matter because people

[1108] Scheffler, 16.
[1109] Fackler, 633. Trust, 8.
[1110] Jeffrey Gettleman, 'Tribal Rivalry Boils Over After Kenyan Election' *New York Times* .
[1111] Trust, 14.
[1112] Ibid, 14.

knew, if they wanted the names of the community with 'responsibility for the violence', they could turn on BBC or CNN. The problem was identified to stem from journalists who did not know the facts or the nuances or hidden dynamics and could not be bothered to delve more in-depth than the Western schema of Africa. When those journalists 'parachuted in,' they mischaracterised the conflict.[1113] In contrast, other news networks, such as Al Jazeera, maintain that they did not carelessly use the labels mentioned above and instead provided fair airtime to both parties. Indeed, when the government imposed a media ban, Al Jazeera is said to have filled the void brought on by an absence of live local news in the face of mounting suspicion.

2.2.2 Local language media

Vernacular radio stations are another media tool deserving special attention for the way they overcame linguistic barriers and were, therefore, able to incite violence and ethnic hatred among the majority of the population.[1114] Vernacular radio is particularly effective at being directive of mass action, as we saw from our discussion of Ellul's work in Chapter 1. Individual listeners are considered in the context of their commonality with the group – through their shared myths, feelings, and motivations. Broadcasters routinely called for the eviction of other ethnic groups.[1115] Materu argues that their role is similar to the role of RTLM during the Rwandan genocide.[1116] In an earlier chapter, we saw how RLTM was instrumental in the organisation and incitement to violence and ethnic hatred of the Hutu against the Tutsi. Although, unlike RTLM, which was designed for the whole of Rwanda, in Kenya, almost every major ethnic group has a radio broadcaster in their native language. These radio broadcasters are what I refer to as vernacular radio stations.[1117] RTLM was part of a coordinated State attack against the minority Tutsi population, whereas vernacular radio stations in Kenya were different. There was no 'sophisticated planned hate campaign' by radio stations that could be deciphered from their broadcasts.[1118] However, there were failings in their institutional structures that enabled irresponsible broadcasting.[1119]

[1113] Ibid, 14.
[1114] Materu, 54. Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 123.*
[1115] Government of Kenya, *Commission of Inquiry into the Post Election Violence (CIPEV) Final Report* (2008), 295.
[1116] Materu, 54.
[1117] Fackler, 632.
[1118] Trust, 5.
[1119] Ibid, 5. Ogola, 89.

Organisational structures of most vernacular radio stations made them more vulnerable to crossing the line from free speech into hate speech.[1120] This includes vernacular radio show correspondents being improperly trained.[1121] That is to say, they did not receive training in journalism, journalistic ethics and standards, or conflict reporting. Most were not permanent employees but correspondents without regular pay and hired on short contracts. Some would earn about £76 a month, and that was if they worked for larger media outlets. Most correspondents got their jobs based on their popularity and proficiency in the respective languages.[1122] Correspondents would operate recklessly and irresponsibly, not attempting to hide their partisanship.[1123] They also controlled what was aired on the radio.[1124] So, what aired depended on who was present in the studio. What is more, correspondents only received payment for the stories that were eventually broadcasted. Fackler et al. argue that that created incentive for sensationalist stories.[1125] The latter criticism can be levied against world media which has recorded predispositions to simplification and sensationalism, often having to balance self-interest (like profit and power) against the public interest.[1126] Still, political ownership was the central issue for vernacular radio because editorial policies often reflected the interests of the station owner, and the station owner was generally a politician.[1127] Politicians early on figured out that money plays a role in elections and, if they owned a media station, they could 'spend less and influence more'.[1128] Ultimately, radio stations failed to prevent their patrons (both owners and listeners) from spreading hate speech and were, thus, indirectly culpable.[1129] KNCHR said that 'local language media' either influenced or facilitated the influencing of communities to ethnic hatred or violence.[1130] The influence of government officials in local language media outlets is 'pervasive.[1131] They focus political influence in vernacular radio through undisclosed ownership structures while employing creative ways to hide their ownership.

[1120] Fackler, 638.
[1121] Ibid, 638. Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 29.* Trust, 2.
[1122] Ogola, 89.
[1123] Waki and others, 296.
[1124] Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance, 36.*
[1125] Fackler, 638.
[1126] Trust, 10.
[1127] Ibid, 5.
[1128] Ibid, 5. Jamal Abdi and James Deane, *The Kenyan 2007 elections and their aftermath: the role of media and communication* (BBC World Service Trust 2008), 5.
[1129] Waki and others, 302.
[1130] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 8.*
[1131] Nyanjom, 45-46.

To further understand the influence of vernacular radio, it is essential to highlight that Kenya has had between 42 and 111 recognised ethnic groups, the majority of Kenyans live in rural areas, and Kenyan terrain constraints TV broadcasts to urban areas.[1132] Plus, the prohibitively expensive costs of owning and running a TV receiver resulted in TV being a medium mainly for the urban middle class. For the multitude of 'rural poor', the main form of media is radio.[1133] That can be evidenced by the fact that only around 37% of Kenyans have access to TV, whereas radio stations jointly reach 96% of the population. Kameme FM was the first to be granted a licence in 2000. It sparked a national debate about whether vernacular radio would provoke ethnic conflict. That resulted in its suspension until the following year.[1134] Vernacular radio stations proliferated after the liberalisation of the media in 2002, propelled by the precedent set by Kameme FM.[1135] Previously, the media was controlled by the State. Even the 1991 repeal of section 2A of the Constitution[1136] had not changed how media outlets would voice the views of KANU.[1137] KANU's views were broadcast through media outlets because of censorship and self-censorship. Contrarians were subject to harassment, fines, imprisonment or torture. Thus, a large proportion of the Kenyan population, mainly the poorest and most politically marginalised, only had access to government-controlled media, which they greatly distrusted.[1138]

With the liberalisation of the media came the granting of licences for new stations. Problematically, licences were issued by the Ministry of Information and Broadcasting (MIB) without any regulatory and legislative framework. That created what the Permanent Secretary of MIB called a 'free for all'.[1139] It was within this context that vernacular radio stations were born – free to operate in the absence of regulation. Some stations almost effortlessly turned into 'partisan political platforms' that advocated for specific ethnic interests.[1140] By 2004, a new wave of vernacular radio stations emerged, encompassing the major ethnic languages in the country – Kikuyu, Luhya, Kalenjin, Luo, Kamba, Kisii, and Meru.[1141] The proliferation of vernacular radio made it harder for the State to exert control or even monitor broadcasts (made

---

[1132] Kenya Human Rights Commission, *Ethnicity and Politicization in Kenya* (2018), 9.
[1133] Fackler, 62.
[1134] Trust, 4.
[1135] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 29.*
[1136] The provision that had turned Kenya into a de jure single-party state.
[1137] The BBC World Service Trust takes the position that the pivotal moment in 1992 led to the media becoming a thriving industry. Trust, 3.
[1138] Ibid, 3.
[1139] Waki and others, 296.
[1140] Ogola, 89.
[1141] Nyanjom, 26 - 27.

even harder by the different languages of the ethnic communities).[1142] Further, the liberalisation of vernacular radio happened in many countries on the continent.[1143] Kenya was unique because of its particular mythic structures, which could effectively be operationalised through radio broadcasts, which targeted listeners based on shared myths, feelings, and motivations (discussed in Chapter 1). Plus, the untrained reporters with economic incentives to push sensationalised stories ramped up the tension in the security environment. Ogola suggests that the Moi administration encouraged the proliferation of vernacular radio to demolish the NARC alliance (discussed in the previous chapter). The aim was to reawaken ethnic consciousness and suspicion to weaken NARC and make the population more susceptible to KANU's ethno-nationalist messages.[1144] Nonetheless, radio station owners are said to have also envisioned the radio stations as profit-making enterprises and primarily as entertainment tools. However, music and entertainment content early on was dwarfed by listeners calling for more focus on popular public discussion, and that served the agenda of station heads. As a result, morning talk shows were able to attract big audiences.[1145] In that way, vernacular radio abruptly and largely accidentally became an outlet for public debate and the expression of voices that had been silenced for many decades. Many of the voices were from people who were disaffected, angry, and resolute on change.

Radio stations gave ordinary citizens a unique platform to share all kinds of views.[1146] The content of broadcasts led to complaints about vernacular radio stations perpetuating hate speech all across the country, even before violence linked to the 2007 election.[1147] Some radio stations, like KASS FM (KASS), were known to have spread 'dangerous propaganda and hate speech' years before the election, specifically during the 2005 constitutional referendum.[1148] Generally, four vernacular radio stations were infamous for spreading inflammatory ethnic

---

[1142] Ogola, 86 and 93. Trust, 4.

[1143] Since 2000, there was an explosion in the numbers of small radio stations across Africa. Mary Myers, 'Local radio: fostering community development or ethnic hatred? Donor dilemmas and perspectives from Rwanda, D.R. Congo and Kenya' (CAMRI: The Media and Development in Africa), 1. Mary Myers, *Radio and Development in Africa: A Concept Paper* (International Development Research Centre (IDRC) of Canada 2008), 5, 12, and 34. Local commercial radio grew by an average of 360% between 2000 and 2006. Myers attributes this to the widespread distribution of cheap transistors, the high unit costs of television, the lack of rural electrification, deregulation, and fresh investment by NGOs and governments, civil society, the private sector and international donors.

[1144] Ogola, 87.

[1145] Ibid, 87.

[1146] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 29.*

[1147] Waki and others, 295. Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 123.*

[1148] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 29.*

rhetoric during the 2007 election. They were KASS that broadcasted in Kalenjin, Lake Victoria FM that broadcasted in Luo, and Inooro and Kameme that both broadcasted in Kikuyu. The infamous four represented the three largest ethnic groups and were principally implicated in the intentional or indirect dissemination of hate speech by either condoning or sanctioning it.[1149] That is to say, they gave guests and call-in listeners a platform in which they would disseminate hate speech. They also regularly played uncensored statements amounting to hate speech made by politicians.[1150]

The language used was coded or highly idiomatic, but the meaning was still clear to the listener.[1151] After the election results, battle lines were drawn against particular ethnic communities. Those ethnic communities were portrayed as being against the ethnic community of the broadcasters.[1152] Most broadcasts were woven interwoven with symbolic politics. The theme of most pro-ODM callers was that the Kikuyu had stolen resources (livestock, land, or so on) and should be 'removed'. Conversely, the theme of most pro-PNU callers was the Kikuyu were under an unjustified attack from which they could lose their lives or resources (land, livestock, or so on). Additionally, pro-PNU callers insisted that their ethnic community should not let themselves be governed by the immature, (thus, drawing on maturation myths), or unsophisticated 'other' ethnic communities. Accordingly, pro-PNU callers often denigrated other ethnic groups by calling them animals, such as mongoose.[1153] By way of examples, Lake Victoria FM metaphorically referred to the Kikuyu leadership as 'leadership of baboons.'[1154] Kameme FM played a derogatory Kikuyu song whose lyrics can be translated to 'the beasts from the West.'[1155] The 'beasts' signified ethnic groups from Western and Nyanza provinces, the largest of which is the Luo community. Inooro FM habitually put on air very emotional and distraught victims of violence, which whipped up the emotions of the listener.[1156] The MIB was alarmed by Inooro FM broadcasts and feared the broadcasts would entice more young people to join Mungiki.[1157] Music amounting to hate speech contributed to heightened ethnic tensions. Songs were played in the Kikuyu language on Kameme and Inooro radio stations.

[1149] Materu, 55.
[1150] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 123.*
[1151] Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance, 36.*
[1152] Trust, 4.
[1153] Waki and others, 302.
[1154] Materu, 55.
[1155] ibid, 55.
[1156] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 114.*
[1157] Waki and others, 299.

One song by Miuga Njoroge was noted for negative lyrics against Raila and the Luo community. The piece included parts about Raila being a murderer, power-hungry and categorised people of his ethnic group (the Luo) as lazy hooligans.[1158] There have been no successful prosecutions against those who had effective control of the radio stations.

2.2.3 A Case Study on Kass FM

KASS, in particular, is a useful example of how hate speech was perpetuated. KNCHR said that KASS was a specialist in peddling hate speech against the Kikuyu community and, to a lesser extent, other non-Kalenjin communities, such as the Kisii.[1159] Compared to other radio stations, like Inooro FM and Kameme FM, KASS was recognised for lack of subtlety in the way it waged its 'ethnic propaganda campaign'.[1160] It commonly called for the expulsion of Kikuyus.[1161] The 2005 constitutional referendum proved to be the dress rehearsal for KASS's incitement before and after the 2007 election.[1162] Kibaki's administration had temporarily suspended KASS in November 2005 under suspicions that it was inciting violence during the 2005 constitutional referendum.[1163] Supporters of the Orange movement (those against the Amos Draft of the constitution) accused the government of targeting KASS because it was an independent broadcaster that aired the views of Orange supporters. The radio station was allowed back onto the air when it furnished transcripts of programmes to show that no hate messages were broadcast. Ironically, Kibaki's actions added to suspicion against him, and they gave the station greater credibility among Kalenjin listeners. Again in 2007, the Kenyan Media Council had investigated KASS for 'inciting the public to violence'.[1164] Ultimately by August, the Council decided that KASS was innocent of the charges but was negligent in the handling of discussions with callers.

During PEV, KASS aired Kalenjin callers who called on 'people of the milk' to 'cut grass', a coded rallying cry, one that drew on *majimboism* by calling for Kalenjins to clear the land by removing Kikuyus so that they could 'reclaim their land'.[1165] Of all the radio stations,

---

[1158] Kenya Today, 'Why Vernacular Radio Stations Like Kameme, Inooro, Egesa, Kass Etc Should be Banned In Kenya' (*https://www.kenya-today.com/opinion/vernacular-radio-stations-like-kameme-inooro-egesa-kass-etc-banned-kenya*, 2016) accessed 10 March 2017

[1159] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 58.*

[1160] Ibid, 123.

[1161] Government of Kenya, 295.

[1162] Materu, 55.

[1163] Keith Somerville, 'Kenya: Violence, Hate Speech and Vernacular Radio' Montreal Institute for Genocide and Human Rights Studies Occasional Paper 1 , 34.

[1164] Waki and others, 41.

[1165] Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance, 36 - 37.*

KNCHR identified Kalenjin and Kikuyu vernacular radio stations as being the most culpable for facilitating or disseminating ethnic hatred. Namely, for 'disseminating negative ethnic stereotypes, cultural chauvinism and the peddling of sheer untruths about the political situation or specific politicians'.[1166] To echo some of the points I made in Chapter 1 about precipitating violence, here we see how leaders closed in on their decision to commit violence, so they co-opted the radio station as a short-term modality for physical violence that the listenership was primed to think was inevitable. Radio hosts incited listeners, who in turn incited others, forming an endless loop. Even before the election, KASS said that there would be rigging and encouraged people to use their radio platform to incite other people.[1167] Most people said regardless of whether ODM won, Kikuyus would be expelled from the Rift Valley. Around the 2007 elections, KASS was singled out by CIPEV for its contribution to 'a climate of hate, negative ethnicity, and… incit[ing] violence in the Rift Valley'.[1168] The impact of such statements cannot be understated, which is well illustrated by the Kipkelion constituency.[1169] Kipkelion experienced only one death and the burning of three houses in comparison to comparable areas that experienced above 20 deaths and the burning of about 2,563 homes. The difference was in Kipkelion, one of the councillors in the area had gone to KASS and other Kalenjin radio stations to preach tolerance, from which he was branded a traitor by local leaders. KASS also took an obstructionist stance against the investigation of CIPEV. CIPEV listened to recordings in which unnamed Kalenjins were on air cautioning members of their community against volunteering or disclosing information to investigators.[1170] Speakers suggested that listeners should be cautious about speaking to unknown people because it 'might cause them problems or be incriminating'.[1171] So, listeners were told to redirect questions to chiefs or other opinion leaders. In the end, CIPEV relied on second-hand accounts because it could not acquire tapes or transcripts of what was aired on KASS.

One of KASS FM's radio presenters, Joshua Arap Sang, was charged by the ICC. Charges were brought against Sang for contribution to the implementation of the common plan, by *inter alia* fanning violence by spreading hate speech messages and explicitly revealing a

[1166] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 8.*
[1167] Waki and others, 67.
[1168] Ibid, 69 and 295.
[1169] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 58.*
[1170] Waki and others, 72.
[1171] Ibid, 301.

desire to expel Kikuyus.'[1172] The Trial Chamber terminated the case against Sang in April 2016 because of insufficient evidence to lead to a conviction. Sang and other ICC indictees (Ruto and Uhuru) had weakened the Office of the Prosecutor's case by intimidating witnesses through bribery and threats.[1173] Chile Eboe-Osuji, a judge in the Trial, noted that there was insufficient evidence because of a 'tainting of the trial process by way of witness interference and political meddling that was reasonably likely to intimidate witnesses'.[1174] Hate speech, mostly advanced by local language media, was connected to less violence than hate speech that took place during face-to-face meetings. This highlights the effectiveness of direct propaganda (discussed in Chapter 1) to operationalise mythic structures of ethnic communities after the long process of conditioning during which sociological propaganda has taken root. It also highlights how the transference of affect at public gatherings is effective at propelling people to enact violence against the ethnic 'other', even if the 'other' is their next-door neighbour.

2.2.4 Politicians

Most contemporary politicians aim to establish and highlight policy differences between themselves and their running mates. However, in Kenya, the objective of most politicians is to sow discord and show their voting base the 'spoils that will flow to them if they vote for a particular candidate'.[1175] Face to face platforms, such as political rallies and public meetings, bridged the linguistic barriers to communication, especially in rural and peri-urban areas.[1176] Politicians from all camps used coded speech in the form of imagery and idioms.[1177] They did not just ridicule the opposition but also aimed their ridicule at the politician's entire ethnic community. In KNHCR's Schedule of Alleged Perpetrators, incidents of violence that followed hate speech took place after face-to-face meetings, often with an audience of youth militias.[1178] From our discussion of direct propaganda and transference of affect in Chapter 1, we

---

[1172] International Criminal Court, 'Situation in the Republic of Kenya: The Prosecutor v. William Samoei Ruto and Joshua Arap Sang – Case Information Sheet (April 2016)' (*https://www.icc-pi.int/kenya/rutosang/Documents/RutoSangEng.pdf*) accessed 11 February 2017

[1173] #globaljustice, 'Ruto/Sang ICC Case Thrown Out: Explanation and Reaction' (*https://ciccglobaljustice.wordpress.com/2016/04/07/rutosang-icc-case-thrown-out-explanation-and-reaction/*, 2016) accessed 17 February 2017, Financial Times, 'International Criminal Court Drops Charges against Kenya's Ruto' (*https://www.ft.com/content/ddea856e-fb51-11e5-8e04-8600cef2ca75*, 2017) accessed 11 February 2017

[1174] International Criminal Court, 'Ruto and Sang case: ICC Trial Chamber V(A) Terminates the Case without Prejudice to Re-prosecution in Future' (*https://www.icc-cpi.int/Pages/item.aspx?name=pr1205*, 2016) accessed 11 February 2017

[1175] Mike Pflanz, 'Kenya Reins in Hate Speech Ahead of Constitution Vote' *The Christian Science Monitor* (https://www.csmonitor.com/World/Africa/2010/0618/Kenya-reins-in-hate-speech-ahead-of-constitution-vote).

[1176] Ndlela, 465.

[1177] Kenya National Human Rights Commission, *Annex One: Schedule of Alleged Perpetrators" in On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence* (2008)

[1178] Ibid

understand the reasons that that may be the case. Direct propaganda operationalises mythic structures that take root following a long period of conditioning and then directs cycles of violence. Thus, face-to-face meetings played a significant role in PEV and were held in houses, markets, rural commercial centres, rural bars and village meetings.[1179] They were organised locally and used to recruit youth militias, usually by an authority or elite figure. Incitement to ethnic hatred and violence were merely tools wielded by politicians who were dealing in identity politics. [1180]

Hate speech began during the election campaign, which was virulently divisive from the outset, specifically in August 2007 as political candidates started vying for nominations.[1181] KNCHR noted that the statements made by politicians while they were campaigning incited the local community to commit acts of violence after the announcement of the election results.[1182] Politicians on both sides characterised their opponents in derogatory terms connected to their ethnicity.[1183] According to a European Union Observer, the campaign was characterised by '…strong ethno-political polarisation between the two main contenders.'[1184] Accordingly, human rights organisations went as far as to denounce instances of intimidation and murder.[1185] European Union observers noted that there were thirty-four pre-election-related deaths and one-hundred and ninety intense incidents ranging from intimidation to murder. Most of these incidents occurred in Western, Nyanza and Rift Valley Provinces. As campaigns continued and the election approached, in Eldoret, local ODM mobilisers and other prominent individuals called meetings to urge violence if Kibaki was declared the winner. They claimed that Kibaki's victory could only be the result of rigging, and as such, the leaders would respond by declaring 'war' against local Kikuyu residents.[1186] They told community attendees that a PNU victory should be viewed as conclusive proof of electoral fraud, and all Kikuyu were complicit in it.[1187] Attendees described how 'war' was used extensively to urge a violent reaction to discontent at the polls.

[1179] Scheffler, 29.
[1180] Ibid, 35.
[1181]Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance, 19.*
[1182] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 105.*
[1183] Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance, 20.*
[1184] European Union Election Observation Mission, *Doubts about the Credibility of the Presidential Results Hamper Kenya's Democratic Progress - Preliminary Statement* (1 January 2008), 8. Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance, 20.*
[1185] Lafargue and Katumanga, 12.
[1186] Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance, 4.*
[1187] Ibid, 37.

Various techniques were utilised for incitement to ethnic hatred and violence. They included dehumanisation and accusation in mirror.[1188] For example, in one of Mutahi Kagwe's speeches, he compared Raila to Idi Amin and Hitler. Utilising accusation in mirror, he claimed that once victorious, Raila would begin to suppress Kikuyus. In a similar vein, both incumbent and opposition groups accused each other of ethnic cleansing against their respective supporters.[1189] Terms like '*kuondoa madoadoa'*, which translates to 'to remove the spots', 'people of the milk', to 'cut grass' about the opposition, and referring to the ethnic 'other' as an animal that has stolen chicken, were ways to dehumanise them.[1190] The joint denigration of political opponents using ethnic stereotypes and coded language was common. A useful illustration of the stereotypes that were employed to cast other ethnic groups in a negative light was that Luos' fish, Kikuyus' are greedy businessmen, Kalenjins' are pastoralists, Somalis' trade and Luhyas' are farmers.[1191] Regarding coded language, some examples include Kalenjin local leaders (in support of ODM) allegedly telling Kalenjin voters to remove the 'roots,' and the Kalenjin had a 'snake' code for Kikuyus of which to rid themselves.[1192] Other high-profile leaders, like Raila (leader of the ODM ticket) and Deputy President Ruto, directly instructed Kalenjin voters to remove all the *madoadoa* from the Rift Valley during public meetings.[1193] Another useful illustration was Ruto's open ceremony speech for a Seventh Adventist Church. He said that 'they' would uproot the '*sangari'*, in the context referring to the opposition as weeds.[1194] He told members of his ethnic community to shake off the soil, gather it together and burn it.

