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The Internal and External Contexts of Human Rights Practice in Kenya: Daniel Arap Moi's Operational Code

Introduction

When Daniel Arap Moi took over the helm of the Presidency of Kenya in 1978, there was a wide-spread expectation among the public that a democratic and human rights oriented political space would be put in place by his Administration. During Kenyatta's Presidency, the economic and political realm in the country was dominated by a small elite, particularly by a clique of the so-called Kiambu Mafia from his ethnic group, Kikuyus and their loyalists. This group undermined Kenyatta's nationalist and populist background, alienating other ethnic groups as well as non-conforming Kikuyus. Even though he remained loyal to Kenyatta as the Vice-President from 1967 to 1978, Moi was generally an outsider of Kenyatta's inner Cabinet and as such was regarded by Kenyans to be the right candidate to steer the country towards a more accommodative human rights environment.

This general perception by Kenyans of Moi's potential operational code was reinforced by the decisions and promises he made immediately he took over the Presidency. Moi released all 26 political detainees across the ethnic spectrum, most of whom had been languishing in jails for years.¹ He also reassured Kenyans that his Administration would not condone drunkenness, tribalism, corruption and smuggling.² These problems were already deeply entrenched in Kenya's socio-economic and political milieu. His Administration took quick action against top civil servants accused of corruption, culminating into the resignations of officials, including the Police Commissioner at the time. These actions were interpreted by Kenyans as the beginning of the establishment of a conducive environment for the adherence to democracy and human rights practice by his Administration. However, over the years he has been more interested in neutralising those perceived to be against his leadership. The issues of corruption, tribalism and human rights *per se* have remained distant concerns.

Instead, Moi began to centralise and personalise power when he took over the Presidency by *traditionalising* his authority through his pledge to follow Kenyatta's *nyayo* (Swahili for footsteps). Specifically, he wanted ordinary Kenyans to perceive him as a true nationalist not only on his own right but also as a close confidant of Kenyatta. He travelled constantly throughout the country addressing many pre-arranged and *ad hoc* public gatherings, with the theme *nyayo*, conceptualised within the contexts of 'love, peace and unity' at centre stage.³ This grand design, we argue, was a strategy geared towards the achieve-

ment of specific objectives namely, the control of the state, the consolidation of power, the legitimisation of his leadership, and the broadening of his political base and popular support.

Initially, Moi's ascendancy to the Presidency faced a major test because of the dissension over his leadership from within the ranks of the ruling party, the Kenya African National Union (KANU). However, the real threat to his Presidency came mainly from the influential elite group close to Kenyatta who, by 1976, had constituted themselves into what became known as the Change-the Constitution Movement.⁴ The main objective of the Movement was to bar Moi from taking over the Presidency. The group called for the amendment of the Kenyan Constitutional clause which conferred rights on the Vice-President to take over the Presidency for ninety days – pending the general elections – should the Office of the President fall vacant.⁵ However, Moi succeeded in assuming the Office of the President and thereafter began systematically to institute undemocratic authoritarian and oppressive one-man state rule. He persistently reminded Kenyans during his public speeches that 'when I was Vice-President, I sang like a parrot after Kenyatta; now I am President and you must sing like a parrot after me'.⁶

However, Kenyatta's style of restraint and steering the country as a *de facto* one-party state did not conform to Moi's leadership and behavioural characteristics. Moi's style of centralisation and personalisation of power and the state apparatus has gradually laid the foundation for dictatorship, authoritarianism and human rights violations by his Administration. The adoption of the 1982 *de jure* one-party state solidified this process and by extension criminalised competitive politics and criticism of Moi's leadership.⁷ Throughout the 1980s to the 1990s the security forces, particularly the police, have been used by his Administration to suppress and oppress the critics of his regime.

Yet, this persistent trend of human rights violations at home by his Administration is inconsistent with Moi's concerns to uphold the same rights abroad. His concern for human rights abroad dates back to the 1979-1980 period when Kenya participated in the Commonwealth Monitoring Force Zimbabwe (CMFZ). Since then, Kenya has taken part in many continental and global peacekeeping missions established to protect human rights principles. The central purpose of this study is to put into proper perspective this inconsistency, that is, Moi's violations of human rights at home and the protection of the same principles abroad. Specifically, the study rests on the premise that the violation of human rights at home by his regime is inconsistent with his Administration's frequent participation in peacekeeping missions established to protect human rights abroad. Moi's frequent commitment of Kenyan personnel to peacekeeping missions abroad, it can be argued, is mainly carried out to enhance his image internationally and by extension to legitimise his grip on power and the state at home.

Moi is not alone in this trend of readiness and willingness to commit troops abroad in such multilateral peacekeeping operations. For most of the Africa's independence history, a number of oppressive and authoritarian regimes in the continent have participated in similar peacekeeping missions, particularly those established by the United Nations (UN) and the Organisation of African Unity (OAU). Brushing aside the human rights situation at home, Mobutu of Zaire (now the Democratic Republic of Congo, DRC) – who presided over one of the most corrupt and oppressive regimes in the continent – sent a strong military contingent to participate in the OAU Chad 1981, peacekeeping mission at the time when human rights violations were rampant in his country. Irrespective of their poor human rights records, many African countries, Sudan, Zimbabwe, Zambia, Nigeria, and Congo, among others, have participated in a number of UN peacekeeping operations abroad established to protect human rights. The focus of this study is on Moi's inconsistent policy of upholding the sanctity of human rights practice abroad while violating the same principles at home.

To ensure his grip on power, President Moi has systematically usurped the functions of the other institutions of the Government to the extent that the concept of the *separation of powers* has been rendered nugatory. A few days after releasing all the political detainees, he rushed a bill through Parliament which granted him emergency powers, for the first time in Kenya's post-independence peacetime history. Moi associates insecurity and instability with open criticisms and challenge to his policies and style of leadership. In other words peace, unity, and stability in Kenya prevail if he is the only one at the helm of the Presidency. Moi has made comments to this effect on many occasions.

Moi's presidential style of leadership is centred on the power to control, dominate, command, and give