Pro-PNU politicians were also found to have whipped up Kikuyu ethno-nationalist passions and incited retaliatory attacks.[1195] Kikuyus made demeaning references towards other ethnic communities, often using the symbol of circumcision.[1196] For instance, references to Luos as *kihii*, which we saw in an earlier chapter, is an offensive maturation myth often levied

---

[1188] The later term is used to the rhetorical practice of falsely accusing one's enemies of conducting, plotting or desiring to commit precisely the same transgressions that one plans to commit against them. Scheffler, 17.

[1189] Heidelberg Institute for International Conflict Research (HIIK), 'Conflict Research ' (*https://www.hiik.de/en/konfliktbarometer/pdf/ConflictBarometer_2008.pdf*, 2008) accessed 12 March 2017, 36.

[1190] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, 52* Integrated Regional Information Networks, 'Spreading the Word of Hate' (*http://www.irinnews.org/report/76346/kenya-spreading-word-hate*, 2008) accessed 28 March 2017.

[1191] iHub and Ushahidi, 'Umati: Monitoring Online Dangerous Speech' (*https://ihub.co.ke/ihubresearch/uploads/2013/february/1361013008_819_929.pdf*, 2013) accessed 12 March 2017

[1192] Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance, 36.*

[1193] Waki and others, 92.

[1194] Philip Waki and others, *Report from the Commission of Inquiry into Post-Election Violence: Embargoed Schedule of Alleged Perpetrators (Annex One)* (2008), 172 - 173.

[1195] Waki and others, *Report from the Commission of Inquiry into Post-Election Violence (The Waki Report), 217.*

[1196] Ibid, 217.

at Luo politicians and their ethnic community. The statement appealed to Bantu communities who view circumcision as a key social value associated with cleanliness and respectability.[1197] PNU politicians argued that a *kihii*, uncircumcised boy would never lead the country.[1198] Leaders spoke in indigenous dialects and told the audience that enough was enough, which suggested that the Kikuyu community should no longer be passive in the face of attacks. Religious leaders, in particular, distributed inciteful messages with calls for Kikuyus to protect themselves against non-Kikuyu communities and ODM.[1199] One called on Kikuyus to be armed the way he was 'armed with the Bible.'[1200] The effect of face-to-face meetings is well illustrated by the burning of the Narok market after Ntimama told Kalenjin and Maasai youths[1201] that the Kikuyu women who work at the market had insulted him.[1202] Following this meeting, the youth started attacking the Kisii community in the area and burned down their houses.[1203] Similarly, MP Franklin Bett and MP Lorna Laboso held a meeting with five to seven hundred youths and said that they would fight until given their right.

2.2.5 New Media

Hate speech was also disseminated via members of the public in what Cheeseman describes as 'new means of communication'.[1204] That is the internet, emails and especially short message services (SMS). In Cheeseman's estimation, the 2007 election was 'Kenya's first election in the Information Age.'[1205] The communicative capacity of ordinary citizens is said to have far exceeded even the most intrusive State attempts to control the flow of information.[1206] Accordingly, Kenyan voters were subjected to so much election-related information that it was more challenging than ever before to distinguish between fact and fiction. Much of the information contained hate speech, which Materu asserts initiated from the public, and shaped and contributed to the way the violence unfolded.[1207]

[1197] International Crisis Group, 'Kenya in Crisis' Africa Report, 5.
[1198] Scheffler, 18.
[1199] Commission, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence, para 547.*
[1200] Waki and others, *Report from the Commission of Inquiry into Post-Election Violence (The Waki Report), 217.*
[1201] According to the Kenyan Youth Policy, youth are defined as persons resident in Kenya in the age bracket of fifteen to 30. Ministry of Youth Affairs, Republic of Kenya, *Kenya National Youth Policy,* (Ministry of Youth Affairs and Sports Nairobi 2006), 1.
[1202] Kenya National Human Rights Commission, 174.
[1203] Ibid, 169.
[1204] Cheeseman, 169.
[1205] Ibid, 169. Trust, 9.
[1206] Cheeseman, 169.
[1207] Materu, 55.

Leaflets are a useful example. KNHCR found that leaflets had the power to excite ethnic hatred and cause violence.[1208] They were, for instance, circulated in Western Province, compelling 'Mount Kenya mafia' (and Kikuyus generally) to leave the area. Landlords to those identified as part of the 'mafia' were ominously told to 'avail quit notices' and comply immediately. Another example is from the hate leaflets that targeted Raila. One leaflet read: 'Raila is planning revolution (sic) christened 28 December Orange Revolution.'[1209] In other leaflets, Raila was accused of being a communist, terrorist, devil worshipper, tribalist, dishonest, and practising witchcraft to win the election. Emails further inflaming ethnic tensions were circulated among the Kalenjin. One email noted that the Kalenjin had been systematically marginalised and called for the community to defend itself to 'the bitter end'.[1210] The email encouraged those who could afford it to 'ferry two warriors from upcountry fully armed and house them' until the 'thing' was sorted. Additionally, several forged documents were 'leaked' online to discredit the Presidential candidates, primarily through blogs.[1211]

Social media served to provide an alternative public sphere cultivating a new kind of citizen participation and discussion of the situation. Makinen and Kuria assert that social media was a potent medium of information sharing.[1212] Kenya's blog culture had formed a space for public debate and investigation, particularly during times when investigative journalism was under threat by the government.[1213] Still, blogs in the country are factionalised; some contain very virulent content. Some blogs aimed to promote peace and justice, while others had more nefarious purposes, including the spread of biased information, ethnic prejudice, and ethnic hatred.[1214] In one infamous example, a forged Memorandum of Understanding (MOU) was leaked that suggested to Christian voters that Raila had plans to turn Kenya into a Sharia state. This sort of misinformation bolstered incitement to ethnic hatred and violence.[1215] In reality, the real MOU only obligated Raila to devolution and more lavish public spending in northern regions and poor coastal regions of the country. In another example, the popular blog *mashada.com* had to be suspended because of 'shocking tribal vitriol'.[1216] It was the 'subversive forces and hate-peddlers' who were said to have won blog wars and SMS.[1217] SMS

[1208] Commission, *Still Behaving Badly: Second Periodic Report of the Election Monitoring Project, 9.*
[1209] Waki and others, *Report from the Commission of Inquiry into Post-Election Violence (The Waki Report), 216.*
[1210] Ibid, 299.
[1211] Cheeseman, 169.
[1212] Mäkinen and Wangu Kuira, 328.
[1213] Trust, 11.
[1214] Mäkinen and Wangu Kuira, 333.
[1215] Cheeseman, 169.
[1216] Trust, 11.
[1217] Ibid, 11.

messaging was most frequently used to spread ethnic hatred and encourage violence, especially after the disputed election result.[1218] It was predictable because there were around seven million mobile phone users in Kenya – the most in the region.[1219] Kenya had pioneered mobile phone services, like M-Banking.[1220] However, during the election, the economic and democratic benefit of the new technology was eschewed. Following the uncharacteristic lack of information during election counting and the subsequent ban on media reporting, the use of SMS mushroomed.[1221]

During ballot counting, journalists had been bizarrely prevented from accessing tallying rooms. That was despite improprieties being levied at the process. Kivutu's press conference, mentioned above, revealed his reservations about the integrity of the count, thereby fuelling an already tense electorate. The government decided to institute a media ban in an alleged attempt to 'defuse public anger,' which had the reverse effect.[1222] Rumours were spread over SMS messaging with malicious information and outright falsehoods.[1223] Live broadcasts were replaced by cell phones.[1224] Notwithstanding the governments best attempts, telephone providers, like Safaricom, refused to close the SMS system. In addition to SMS, social media platforms, including Facebook, Flickr, YouTube, and Twitter, functioned as an alternative medium for citizen communication and participatory journalism.[1225] Social media served to provide an alternative public sphere cultivating a new kind of citizen participation and discussion of the situation.[1226] Accordingly, Makinen and Kuria assert that social media was a powerful medium of information sharing in PEV.

CIPEV's investigation revealed that hate speech and alarming rumours were being circulated via malicious text messages.[1227] SMS was utilised by some people to promote peace; others used it to mobilise militias and spread rumours containing ethnic hatred.[1228] There are also reports of people receiving flyers threatening them. Consequently, these alternative mediums of communication allowed citizens to share their views in public and discuss the

---

[1218] Ibid, 10.
[1219] Ibid, 10.
[1220] Having a bank account associated with a mobile phone number.
[1221] Cheeseman, 169. Waki and others, *Report from the Commission of Inquiry into Post-Election Violence (The Waki Report), 216.*
[1222] Trust, 8.
[1223] Ibid, 8.
[1224] Ibid, 11.
[1225] Mäkinen and Wangu Kuira, 328.
[1226] Ibid, 330.
[1227] Waki and others, *Report from the Commission of Inquiry into Post-Election Violence (The Waki Report), 216.*
[1228] Cheeseman, 169. Waki and others, *Report from the Commission of Inquiry into Post-Election Violence (The Waki Report), 216.*

situation with others in the country and globally. This is partly because SMS and social media could not easily be controlled by the government and therefore widened and diversified public discussions. KNCHR was so disturbed by the hate messages that it decided not to publish them in fear of further disseminating hate speech.[1229] The messages could not be attributed to any single politician or political party. Still, they had the effect of contributing to the creation of what KNCHR describe as a 'climate of hatred'.[1230] They conditioned the environment so the physical violence could flourish. Further, the statements circulated were found to have poisoned the already tense political environment. For example, in the middle of January in 2008, a text message was spread among Kikuyus in Nairobi, which is credited for inciting retaliatory attacks. It read in part '...no more innocent Kikuyu (sic) will be shed. We will slaughter them… compile a list of all Luos and Kale[njins].' Thus, in addition to the internet, email, and blogs, SMS was used to disseminate hate speech and incite acts of violence during the 2007 election period in addition to vernacular radio and public gatherings. Similar to the situation in Rwanda, the politicians and mass media were inextricably linked to violence.

This section of the chapter has demonstrated that incitement to hatred and incitement to violence was evident before and after the 2007 election. It originated from the upper echelons of power down to ordinary individuals with the help of the media, especially vernacular radio. That incitement violated Article 20 of the ICCPR and Article 4 of CERD, to which Kenya is a signatory. That is why CIPEV found that the incitement to discrimination violated the Kenyan government's obligations under Article 20 and Article 4.[1231] Under Article 2(1) of CERD, the State should not engage in conduct that would 'sponsor, defend, or support' ethnic discrimination.[1232] The State was also obligated to protect the security of the people' against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.'[1233] CIPEV said that advocacy of leaders, radio stations, and individuals led to both hostility and violence against certain ethnic groups in Kenya.[1234]

[1229] Commission, *Still Behaving Badly: Second Periodic Report of the Election Monitoring Project, 8.*
[1230] Trust, 10.
[1231] Waki and others, *Report from the Commission of Inquiry into Post-Election Violence (The Waki Report), 149.*
[1232] UNIES NATIONS, 'International Convention on the Elimination of all Forms of Racial Discrimination', Article 2(1).
[1233] Ibid, Article 5(1).
[1234] Waki and others, *Report from the Commission of Inquiry into Post-Election Violence (The Waki Report), 149.*

2.3 Use of Hate Speech Regulations After Election-Related Violence

NCIC was warned that it would become a target of political hostility. During an NCIC meeting, one investigating officer thanked the Commission for political cover.[1235] That cover allowed the police force to 'work in peace' regarding the investigation and prosecution of speech offences.[1236] The officer foreshadowed that NCIC would become the new political target, one in receipt of the political animosity, which had been so readily received by the police force. The Commission received about twenty complaints of hate speech per week.[1237] Still, they only recommended a handful of the most extreme cases for prosecution. A dominant section of the government found that it had fallen short of their expectations.[1238] So, the government created a parallel body – the National Elders' Council – with a similar mandate. The Council was not created through statute or policy but was nevertheless allocated funding earmarked for NCIC. NCIC had to rely on the Commission of Experts on Constitutional Review for a broad range of resources, even staff, due to the lack of government funding.[1239] Nonetheless, the NCIC was able to rely on partners, like the United Nations Development Programme, to push its peace agenda.[1240]

Despite periodic political resistance, NCIC built an 'impressive body of work', as it relates to peacebuilding and conflict prevention.[1241] The Commission was able to encourage peace when faced with the next issue that polarised the nation – the 2010 Constitutional Referendum. There was vehement opposition to the proposed Constitution from several leading politicians, including former President Moi. The opposition or 'No' campaign called for ethnic division and violence if the 'Yes' campaign won. Through its peace campaigns during the referendum, the Commission captured the hearts of the electorate with the Uwiano Platform for Peace[1242] (in conjunction with NSC, the United Nations Development Programme, and other civil society organisations) and consequent peace campaigns during the 2010 referendum.[1243] Uwiano's task was facilitated by the endorsement of Kibaki (the incumbent Head of State) and Raila (the incumbent Prime Minister). It is hard to assess the effectiveness

---

[1235] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 173 - 174.*
[1236] Ibid, 173 - 174.
[1237] Nderitu, *On Hate Speech.*
[1238] Chuma and Ojielo, 31.
[1239] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 174.*
[1240] Chuma and Ojielo, 31.
[1241] Ibid, 31.
[1242] 'Uwiano' is Swahili for 'cohesion'. Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 181.*
[1243] Ibid, 189 - 190.

of Uwiano's peace campaign outside the context of its other initiatives, such as its media monitoring project and early warning system through which people would send an email or text from areas where ethnic tensions were being instrumentalised by politicians.[1244] The system enabled swift responses from the appropriate authorities, like the police or local mediators.[1245] The correspondence would detail plans for violence, usually in the form of voice recordings of leaders disseminating hate speech. Ultimately the Platform prevented more than a hundred incidents of violence in just the Rift Valley.[1246]

2.3.1 Politicians

In the middle of the peace campaigns, hate leaflets surfaced during the referendum campaigns for which some District Commissioners held politicians culpable.[1247] The leaflets warned non-indigenous communities to vacate. Politicians had a habit of using hate leaflets (and hate speech generally) not just to galvanise their voting bases but also to displace the 'ethnic other'.[1248] That was in the context of both the Yes and No campaigns zoning the country into red and green areas. Then respective colour zones warned each other not to 'trespass'.[1249] Both sides ignored AG Wako's warning about campaigning outside the allotted 30-day period.[1250] No campaign politicians focused their inflammatory language on *majimboism* that was central to the proposed Constitution and used devolution to inflame tensions, such as former President Moi.[1251] An explicit exercise of symbolic politics. The committee of the National Multi-Sectoral 'Yes' campaign complained to NCIC about incidents of hate speech from Moi.[1252] In a similar way to his response to the reintroduction of multiparty politics, Moi warned of violence in the Rift Valley if the referendum resulted in the promulgation of the proposed Constitution. NCIC thought Moi had incited the public in a constituency of the Rift Valley by calling those campaigners in the Yes team 'enemies of the people' of the Rift Valley.[1253] NCIC cautioned both Moi and Kibaki against public exchanges after Moi publicly questioned his

---

[1244] Ibid, 193. Commission, *Alternative Report to the UN Human Rights Committee in Consideration of Kenya's Third Periodic Report, 41.*
[1245] Cherotich Mung'ou, 'The Role of Information and Communication Technologies in Peacebuilding in Mount Elgon Region, Kenya' (Kabarak University 2016), 120. Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 195.*
[1246] Paul Van Tongeren, 'Increasing Interest in Infrastructures for Peace' 2 Journal of Conflictology, 48.
[1247] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 163.*
[1248] IRIN, 'Dozens killed in Tana River clashes' *IRIN* (https://www.thenewhumanitarian.org/report/96153/kenya-dozens-killed-tana-river-clashes).
[1249] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 162.*
[1250] Ibid, 163.
[1251] Ibid, 179.
[1252] Ibid, 164.
[1253] Ibid, 164.

once Vice-President on his reform credentials. Kibaki responded by pointing out that, despite 24 years of ruling the country, Moi had failed to do the same.[1254] Aside from the warning, there were no concrete actions taken against former President Moi, at least not publicly. Conversely, other No campaign politicians who incited ethnic hatred and violence faced criminal sanction.

At the beginning of June 2010, the Commission found that there were sufficient grounds to bring incitement to ethnic hatred and incitement to violence cases against a handful of politicians. It is worth highlighting that the term hate speech is often conflated to mean incitement to hatred as separate from incitement to violence.[1255] However, in international law, hate speech includes both incitement to hatred and incitement to violence. The confusion is made worse by the fact that the Penal Code houses incitement to violence. At the same time, NCIA creates a separate crime for incitement to ethnic hatred, among other protected characteristics. The only internationally recognised protected characteristic that the State does not recognise is sexual orientation because consensual same-sex relationships are criminalised under sections 162, 163, and 165 of the Penal Code.[1256]

This chapter will focus on the four accused that Commissioner Nderitu highlighted as requiring action due to incontrovertible evidence of hate speech.[1257] They were Wilfred Machage, an Assistant Minister, Fred Kapondi Chesebe and Joshua Kutuny, both Members of Parliament, and Christine Nyagitha Miller, a political activist. There were other officials charged with hate speech, namely Ruto (who is said to have disseminated hate speech on the infamous KASS in a move reminiscent of the 2007 election cycle[1258]), the acting Minister of Higher Education (and leader of the No campaign), Mohammad Sheikh Dor and Dr Julius Kones, both Members of Parliament.[1259] As Wesangula noted, since its creation, NCIC has investigated hundreds of hate speech cases.[1260] Yet, only a handful went to court, all from politicians challenging the President's agenda, and of those, none resulted in a conviction, which we shall see with the four forthcoming cases.

The charges against the four accused came on the heels of violence in the run-up to the referendum vote. Six people lost their lives when a grenade exploded at a prayer meeting that

---

[1254] Ibid, 179.
[1255] Aluanga-Delvaux, .
[1256] 19, 7.
[1257] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 170.*
[1258] Oscar Obonyo, 'MPs Plot to Disband Hate Speech Watchdog' *The Standard* (https://www.standardmedia.co.ke/business/article/2000012076/n-a).
[1259] Nichols, 193.
[1260] Daniel Wesangula, 'Kenya Tackles Hate Speech Ahead of Elections' *Modern Ghana* (https://www.modernghana.com/news/440488/kenya-tackles-hate-speech-ahead-of-elections.html).

was part of a No rally in Uhuru Park, Nairobi.[1261] The prosecution joined the cases of Machage, Chesebe, and Miller. All of the accused had threatened Kenyans with evictions, bloodshed, or religious wars if the constitution passed. Their statements had been broadcast on TV and radio during the launch of the No campaign's secretariat.[1262] They were given an ultimatum by the Commission to make a public apology or face criminal sanction.[1263] None apologised. Machage, in particular, said that communities would drive others out of the land under the guise of claiming ancestral land. He said his community would reclaim its ancestral land 'even if it means using some force'.[1264] It is important to highlight that at the time of the speeches, the Truth Justice and Reconciliation Commission (another Agenda 4 Commission) had not yet released its report, so victims of PEV had seen no official recognition of the injustices they suffered during PEV.[1265] Machage said that his words were merely an interpretation of the Constitution as he read it.[1266] He accused the Commission of criminalising him for voicing what minorities were thinking. Commissioner Nderitu explained that, in the context of the recent widespread election-related violence, the audience had been likely to take the comments from the leadership as instructions to cause chaos.

As the first prosecutions out of the gate since PEV, they were seen as a message to the political class that no one was too far out of reach to face the consequences of incendiary remarks under the new legislation, especially if the speech acts challenged the President's agenda. It was the first occasion in the country's history that politicians were in the dock facing charges for hate speech.[1267] However, as we saw with Uhuru, Ruto and Sang, being present in court does not mean criminal accountability is forthcoming or even guaranteed. Hate speech had previously been an essential part of regular campaigning—a way for leaders to strike fear or animosity in their ethnic communities.[1268] Then present themselves as the only candidate who could deliver security or redress for decades of pilferage from the ethnic 'other' or their leaders. Often relying on mythic structures to rouse emotions like anger in the crowd. Leaders

---

[1261] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 179.* Humphrey Malalo and Duncan Miriri, 'Kenya Charges Politicians with Charter Hate Speech' *Reuters UK* (https://uk.reuters.com/article/idUKLDE65F0P7).
[1262] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 170 - 171.*
[1263] Njoroge Kinuthia, 'Is NCIC Climbdown on Hate Speech Case a Bold Move?' *The Standard* (https://www.standardmedia.co.ke/fact-check/article/2000040635/n-a).
[1264] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 171.*
[1265] Ibid, 451.
[1266] Ibid, 175.
[1267] Ibid, 172.
[1268] Sophie Muluka, 'Hate Speech, Ethnic Cleavages and Youth Violence in Kenyan Politics' (Moi University 2017), 63.

for whom the entire community should bear complete responsibility. The prosecutions were supposed to be an indication that, for the first time, the government was taking hate speech seriously and would implement speech offences enshrined in NCIA. Still, according to Abdullah Boru Halakhean, an analyst for the International Crisis Group, the broad definition of hate speech (highlighted earlier in the previous section) made it challenging to submit evidence that passed the prosecutorial threshold.[1269] That is because the line between hate speech and freedom of speech was so obscure; many accused claimed that their speech was a legitimate exercise of free speech. However, during the prosecution of the joint case against Machage, Chesebe, and Miller, the NCIC requested that the Director of Public Prosecutions (DPP) (who took over the case from the police prosecution wing) withdraw the charges.[1270] The Commission had been approached by Katwa Kigen, the defence attorney for the Members of Parliament, before making the request. NCIC said that it would be seeking alternative methods of reconciliation. The trial proceeded despite the request.

Ultimately, the High Court declared the accused not guilty due to a lack of clarity on how technological evidence should be admitted.[1271] According to Chief Magistrate Gilbert Mutembei, the prosecution had failed to comply with rules of evidence regarding the videos that were adduced depicting the three accused engaging in hate speech.[1272] The Defence lawyers maintained that the source of the video was unknown and, therefore, a contravention of the Evidence Act 1963.[1273] The Evidence Act stipulates that there should be *inter alia* a certificate of ownership for primary evidence (section 65(8)). Justice Mutembei said the maker of the video should have been the one to produce it in court. When Dickson Gitonga, NCIC investigator, produced the video, he was asked to identify the source of the videos in the Kenya Broadcasting Corporation.[1274] However, Mr Gitonga would not do so because the person did not want to be identified.[1275] What is more, when the Prosecution witnesses were questioned,

---

[1269] IRIN, 'Analysis: Taming Hate Speech in Kenya' (2012) accessed 08 September 2020.

[1270] Wahome Thuku, 'Machage, Kapondi Get Reprieve Over Hate Speech Case' *The Standard* (https://www.standardmedia.co.ke/index.php/business/article/2000040235/machage-kapondi-get-reprieve-over-hate-speech-case). Wahome Thuku, 'NCIC to Withdraw Hate Speech Charges Against Machage, Kapondi' *The Standard* (https://www.standardmedia.co.ke/index.php/business/article/2000040188/ncic-to-withdraw-hate-speech-charges-against-machage-kapondi).

[1271] Commission, *Alternative Report to the UN Human Rights Committee in Consideration of Kenya's Third Periodic Report, 42.*

[1272] The Nation, 'Court Rejects Video Evidence in Hate Speech Case' *The Nation* (https://nation.africa/kenya/news/court-rejects-video-evidence-in-hate-speech-case-743038).

[1273] Capital Reporter, 'Court Acquits MPs Over Hate Speech Charges' *Capital News* (https://www.capitalfm.co.ke/news/2011/12/31658/?moriarty=mobile).

[1274] Nation, .

[1275] Wahome Thuku, 'Machage and Kapondi Trial on incitement Now Begins' *The Standard* (https://www.standardmedia.co.ke/busia/article/2000021115/machage-and-kapondi-trial-on-incitement-now-begins).

they said they did not hear the accused make the alleged statements.[1276] It's unclear whether the change in position was the result of political pressure. Without the videos, Justice Mutembei held there was insufficient evidence to convict three of the four accused.[1277]

The absence of clear guidelines and rules, specifically for determining the authenticity of electronic evidence, presented a challenge to the prosecutions.[1278] JSC published a Memorandum in 2019 that shifted the fault from the constraints of evidence to the quality of prosecution.[1279] Accordingly, most prosecutions were withdrawn because of conciliation or witnesses failure to attend court. Failures to attend court are commonly attributed to witness interference. In the words of Judge Onguto, witness interference is 'axiomatic'.[1280] It was not a recent phenomenon. JSC said that the remainder of cases were so 'poorly prosecuted' that the often-electronic evidence tendered could not secure a conviction based on the standards set out in the Evidence Act. Similar problems were created in the later prosecution of MPs Moses Kuria and Ferdinand Waititu.[1281] Kuria and Waititu were acquitted after the court held that the video evidence was not authenticated and thus, did not warrant a conviction for incitement to violence.[1282] Still, Waititu's comments: 'We don't want to see any Maasai here in Kayole', were recorded on video and allegedly resulted in the death of two individuals.[1283] There was no accountability for the utterances that led to their deaths. The Evidence Act does not take into account new technologies, and there is a lack of political will to change it. That is undoubtedly because the Act has furnished many politicians with a loophole to escape culpability.

Kutuny was tried for incitement to violence separately. He was charged with the distribution of hate leaflets that targeted non-indigenous communities in Kitale Township.[1284] Similar to Miller, the charge of incitement did not have the option for a fine, only imprisonment

---

[1276] Sylvia Chebet, 'Courts Round Up' *Kenya CitizenTV* (https://www.youtube.com/watch?v=x2iX6s698E4&ab_channel=KenyaCitizenTV).
[1277] Reporter, .
[1278] Patrick Mutahi and Brian Kimari, *The Impact of Social Media and Digital Technology on Electoral Violence in Kenya*, vol 493 (Institute of Development Studies 2017), 23.
[1279] Commission, 57.
[1280] *Johnstone Muthama & 8 Others v Inspector General of Police & 2 Others* [2016] eKLR High Court of Kenya at Nairobi (Constitutional & Human Rights Division), [28].
[1281] Mutahi and Kimari, 23.
[1282] Maureen Kakah, 'Moses Kuria, Waititu Acquited in Hate Speech Case' *Nairobi News* (https://nairobinews.nation.co.ke/news/moses-kuria-waititu-hate-speech).
[1283] BBC News, 'Kenya MP Ferdinand Waititu Charged With Hate Speech' (*http://www.bbc.co.uk/news/world-africa-19751394*, 2012) accessed 12 December 2017" (2012). Sambuli.
[1284] Wahome Thuku, 'In Court: MPS Face Charges of Incitement' *The Standard* (https://www.standardmedia.co.ke/business/article/2000011846/in-court-mps-face-charges-of-incitement). Evelyn Kwamboka, 'State Drops Incitement Charges Against Kutuny' *The Standard* (https://www.standardmedia.co.ke/between-the-sheets/article/2000033135/state-drops-incitement-charges-against-kutuny).

of up to five years. The harsher penalty reflected the seriousness with which the State was thought to consider incitement to violence.[1285] In the end, the government withdrew the charges against Mr Kutuny. Frank Mnene, the Chief Inspector prosecuting the case, told Kennedy Bidali, the Principal Magistrate, about the Inspector's inability to give evidence because the AG had called for the police file. The AG used powers given to him under section 87 of the Criminal Procedure Code 1930. According to Mnene, the AG wanted to study the file to advise if the prosecution should be terminated. There was no further prosecution of Kutuny.

Evidentiary issues and political interference were not the only hurdles to prosecution. Due to the broad definition of hate speech and the country's 111 different ethnic dialects, expert witnesses often had to be relied on in court to explain why and how coded hate speech can incite hatred or violence.[1286] Even with expert testimony, judges have proven reluctant to find that utterances do amount to hate speech. This can be seen through the combined incitement to violence and hate speech case of Kikuyu musicians John Muigai (producer of *Hague Bound*), Mark Kamande wa Kioi (singer of *Uhuru ni Witu*), and John Ng'ang'a (singer of *Mwaka wa Hiti*). The three were prosecuted for Kikuyu lyrics that denigrated Prime Minister Raila and his ethnic community.[1287] Only Kamande honoured an NCIC summons (on the threat that the Commission would file for contempt) through which he was questioned about the lyrics to the song *Uhuru ni Witu* translating to 'Uhuru is Ours'.[1288] The songs were circulated on three of the four vernacular radio stations notorious for spreading inflammatory ethnic rhetoric during the 2007 elections, namely Inooro FM, Coro FM, and Kameme FM. Members of the public had complained after hearing the songs on those stations.[1289] Kamande was arrested shortly after speaking to NCIC. NCIC employed an official Kikuyu-English translator before finding that the words did constitute hate speech and thus recommended the accused for prosecution.[1290]

[1285] Kwamboka, .
[1286] IRIN.
[1287] Ibid. Nation News, 'Kalonzo Tells Poll Aspirants to Shun Ethnic Campaigns' *The Nation* (https://nation.africa/kenya/news/politics/kalonzo-tells-poll-aspirants-to-shun-ethnic-campaigns--819280).
[1288] Geoffrey Mosoku, 'Kenya: Musicians to Be Charged for Hate Speech' *The Star* (https://allafrica.com/stories/201206291029.html).
[1289] Susan Kilonzo, Kitche Magak and Bryson Omwalo, 'The Influence of Information Technology on the Socio-political Song in Kenya' 29 Critical Arts (South-North Cultural and Media Studies) 518, 529.
[1290] The Nation, 'We're Not Drumming up Hate Speech, Say Musicians on Probe' *The Nation* (https://nation.africa/kenya/news/we-re-not-drumming-up-hate-speech-say-musicians-on-probe--817416).

The songs of the three accused (including Uhuru is Ours, Hague Bound and the Year of the Hyena[1291]) were rich in proverbs, riddles, and metaphors.[1292] The song *Mwaka wa Hiti* or *Year of the Hyena* has Kikuyu lyrics that can be translated to 'when a man is seated, he sees further than a boy on top of a tree'.[1293] It is an apparent reference to the maturation myth we explored in an earlier chapter. Another much more overt lyric in the song *Hague Bound* said Uhuru should 'kill him'. That 'an uncircumcised man' was, in the translated words of the song, pushing for ICC prosecution and allegedly intent on taking Uhuru's wife, and it was clear to the listener that the man in question was Raila, even if he wasn't explicitly mentioned.[1294] Even the National Alliance, Uhuru's political party to date, condemned the songs. Uhuru, the Deputy Prime Minister at the time, said that the songs were shameful. Gichuki Kingara, a lawyer representing the defence, asserted that there was a 'gross abuse of the court process' for what he claimed amounted to a 'criminal interpretation of artistic works'.[1295] Representatives like Kingara, and politicians, such as Machage, used the court proceedings as a forum to criticise the government for 'grossly abusing' state power. The defence maintained that the translations of the songs missed the point and were misinterpreted.[1296]

Only Ng'ang'a faced a full trial because Muigai and Kamande struck a deal with NCIC for out of court reconciliation that resulted in the charges against them being dropped.[1297] The agreements entailed singing reconciliation songs to promote unity and cohesion among communities and uniting them against negative ethnicity.[1298] Conversely, Ng'ang'a decided to wait for a full trial under the belief that his name would be cleared. Senior Principal Magistrate Ellena Nderitu did just that; she cleared his name. She held that the prosecution had not produced enough evidence to link Ng'ang'a to hate speech in the song.[1299] Nderitu's finding was based on the fact that the song did not explicitly mention any ethnic community. The judiciary and the NCIC ended up at very different conclusions based on the same utterances

---

[1291] Kilonzo, Magak and Omwalo, 529.
[1292] Wahome Thuku, 'Musicians Face Five Years in Jail' *The Standard* (https://www.standardmedia.co.ke/central/article/2000061182/musicians-face-five-years-in-jail).
[1293] IRIN.
[1294] Ibid.
[1295] Ibid. BBC News, 'Kenya Musicians Charged with Hate Speech' *BBC News* (https://www.bbc.co.uk/news/world-africa-18712858)
[1296] IRIN.
[1297] Sam Aflan, 'Court Acquits Local Artist John De Mathew.' *Smart Sam News* (https://smartnewz.wordpress.com/2014/06/23/court-acquits-local-artist-john-de-mathew/). Vincent Agoya, 'Court Acquits Musician Demathew over Anti-Raila Song' *The Nation* (https://nation.africa/kenya/news/court-acquits-musician-demathew-over-anti-raila-song-995860).
[1298] Wahome Thuku, 'National Cohesion and Integrated Commission in Out-of-Court Deal with 'Hateful' Musician' *The Standard* (https://www.standardmedia.co.ke/kenya/article/2000092686/ncic-in-out-of-court-deal-with-hateful-musician).
[1299] Aflan, . Agoya, .

illustrating the problem with words that are coded. To be able to determine if the coded language is hate speech, the context and history of the ethnic community must be understood. For *Mwaka wa Hiti* to be seen as hate speech, the audience needs to grasp that circumcision is a significant social value for the Kikuyu community (not exercised by other ethnic communities like the Luo). Additionally, Raila (and Luos generally) were in those days being subjected to ethnic vitriol from the Kikuyu community because Raila had publicly supported the ICC prosecution of Uhuru (discussed further below). It is only then that the NCIC understanding of the song as 'insulting and threatening' can be understood.[1300] The case of the three accused also perpetuated sales of their music as the audience sought to listen to the songs.[1301] It illustrates the point made by Butler. That is, hate speech cases perpetrate the utterances that they seek to ban. Plus, with the advent of the internet, utterances take on a life of their own, especially artistic works like *Mwaka wa Hiti*.[1302] The audience takes the original lyrics and applies them in different contexts fuelling the existence of the song into perpetuity.

The prosecutions of Machage, Chesebe, Miller, and Kutuny, through which Commissioner Nderitu said the NCIC would take 'decisive step[s]' against hate speech, resulted in no criminal accountability. Machage was especially defiant despite evading a hate speech conviction based on an evidentiary technicality and a change in testimony. Machage said he had no apologies to make for 'defending' his ethnic community's interests.[1303] Machage's case illustrates how some prosecutions served as a way for the accused to bring attention to the strategic and political use of speech laws and highlight problems in governance. In Chapter 1, we discussed how one of the problems with speech laws is that speech is often labelled problematic based on the ability of people to manipulate the political process, and normative frameworks that are used to determine whether something is offensive are deployed in political landscapes. Machage hosted news conferences criticising the government and accusing the President and his inner circle of partisanship. Public performances of grievances were undoubtedly bolstered by the fact that until Robert Alai's prosecution (discussed further below), there had been no successful conviction of anyone accused of hate speech. Evidently, the judiciary was unimpressed by the prosecution of inflammatory speech, even when the speech could be linked to homicide. Machage's public performances put the speech laws on trial for a public audience. His was a familiar script used by politicians and their representatives

[1300] Agoya, .
[1301] Mutahi and Kimari, 24.
[1302] Kilonzo, Magak and Omwalo, 532.
[1303] Beauttah Omanga, 'Highs and Lows of Fiery Machage' *The Standard* (https://www.standardmedia.co.ke/business/article/2000012060/highs-and-lows-of-fiery-machage?pageNo=1).

when faced with a hate speech charge, as we saw earlier from Kingara. It was successful at turning politicians, like Machage, into a martyr for their ethnic community.[1304] Their ethnic community would claim victimisation as a result of the charges. What is more, the politicians would become 'their communities heroes' so much so that NCIC found it hard to exercise its peacebuilding and conflict prevention functions in those communities.[1305] This echoes some of the concerns raised in Chapter 1 about how speech laws create sympathy for the accused, particularly when the speech is coded or susceptible to multiple interpretations or meanings.

Only Machage and Ruto suffered short-term political repercussions due to the charges in that they both lost their ministerial positions but not the support of their voting bases. Still, Ruto retained his seat as a Member of Parliament. The suspension of the two was seen as selective and discriminatory because of the perception that the Coalition Government was filled with people who were facing court charges, for which many were never cleared.[1306] President Kibaki had directed the police to crack down on 'purveyors' of hate speech on 1 June 2010.[1307] It was perceived as an act of intimidation by the government-supported Yes campaign. The NCIC was accused of being used by the government to persecute and intimidate opponents of the proposed Constitution.[1308]

Commentators speculate that President Kibaki used Machage and Ruto as examples to subdue rebellion against the joint Cabinet decision to support the Constitution.[1309] Indeed, Mathew Iteere, the Police Commissioner, was called to a meeting to discuss the grenade attack (mentioned above). During the meeting, the Police Commissioner was challenged on what steps he had taken about politicians who were inciting violence. Police officers did not believe hate speech merited the time that they could be spending on 'serious crimes,' like robberies and murders.[1310] As many police officers faced abuse centred on ethnicity during police training, they explained that they found it hard to see the harmful effects of speech when a complainant would come forward. Plus, there was no judicial precedent of a successful hate speech case. The idea that hate speech is less serious is fuelled by the fact that NCIC recommends the withdrawal of charges based on a public apology. Shortly after the meeting

---

[1304] Nderitu, *On Hate Speech.*
[1305] Ibid.
[1306] Omanga, .
[1307] Cyrus Ombati, David Ochami and Vitalis Kimutai, ''No' Side Accuses State of Hypocrisy' *The Standard* (https://www.standardmedia.co.ke/index.php/business/article/2000011762/no-side-accuses-state-of-hypocris).
[1308] Ibid. Osinde Obare, 'We Shall Not Be Cowed, 'No' Team Declares' *The Standard* (https://www.standardmedia.co.ke/busia/article/2000012056/we-shall-not-be-cowed-no-team-declares).
[1309] Standard Team, 'Why Kibaki Sent Machage Home' *The Standard* (https://www.standardmedia.co.ke/index.php/business/article/2000011942/why-kibaki-sent-machage-home).
[1310] Nderitu, *On Hate Speech.*

with Kibaki, police officers were sent to search for the politicians that NCIC had identified as hate speakers.[1311]

Although the No team did not contest the charges against their members, they said that NCIC should have an even number of members of the Yes camp face sanction or censure.[1312] Ruto specifically called for various No camp members to be investigated, including Prime Minister Raila. He went on to say that one need not be intelligent to see that there was a '[government] conspiracy to silence people in the 'No' camp'.[1313] Notwithstanding their best attempts, Commissioner Nderitu said the Commission could not find any evidence of hate speech from the Yes campaign, despite going through extensive archives of audio and video recordings. Some members of the Yes team had been summonsed to NCIC offices, but those cases apparently did not rise to the level of a criminal charge for hate speech.[1314] Under pressure from the political elite, the Commission resorted to a public appeal for evidence of hate speech from the Yes campaign.[1315] There were zero prosecutions initiated against politicians in the Yes campaign. That fuelled the idea that politicians in the No campaign were being targeted in addition to the sense of victimisation from the communities that supported those politicians. As one would imagine, Members of Parliament (like Ruto) were not enthused by the Commission's rejection of political manipulation of the masses through hate speech.[1316] Thus, they considered introducing a Motion to the Parliament to disband NCIC, which did not get very far.[1317] Nonetheless, all the politicians mentioned above (even Machage and Ruto) went on to have lucrative political careers. None more so than Ruto – the Deputy President of the nation at the time of writing this chapter.

In addition to handing over cases for prosecution, another method the Commission adopted for addressing hate speech that was the issuing of cessation notices under section 25(2)(s) of NCIA. The notice requires the person notified to comply with a duty specified in the notice (section 57 NCIA). The notices required political leaders to 'keep the peace and watch the use of language that [is]…likely to inflame ethnic tensions'.[1318] They were reserved for politicians whose words were considered hate speech but fell short of the threshold of a

---

[1311] Team, .
[1312] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 174.*
[1313] Walter Menya and others, '3 Kenya MPs Held Over Hate Speech' *The Nation* (https://nation.africa/kenya/news/3-kenya-mps-held-over-hate-speech--637600).
[1314] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 173.*
[1315] Ibid, 174.
[1316] Obonyo, .
[1317] Ibid.
[1318] Commission, *Alternative Report to the UN Human Rights Committee in Consideration of Kenya's Third Periodic Report, 42.*

court charge.[1319] Commissioner Nderitu observed that there was a stream of politicians going to and leaving the NCIC offices to answer summons on hate speech and ethnic incitement. The Commission chose not to make summons or notices public 'unless they [politicians] repeated the offence'.[1320] In some instances, Commissioners issued cessation orders in circumstances where they believed that the police should have acted before the Commission had to get involved.[1321] One example given by the Chairman of NCIC was a 'public spat' between Ruto and incumbent Prime Minister Raila in 2011.[1322] Those who were known to have received a notice included Jakoyo Midiwo, a member of Parliament, and Hasan Omar, the former Vice-Chair of KNCHR. However, the notices did not deter politicians from participating in abrasive rhetoric. Instead, NCIC faced accusations of being one-sided in the enforcement of its mandate.

A significant setback for NCIC was it only had the power to summon individuals.[1323] Then, if appropriate, 'recommend' suspects to 'the AG, the Human Rights Commission or any other relevant authority'.[1324] In the words of a Chair of the Commission, 'We are not a prosecuting agency but only recommend prosecution on the basis of our own understanding'.[1325] Unfortunately for the Commission, the office of the AG was known for selectively exercising the prosecutorial power vested in it.[1326] That was partly because, before the 2010 Kenyan Constitution, the AG was a Presidential nominee. They could decide if and when individuals could be prosecuted under section 86 of the Independence Constitution of 1963. The AG also had the power to manage criminal proceedings undertaken by others and to terminate them. These powers were habitually abused, leading to charges being dropped after prosecutions had begun.

Take Amos Wako (AG from 1991 to 2011) as an example; he has been described as a 'handmaiden of the ruling party' by Yash Pal Ghai.[1327] During the KANU-era, Wako openly exhibited the fact that the ruling party had seized his office. When multiparty politics was reintroduced, Wako is said to have maintained an 'open companionship' with the ruling party,

---

[1319] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 173.*
[1320] Ibid, 174.
[1321] Peter Opiyo, 'Hate Speech: Cohesion Commission Frustrated by AG's Office' *The Standard* (https://www.standardmedia.co.ke/business/article/2000031828/n-a).
[1322] Ibid.
[1323] National Cohesion and Integration Act, section 25.
[1324] National Cohesion and Integration Act, section 25.
[1325] Obonyo, .
[1326] Migai Akech, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?' 18 Indiana Journal of Global Legal Studies 341, 362. Freedom House, 'Kenya: Freedom in the World 2008' (2008) accessed 28 March 2017.
[1327] Yash Pal Ghai, 'The Attorneys-General: Upholders or Destroyers of Constitutionalism?' in Yash Pal Ghai and Jill Cottrell (eds), *The Legal Profession and the New Constitutional Order in Kenya* (Strathmore University Press 2014), 154.

which explains his ability to remain in the position despite changing administrations. Thus, the NCIC was reliant on an unreliable criminal accountability mechanism. In the words of Commission-chair Kibunjia, 'unless we [NCIC] get help from other institutions [like the police and the AG's office,] it is impossible to say we are successful.'[1328] It was a sentiment shared by Commissioner Nderitu when she said successful prosecution depended on '…the Police, Director of Public Prosecutions and the Judiciary…[NCIC] can only be successful if the conveyor belt runs efficiently.'[1329] Consequently, the AG undermined NCICs credibility and its ability to carry out its statutory functions regarding hate speech. Even when the Commission had investigated complaints of incitement or ethnic discrimination and found credible evidence, naming and shaming were as far as the Commission could go.

In the words of Commissioner Nderitu, the Commission was 'unable to stem the messages against particular religions, races or ethnic groups or stop the spread of hate messages that promote violent extremism'.[1330] Once investigations were handed over to the police for prosecution, they would conduct another investigation. The Commission and the police would play 'duplicating and sometimes competing roles'.[1331] It meant that only the cases that the police wanted to prosecute were prosecuted. Commissioner Nderitu notes that the bureaucracy explains the reason that NCIC proved ineffective against hate speech. Paradoxically, the pursuit of criminal accountability for acts of hate speech (without the powers to prosecute) undermined the Commissions role in promoting national cohesion and healing. It was branded a 'hate Commission,' especially by ethnic communities of politicians who were charged with hate speech.[1332] The No campaign specifically accused the Commission of being exploited by President Kibaki and Prime Minister Raila as both of them were backing the Yes campaign.[1333]

The year after the aforementioned prosecutions, the Commission criticised the AG's office (with Wako at the helm) for failing to prosecute some hate speech cases.[1334] Commission chair Kibunjia referred explicitly to the case of Chirau Ali Mwakwere, the Trade Minister. The Commissioner cited a lack of rhyme or reason as to why some cases forwarded to the AG would result in action and others like Mwakwere did not. The Interim Independent Electoral Commission had complained about Mwakwere and other individuals for comments made during by-elections of the previous year. Mwakwere was accused of inciting ethnic hatred for

---

[1328] Opiyo, .
[1329] Nderitu, *On Hate Speech.*
[1330] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 485.*
[1331] Ibid, 485.
[1332] Ibid, 485. Nderitu, *On Hate Speech.*
[1333] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 172.*
[1334] Opiyo, .

saying the Arab community had taken land from the indigenous coastal population for generations.[1335] He said he could create chaos if he said the word, and the Arab community were forewarned.[1336] In the words of Commissioner Kibunjia, the Commission would ask the AG's office about the Mwakwere case and 'get nothing'.[1337] The prosecution of Mwakwere was eventually initiated only to be dropped after he apologised for his statements and the complainants (Muslims for Human Rights and NCIC) requested the charges be withdrawn.[1338]

Mwakwere's case set a precedent that was relied on by future politicians, such as Mutahi Ngunyi, who was charged with ethnic contempt contrary to section 62(1).[1339] Apollo Mboya raised a complaint with NCIC about Tweets that had targeted him and the Luo ethnic community from Ngunyi.[1340] Ngunyi's lawyers argued that he should be given a reprieve for charges of ethnic contempt and hate speech because he was seeking reconciliation with NCIC, like Mwakwere. They cited the dropping of charges after Mwakwere's public apology. Jennifer Shamalla, half Ngunyo's defence team, corrupted NCIC's function of promoting alternate dispute resolution mechanisms under section 25(2)(g) and section 61(1) of NCIA that says NCIC 'shall make all reasonable endeavours to conciliate the matter'. She asserted that the two sections gave Ngunyi a 'right' to reconciliation.[1341] Both the DPP and NCIC rejected the bid for reconciliation. Nonetheless, Ngunyi petitioned the High Court for interim orders that would stay the prosecution until the full determination of the High Court petition because he alleged the proceedings were an abuse of process. [1342] Judge Joseph Onguto declined to stay the proceeding and chose to favour the public interest in a speedy trial over Ngunyi's embarrassment in the public eye.[1343] Two years later, at the full hearing, the same learned judge found that the trial was 'an abuse of the justice system.[1344] Onguto J said that the finding was based on the fact that Ngunyi was not given 'room' to pursue the 'alternative window of conciliation'.[1345] The court agreed that the charge sheet was defective because the utterances,

---

[1335] IRIN.
[1336] *Chirau Alimwakwere v Robert M. Mabera & 4 others* (2012) eKLR High Court of Kenya at Nairobi [2].
[1337] Opiyo, .
[1338] Aluanga-Delvaux, .
[1339] Vincent Agoya, 'Mutahi Ngunyi Seeks to Reconcile With NCIC in Hate Speech Case' *The Nation* (https://nation.africa/kenya/news/politics/mutahi-ngunyi-seeks-to-reconcile-with-ncic-in-hate-speech-case-1160576). *Godfrey Mutahi Ngunyi v Director of Public Prosecutions & 4 others* eKLR High Court of Kenya Constitutional & Human Rights Division, [8].
[1340] Sambuli.
[1341] Agoya, 'Mutahi Ngunyi Seeks to Reconcile With NCIC in Hate Speech Case'.
[1342] *Godfrey Mutahi Ngunyi v Director of Public Prosecutions & 4 others , [13].*
[1343] Ibid, [65].
[1344] Star Reporter, 'High Court Stops 'Hurried' Mutahi Ngunyi Hate Speech Case' *The Star* (https://www.the-star.co.ke/news/2017-02-28-high-court-stops-hurried-mutahi-ngunyi-hate-speech-case/).
[1345] Ibid. Leah Mutimba, 'Mutahi Ngunyi's Hate Speech Case Stopped!' *Classic 105* (https://classic105.com/ngunyi-hate-speech-case-stopped/).

which read in part 'Luo Nation MUST liberate itself from the BONDAGE and poverty-producing SPELL of Odingaism (emphasis in original),' should have been put into the correct context before the case started.[1346]

Ngunyi's decision was, in turn, relied on by Senator Johnstone Muthama in a petition asking the High Court of Kenya to find that section 96 was unconstitutional. Muthama argued that the offence violated the right to a fair trial (guaranteed under Article 50(1) of the Constitution) and the right to be presumed innocent (guaranteed under Article 50(2)(a) of the Constitution).[1347] Section 96 says that 'the burden of proof … shall lie upon [the accused]'. The High Court agreed with both submissions. It found that the provision shifted the 'the legal and evidential burden of proof to the accused person, thereby infringing the presumption of innocence'.[1348] It also found that the right to a fair trial, specifically the right not to be a compellable witness against oneself, was unlawful.[1349] The court pointed out that the accused would be compelled to give 'evidence of reasonable cause to avoid conviction even if the prosecution leads (sic) no evidence to establish a prima facie case'.[1350] The court barred the case against Muthama.[1351] It further ordered the AG to amend section 96 to comply with the Constitution by 29 January 2021.[1352] The court declined to weigh in on whether the section violated the right to free speech (guaranteed under Article 33 of the Constitution) by finding that Muthama was trying to argue his defence to the criminal trial in the Constitutional Petition.

Dropping the charges based on an apology calls into question the efficacy of NCIA and the Penal Code. That is because if incitement to hatred and incitement to violence are serious enough to warrant a three to five-year prison sentence, how can an accused be excused from punishment simply because of an apology. The offences cease to have a deterrent effect because no politician has successfully been convicted, and only the opposition is targeted.[1353]

[1346] Evelyn Kwamboka, 'Judges Hands Tied as Hate Speech Cases Flop in Court' *The Standard* (https://www.standardmedia.co.ke/nairobi/article/2001343639/judges-hands-tied-as-hate-speech-cases-flop-in-court). Ndesanjo Macha, 'Kenyan Public Intellectual Accused of Using Hate Speech on Twitter' *Global Voices* (https://advox.globalvoices.org/2015/09/09/kenyan-public-intellectual-accused-of-using-hate-speech-on-twitter/). There were other cases that failed as a result of a defect in the charge sheet, such prosecutions against Florence Mutua (Busia Woman Representative), Aisha Jumwa (Kilifi Woman Representative), Timothy Bosire (MP for Kitutu Masaba), and Junet Mohamed (MP for Suna East). Kwamboka, 'Judges Hands Tied as Hate Speech Cases Flop in Court'. The defect was related to an inaccurate English and Kiswahili translations of their utterances.

[1347] *Senator Johnstone Muthama v Director of Public Prosecutions & 2 others; Japhet Muriira Muroko (Interested Party)* eKLR High Court of Kenya at Nairobi, [20].

[1348] Ibid, [168d].

[1349] Ibid, [168f].

[1350] Ibid, [168f].

[1351] Ibid, [169b].

[1352] Ibid, [169c].

[1353] IRIN.

When they are prosecuted, they apologise and get away. Atsango Chesoni, Executive Director of KNCHR, noted that the failure to convict perpetuates the culture of impunity and the behaviour of politicians.[1354] Many say if politician-(x) evaded conviction, I can too.[1355] In defence of the policy of dropping charges in exchange for an apology, Milly Lwanga, Vice-Chairperson of NCIC, said the Commission's mandate was not just to condemn but also to promote cohesion.[1356] According to Lwanga, there was no value in a hefty jail sentence if the statements are left to fester among followers.

Even six years after PEV, there had been minute attempts to prosecute those who were identified as having the most responsibility for not just hate speech but other election-related crimes.[1357] In 2012, the DPP, Keriako Tobiko, said that 5,000 PEV-related cases would be fast-tracked before the 2013 elections.[1358] A multi-sectoral task force with officers from different parts of the government (Ministry of Internal Security, Provincial Administration, DPP, and so on) were supposed to review all the cases.[1359] However, by August of the same year, those appointed said that the cases had not proceeded as they were finding it difficult to get evidence. There has not been any high-level prosecution of hate speech charges for acts of hate speech that occurred during PEV or the referendum.[1360] There have been no subsequent successful prosecutions of politicians who made utterances that NCIC flagged as hate speech. That does not ring true for average citizens who do not wield political power. The failed prosecutions of Machage, Chesebe, Miller, and Ruto are emblematic of a fundamental problem with hate speech regulations in Kenya. That is the speech that is the most effectual at violence, which often contains direct propaganda communicated at public rallies in which attendees can capitalise on the transmission of affects, such as anger and aggression, does not lead to either criminal or political accountability. Instead, most of the politicians, who were linked to speech acts that could be causally connected to deaths, escape culpability and the state invests even

---

[1354] Ibid.
[1355] Ibid.
[1356] Wesangula,
[1357] Abdullahi Boru Halakhe, *"R2P in Practice": Ethnic Violence, Elections and Atrocity Prevention in Kenya* (2013), 14. Aluanga-Delvaux, .
[1358] Halakhe, 14. Human Rights Watch, 'Kenya: Human Rights Priorities for the New Administration' (*https://www.hrw.org/news/2013/04/23/kenya-human-rights-priorities-new-administration*, 23 April 2013) accessed 12 September 2020. Nation News, 'Over 5,000 poll chaos cases have stalled, says DPP' (*https://nation.africa/kenya/news/politics/over-5-000-poll-chaos-cases-have-stalled-says-dpp--797408*, 23 January 2012) accessed 12 September 2020.
[1359] Watch, 'Kenya: Human Rights Priorities for the New Administration'. News.
[1360] Peter Onyango Onyoyo, 'Criminality in "Hate Speech" Provision in the Laws of Kenya- Jurisprudential Challenges' (*http://erepository.uonbi.ac.ke/bitstream/handle/11295/74354/Onyoyo_Hate%20speech.pdf?sequence=2*, 2014) accessed accessed 21 February 2017. Sambuli.

more capital on those with less political power, especially those that post on new media platforms.

2.3.2 New Media

Katiambo highlights how social media (and the internet generally) became a site of dislocation facilitated by the accessibility of mobile phones and affordable internet, like in the case of Alan Wadi (discussed further below).[1361] Social media is filled with unlimited content creation, thereby creating an abundance of similar utterances. The resultant excess of meanings disrupts the hegemonic structure. It is a site of dislocation because utterances that are critical of the government disturb the existing hegemony by preventing it from functioning normally.[1362] Individuals previously excluded from the dominant social order were given the ability to air their dismay about the functioning of the government and afforded new possibilities of decision-making.[1363] Conversely, mainstream media had deep-rooted systems of 'editing'.[1364] The unlimited freedom to create content on online platforms dislocated the 'myth of a stable society,' which had previously been inconspicuously supported and perpetuated by mainstream media. Consequently, online utterances are sites of dislocation, which are impossible to integrate into the existing consensual liberal democracy and are, therefore, resisted by hegemonic forces. Their resistance was aided by the ambiguity inherent in speech offences, which are the government's primary means of cracking down on online detractors. Utterances that criticised the administration disrupted the usual way that politics were represented.[1365] That is because the utterances enabled the widespread articulation of previously suppressed alternative discourses, and in a way that the State could not domesticate as it had grown accustomed with mainstream media.[1366] So, in keeping with most dominant social orders, the government responded by trying to either create consensus or absorb the dislocation into the already present social practices.[1367] Though dislocation is threatening to the dominant

[1361] Larry Madowo, 'It Is Unfair to Jail Small Fry for Hate Speech While Big Fish Go Scot-free' *The Nation* (https://nation.africa/kenya/life-and-style/dn2/it-is-unfair-to-jail-small-fry-for-hate-speech-while-big-fish-go-scot-free--1057312). David Katiambo, 'Incivility in Social Media as Agonistic Democracy? A Discourse Theory Analysis of Dislocation and Repair in Select Government Texts in Kenya.' (University of South Africa 2019), 139.
[1362] Katiambo, 138.
[1363] Ibid, 139.
[1364] Ibid, 139.
[1365] Ibid, 139.
[1366] Ibid, 140 - 141.
[1367] Ibid, 140.

identities, it also made new ones. It created a new way to 'do' politics, and in so doing, denaturalised political practices.

The State sought to repair the dislocation by defending itself from the citizen's counter-hegemonic speech acts by reconstructing the utterances as a threat to national security. Hate speech was located in the framework of national security and hate speech itself became what Butler terms 'the convergence of differing schemes of moral evaluation' since to be able to judge phenomenon, one has to locate the phenomenon in a specific framework.[1368] The adoption of a national security framework lasted long past the context of EV. When it came to dissent online, the national security framework became a tool for the executive to repair the sites of dislocation and control the alternative discourses it used to be able to suppress. It sought to take the national security framework introduced in the particular PEV context to send the message that disharmony online would not be tolerated. Generally, speech offences are used to scare people while the State simultaneously benefits from being symbolically authoritarian and, at the same time, democratic enough not to convict or by reversing convictions.[1369] This framing was bolstered by the fact that the 'threat' to the nation has historically been from internal armed conflicts around elections.[1370] Reconstructing speech from counter-hegemonic voices as a national security threat contradicted reports from numerous human rights organisations, like the Kenya National Commission on Human Rights (KNHCR). The reports in question illustrated that where outbreaks of violence could be traced to an individual, the individual was a politician speaking face-to-face with the audience.[1371]

Utterances were conceived of as a national security threat by the police, DPP, AG, NCIC and to a much lesser degree, the courts. All four constitutional bodies can be said to have reinforced the executive's 'hate speech master narrative' through which social media was framed as a 'channel for hate speech'.[1372] Those claims relied on the blame that was directed at news media following PEV. The master narrative has created dichotomies with speech falling into either inflammatory and offensive or acceptable.[1373] However, there is institutional ambiguity pitting the executive and Parliament (that seek to securitise social media by making it appear to be a threat to national security) against the frequent acquittals of social media

[1368] Asad and others, 104.
[1369] Katiambo, 209.
[1370] Ibid, 143.
[1371] Kenya National Human Rights Commission, "Annex One: Schedule of Alleged Perpetrators" in *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence* (KNCHR, 2008).
[1372] Katiambo, 2.
[1373] Ibid, 3-4.

users.[1374] The side that supports the maintenance of dominant groups is considered acceptable. Anything outside that boundary is at risk of being criminalised through speech offences and displaced from politics altogether.[1375]

The dominant securitising actors (the police, AG, and DPP) prosecute people accused. To that end, there is a certain office in the Criminal Investigation Department that is specifically tasked with tackling hate speech.[1376] The dominant securitising actors use the discourse of national security to 'skew… tensions in favour of the Executive'.[1377] Kyalo Mwendi, NCIC's assistant director for legal matters and complaints, went as far as to claim that the Interior Ministry's denial of permission to prosecute people who post on social media prevented the Commission from launching investigations.[1378] However, section 25 of the NCIA empowers the Commission to investigate complaints on its own accord, which is an ostensibly fundamental misunderstanding for someone in charge of legal matters. Conversely, the courts have prevented the executive from using restrictive measures to control critical online speech.[1379] Judicial independence fostered by the 2010 Constitution created an institutional void between the Judiciary and the executive over the securitisation of utterances. Thus, the nature and limits of democracy are said to be tested without actually turning the country from a democracy into a dictatorship.[1380] The institutional void created a somewhat antagonistic relationship between securitising actors and the court, particularly when it comes to hate speakers who are politicians. The void can be evidenced by a spokesperson for the police blaming the judiciary for an increase in hate speech.[1381] The officer said that the courts had failed to convict politicians, thereby invalidating cautions and warnings by not making them a 'practical' and 'relevant' reality. Additionally, Commission-chair Francis ole Kaparo cited slow court proceedings as an upset to NCIC's work. Nonetheless, the court process, though it may not result in a conviction, can be viewed as a way for the executive to repair dislocation caused by utterances on social media platforms.[1382] Investigation, arrest, and detention (sometimes even during the investigation phase before charges are filed) can be traumatising

---

[1374] Ibid, 208-209.
[1375] Ibid, 4.
[1376] Judie Kaberia, 'Kenya: Too Little Action on Hate Speech?' (*Global Voices Africa*, 11 July 2013) accessed 27 September 2020.
[1377] Katiambo, 208.
[1378] Kaberia.
[1379] Katiambo, 208.
[1380] Ibid, 208 - 209.
[1381] Graham Kajilwa, Faith Karanja and Daniel Nzia, 'Kenya's Judiciary Blamed for Increased Hate Speech Cases' *The Standard* (https://www.standardmedia.co.ke/kenya/article/2000181442/judiciary-blamed-for-increased-hate-speech-cases).
[1382] Katiambo, 209.

and result in sizable legal costs that are not recoverable. Besides, hegemony is not merely dominance but also negotiation strategies that generate acceptance without looking domineering.

2.3.3 Case study: Alan Wadi

The unreported case of *Republic v Alan Wadi* is a useful illustration of the way detractors on social media were constructed as a threat to national security. The case further illustrates the difference in treatment of politicians and regular citizens. Wadi was the first person to be convicted of hate speech under section 13 of NCIA. He pled to the charges without the benefit of representation (a right guaranteed under Article 49 of the Constitution) and arguably *because* he did not have any.[1383] He was further charged with the mind-bogglingly unconstitutional section 132 of the Penal Code. The section is titled 'Undermining authority of public officer'. The offence carries an imprisonment term of three years. The latter is an offence that violates the right to free speech to the degree that it is hard to imagine could exist in a country that supposedly protects the right to free speech. In *Lingens v. Austria*[1384], the European Court of Human Rights looked at freedom of expression and how it relates to people in positions of authority. The Court held that the 'limits of acceptable criticism' are wider for politicians than they are for private individuals.[1385] Further, they noted that because politicians knowingly and inevitably 'open [themselves up] to close scrutiny of every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance'.[1386] If an antithesis of that statement could be found, it would be section 132 of the Penal Code. It was not just any authority that Wadi undermined, but the authority of the President of Kenya, the person who, by analogy, should have the greatest level of tolerance. Section 132 was one of the gifts the country inherited from the outgoing colonialists in 1958. In 1958, the colonial administration had used the section to suppress dissent, and in 2014, it was shockingly levied against Wadi, a Moi University Political Science student at the time.[1387] Eventually, Wadi's conviction was quashed by the High Court.[1388]

[1383] *Alan Wadi Okengo v Republic* eKLR High Court of Kenya at Nairobi (Criminal Division) [the judgment does not contain paragraphs]. Madowo, .
[1384] *Lingens v. Austria* Application no 9815/82 European Court of Human Rights.
[1385] Ibid, 42.
[1386] Ibid, 42.
[1387] *Robert Alai v The Hon Attorney General & another* [2017] eKLR High Court of Nairobi (Constitutional and Human Rights Division), [34].
[1388] *Alan Wadi Okengo v Republic.*

The charges relate to Facebook posts that were said to constitute incitement to hatred and denigration of the President.[1389] The first charge (hate speech contrary to section 13) was levied against a post calling for the expulsion of Kikuyus to central Kenya for the 'security' and 'freedom' of other ethnic communities.[1390] The second charge (undermining the authority of a public authority contrary to section 132) cited a Facebook post in which Wadi said: '…that silly Bill proposed by silly President was passed [into the Security Laws (Amendment) Act No 19 of 2014 (SLAA)] by silly Jubilee skunks and assented by the same silly President was wanting'. Wadi went on to say that the President was desperate to dictate and 'throw away our democratic space' and called for the 'streets [to]… salvage Kenya' from the 2014 Act because the judiciary would not.[1391] By any non-Kenyan executive measure, the statements that relate to the second charge are political commentary. Indeed, Wadi noted that his ideology was to 'fight… for the oppressed'.[1392] SLAA is discussed further below.

The 'right' to conciliation relied on by Ngunyi was seemingly withheld from Wadi, at least for the hate speech charge. Wadi pled guilty and told Ann Kaguru, the presiding magistrate, that he would personally apologise to Uhuru, like the many politicians before him.[1393] Rather than afford him a lenient sentence or no sentence at all (in light of the mental health issues that Wadi highlighted[1394]), Kaguru decided to make an example out of Wadi. Kaguru said: 'the offence is serious and a deterrent penalty is called for to serve as a warning to others abusing the social media forums'.[1395] He was sentenced to one year imprisonment for hate speech and another for undermining the authority of the President to run concurrently.[1396] He also received a fine of 200,000/= Kenyan shillings (£1,400). In the end, he was released after six months. The trial court did not investigate Wadi's mental health claims or whether his mental health affected his capacity to plead to the charge. Therefore, Judge Kimaru sitting in the High Court, held that Kaguru 'erred when [she]… failed to make necessary the inquiry as to whether the Appellant had the requisite mental capacity to plead to the charge' and vacated

[1389] Ibid [the judgment does not contain paragraphs].
[1390] Faith Karanja, 'Hate Messages on President Uhuru Kenyatta Lands Student In Jail' *The Standard* (https://www.standardmedia.co.ke/kenya/article/2000146557/hate-messages-on-president-uhuru).
[1391] The full quotation can be found at: ibid.
[1392] Elvis Ondieki, 'Jailed Blogger Usually Blunt: Peers' *The Nation* (https://nation.africa/kenya/news/jailed-blogger-usually-blunt-peers-1056982).
[1393] Richard Munguti, 'University Student Jailed for Insulting President Uhuru Kenyatta' *The Nation* (https://nation.africa/kenya/news/university-student-jailed-for-insulting-president-uhuru-kenyatta-1056582).
[1394] *Alan Wadi Okengo v Republic [the judgment does not contain paragraphs].*
[1395] Munguti, .
[1396] *Alan Wadi Okengo v Republic [the judgment does not contain paragraphs].*

the conviction.[1397] Wadi's appeal team further submitted that the particulars in the charge sheet did not actually support the charge.

Wadi's case was treated as special by the executive. Gaitho notes that Kenyan Police Service, the DPP, and the Judiciary, are well-known for being slow to act on anything.[1398] Yet, in the case of Wadi, he was arrested then jailed at an uncharacteristically high speed while he was attempting to cross the Ugandan border.[1399] A journey that is often travelled by Kenyans without interference from border officials. The arrest, prosecution, and jailing of Wadi were signs of the intolerance and authoritarian tendencies of the Uhuru administration.[1400] Through the case, the administration sent a signal to would-be detractors. The message was that criticisms, whether or not justified, could lead to prosecution.[1401]

2.3.4 Case Study: Robert Alai

Robert Alai is another government detractor who faced legal action under section 132 for using social media as a platform to criticise the government. Alai, however, did not plead guilty. He chose to contest the constitutionality of section 132 through a Petition to the High Court.[1402] The utterances in question were disseminated through a tweet that said: 'Insulting Raila is what Uhuru can do. He hasn't realised the value of the Presidency. Adolescent President. This seat needs maturity'.[1403] Judge Mwita declared that section 132 was unconstitutional and therefore invalid under Article 2(4) of the Constitution and stated that 'criminalizing criticism is not in accord with… [the] constitution'.[1404] The judge focused on the broader tolerance that should be expected from officials in the government.[1405] Mwita sitting in the High Court, said, 'Dissent in opinion should not amount to a crime otherwise this is in effect, suppressing the right to hold different opinion from those in public office'. The judge further highlighted that section 132 violated the right to a fair trial (much like section 96) because it shifted the burden of proof and denied the accused the right to remain silent.[1406] The State was also said to have not 'even in

[1397] Ibid [the judgment does not contain paragraphs].
[1398] Macharia Gaitho, 'There Should Be No Discrimination In Dealing with Social Media Terrorists' *The Nation* (https://nation.africa/kenya/blogs-opinion/opinion/there-should-be-no-discrimination-in-dealing-with-social-media-terrorists-1057362).
[1399] Ibid. Madowo, .
[1400] Gaitho, .
[1401] Sambuli.
[1402] *Robert Alai v The Hon Attorney General & another.*
[1403] Ibid, [1] and [19].
[1404] Ibid, [1] and [35].
[1405] Ibid, [33], [38], and [60].
[1406] Ibid, [42] and [61].

the remotest sense, attempted to show that the limitation was reasonable and justifiable'.[1407] The judge highlighted that the Penal Code did not even define 'undermining the authority of a public officer'.[1408] Thus, it was subjectively interpreted, vague, and unclear to guide the conduct of the individual. That was compounded by the fact that it was a colonial-era law (noted above) to suppress dissent in order to protect and sustain the colonial government.[1409] The judge pointed out that the product of the law during colonialism was 'fear' and 'submission' among the natives.[1410]

Seemingly discontent with the decision, documents released by WikiLeaks indicate that the government tried to 'tear down' *Kahawa Tungu*, a website associated with Alai.[1411] The leaked emails add credence to widespread suspicions that the Kenyan government spies on individuals without a warrant. The government has been observed using the internet as surveillance to monitor people. Even though section 2012 of the National Intelligence Service Act 2012 necessitates a warrant to monitor and intercept communications. Furthermore, in 2012, the Communication Commission of Kenya installed Network Monitoring Software for Internet traffic.[1412] In 2013, the government started an observation regime with around 100 monitors hired to watch social media content.[1413] It further highlights how speech offences are operationalised at the expense of other human rights, especially the right to privacy (guaranteed in Article 31 of the Kenyan Constitution).

2.3.5 Further Prosecutions of Publications on New Media

Alai's successful petition did not stop the government from using other draconian laws; each new attempt to undermine dislocations of the existing hegemony was an iteration of the last. Abraham Mutai, Nancy Mbidala, and Geoffrey Andare are just a few others who were criminalised by vague and obscure laws aimed at stemming criticisms of the government. Due to the overall word limit, the chapter will not go into too much detail on these cases. Mutai (a blogger well-known for exposing corruption[1414]) posted about rampant corruption in Isiolo,

---

[1407] Ibid, [56].
[1408] Ibid, [56].
[1409] Ibid, [34].
[1410] Ibid, [34].
[1411] WikiLeaks, 'Hacking Team' (*WikiLeaks*, 2015) accessed 22 September 2020.
[1412] Grace Mutung'u, 'New media in Kenya: Time for regulation?' (*https://www.article19.org/join-the-debate.php/72/view/*, 2012) accessed 3 March 2017
[1413]Curt Hopkins, 'How Technology Is Shaping the Decisive Kenyan Elections' *Daily Dot* (https://www.dailydot.com/debug/kenyan-election-2013-technology-umati/).
[1414] Freedom House, 'Freedom on the Net 2015 - Kenya' (*Freedom House*, 2015) accessed 27 September 2020.

Wajir, and Mombasa counties.[1415] He was charged under Section 29 of the Kenya Information, and Communication Act 1998 and his media platforms were blocked. The prosecutor claimed that Mutai's tweets constituted a 'misuse of a licensed communication platform to cause anxiety'.[1416] Public outrage, especially over social media, resulted in Mutai being released and his media platforms being reinstated.[1417] The event had a chilling effect on Mutai, who said he scaled back his tweets and would reconsider publishing what he uncovers about corruption. Indeed, other journalists have noted that they are never sure if a story will be classed as offensive. If it is, journalists report that they are put on the target list as one of the people who need to be 'toned down' or 'silenced'.[1418]

Mbidala, a University student and intern at the Department of Finance at the County Government at the time, posted a series of Facebook posts highlighting the mismanagement of funds and corrupt tendering processes of Martin Wambora, the Embu County governor.[1419] Mbidala's posts questioned why: all the county's tenders were allegedly assigned to one woman, and a Hospital was closed due to lack of water, thereby signing the 'death certificates for…patients'.[1420] She highlighted that another hospital would also be closed shortly. The investigating officer said that the utterances were 'demeaning and… insulting' but failed to elaborate on the actual charge.[1421] She was released and pardoned of the four charges that were brought against her after she apologised to the governor.[1422]

Andare was charged under section 29 of KCIA. Like Alai, Andare challenged the constitutionality of the section in the High Court.[1423] Andare had directed a critical post against Titus Kuria, an employee of a non-profit educational organization.[1424] Kuria brought the complaint against Andare. The AG, in turn, charged Andare for 'grossly offensive' utterances. Andare's post read: 'you don't have to sleep with the young vulnerable girls to award them opportunities to go to school, that is so wrong! Shame on you'.[1425] Justice Mumbi Ngugi

---

[1415] Article 19, *Silenced and Intimidated: Attacks on Freedom of Expression in Kenya* (2015), 9.
[1416] Marilyn Vernon, 'Dialogue on Internet Rights and Freedom in Kenya' (*Open Net Africa*) accessed 27 September 2020.
[1417] Anne-Mari Tomchak, '#FreeSpeechStories: Arrested for a Tweet' *BBC News* (https://www.bbc.co.uk/news/blogs-trending-30922600).
[1418] 19, 6.
[1419] Ibid, 9.
[1420] Njeri Wangari, '24-Year-Old Nancy Mbindalah Held in Custody then Pardoned for Undermining the Embu Governor' *Kenya Monitor* (https://www.monitor.co.ke/2015/01/22/24-year-old-nancy-mbindalah-held-in-custody-then-pardoned-for-undermining-the-embu-governor/).
[1421] Ibid.
[1422] House, 'Freedom on the Net 2015 - Kenya'.
[1423] *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR High Court of Nairobi (Constitutional and Human Rights Division).
[1424] House, 'Freedom on the Net 2015 - Kenya'.
[1425] *Geoffrey Andare v Attorney General & 2 others, [7].*

declared that the section was overly wide and vague because numerous operative words were not defined, like 'grossly offensive', 'indecent', 'obscene', and so on.[1426] Judge Ngugi went further, saying the Act did not provide certainty on the utterances it sought to outlaw instead depending on subjective interpretations.[1427] Ngugi J relied on *Sunday Times vs United Kingdom*[1428] to point out that laws should be crafted with sufficient precision to allow the citizen to regulate his conduct. The judge said that the law was too vague, imprecise, and undefined to fall into the prescribed limitations of Article 33(2).[1429] What is more, the court found that there were less restrictive ways to meet the stated purposes of the AG and DPP to protect the reputation of others, such as libel laws.[1430] Thus, the section was also found to have unjustifiably curtailed the right to free speech due to the unconstitutionally wide margin of interpretation.

The next attempt to repair the dislocation was hampered not by an individual but an oppositional political party - the Coalition for Reform and Democracy.[1431] The executive had exerted pressure on the legislature to enact SLAA, to which Wadi had directed his attention and called on citizens of the Republic to unite against when he was charged with undermining the authority of the President. The Act aimed to strengthen national security in the face of a rise of terrorist attacks in the country by adding new sections to various Acts.[1432] The AG said that Kenya was in an unofficial war, and the court agreed that terrorism is a serious threat.[1433] Nevertheless, the Human Rights and Constitutional Division of the High Court did not think that infringement of freedoms was the way to go about confronting terrorism. The government had tried to create two new speech offences, citing national security aims, especially with sections 12 and 64 of SLAA, which were flagged by Article 19 during the proceedings.[1434]

Section 12 introduced an offence of 'insulting, threatening, or inciting' publications of 'dead or injured persons' that are likely to cause 'fear' and 'alarm' with a term of imprisonment of up to five years and a fine of one million shillings (£36,070). It was intended to curb media freedom, which the AG alleged had resulted in the media 'abusing' their free speech rights by

[1426] Ibid, [77].
[1427] Ibid, [77] - [78].
[1428]Ibid, [49].
[1429] Ibid, [98].
[1430] Ibid, [98].
[1431] *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10* [2015] eKLR High Court of Nairobi (Constitutional and Human Rights Division), [] and [252].
[1432] Katiambo, 207. Article 19 was an interested party during the proceedings.
[1433] *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10, [226].*
[1434] Ibid, [63] - [65].

publishing images of security operations and fatally wounded people.[1435] The AG said that the publications were precisely what terrorists wanted.[1436] Like sections 96 and 132 of the Penal Code, the court held the language of the Act was too broad and imprecise and encouraged the government to work with the media to find a consensus on how to effectively report on terrorism without compromising terrorism operations or national security.[1437] Besides, the court found that the 2010 Kenyan constitution, specifically Article 33(3), says regard should be had to the reputation of others, which could be used to bring actions against the media. So, the AG and DPP did not need additional laws, particularly not ones that were as vague and imprecise as section 12.[1438]

Meanwhile, section 64 sought to introduce a new offence of broadcasting information that undermines investigations or security information concerning terrorism without the consent of the National Police Service. Any contravention of the section would result in three years in prison and a fine of five million. The court agreed with Article 19's argument that the offence of broadcasting information without consent was tantamount to a 'blanket ban on publication of any security-related information without consulting the National Police Service [because there was]… doubt as to what is intended to be prohibited'.[1439] The section was deliberately unclear about how information could be construed as undermining an investigation or security operation or who made that determination.

It is worth noting that there are numerous bloggers, some allegedly on the State's payroll, who spend a significant proportion of their time spreading inflammatory speech (comparable to that mentioned above) directed at opposition leaders, such as Raila.[1440] Some even go as far as to suggest that the whole Luo community should be exterminated. Still, the side of the blogosphere that is in harmony with the President's agenda appears to have immunity from utterances that rise to the level of hate speech. Whereas those on the opposition side are made to feel the full weight of the executive at speeds not felt by other suspects, even suspected murderers. For every Alai and Wadi, who were critical of the government, there was a Kuria, Waititu, Mwakwere, and so on, who were critical but eventually escaped charges. Politicians should bear more responsibility, not least because their utterances are sometimes linked to the killing of individuals who cannot be brought back from the dead by an apology.

[1435] Ibid, [227].
[1436] Ibid, [227].
[1437] Ibid, [277] and [280]
[1438] Ibid, [259] and [277].
[1439] Ibid, [275].
[1440] Gaitho, .

By definition, hate speech is targeted at a group.[1441] Yet, the ethnic community targeted by the hateful utterances is not consulted when complainants (such as Muslims for Human Rights or NCIC) unilaterally decide to request the withdrawal of charges.[1442] The group does not get a say, even though the Office of Prosecutor (that has the final say on whether charges are dropped) is entrusted with the dispensation of justice on behalf of those same aggrieved communities.

The regulations are also not applied equally, and punishment is not meted out in a balanced manner. The inequity of speech offences has to be situated in the greater context of ethnic tension and frustration that once led the country to an election that resulted in the death of over one thousand and displacement of seven-hundred thousand people.[1443] Those tensions and frustrations are only exacerbated when ethnic consciousness and political power pervade the choice of who is and is not punished for similar acts. If the executive is afforded continuous attempts to criminalise those who criticise it, eventually, a law will be crafted that is vague but also specific enough to pass into law and resist any constitutional challenges. Then, it will be enforced in the lower courts (like in *Republic v Wadi*), but there may not be a Judge Kimaru or a Judge Ngugi in the appellate court to overturn it. So long as the executive keeps trying, there is a chance they will succeed.

If the metric for success is the acquisition of a high-profile conviction for hate speech in a bid to end impunity and communicate the impermissibility of hateful language, then the AG, DPP, and NCIC failed. Nevertheless, Commissioner Nderitu maintains that the actions to address hate speech during the 2010 referendum did have results. That is, there was widespread consciousness that it was illegal to send hate messages. [1444] As the country faced the next polarising event, the 2013 General Election, the NCIC served cessation notices on 48 politicians, including several cabinet ministers.[1445] That, in combination with the previous politicians being charged with hate speech and appearing in court to respond to those charges, is said to have significantly reduced hate speech during the 2013 general election. Commissioner Nderitu said that Kenyan politicians had 'proved to have few ideas on campaigning on platforms other than the usual ethnic ideology of the 'we' versus 'them'

[1441] Charles Lwanga Opiyo, 'An Analysis of the Prosecution of Hate Speech in Kenya: The Common Good Perspective' (Strathmore University 2018), 39 - 40.
[1442] Ibid, 39 - 40.
[1443] Maina Kiai, 'To Safeguard His Legacy, Uhuru Must Write a Different Script on Tribalism' *The Nation* (https://nation.africa/kenya/blogs-opinion/opinion/to-safeguard-his-legacy-uhuru-must-write-a-different-script-on-tribalism-1060518).
[1444] Nderitu, *On Hate Speech.*
[1445] Halakhe, 10.

campaign method'.[1446] Following the termination of the ICCs cases against Uhuru, Ruto and Sang, it is ever more unlikely that there will be any prosecutions against those that there is evidence incited the population to ethnic hatred and violence.[1447]

The ICC prosecution, in particular, was cleverly stage-managed to reposition Uhuru and Ruto not as criminals but as people chased by a 'hostile' international body.[1448] Pursued not for acts that contributed to the death of over one thousand and displacement of hundreds of thousands, but for 'merely' protecting their communities' interests when their communities were threatened during PEV. [1449] Ruto and Uhuru joined forces ahead of the 2013 General Election under the Jubilee Alliance. There's was aptly coined 'the alliance of the accused'.[1450] Jubilee reframed the prosecution of both men as a performance of 'injustice, neo-colonialism, and threat to the country's sovereignty, peace, and stability'.[1451] The focus became the limited investigations of the ICC as it had relied on the investigations of KNCHR and CIPEV at least at the beginning of its investigations.

Questions were raised about why Raila and Kibaki were not called to account for the violence, especially when revenge attacks during PEV were planned inside the White House (while Kibaki was the President). The undeniable fact that all of the ICC's prosecutions had at that point been in Africa was seen as evidence that the ICC was a ''neo-imperial body' that sought to 'prosecute Africans but not Whites'.[1452] Accordingly, the ICC was cast as a weapon used by the West not just to punish Kenya but also the entire African continent. Ruto and Uhuru were thus cast as the shield defending State sovereignty and independence against foreign interference. Western actors had long been considered patronising, hypocritical, and entirely unhelpful by the populous. Raila, who had called for a Special Tribunal (discussed in the previous chapter) and publicly supported the ICC process, became the villain along with the whole Luo ethnic community.[1453] Rather than marking a turning point for the nation, PEV and the ICC trials had entrenched 'ethnic politics in a way that was unprecedented in the history of the Kenyan state'.[1454]

[1446] Nderitu, *On Hate Speech.*
[1447] Scheffler, 74.
[1448] Moore, 59.
[1449] Mueller
[1450] Gabrielle Lynch, 'Electing the 'alliance of the accused': the success of the Jubilee Alliance in Kenya's Rift Valley' 8 Journal of Eastern African Studies 93.
[1451] Ibid, 105.
[1452] Ibid, 105.
[1453] Ibid, 105 - 107.
[1454] Nderitu, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration, 419 - 420.*

3. Conclusion

In this chapter, the Rwandan genocide was analysed to consider how it influenced discourses on ethnic conflict, especially the connection between the media and mass violence that was highlighted in the *Hate Media Trial*[1455]. It makes sense that the international community sought to outlaw incitement to ethnic hatred and incitement to violence. However, the post-post-conflict use of speech regulation did not garner as much attention. A fuller understanding of the way the post-genocide government deployed the laws would have enabled an awareness of the secondary effects of speech regulations. In Rwanda, the government criminalised children, imposed over twenty-five-year sentences, sent people to 'solidarity camps', and created a hostile environment for those who, *inter alia* oppose the government, identify themselves as either Tutsi, Hutu, or Twa, or pointed out documented systematic attacks on Hutus. The Rwandan State has undoubtedly restrained, hurt, and rendered those who oppose its hegemony helpless, which does not touch the material and symbolic forms of injustice or inequality, thereby setting up the country for a resurgence of violence.

Speech regulation was recommended by the OHCHR and included in the Peace Agreement 14 years later. Knowledge of Kenya's history of the State oppression of dissenting voices enabled CIPEV to sense the danger of speech regulations and advise against media monitoring to facilitate their implementation of speech laws. As a result of them coming into force, the government has had an internationally and transnationally sanctioned way to target dissenters. The chapter illustrated that there are two tiers of justice. One for politicians who are given the option to apologise and escape imprisonment. The other is for people without political power who are sent to prison (even when they offer to make an apology) or forced to challenge the constitutionality of the laws in higher courts. To showcase the difference in treatment, the chapter considered the prosecution of prominent figures who opposed the government on issues (like Machage) and citizens who used new forms of media to criticise the government and the President (like Wadi). What is clear is the techniques used to criminalise dissenting opinions in Rwanda and Kenya mirror each other. Both governments used national security and undermining the authority of a public officer as a pretext to outlaw legitimate criticisms. Since freedom of speech is legitimised by those endowed with State power, free speech belongs to the governments of Rwanda and Kenya rather than their citizens. It has the chilling effect of shrinking the political space. However, as we have seen, government

[1455] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze.*

critics never truly disappear, and their criticisms are not eliminated. They are just driven underground until the myth-symbol complexes are rearticulated in a way that guarantees a return of violence.

Conclusion

This thesis focuses on speech-regulation precisely because of the inherent dangers in the exercise. Humans are created through language. Speech creates the subject and community and how members of the community relate to one another. It is how they become gendered, for example. It is how members of the community learn what society deems acceptable for them. As we saw from Butler in chapter 1, there are often surprising and dangerous consequences when the State gets involved in determining legitimate speech. Kenya's problems with ethnic violence did not begin during the election. Indeed, it did not even begin in the immediate run-up to the election. This thesis has shown the slow emergence of these forms of violence. We have seen that modes of social ordering developed in colonialism have been rearticulated and reconfigured over and again since independence. In these re-articulations, we find myths, symbols, ideas and images that return over and again, but with each retelling, they subtly shift. They are deployed in different ways and to different ends. They reach different people as their social, political and economic interests, hopes and desires are woven into the symbols.

On their own, words like '*madoadoa*' and '*kihii*' are nothing. But in their context, they bear a terrible force. They crystallise the myth-symbol complex into violence that can be levied against an ethnic 'other'. This thesis has deployed SPT to understand how words can precipitate violence. It has focused on a number of key elements of the various myth-symbol complexes at play within the Kenyan PEV. It has used the experience of Rwanda both to shed further light on the events in Kenya, but also to understand the international response to the Kenyan PEV. One of the key lessons from Rwanda was the link between inflammatory speech and violence. Thus, speech laws were understood as a preventative measure, a way of lessening the social tensions so that the pathways to violence would be disrupted.

In one sense, thinking about prohibitions of hate speech make sense after the terrible events in Rwanda. However, as we have seen, hate speech is an intrinsically ambiguous concept that necessitates a continuous process of definition and interpretation. Speech offences are unique in the way that they are context and culture-specific, particularly with the coded speech that is prevalent in advance of violence. Regulation of this political speech involves police and courts engaging in the exploration of second-order meanings. In Rwanda, we saw that this type of intervention was particularly subject to abuse. The post-genocide speech-related offences were used by the government to impose their narrative of what happened during the Rwandan genocide. They criminalised those that did not abide by that narrative

using divisionism and genocide denial laws. Genocide denial has a well-established international jurisprudence that has little to do with the way the Rwandan government created and then imposed its laws. While the international community was quick to observe and prosecute the role of hate speech in the genocide, it appears not to have noticed the secondary effects of hate speech regulation. In Kenya, as we have seen, the State sought to impose its hegemonic structure by criminalising critical speech, thereby removing it as an effective force in the political sphere. In Kenya, just as in Rwanda, speech offences have been used to criminalise utterances deemed overly critical of the administration while leaving hateful speech by government agents largely unmolested.

Citizens faced difficulty moderating their words because speech offences were applied differently according to who was criticised. They used certain symbols, such as *majimboism* and circumcision, to operationalise mythic structures that had an impact on the physical violence evidenced by the form of some of the violence in PEV, such as forcible circumcision of males. Worse still, citizens faced difficulty moderating their utterances when their leaders disseminate hate speech. Leaders disseminated hate speech targeted at the ethnic 'other' then linked the 'other' to socio-economic inequality. Loyalists follow the same political playbook. However, unlike those at the top (Presidents, Vice Presidents, Prime Ministers, and so on), falling foul of hate speech regulations for those without as much political power leads to criminal sanction. Whereas the people in the upper echelons of power, like President Moi, merely receive a warning. Alternatively, those at the top exert political pressure to prevent criminal sanctions then reward their loyal hate speakers with more political power. Thus, elites fuel a culture of impunity and send a signal to others with political ambitions that negative ethnicity and hate speech are useful avenues of acquiring political power and political prestige. Indeed, the playbook has been part of the repertoire for so long. It would be strange for the people of Kenya to go through an election cycle rooted in policy not embedded in ethnicity.

The State has responsibility for the death of over a thousand and displacement of hundreds of thousands during the 2007 PEV. It acquired responsibility for this by failing to protect citizens and by unleashing State agencies (the police) and non-state agents (the Mungiki). What is more, leaders of the State have been implicated in the dissemination of hate speech through political rallies and vernacular radio. The paradox is that at the same time, the government is entrusted with ensuring the fair and consistent application of speech regulations in a way that complies with the rule of law and rights to free speech of individuals. Ultimately, this thesis argues that hate speech regulation does not deal with the underlying causes of Kenyan PEV. The underlying tensions between myth-symbol complexes remain in place. By criminalising

particular forms of critical speech, the law hands the ruling party a form of cushioning. This is dangerous because starved of their outlets, those critical of the government will not disappear. Instead, their discussions are driven underground. Instead of a fair airing of political debate, we see the re-articulation of myth-symbol complexes in ways that ensure that the repressed violence returns. Even with fewer abuses of the hate speech regulations, this thesis argues that they remain problematic. Aside from stopping the expression of precipitating words, they do little to prevent new forms of social violence. They do not touch the fundamental ethnic tensions that underlie the State and the competition for resources and power through it. What would be necessary to prevent the re-emergence of this violence would be a program of action to dismantle or re-articulate the material and symbolic forms of inequality and injustice. Even with the best implementation, speech regulation just stops the expression of social tensions. It does nothing to change the conditions of this expression.

The data used in the thesis goes up to the 2015-16 period. That is because the primary focus is on the preconditions that make violence possible and the ways in which speech regulation can undermine democracy. It is worth noting physical violence related to elections has decreased rapidly, but there has been a sharp increase in the rise of online hate speech around elections.[1456] Hate speech has also become interlaced with fake news. With the help of Cambridge Analytica and Aristotle International, politicians realised they could use social media, influencers, bots, and data mining companies to infect the social climate with propaganda.[1457] After all, as we saw in Chapter 1, those seeking to use propaganda must use all technical means available to them. The thesis's arguments about the dangers inherent in the regulation of speech and the operationalisation of mythic structures using symbols is relevant to the past, present, and future. That is despite the many iterations of speech laws to outlaw counter-hegemonic voices or the changes in the political landscape (such as political actors shifting to form new parties and new coalitions). Indeed, when President Uhuru was questioned by David Maraga, the Chief Justice of Kenya, about bloggers, the President complained that the government attempted to 'restrain these people', but the judiciary continuously nullified government attempts.[1458]

[1456] Fredrick Meeme Irimba, Jacinta Ndambuki and Florence Mwithi, 'Problematising Hateful Ethno-Political Rhetoric in Facebook and Twitter during 2017 General Elections in Kenya' 2 Editon Consortium Journal of Literature and Linguistic Studies 162, 172.
[1457] Maweu, 148 - 149.
[1458] Nancy Agutu, 'Get Used to Bloggers and Move On, Uhuru Tells Maraga' *The Star* (https://www.the-star.co.ke/news/2019-01-25-get-used-to-bloggers-and-move-on-uhuru-tells-maraga/ accessed 01 November 2021),

In Chapter 3, I mentioned that the government would continue to craft speech laws until finally, one would be crafted that would resist a constitutional challenge. In 2018, through *Bloggers Association of Kenya v Attorney General*[1459], Judge Makau upheld the constitutionality of a new speech offence. Namely, Section 27 of the Computer Misuse and Cybercrimes Act 2018 (CMCA), which outlawed 'cyber-harassment. Member of Parliament Paul Amollo foreshadowed the 'danger' posed by the new speech laws during the parliamentary debate of the Bill.[1460] Still, section 27 became law, contravention of which would result in a 20 million Kenyan shillings (£134,200) fine, a 10-year term of imprisonment, or both.[1461] Section 27 is eerily similar to section 29 of KCIA (discussed in Chapter 3). Both laws targeted online communication and used overly broad words, such as 'indecent', 'offensive', and 'obscene'. As I noted in Chapter 3, Ngugi J said that the law was too wide and vague, without defining the operative words. Conversely, Judge Makau (the judge in *Bloggers Association of Kenya*) first distinguished between sections 27 and 29, stating that they touched on different subjects.[1462] That is despite both sections being targeted at online utterances. Makau J further held that the laws were justified given the 'socially harmful conduct', and the petitioner (Bloggers Association of Kenya) had failed to show the law was unnecessary given there was no other law like section 27. It took a different case[1463] in which the Senate challenged the constitutionality of the law because of the failure of the National Assembly to engage them before passing the laws for section 27 to be suspended.[1464] It seems that the government is committed to restraining the voices of 'these people' on new forms of media by crafting ever vague speech laws.

Regarding changes to the political landscape, in the most recent 2017 election, Raila (fronting National Super Alliance (NASA)) and Uhuru and Ruto (fronting the Jubilee Party) were the two main contenders. Lockwood traced NASA to the post-independence period when

---

[1459] The full case title is *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* eKLR High Court of Kenya (Constitutional & Human Rights Division).

[1460] Abdulmalik Sugow, Margaret Zalo and Isaac Rutenberg, 'Appraising the Impact of Kenya's Cyber-Harassment Law on the Freedom of Expression' 1 Journal of Intellectual Property and Information Technology Law (JIPIT) 91, 93.

[1461] Computer Misuse and Cybercrimes Act, section 27(2).

[1462] *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties) [74].*

[1463] *Senate of the Republic of Kenya, Speaker of the Senate, Senate Majority Leader, Senate Minority Leader & Council of County Governors v Speaker of the National Assembly & National Assembly of Kenya; Attorney General, Kenya Medical Supplies Authority, Institute for Social Accountability, Mission for Essential Drugs & Supplies, Katiba Institute, Pharmaceutical Society of Kenya, Elias Murundu & Commission on Revenue Allocation (Interested Parties)* eKLR High Court of Kenya (Constitutional & Human Rights Division).

[1464] Ibid. Sylvia Ndanu Mutua and Zhang Yanqiu, 'Online Content Regulation Policy in Kenya: Potential Challenges and Possible Solutions' Journal of Cyber Policy 177, 183.

KADU promoted devolution to protect smaller communities from the influence of the state. Raila sought to draw together a 'non-Kikuyu' ethnic alliance from outside the political centre during his opposition campaigns in 2017 (as he had done during the 2013 and 2007 election campaigns).[1465] Electoral malpractice during these elections created a feeling among his supporters of marginalisation. Raila's 'people' still encompassed various disillusioned groups during the 2017 election, regardless of their ethnic identity, reflecting the political agitation for *majimboism*.[1466] While both parties used bloggers, social media, bots, and data mining companies, money played a key role in controlling and 'filtering out' political propaganda.[1467] Since Kenyatta was the incumbent with effective control over state resources and officials, he outspent Raila and other opposition candidates at both the county and presidential level, which incidentally is contrary to election law.[1468]

Majimboism as a symbol was not as prominent following the 2010 Constitution that resulted in the creation of 47 new county governments, which had the effect of devolving power from the presidency.[1469] Besides, as we saw in the thesis, symbols are rarely ever-present, they resurge as the security environment demands. Symbolic politics was nonetheless still salient in the 2017 election. For example, during Raila's campaign, he drew on the symbol of hosts/guests during a campaign rally in which he urged the Maasai not to sell to 'outsiders' whom he claimed were going to 'invade'.[1470] Circumcision also resurged during the 2017 election cycle, evidenced by a viral image of a man (taken to be Luo) with blood on his legs and the (now debunked) caption underneath alleged the Mungiki had circumcised him during 2017 post-election demonstrations.[1471] In actuality, the image was lifted from a Liberian website. Despite the image being part of a fake news campaign, the picture was used to create fear and alarm among the Luo community by insinuating that Mungiki was targeting them. Conversely, for some Kikuyu, it embodied their desire to turn the Luo 'into men'. Indeed, one caption under the image wrote 'Yes. At least now Nairobi business community has made one Luo a man'.[1472]

[1465] Peter Lockwood, ''Before There is Power, There is The Country': Civic Nationalism and Political Mobilisation Amongst Kenya's Opposition Coalitions, 2013–2018' 57 The Journal of Modern African Studies 541, 556.
[1466] Ibid, 556.
[1467] Maweu, 148 - 149.
[1468] Cheeseman and others, 268. Maweu, 150.
[1469] Cheeseman and others, 215 - 216.
[1470] Cheeseman, Lynch and Willis.
[1471] Patrick Mutahi, 'Fake News and the 2017 Kenyan Elections' 46 Communicatio: South African Journal of Communication Theory and Research 1, 10 - 11.
[1472] Ibid, 10 - 11.

Bibliography

Acting Together For Kenya: Agreement on the Principles of Partnership of the Coalition Government (28 February 2008)

Cheeseman N, Lynch G and Willis J, *Voting for the Devil You Know: Kenya's 2017 Election* (<http://roape.net/2017/08/14/voting-devil-know-kenyas-2017-election/> 2017)

Abdi J and Deane J, *The Kenyan 2007 elections and their aftermath: the role of media and communication* (BBC World Service Trust 2008)

Appadurai A, *Modernity at Large: Cultural Dimensions of Globalisation* (Cambridge University Press 2000)

Armstrong K, *A Short History of Myth* (Canongate Books 2005)

Asad T and others, *Is Critique Secular?: Blasphemy, Injury, and Free Speech* (Oxford University Press 2013)

Austin JL, *How to do Things with Words*, vol 88 (Oxford University Press 1975)

Barbier M-C, Deschamps B and Prum M, *Racial, Ethnic, and Homophobic Violence: Killing in the Name of Otherness* (Routledge 2007)

Berman B, *Control and Crisis in Colonial Kenya: The Dialectic of Domination* (James Currey Limited 1990)

Branch D, *Kenya: Between Hope and Despair, 1963-2010* (Yale University Press 2011)

Brennan T, *The Transmission of Affect* (Cornell University Press 2004)

Brubaker R, *Ethnicity Without Groups* (Harvard University Press 2004)

Buijtenhuijs R, *Mau Mau–Twenty Years After: The Myth and the Survivors*, vol 4 (Walter de Gruyter GmbH & Co KG 2016)

Butler J, *Excitable speech: A Politics of the Performative* (Routledge 1997)

——, *The psychic life of power: Theories in subjection* (Stanford University Press 1997)

Butler J and Salih S, *The Judith Butler reader* (Blackwell Pub. 2004)

Chase RV, *Quest for Myth* (Louisiana State University Press 1949)

Clark P, *The Gacaca courts, post-genocide justice and reconciliation in Rwanda: Justice without lawyers* (Cambridge University Press 2010)

Cobb RW and Elder CD, *The Political Uses of Symbols* (Longman 1983)

Coleman JS, *Individual Interests and Collective Action: Selected Essays* (Cambridge University Press Cambridge 1986)

Davidson B, *The Black Man's Burden: Africa and the Curse of the Nation-State* (James Currey London 1992)

Des Forges AL, Watch HR and Rights IFoH, *"Leave None to Tell the Story": Genocide in Rwanda* (Human Rights Watch 1999)

Deutsch J-G, *Emancipation without abolition in German East Africa, c. 1884-1914* (James Currey Publishers 2006)

Easton D and Dennis J, *Children in the Political System: Origins of Political Legitimacy* (McGraw-Hill Book Company 1980)

Eder K, Giesen B and Tambini D, *Collective Identities in Action: A Sociological Approach to Ethnicity* (Ashgate Publishing Limited 2002)

Ellul J, *Propaganda: The formation of men's attitudes* (Vintage books 1973)

Erikson RS and Tedin KL, *American Public Opinion: Its Origins, Content and Impact* (Routledge 2015)

Fazan SH, *Colonial Kenya Observed: British Rule, Mau Mau and the Wind of Change* (Bloomsbury Publishing 2014)

Fine JV, *The Bosnian Church: A New Interpretation; A Study of the Bosnian Church and Its Place in State and Society from the 13th to the 15th Centuries* (Columbia Univ. Press 1975)

Good K, *The Struggle of Democratisation Against Authoritarianism in Contemporary Africa* (Cambridge Scholars Publishing 2020)

Gourevitch P, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families*, vol 24 (Pan Macmillan 2015)

Gregg M and Seigworth GJ, *The Affect Theory Reader* (Duke University Press 2010)

Habermas J, *Erkenntnis und Interesse: mit einem neuen Nachwort* (Suhrkamp 1973)

Habermas J, McCarthy T and McCarthy T, *The Theory of Communicative Action*, vol 1 (SciELO Brasil 1984)

Hare I and Weinstein J, *Extreme speech and democracy* (Oxford University Press 2010)

Herz M and Molnár P, *The content and context of hate speech: rethinking regulation and responses* (Cambridge University Press 2012)

Hirshleifer J, *The Dark Side of The Force: Economic Foundations of Conflict Theory* (Cambridge University Press 2001)

Hornsby C, *Kenya: A History Since Independence* (IB Tauris 2013)

Horowitz DL, *Ethnic groups in conflict, updated edition with a new preface* (Univ of California Press 2000)

Horvath A, *The Bahutu Manifesto* (Suzeteo Enterprises 2018)

Jones N, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2010)

Kaufman SJ, *Modern hatreds: The symbolic politics of ethnic war* (Cornell University Press 2001)

——, *Nationalist Passions* (Cornell University Press 2015)

Kroslak D, *The role of France in the Rwandan genocide* (Hurst & Co. 2007)

Kuperman AJ, *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings Institution Press 2001)

Lane RE, *Political thinking and consciousness: The private life of the political mind* (Markham Publishing Company 1969)

Leys C, *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism* (University of California Press 1975)

Lindenmayer E and Kaye JL, *A Choice for Peace?: The Story of Forty-One Days of Mediation in Kenya* (International Peace Institute New York 2009)

Long WJ and Brecke P, *War and reconciliation: Reason and emotion in conflict resolution* (MIT Press 2003)

Luongo K, *Witchcraft and Colonial Rule in Kenya, 1900–1955*, vol 116 (Cambridge University Press 2011)

Lynch G, *I Say to You: Ethnic Politics and the Kalenjin in Kenya* (University of Chicago Press 2011)

Malinowski B, *Myth in Primitive Psychology* (Norton 1926)

Maloba WO, *Mau Mau and Kenya: An Analysis of a Peasant Revolt* (East African Publishers 1994)

Mamdani M, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton University Press 2014)

Manby B, *Citizenship Law in Africa* (Open Society Institute 2009)

Materu SF, *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (T.M.C. Asser Press 2015)

Matsuda MJ, *Words that wound: Critical race theory, assaultive speech, and the first amendment* (Westview Press 1993)

Melvern L, *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books Ltd. 2000)

——, *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books Ltd. 2009)

Muriuki G, *A History of the Kikuyu, 1500-1900*, vol Oxford University Press (Nairobi, Kenya and London, England 1974)

Murji K and Solomos J, *Racialization: Studies in Theory and Practice* (Oxford University Press on Demand 2005)

Mutahi P and Kimari B, *The Impact of Social Media and Digital Technology on Electoral Violence in Kenya*, vol 493 (Institute of Development Studies 2017)

Mutua M, *Kenya's Quest for Democracy: Taming Leviathan* (Lynne Rienner Publishers 2008)

Nderitu AW, *Kenya, Bridging Ethnic Divides: A Commissioner's Experience on Cohesion and Integration* (Mdahalo Bridging Divides Limited 2018)

Neocleous M, *War Power, Police Power* (Edinburgh University Press 2014)

Nichols L, *The International Criminal Court and the End of Impunity in Kenya* (Springer 2015)

Njoroge RJ, *Education for Renaissance in Africa* (Trafford Publishing 2004)

Ochieng WR and Ogot BA, *Decolonization and Independence in Kenya* (Ohio State University Press 1995)

Oucho JO, *Undercurrents of Ethnic Conflicts in Kenya* (Brill 2002)

Prunier G, *The Rwanda Crisis: History of a Genocide* (Columbia University Press 1997)

Rawls J, *Political Liberalism* (Columbia University Press 1993)

Rights KNCoH, *'The Cry of Blood': Report on Extra-Judicial Killings and Disappearances* (Kenya National Commission on Human Rights 2008)

Rochlin G, *Griefs and Discontents: The Forces of Change* (Little, Brown and Company 1965)

Rothchild D and Olorunsola VA, *State Versus Ethnic Claims: African Policy Dilemmas* (Westview Press 1983)

Salih S, *Judith Butler* (Routledge 2002)

Scheffler A, *The Inherent Danger of Hate Speech Legislation: A Case Study from Rwanda and Kenya on the Failure of a Preventative Measure* (2015)

Sharma S, *The Responsibility to Protect and the International Criminal Court: Protection and Prosecution in Kenya (Kindle Sample)* (Routledge 2015)

Smith AD, *The Ethnic Origins of Nations* (Blackwell Publishing 1986)

Stafford F, *The Last of the Race* (Clarendon Press 1994)

Strenski I, *Four Theories of Myth In Twentieth-Century History: Cassirer, Eliade, Levi-Strauss and Malinowski* (Macmillan Press 1987)

Throup D and Hornsby C, *Multi-Party politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Election* (James Currey Publishers 1998)

Twagilimana A, *Historical dictionary of Rwanda* (Rowman & Littlefield 2015)

Volkan VD, *Bloodlines: From ethnic pride to ethnic terrorism* (Basic Books 1998)

Waldron J, *The harm in hate speech* (Harvard University Press 2012)

Wasserman G, *Politics of Decolonization: Kenya Europeans and the Land Issue 1960-1965* (Cambridge University Press 1976)

White HC, *Identity and Control: A Structural Theory of Social Action* (Princeton University Press 1992)

White L, *The Science of Culture: A Study of Man and Civilisation* (Grove Press 1949)

Anderson B and Harrison P, 'The Promise of Non-Representational Theories' in Anderson B and Harrison P (eds), *Taking-Place: Non-Representational Theories and Geography* (Ashgate 2010)

Barry N, 'A View of the Impact of Genocide Denial Laws in Rwanda' in (Taylor & Francis 2017)

Becker G, 'Interview: Gary Becker' in Swedberg R (ed), *Economics and Sociology: Redefining Their Boundaries: Conversations with Economists and Sociologists* (Princeton University Press 1990)

Boahen A, 'Conclusion: The Colonial Era: Conquest to Independence' in Gann LH and Duignan P (eds), *Colonialism in Africa 1870-1960*, vol 2 (CUP Archive 1969)

Brown W, 'Introduction' in Asad T and others (eds), *Is Critique Secular?: Blasphemy, Injury, and Free Speech* (Oxford University Press 2013)

Butler J, 'The Sensibility of Critique: Response to Asad and Mahmood' in Asad T and others (eds), *Is Critique Secular?: Blasphemy, Injury, and Free Speech* (Oxford University Press 2013)

Calas B, 'From Rigging to Violence: Mapping of Political Regression' in Lafargue J (ed), *The General Elections in Kenya 2007* (Mkuki na Nyota Publishers Ltd and and IFRA 2009)

Caplan G, 'Rwanda: Walking the Road to Genocide' in Thompson A (ed), *The Media and the Rwanda genocide* (Pluto Press 2007)

Clarke W, 'Failed Visions and Uncertain Mandates in Somalia' in Clarke W and Herbst J (eds), *Learning From Somalia: The Lessons Of Armed Humanitarian Intervention* (Routledge 2018)

Cussac A, '"Kibaki Tena?" The Challenges of a Campaign' in Lafargue J (ed), *The General Elections in Kenya 2007* (Mkuki na Nyota Publishers Ltd and IFRA 2009)

Dallaire R, 'The Media Dichotomy' in Thompson A (ed), *The Media and the Rwanda Genocide* (Pluto Press; Fountain Publishers; International Development Reserch Centre 2007)

De Vos G, 'Concepts of Ethnic Identity' in Romanucci-Ross L and De Vos G (eds), *Ethnic Identity: Creation, Conflict, and Accommodation* (Altamira Press 1995)

Des Forges AL and Longman T, ‘Legal Responses to Genocide in Rwanda’ in Stover EE and Weinstein HM (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press 2004)

Fackler PM, ‘Media and Post-Election Violence in Kenya’ in Obonyo L, Terpstra M and Okaalet E (eds), *The Handbook of Global Communication and Media Ethics*, vol 2 (2011)

Figueiredo Rd and Weingast B, ‘The Rationality of Fear: Political Opportunism and Ethnic Conflict’ in Walter BF, Snyder JL and Snyder J (eds), *Civil Wars, Insecurity and Intervention* (Columbia University Press 1999)

Fish S, ‘There's no such thing as free speech: And it's a good thing, too’ in Berman P (ed), *Debating PC: The controversy over political correctness on college campuses* (Delta 1992)

Fultner B, ‘Introduction: Communicative Action and Formal Pragmatics ’ in Fultner B (ed), *Jurgen Habermas: Key Concepts* (Routledge 2014)

Ghai YP, ‘The Attorneys-General: Upholders or Destroyers of Constitutionalism?’ in Ghai YP and Cottrell J (eds), *The Legal Profession and the New Constitutional Order in Kenya* (Strathmore University Press 2014)

Hall S, ‘Cultural Identity and Diaspora’ in Rutherford J (ed), *Identity: community, culture, difference* (Lawrence & Wishart 1990)

——, ‘Who Needs‘ Identity?’ in Du Gay P, Evans J and Redman P (eds), *Identity: a reader* (Sage Publications 2000)

Kabatsi F, ‘Confronting Genocide Denial: Using the Law as a Tool in Combating Genocide Denial Rwanda’ in (Taylor & Francis 2017)

Kanyinga K, ‘Limitations Of Political Liberalization: Parties and Electoral Politics in Kenya, 1992-2002’ in Oyugi WO, Wanyande P and Odhiambo-Mbai C (eds), *The Politics of Transition in Kenya* (Heinrich Böll Foundation 2003)

Kivuva J, ‘Different Paths, Similar Destination: The Unending and Un-consolidating Democratic Transition(s) in Kenya and Uganda’ in Nasong’o WS (ed), *African Governance, Security, and Development* (Lexington Books 2021)

Lafargue J and Katumanga M, ‘Kenya in turmoil: Post-Election Violence and Precarious Pacification’ in Lafargue J (ed), *The General Elections in Kenya 2007* (Mkuki na Nyota Publishers Ltd and IFRA 2009)

Lonsdale J, ‘Kenya’s Four Ages of Ethnicity’ in Hino H and others (eds), *From Divided Pasts to Cohesive Futures* (Cambridge University Press 2019)

Manji A, ‘Land Rights and the Rule of Law’ in Cheeseman N, Kanyinga K and Lynch G (eds), *The Oxford Handbook of Kenyan Politics* (Oxford University Press 2020)

Maupeu H, 'Revisiting Post-Election Violence' in Lafargue J (ed), *The General Elections in Kenya 2007* (Mkuki na Nyota Publishers Ltd and IFRA 2009)

Maweu JM, 'Still Manufacturing Consent in the Digital Era: Disinformation, "Fake News" and Propaganda in the 2017 Elections in Kenya' in MacLeod A (ed), *Propaganda in the Information Age: Still Manufacturing Consent*, vol 142-153 (Routledge 2019)

Melson R, 'Modern Genocide in Rwanda: Ideology, Revolution, War, and Mass Murder in an African State' in Gellately R and Kiernan B (eds), *The Specter of Genocide: Mass Murder in Historical Perspective* (Cambridge University Press 2003)

Moore HL, 'Democracy and the Ethical Imagination' in Cook J, Long NJ and Moore HL (eds), *The State We're In: Reflecting on Democracy's Troubles* (Berghahn Books 2016)

Ndlela MN, 'Social Media and Elections in Kenya' in *The Routledge Companion to Social Media and Politics* (Routledge 2015)

Parmar S, 'Reckoning with the Past: Rwanda's Revisted Genocide Ideology Law and International Human Rights Law on Freedom of Expression' in (Taylor & Francis 2017)

Peskin V, 'Victor's Justice Revisited: Rwandan Patriotic Front Crimes and the Prosecutorial Endgame at the ICTR' in Straus S and Waldorf L (eds), *Remaking Rwanda: State building and human rights after mass violence* (University of Wisconsin Press 2011)

Pommerolle M-E, 'The 2017 elections and electoral (in)justice (2015–2017)' in Cheeseman N, Kanyinga K and Lynch G (eds), *The Oxford Handbook of Kenyan Politics* (Oxford University Press 2020)

Post R, 'Hate Speech' in Hare I and Weinstein J (eds), *Extreme Speech and Democracy* (Oxford University Press 2010)

Redman P, 'Introduction' in Du Gay P, Evans J and Redman P (eds), *Identity: a reader* (Sage Publications 2000)

Roberts MJ, 'Conflict Analysis of the 2007 Post-Election Violence in Kenya' in Adebayo AG (ed), *Managing Conflicts in Africa's Democratic Transitions* (2012)

Rothman R, 'Political Symbolism' in Long S (ed), *The Handbook of Political Behavior*, vol 2 (Plenum Press 1981)

Šuica M, 'The Image of the Battle of Kosovo (1389) Today: a Historic Event, a Moral Pattern, or the Tool of Political Manipulation' in Evans RJW and Marchal GP (eds), *The Uses of the Middle Ages in Modern European States* (Palgrave Macmillan 2011)

Tully M, 'All's Well in the Colony: Newspaper Coverage of the Mau Mau Movement, 1952–1956' in Otero S (ed), *Narrating War and Peace in Africa* (University Rochester Press 2010)

Vannini P, 'Non-Representational Research Methodologies: An Introduction' in Vannini P (ed), *Non-Representational Methodologies: Re-Envisioning Research* (Routledge 2015)
Waldorf L, 'Censorship and Propaganda in Post-Genocide Rwanda' in Thompson A (ed), *The Media and the Rwandan Genocide* (Pluto Press 2007)
Young C, 'The Politics of Cultural Pluralism' in Melson R (ed), *ASA Review of Books*, vol 6 (The University of Wisconsin Press 1976)
Zirojević O, 'Kosovo in the Collective Memory' in Popov N and Gojkovi CD (eds), *The Road to War in Serbia Trauma and Catharsis* (Central European University Press 2000)
Chirau Alimwakwere v Robert M. Mabera & 4 others (2012) eKLR (High Court of Kenya at Nairobi)
Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 [2015] eKLR (High Court of Nairobi (Constitutional and Human Rights Division))
Johnstone Muthama & 8 Others v Inspector General of Police & 2 Others [2016] eKLR (High Court of Kenya at Nairobi (Constitutional & Human Rights Division))
Robert Alai v The Hon Attorney General & another [2017] eKLR (High Court of Nairobi (Constitutional and Human Rights Division))
Prosecutor v. Jean-Paul Akayesu ICTR-96-4-T (Trial Chamber of the International Criminal Tribunal for Rwanda)
Prosecutor v. Nahimana, Barayagwiza, & Ngeze ICTR-99-52-T (Trial Chamber of the International Criminal Tribunal for Rwanda)
Prosecutor v. Kenyatta: Decision on Prosecution's Application for a Finding of Non-Compliance Under Article 87(7) ICC-01/09-02/11-982 (International Criminal Court)
Prosecutor v. Ruto and Sang: Decision on Defence Applications for Judgments of Acquittal ICC-01/09-01/11-2027-Red-Corr (International Criminal Court)
Report of the Special Rapporteur on minority issues, Rita Izsák A/HRC/28/64 (Human Rights Council)
General Comment No. 34 CCPR/C/GC/34 (Human Rights Committee)
Prosecutor v. Kenyatta: Decision on Withdrawal of Charges Against Mr. Kenyatta ICC-01/09-02/11-1005 (International Criminal Court)
Prosecutor v. Kenyatta: Second Decision on Prosecution's Application for a Finding of Non-Compliance Under Article 87(7) ICC-01/09-02/11-1037 (International Criminal Court)
Ingabire Victoire Umuhoza v Rwanda Application 003/2014 (African Court on Human and Peoples' Rights)
Lingens v. Austria Application no 9815/82 (European Court of Human Rights)

Alan Wadi Okengo v Republic eKLR (High Court of Kenya at Nairobi (Criminal Division))

Geoffrey Andare v Attorney General & 2 others [2016] eKLR (High Court of Nairobi (Constitutional and Human Rights Division))

Godfrey Mutahi Ngunyi v Director of Public Prosecutions & 4 others eKLR (High Court of Kenya Constitutional & Human Rights Division)

Senator Johnstone Muthama v Director of Public Prosecutions & 2 others; Japhet Muriira Muroko (Interested Party) eKLR (High Court of Kenya at Nairobi)

UNSC Statement by the President of the Security Council 5831 S/PRST/2008/4 (UNSC)

UNGA Report of the Secretary-General: Implementing the Responsibility to Protect A/63/677 (United Nations General Assembly)

UNSC Presidential Statement 3371 S/PRST/1994/21 (UNSC)

Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties) eKLR (High Court of Kenya (Constitutional & Human Rights Division))

Senate of the Republic of Kenya, Speaker of the Senate, Senate Majority Leader, Senate Minority Leader & Council of County Governors v Speaker of the National Assembly & National Assembly of Kenya; Attorney General, Kenya Medical Supplies Authority, Institute for Social Accountability, Mission for Essential Drugs & Supplies, Katiba Institute, Pharmaceutical Society of Kenya, Elias Murundu & Commission on Revenue Allocation (Interested Parties) eKLR (High Court of Kenya (Constitutional & Human Rights Division))

Myers M, 'Local radio: fostering community development or ethnic hatred? Donor dilemmas and perspectives from Rwanda, D.R. Congo and Kenya' (CAMRI: The Media and Development in Africa)

Nations U, *Security Council 6134th Meeting* (S/PV.6134 4 June 2009)

Markussen T and Mbuvi K, *When Does Ethnic Diversity Lead to Violence? Evidence from the 2007 Elections in Kenya* (2011)

Yamano T, Gitau R and Tanaka Y, *Haki Yetu (It's Our Right): Determinants of Post-Election Violence in Kenya* (GRIPS Policy Research Center 2010)

Newsweek RTf, 'Louise Mushikiwabo Defends 'Genocide Ideology' Law' <http://wwwnewsweekcom/louise-mushikiwabo-defends-genocide-ideology-law-74831> accessed 13 June 2018

Annan K and Personalities CotPoEA, *Kenya National Dialogue and Reconciliation: Statement of Principles on Long-Term Issues and Solutions* (23 May 2008)

Commission KNHR, *Still Behaving Badly: Second Periodic Report of the Election Monitoring Project* (Kenya National Human Rights Commission 2007)
Jürgen H, *Knowledge and Human Interests* (Beacon Press, Boston 1971)
Kenya Ro, *Kenya National Youth Policy,* (Ministry of Youth Affairs and Sports Nairobi 2006)
McCarthy T, *The Critical Theory of Jürgen Habermas, Massachusetts* (Massachisetts Institute of Technology Press 1978)
Myers M, *Radio and Development in Africa: A Concept Paper* (International Development Research Centre (IDRC) of Canada 2008)
Omie M and Winant H, *Racial Formation in the United States: From the 1960's to the 1980's* (New York: Routledge and Kegan Paul 1986)
Turner BS, *Bronwen Manby, Struggles for Citizenship in Africa* (Springer 2010)
Government of Kenya, *Commission of Inquiry into the Post Election Violence (CIPEV) Final Report* (2008)
(Commons Daily Hansard, Volume 711, Page 938 3 May 1965)
Aberbach D, 'European National Poetry, Islam and the Defeat of the Medieval Church' 18 Nations and Nationalism 603
Ahlberg BM and Njoroge KM, ''Not Men Enough to Rule!': Politicization of Ethnicities and Forcible Circumcision of Luo Men During the Postelection Violence in Kenya' 18 Ethnicity & Health 454
Akech M, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?' 18 Indiana Journal of Global Legal Studies 341
Allen JM and Norris GH, 'Is Genocide Different-Dealing with Hate Speech in a Post-Genocide Society' 7 J Int'l L & Int'l Rel 146
Anderson D and Lochery E, 'Violence and Exodus in Kenya's Rift Valley, 2008: Predictable or Preventable?' 2 Journal of Eastern African Studies 328
Atieno-Odhiambo ES, 'Hegemonic Enterprises and Instrumentalities of Survival: Ethnicity and Democracy in Kenya' 61 African Studies 223
Bagwell B, 'Yugoslavian constitutional questions: Self-determination and secession of member republics' 21 Ga J Int'l & Comp L 489
Baker CE, 'Autonomy and hate speech' in Hare and Weinstein, *Extreme Speech and Democracy*
Bartels BL, Horowitz J and Kramon E, 'Can Democratic Principles Protect High Courts from Partisan Backlash? Public Reactions to the Kenyan Supreme Court's Role in the 2017 Election Crisis' American Journal of Political Science

Benesch S, ‘Inciting Genocide, Pleading Free Speech’ 21 World Policy Journal 62
——, ‘Vile crime in inalienable right: Defining incitement to genocide’ 48 Va J Int'l L 485
——, ‘Countering dangerous speech: New ideas for genocide prevention’ Washington, DC: United States Holocaust Memorial Museum
Berman BJ, ‘Nationalism, Ethnicity, and Modernity: The Paradox of Mau Mau’ 25 Canadian Journal of African Studies/La Revue canadienne des études africaines 181
Berry S, ‘Hegemony on a Shoestring: Indirect Rule and Access to Agricultural Land’ Africa: Journal of the International African Institute 327
Boone C and others, ‘Land Politics under Kenya's New Constitution: Counties, Devolution, and the National Land Commission’ International Development, Working Paper Series 2016 66
Branch D and Cheeseman N, ‘Democratization, Sequencing, and State Failure in Africa: Lessons from Kenya’ 108 African Affairs 1
Brown S and Sriram CL, ‘The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya’ 111 African Affairs 244
Brunk DC, ‘Curing the Somalia Syndrome: Analogy, Foreign Policy Decision Making, and the Rwandan Genocide’ 4 Foreign Policy Analysis 301
Butler J, ‘Conscience doth make subjects of us all’ Yale French Studies 6
Carotenuto M, ‘Riwruok E Teko: Cultivating Identity in Colonial and Postcolonial Kenya’ Africa Today 53
Carotenuto M and Luongo K, ‘Dala or diaspora? Obama and the Luo community of Kenya’ 108 African Affairs 197
Cheeseman N, ‘The Kenya Elections of 2007: An Introduction’ 2 Journal of Eastern African Studies 166
Cheeseman N and others, ‘Kenya’s 2017 Elections: Winner-Takes-All Politics As Usual?’ 13 Journal of Eastern African Studies 215
Chege M, ‘Kenya: Back from the Brink?’ 19 Journal of Democracy 125
Chelimo FJ and Chelelgo K, ‘Pre-Colonial Political Organization of the Kalenjin of Kenya: An Overview’ International Journal of Innovative Research & Development
Chuma A and Ojielo O, ‘Building a Standing National Capacity for Conflict Prevention and Resolution in Kenya’ 7 Journal of Peacebuilding & Development 25
Cover RM, ‘Violence and the Word’ 95 Yale Law School 1601
Craig D and Mkhize N, ‘Vocal killers, silent killers: popular media, genocide, and the call for benevolent censorship in Rwanda’ Popular Music Censorship in Africa 39

Cramer C, ‘Homo Economicus Goes To War: Methodological Individualism, Rational Choice and the Political Economy of War’ 30 World Development 1845
Cryer R, ‘Witness Tampering and International Criminal Tribunals’ 27 Leiden Journal of International Law 191
Delgado R, ‘Words that wound: A tort action for racial insults, epithets, and name-calling’ 17 Harv CR-CLL Rev 133
Fearon JD, ‘Rationalist Explanations for War’ 49 International Organization 379
Fearon JD and Laitin DD, ‘Violence and the Social Construction of Ethnic Identity’ 54 International Organization 845
Gelber K, ‘‘Speaking Back’: The Likely Fate of Hate Speech Policy in the United States and Australia’ Speech and Harm: Controversies over Free Speech 50
Gibson CC and Long JD, ‘The Presidential and Parliamentary Elections in Kenya, December 2007’ 28 Electoral studies 1
Gordon GS, ‘A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech’ 45 Va J Int'l L 139
——, ‘Hate speech and persecution: A contextual approach’ 46 Vand J Transnat'l L 303
——, ‘The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law’ 75 Ohio St LJ 571
Grossman HI, ‘A General Equilibrium Model of Insurrections’ The American Economic Review 912
Group IC, ‘Kenya in Crisis’ Africa Report
Guzina D, ‘Socialist Serbia's Narratives: From Yugoslavia to a Greater Serbia’ 17 International Journal of Politics, Culture, and Society 91
Hall S, ‘New Ethnicities’ Stuart Hall: Critical dialogues in cultural studies 441
Harrington J and Manji A, ‘Satire and the Politics of Corruption in Kenya’ 22 Social & Legal Studies 3
Hintjens H, ‘Post-genocide identity politics in Rwanda’ 8 Ethnicities 5
Horowitz DL, ‘Making moderation pay: The comparative politics of ethnic conflict management’ 451 Conflict and peacemaking in multiethnic societies 451
Initiative-Africa and Africa NPI, ‘Conflict Management and Disaster Risk Reduction’ Africa Portal
Irimba FM, Ndambuki J and Mwithi F, ‘Problematising Hateful Ethno-Political Rhetoric in Facebook and Twitter during 2017 General Elections in Kenya’ 2 Editon Consortium Journal of Literature and Linguistic Studies 162

Jenkins S, ‘Ethnicity, Violence, and the Immigrant-Guest Metaphor in Kenya’ 111 African Affairs 576
Jutland Ai, ‘Affect- A Basic Summary of Approaches’
Kagwanja P and Southall R, ‘Introduction: Kenya–A Democracy in Retreat’ 27 Journal of Contemporary African Studies 259
Kagwanja PM, ‘‘Power to Uhuru’: Youth Identity and Generational Politics in Kenya’s 2002 Elections’ 105 African Affairs 51
Kamatali J-M, ‘From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans’ 12 New Eng J Int'l & Comp L 89
Kaufman SJ, ‘Symbolic Politics or Rational Choice? Testing Theories of Extreme Ethnic Violence’ 30 International Security 45
——, ‘Narratives and symbols in violent mobilization: the Palestinian-Israeli case’ 18 Security Studies 400
Kaufmann C, ‘Rational Choice and Progress in the Study of Ethnic Conflict: A Review Essay’ 14 Security Studies 178
Kiage P, ‘Prosecutions: A Panacea for Kenya's Past Atrocities’ 2 E African J Hum Rts & Democracy 104
——, ‘Prosecutions: A Panacea for Kenya's Past Atrocities’ 2 E African J Hum Rts & Democracy 104
Killingray D, ‘‘A Swift Agent of Government’: Air Power in British Colonial Africa, 1916–1939’ 25 The Journal of African History 429
Kilonzo S, Magak K and Omwalo B, ‘The Influence of Information Technology on the Socio-political Song in Kenya’ 29 Critical Arts (South-North Cultural and Media Studies) 518
Kimundi E, ‘Post-Election Crisis in Kenya and the Implications for the International Criminal Court's Development as a Legitimate Institution’ 7 Eyes on the ICC 85
Kinoti HW, ‘Some Principles of Man-Woman Relationships in Traditional Gikuyu Society’ 3 WAJIBU 2
Kivoi DL and Mbae CG, ‘The Achilles’ heel of police reforms in Kenya’ 2 Social Sciences 189
Klopp JM, ‘Can Moral Ethnicity Trump Political Tribalism? The Struggle for Land and Nation in Kenya’ 61 African Studies 269
——, ‘Kenya's Unfinished Agendas’ 62 Journal of International Affairs 143

Kroetz FS, ‘Post-genocide Identity Politics in Rwanda and Bosnia and Herzegovina and their Compatibility with International Human Rights Law’ 23 International Journal on Minority and Group Rights 328
Lake DA and Rothchild D, ‘Containing Fear: The Origins and Management of Ethnic Conflict’ 21 International Security 41
Lammertink A, ‘The Bosnian War 1992-1995’ 8 International Relations 1
Lamont M, ‘Forced male circumcision and the politics of foreskin in Kenya’ 77 African Studies 293
Latour B, ‘How to Talk About the Body? The Normative Dimension of Science Studies’ 10 Body & Society 205
Lears TJ, ‘The concept of cultural hegemony: Problems and possibilities’ The American Historical Review 567
Lentz C, ‘’Tribalism’ and Ethnicity in Africa: A Region of Four Decades of Anglophone Research’ 31 Cahiers des Sciences Humaines 303
Lockwood P, ‘‘Before There is Power, There is The Country’: Civic Nationalism and Political Mobilisation Amongst Kenya's Opposition Coalitions, 2013–2018’ 57 The Journal of Modern African Studies 541
Lynch G, ‘Electing the ‘alliance of the accused’: the success of the Jubilee Alliance in Kenya's Rift Valley’ 8 Journal of Eastern African Studies 93
MacKinnon CA, ‘Prosecutor v. Nahimana, Barayagwiza, & Ngeze. Case No. ICTR 99-52-T’ 98 American Journal of International Law 325
Mafeje A, ‘The Ideology of 'Tribalism'’ 9 The journal of modern African studies 253
Mäkinen M and Wangu Kuira M, ‘Social Media and Post-Election Crisis in Kenya’ 13 The International Journal of Press/Politics 328
Manji A, ‘The Grabbed State: Lawyers, Politics and Public Land in Kenya’ 50 The Journal of Modern African Studies 467
——, ‘The Politics of Land Reform in Kenya 2012’ 57 African Studies Review 115
Mart CT, ‘British Colonial Education Policy in Africa’ 2 International Journal of English and Literature 190
Mbito MN and Malia JA, ‘Transfer of the Kenyan Kikuyu Male Circumcision Ritual to Future Generations Living in the United States’ 32 Journal of adolescence 39
Mburu DM, ‘The Lost Kenyan Duel: The Role of Politics in the Collapse of the International Criminal Court Cases against Ruto and Kenyatta’ 18 International Criminal Law Review 1015

Melvin J, ‘Beyond the Veneer of Reconciliation: Human Rights and Democracy in Rwanda’ Commonwealth Opinion 3

Mitchell J, ‘Remembering the Rwandan genocide: Reconsidering the role of local and global media’ 6 Global Media Journal

Mose E, ‘The ICTR: Experiences and Challenges’ 12 New Eng J Int'l & Comp L 1

Moshman D, ‘Us and them: Identity and genocide’ 7 Identity: An International Journal of Theory and Research 115

Mueller SD, ‘The Political Economy of Kenya's Crisis’ 2 Journal of Eastern African Studies 185

Mueller SD, ‘Kenya and the International Criminal Court (ICC): Politics, The Election and the Law’ 8 Journal of Eastern African Studies 25

Muna B, Pillay N and Rudasingwa T, ‘The Rwanda Tribunal and its relationship to national trials in Rwanda’ 13 American University International Law Review 1469

Musila GM, ‘Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions’ 3 International Journal of Transitional Justice 1

Mutahi P, ‘Fake News and the 2017 Kenyan Elections’ 46 Communicatio: South African Journal of Communication Theory and Research 1

Mutua M, ‘Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya’ 23 Hum Rts Q 96

Mutua SN and Yanqiu Z, ‘Online Content Regulation Policy in Kenya: Potential Challenges and Possible Solutions’ Journal of Cyber Policy 177

Ndegwa SN, ‘Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics’ American Political Science Review 599

——, ‘Kenya: Third Time Lucky?’ 14 Journal of Democracy 145

Neocleous M, ‘Air Power as Police Power’ 31 Environment and Planning D: Society and Space 578

Njoroge MW and Kirori GN, ‘Ethnocentrism: Significance and effects on Kenyan Society’ 8 African Journal of Political Science and International Relations 356

Nwoye L, ‘Partners or Rivals in Reconciliation: The ICTR and Rwanda's Gacaca Courts’ 16 San Diego International Law Journal 119

Nyarko MG and Makunya T, ‘Selected developments in human rights and democratisation during 2017: Sub-Saharan Africa’ 2 Global Campus Human Rights Journal 147

Obuya J and Ong'ondo C, '"Caught between a Rock and a Hard Place": How Kenyan Journalists are Coping with Pressure for Media Accountability' 40 African Journalism Studies 1

Odegi-Awuondo C, 'Kenya 1945–1963: A Study in (sic) African National Movements' 10 Transafrican Journal of History 178

Odhiambo EA and Odede FZ, 'Cultural Heritage and the Socialization Process: A Study of Ramogi Hill' 2 International Journal of Business and Social Research 87

Ogola G, 'The Political Economy of the Media in Kenya: From Kenyatta's Nation-Building Press to Kibaki's Local-Language FM Radio' 57 Africa Today 77

Ogude J, 'The vernacular press and the articulation of Luo ethnic citizenship: the case of Achieng'Oneko's Ramogi' 13 Current Writing: Text and Reception in Southern Africa 42

Onyango JO, 'Ethnic Discourse on Contentious Issues in the Kenyan Press after the 2007 General Elections' CODESRIA 12th General Assembly

Ouma S, 'Reporting for Democracy or Convenience? The Kenyan media and the 2017 elections' 107 The Round Table 1

Oyugi WO, 'Politicised Ethnic Conflict in Kenya: A Periodic Phenomenon' African Conflicts: Their Management, Resolution, and Post-Conflict Reconstruction, Addis Ababa: DPMF/OSSREA

Parekh B, 'Is there a case for banning hate speech?' The content and context of hate speech: Rethinking regulation and responses 37

Perry R and Williams P, 'Freedom of hate speech' Debating PC: The Controversy over Political Correctness on College Campuses

Pottier J, 'Re-imagining Rwanda' Conflict, Survival and Disinformaation in the late 20th Century

Rutten M and Owuor S, 'Weapons of Mass Destruction: Land, Ethnicity and the 2007 Elections in Kenya' 27 Journal of Contemporary African Studies 305

Salihu A, 'The Western Accounts on Early Albanian-Serbian Interactions and the Kosovo Myth' 7 ILIRIA International Review 194

Sanger C and Nottingham J, 'The Kenya General Election of 1963' 2 The Journal of Modern African Studies 1

Sanger C and Nottingham J, 'The Kenya General Election of 1963' 2 The Journal of Modern African Studies 1

Santilli K, 'Kikuyu Women in the Mau Mau Revolt: A Closer Look' 8 Ufahamu: A Journal of African Studies

Smith MB, Bruner JS and White RW, 'Opinions and Personality'
Somers M, 'We're No Angels: Realism, Rational Choice, and Rationality in Social Science' Centre for Research on Social Organisation Working Paper
Somerville K, 'British Media Coverage of the Post-Election Violence in Kenya, 2007–08' 3 Journal of Eastern African Studies 526
——, 'Kenya: Violence, Hate Speech and Vernacular Radio' Montreal Institute for Genocide and
Human Rights Studies Occasional Paper 1
Sottiaux S, ''Bad Tendencies' in the ECtHR's 'Hate Speech'Jurisprudence' 7 European Constitutional Law Review 40
Steiger D, 'A Steady Race Towards Better Compliance with International Humanitarian Law? The ICTR 1995–2012' 14 International Criminal Law Review 969
Strossen N, 'Hate speech and pornography: Do we have to choose between freedom of speech and equality' 46 Case W Res L Rev 449
Sugow A, Zalo M and Rutenberg I, 'Appraising the Impact of Kenya's Cyber-Harassment Law on the Freedom of Expression' 1 Journal of Intellectual Property and Information Technology Law (JIPIT) 91
UNIES NATIONS, 'International Convention on the Elimination of all Forms of Racial Discrimination'
Van Tongeren P, 'Increasing Interest in Infrastructures for Peace' 2 Journal of Conflictology
Wanyeki LM, 'Lessons from Kenya: Women and the Post-Election Violence' 10 Feminist Africa 91
Williams P, 'Spirit-murdering the messenger: The discourse of fingerpointing as the law's response to racism' 42 U Miami L Rev 127
Yieke F, 'Ethnicity and Development in Kenya: Lessons from the 2007 General Elections' 3 Kenya Studies Review 5
Zafirovski M, 'The Rational Choice Generalization of Neoclassical Economics Reconsidered: Any Theoretical Legitimation for Economic Imperialism?' 18 Sociological Theory 448
Nderitu AW, *On Hate Speech* (Awaaz Magazine 27 October 2012)
Aflan S, 'Court Acquits Local Artist John De Mathew.' *Smart Sam News* (https://smartnewz.wordpress.com/2014/06/23/court-acquits-local-artist-john-de-mathew/)
Agoya V, 'Mutahi Ngunyi Seeks to Reconcile With NCIC in Hate Speech Case' *The Nation* (https://nation.africa/kenya/news/politics/mutahi-ngunyi-seeks-to-reconcile-with-ncic-in-hate-speech-case-1160576)

——, 'Court Acquits Musician Demathew over Anti-Raila Song' *The Nation* (https://nation.africa/kenya/news/court-acquits-musician-demathew-over-anti-raila-song-995860)

Agutu N, 'Get Used to Bloggers and Move On, Uhuru Tells Maraga' *The Star* (https://www.the-star.co.ke/news/2019-01-25-get-used-to-bloggers-and-move-on-uhuru-tells-maraga/ accessed 01 November 2021)

Aluanga-Delvaux L, 'Why Hate Speech Law Craves a Fresh Breath' *The Standard* (https://www.standardmedia.co.ke/kenya/article/2000126312/why-hate-speech-law-craves-a-fresh-breath)

BBC, 'Kenya Election Official Roselyn Akombe Flees to US' *BBC* (<https://www.bbc.co.uk/news/world-africa-41660880> accessed 25 November 2021)

Chebet S, 'Courts Round Up' *Kenya CitizenTV* (https://www.youtube.com/watch?v=x2iX6s698E4&ab_channel=KenyaCitizenTV)

Gaffey C, 'Kenya: Hundreds Protest Over 'Extrajudicial Killing' of Human Rights Lawyer' *Newsweek* (<https://www.newsweek.com/kenya-hundreds-protest-extrajudicial-killing-human-rights-lawyer-amnesty-477470> accessed 28 November 2021)

Gaitho M, 'There Should Be No Discrimination In Dealing with Social Media Terrorists' *The Nation* (https://nation.africa/kenya/blogs-opinion/opinion/there-should-be-no-discrimination-in-dealing-with-social-media-terrorists-1057362)

Gettleman J, 'Tribal Rivalry Boils Over After Kenyan Election' *New York Times*

Hopkins C, 'How Technology Is Shaping the Decisive Kenyan Elections' *Daily Dot* (https://www.dailydot.com/debug/kenyan-election-2013-technology-umati/)

Humanitarian TN, 'Taming Hate Speech in Kenya' *The New Humanitarian* (https://www.thenewhumanitarian.org/fr/node/252434)

IRIN, 'Dozens killed in Tana River clashes' *IRIN* (https://www.thenewhumanitarian.org/report/96153/kenya-dozens-killed-tana-river-clashes)

Jazeera A, 'Macron Recognises French 'Responsibility' in Rwanda Genocide' *Al Jazeera* (https://www.aljazeera.com/news/2021/5/27/macron-recognises-french-responsibility-in-rwanda-genocide)

Kajilwa G, Karanja F and Nzia D, 'Kenya's Judiciary Blamed for Increased Hate Speech Cases' *The Standard* (https://www.standardmedia.co.ke/kenya/article/2000181442/judiciary-blamed-for-increased-hate-speech-cases)

Kakah M, 'Moses Kuria, Waititu Acquited in Hate Speech Case' *Nairobi News* (https://nairobinews.nation.co.ke/news/moses-kuria-waititu-hate-speech)

Karanja F, 'Hate Messages on President Uhuru Kenyatta Lands Student In Jail' *The Standard* (https://www.standardmedia.co.ke/kenya/article/2000146557/hate-messages-on-president-uhuru)

Kiai M, 'To Safeguard His Legacy, Uhuru Must Write a Different Script on Tribalism' *The Nation* (https://nation.africa/kenya/blogs-opinion/opinion/to-safeguard-his-legacy-uhuru-must-write-a-different-script-on-tribalism-1060518)

Kinuthia N, 'Is NCIC Climbdown on Hate Speech Case a Bold Move?' *The Standard* (https://www.standardmedia.co.ke/fact-check/article/2000040635/n-a)

Kwamboka E, 'State Drops Incitement Charges Against Kutuny' *The Standard* (https://www.standardmedia.co.ke/between-the-sheets/article/2000033135/state-drops-incitement-charges-against-kutuny)

——, 'Judges Hands Tied as Hate Speech Cases Flop in Court' *The Standard* (https://www.standardmedia.co.ke/nairobi/article/2001343639/judges-hands-tied-as-hate-speech-cases-flop-in-court)

Kwayera J, 'Of Rwandan Case and Loopholes in Hate Speech Law' *The Standard* (https://www.standardmedia.co.ke/commentary/article/2000012086/of-rwandan-case-and-loopholes-in-hate-speech-law)

Macha N, 'Kenyan Public Intellectual Accused of Using Hate Speech on Twitter' *Global Voices* (https://advox.globalvoices.org/2015/09/09/kenyan-public-intellectual-accused-of-using-hate-speech-on-twitter/)

Madowo L, 'It Is Unfair to Jail Small Fry for Hate Speech While Big Fish Go Scot-free' *The Nation* (https://nation.africa/kenya/life-and-style/dn2/it-is-unfair-to-jail-small-fry-for-hate-speech-while-big-fish-go-scot-free--1057312)

Malalo H and Miriri D, 'Kenya Charges Politicians with Charter Hate Speech' *Reuters UK* (https://uk.reuters.com/article/idUKLDE65F0P7)

Menya W and others, '3 Kenya MPs Held Over Hate Speech' *The Nation* (https://nation.africa/kenya/news/3-kenya-mps-held-over-hate-speech--637600)

Mosoku G, 'Kenya: Musicians to Be Charged for Hate Speech' *The Star* (https://allafrica.com/stories/201206291029.html)

Munguti R, 'University Student Jailed for Insulting President Uhuru Kenyatta' *The Nation* (https://nation.africa/kenya/news/university-student-jailed-for-insulting-president-uhuru-kenyatta-1056582)

Mutimba L, 'Mutahi Ngunyi's Hate Speech Case Stopped!' *Classic 105* (https://classic105.com/ngunyi-hate-speech-case-stopped/)

Nation T, 'We're Not Drumming up Hate Speech, Say Musicians on Probe' *The Nation* (https://nation.africa/kenya/news/we-re-not-drumming-up-hate-speech-say-musicians-on-probe--817416)

——, 'Court Rejects Video Evidence in Hate Speech Case' *The Nation* (https://nation.africa/kenya/news/court-rejects-video-evidence-in-hate-speech-case-743038)

News B, 'Kenya Musicians Charged with Hate Speech' *BBC News* (https://www.bbc.co.uk/news/world-africa-18712858)

News N, 'Kalonzo Tells Poll Aspirants to Shun Ethnic Campaigns' *The Nation* (https://nation.africa/kenya/news/politics/kalonzo-tells-poll-aspirants-to-shun-ethnic-campaigns--819280)

Obare O, 'We Shall Not Be Cowed, 'No' Team Declares' *The Standard* (https://www.standardmedia.co.ke/busia/article/2000012056/we-shall-not-be-cowed-no-team-declares)

Obonyo O, 'MPs Plot to Disband Hate Speech Watchdog' *The Standard* (https://www.standardmedia.co.ke/business/article/2000012076/n-a)

Omanga B, 'Highs and Lows of Fiery Machage' *The Standard* (https://www.standardmedia.co.ke/business/article/2000012060/highs-and-lows-of-fiery-machage?pageNo=1)

Ombati C, Ochami D and Kimutai V, ''No' Side Accuses State of Hypocrisy' *The Standard* (https://www.standardmedia.co.ke/index.php/business/article/2000011762/no-side-accuses-state-of-hypocris)

Ondieki E, 'Jailed Blogger Usually Blunt: Peers' *The Nation* (https://nation.africa/kenya/news/jailed-blogger-usually-blunt-peers-1056982)

Opiyo P, 'Hate Speech: Cohesion Commission Frustrated by AG's Office' *The Standard* (https://www.standardmedia.co.ke/business/article/2000031828/n-a)

Pflanz M, 'Kenya Reins in Hate Speech Ahead of Constitution Vote' *The Christian Science Monitor* (https://www.csmonitor.com/World/Africa/2010/0618/Kenya-reins-in-hate-speech-ahead-of-constitution-vote)

Press TA, 'Kenyan First Lady's Slap Later Erased from Video' *NBC News* (https://www.nbcnews.com/id/wbna22261894)

Reporter C, 'Court Acquits MPs Over Hate Speech Charges' *Capital News* (https://www.capitalfm.co.ke/news/2011/12/31658/?moriarty=mobile)

Reporter S, 'High Court Stops 'Hurried' Mutahi Ngunyi Hate Speech Case' *The Star* (https://www.the-star.co.ke/news/2017-02-28-high-court-stops-hurried-mutahi-ngunyi-hate-speech-case/)

Rice X, 'Second Wife Slip Prompts Slap From First Lady' *The Guardian* (https://www.theguardian.com/world/2007/dec/13/kenya.xanrice)

——, 'Two Kenyan rights activists shot dead' *The Guardian* (< https://www.theguardian.com/world/2009/mar/06/kenyan-activists-shot-dead > accessed 25 November 2021)

Team S, 'Why Kibaki Sent Machage Home' *The Standard* (https://www.standardmedia.co.ke/index.php/business/article/2000011942/why-kibaki-sent-machage-home)

Thuku W, 'NCIC to Withdraw Hate Speech Charges Against Machage, Kapondi' *The Standard* (https://www.standardmedia.co.ke/index.php/business/article/2000040188/ncic-to-withdraw-hate-speech-charges-against-machage-kapondi)

——, 'National Cohesion and Integrated Commission in Out-of-Court Deal with 'Hateful' Musician' *The Standard* (https://www.standardmedia.co.ke/kenya/article/2000092686/ncic-in-out-of-court-deal-with-hateful-musician)

——, 'Machage, Kapondi Get Reprieve Over Hate Speech Case' *The Standard* (https://www.standardmedia.co.ke/index.php/business/article/2000040235/machage-kapondi-get-reprieve-over-hate-speech-case)

——, 'Musicians Face Five Years in Jail' *The Standard* (https://www.standardmedia.co.ke/central/article/2000061182/musicians-face-five-years-in-jail)

——, 'In Court: MPS Face Charges of Incitement' *The Standard* (https://www.standardmedia.co.ke/business/article/2000011846/in-court-mps-face-charges-of-incitement)

——, 'Machage and Kapondi Trial on incitement Now Begins' *The Standard* (https://www.standardmedia.co.ke/busia/article/2000021115/machage-and-kapondi-trial-on-incitement-now-begins)

Tomchak A-M, '#FreeSpeechStories: Arrested for a Tweet' *BBC News* (https://www.bbc.co.uk/news/blogs-trending-30922600)

Uwiringiyimana C, 'France's Macron Seeks Forgiveness Over Rwandan Genocide' *Reuters* (https://www.reuters.com/world/frances-macron-rwanda-reset-ties-survivors-expect-apology-2021-05-26/)

Wangari N, '24-Year-Old Nancy Mbindalah Held in Custody then Pardoned for Undermining the Embu Governor' *Kenya Monitor* (https://www.monitor.co.ke/2015/01/22/24-year-old-nancy-mbindalah-held-in-custody-then-pardoned-for-undermining-the-embu-governor/)

Wesangula D, 'Kenya Tackles Hate Speech Ahead of Elections' *Modern Ghana* (https://www.modernghana.com/news/440488/kenya-tackles-hate-speech-ahead-of-elections.html)

European Union Elections Observation Mission, *Preliminary Statement: Doubts about the Credibility of the Presidential Results Hamper Kenya's Democratic Progress* (2008)

19 A, *Silenced and Intimidated: Attacks on Freedom of Expression in Kenya* (2015)

——, *Comment on Prohibition of Hate Speech Bill, 2007 Kenya* (November 2009)

(UNHCR) UNHCfR, *Summary of UNHCR Presentation before Commission of Experts* (11 October 1994)

Africog, *Mission Impossible? Implementing the Ndung'u report.* (2009)

Akiwumi HMJAM, Bosire HMJSEO and Ondeyo HLJSC, *Report of the Judicial Commission Appointed to Inquire Into Tribal Clashes in Kenya (Akiwumi Report)* (31 July 1999)

Alston P, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Mission to Kenya* (26 May 2009)

Commission JS, *Memorandum of the Judicial Service Commission to the Building Bridges to Unity Advisory Taskforce* (2019)

Commission KHR, *Alternative Report to the UN Human Rights Committee in Consideration of Kenya's Third Periodic Report* (15 June 2012)

——, *Ethnicity and Politicization in Kenya* (2018)

Commission KNHR, *On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence* (2008)

Eriksson J and others, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience (Synthesis Report)* (1996)

Group IC, *Rwanda at the End of the Transition: a Necessary Political Liberalization* (2002)

Halakhe AB, *"R2P in Practice": Ethnic Violence, Elections and Atrocity Prevention in Kenya* (2013)

International A, *Rwanda: Gacaca: A Question of Justice* (2002)

——, *Rwanda: Safer to Stay Silent: The Chilling Effect of Rwanda's Laws on 'Genocide Ideology' and 'Sectarianism'* (2010)

——, *Unsafe to Speak Out: Restrictions on Freedom of Expression in Rwanda* (2012)

——, *Setting the Scene for Elections: Two Decades of Silencing Dissent in Rwanda* (2017)

Kenya National Human Rights Commission, *Annex One: Schedule of Alleged Perpetrators" in On the Brink of the Precipice: A Human Rights Account of Kenyas Post-2007 Election Violence* (2008)

Misol L, Hiltermann JR and Hogendoorn EJ, *Playing With Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya* (2002)

Mission EUEO, *Doubts about the Credibility of the Presidential Results Hamper Kenya's Democratic Progress - Preliminary Statement* (1 January 2008)

Ndungu PN and Aronson M, *Report of the Commission of Inquiry into the Irregular Allocation of Public Land (Ndungu Report)* (2004)

Nowrojee B, Manby B and An-Na'im A, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya* (1993)

Nyanjom O, *Factually True, Legally Untrue: Political Media Ownership in Kenya* (Nairobi, 2012)

Rights UNOotHCfH, *Report from OHCHR Fact-finding Mission to Kenya, 6–28 February 2008* (2008)

Task Force on the Establishment of a Truth JaRC, *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission* (2003)

Trust BWS, *The Kenyan 2007 Elections and Their Aftermath: The Role of Media and Communication* (1 April 2008)

Waki P and others, *Report from the Commission of Inquiry into Post-Election Violence (The Waki Report)* (2008)

——, *Report from the Commission of Inquiry into Post-Election Violence: Embargoed Schedule of Alleged Perpetrators (Annex One)* (2008)

Watch HR, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance* (2008)

——, *Law and Reality: Progress in Judicial Reform in Rwanda* (2008)

Katiambo D, 'Incivility in Social Media as Agonistic Democracy? A Discourse Theory Analysis of Dislocation and Repair in Select Government Texts in Kenya.' (University of South Africa 2019)

Muluka S, 'Hate Speech, Ethnic Cleavages and Youth Violence in Kenyan Politics' (Moi University 2017)

Mung'ou C, 'The Role of Information and Communication Technologies in Peacebuilding in Mount Elgon Region, Kenya' (Kabarak University 2016)

Muriuki G, 'A History of the Kikuyu to 1904' (University of London 1969)

Opiyo CL, 'An Analysis of the Prosecution of Hate Speech in Kenya: The Common Good Perspective' (Strathmore University 2018)

van Baalen M, 'Beyond Bullets and Ballots: A Theoretical Inquiry on Sexualised Election Violence' (Uppsala University 2019)

#globaljustice, 'Ruto/Sang ICC Case Thrown Out: Explanation and Reaction' (*https://ciccglobaljustice.wordpress.com/2016/04/07/rutosang-icc-case-thrown-out-explanation-and-reaction/*, 2016) accessed 17 February 2017

Africa E, 'Unit Two: Studying Africa Through the Social Studies' accessed 30 April 2015

BBC News, 'Kenyan MPs Admit to Circumcision' (*http://news.bbc.co.uk/2/hi/africa/7584269.stm*) accessed 18 January 2017

Dictionary Y, 'Majimboism' (*http://www.yourdictionary.com/majimboism*) accessed 04 June 2016

Economist T, 'Paul Kagame, Feted and Feared: Rwanda is a More Prosperous Country than Ever Before, It is Also a Repressed One' accessed 4 May 2018

——, 'The Difficulty of Trying to Stop It Happening Ever Again ' (*https://www.economist.com/middle-east-and-africa/2009/04/08/the-difficulty-of-trying-to-stop-it-happening-ever-again* 2009) accessed 2 June 2018

Encyclopedia NW, 'Serbian Empire' (*https://www.newworldencyclopedia.org/entry/Serbian_Empire*) accessed 18 October 2020

Europe PCfS, 'The Economics Of Isolation And The Role Of Aid' accessed 3 June 2018

Financial Times, 'International Criminal Court Drops Charges against Kenya's Ruto' (*https://www.ft.com/content/ddea856e-fb51-11e5-8e04-8600cef2ca75*, 2017) accessed 11 February 2017

Heidelberg Institute for International Conflict Research (HIIK), 'Conflict Research ' (*https://www.hiik.de/en/konfliktbarometer/pdf/ConflictBarometer_2008.pdf*, 2008) accessed 12 March 2017

House F, 'Kenya: Freedom in the World 2008' (2008) accessed 28 March 2017

——, 'Freedom on the Net 2015 - Kenya' (*Freedom House*, 2015) accessed 27 September 2020

iHub and Ushahidi, 'Umati: Monitoring Online Dangerous Speech' (*https://ihub.co.ke/ihubresearch/uploads/2013/february/1361013008_819_929.pdf*, 2013) accessed 12 March 2017

Information UNDoP, 'The United Nations and Kenya: A Briefing Note (7 February 2008)' (*https://archive.unric.org/html/english/pdf/Kenya_briefing_note.pdf*, 2008) accessed 21 August 2020

Integrated Regional Information Networks, 'Spreading the Word of Hate' (http://www.irinnews.org/report/76346/kenya-spreading-word-hate, 2008) accessed 28 March 2017

International Criminal Court, 'Situation in the Republic of Kenya: The Prosecutor v. William Samoei Ruto and Joshua Arap Sang – Case Information Sheet (April 2016)' (https://www.icc-pi.int/kenya/rutosang/Documents/RutoSangEng.pdf) accessed 11 February 2017

——, 'Ruto and Sang case: ICC Trial Chamber V(A) Terminates the Case without Prejudice to Re-prosecution in Future' (https://www.icc-cpi.int/Pages/item.aspx?name=pr1205, 2016) accessed 11 February 2017

IRIN, 'Analysis: Taming Hate Speech in Kenya' (2012) accessed 08 September 2020

Kaberia J, 'Kenya: Too Little Action on Hate Speech?' (*Global Voices Africa*, 11 July 2013) accessed 27 September 2020

Kamau-Rutenberg W, ''Watu Wazima: A Gender Analysis of Forced Male Circumcisions During Kenya's Post-Election Violence' ' (http://africanarguments.org/2009/07/17/watu-wazima-a-gender-analysis-of-forced-male-circumcisions-during-kenyas-post-election-violence/) accessed 15 January 2017

Kenya Today, 'Why Vernacular Radio Stations Like Kameme, Inooro, Egesa, Kass Etc Should be Banned In Kenya' (https://www.kenya-today.com/opinion/vernacular-radio-stations-like-kameme-inooro-egesa-kass-etc-banned-kenya, 2016) accessed 10 March 2017

Lacey M, 'A Decade After Massacres, Rwanda Outlaws Ethnicity' (*The New York Times* 2004) accessed 14 August 2018

Lonsdale J, 'Kenya: Ethnicity, Tribe and State' (https://www.opendemocracy.net/article/kenya_ethnicity_tribe_and_state) accessed 16 June 2016

Messay Kebede, 'The Ethnicization of Ethiopian Politics: Origins and Significance' (http://www.sudantribune.com/spip.php?article19003) accessed 13 April 2015

Mutung'u G, 'New media in Kenya: Time for regulation?' (https://www.article19.org/join-the-debate.php/72/view/, 2012) accessed 3 March 2017

Network HRH, ''I acted under pressure', says Electoral Commission Chairman Kivuitu' (http://humanrightshouse.org/Articles/870.html) accessed accessed 11 June 2016

News B, 'Kenya MP Ferdinand Waititu Charged With Hate Speech' (http://www.bbc.co.uk/news/world-africa-19751394, 2012) accessed 12 December 2017

News N, 'Over 5,000 poll chaos cases have stalled, says DPP' (https://nation.africa/kenya/news/politics/over-5-000-poll-chaos-cases-have-stalled-says-dpp--797408, 23 January 2012) accessed 12 September 2020

Newsweek, 'The Case against Rwanda's President Paul Kagame' accessed 04 May 2018

Odula T, 'Kenyan Government Sued for Police Brutality during Post-Election Violence Five Years Ago' (http://globalnews.ca/news/393443/kenyan-government-sued-for-police-brutality-during-post-election-violence-5-years-ago/) accessed 29 July 2015

Onyoyo PO, 'Criminality in "Hate Speech" Provision in the Laws of Kenya- Jurisprudential Challenges' (http://erepository.uonbi.ac.ke/bitstream/handle/11295/74354/Onyoyo_Hate%20speech.pdf?sequence=2, 2014) accessed accessed 21 February 2017

openDemocracy, 'Militias, Gangs and Vigilantes in Kenya: The Consequences of Abandoning the Reform Agenda' (https://www.opendemocracy.net/article/email/militias-gangs-and-vigilantes-in-kenya-the-consequences-of-abandoning-the-reform-agenda) accessed 18th March 2017

Others TAN, 'Othering 101: What is "Othering' (https://therearenoothers.wordpress.com/2011/12/28/othering-101-what-is-othering/) accessed 16 March 2015

Sambuli N, 'Defining the Hate Speech Crime' (*iHub*, 2015) accessed 25 September 2020

Serequeberhan T, 'Africa in a Changing World: An Inventory' (https://natna.wordpress.com/africa-in-a-changing-world%E2%80%A8/) accessed 30 May 2015

Times ATfN, '[PHOTOS]: Kwibuka22: Govt to engage diaspora on Genocide ideology' (2016) accessed 3 June 2018.

Truth J, and Reconciliation Commission, 'KNDR Documents - Statement of Principles on Long-term Issues and Solutions Updated with Implementation Matrix' (2008)

US Department of State BoD, Human Rights and Labor, 'Human Rights Reports on Human Rights Practices in Rwanda' (2011) accessed accessed 07 July 2018.

Vernon M, 'Dialogue on Internet Rights and Freedom in Kenya' (*Open Net Africa*) accessed 27 September 2020

Watch HR, 'Kenya: Human Rights Priorities for the New Administration' (https://www.hrw.org/news/2013/04/23/kenya-human-rights-priorities-new-administration, 23 April 2013) accessed 12 September 2020

——, ‘Letter to ICTR Chief Prosecutor Hassan Jallow in Response to His Letter on the Prosecution of RPF Crimes’ (*Human Rights Watch*, 2009) accessed 15 August 2018

WikiLeaks, ‘Hacking Team’ (*WikiLeaks*, 2015) accessed 22 September 2020

World H, ‘History of Kenya’ (*http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad21*) accessed 4 April 2015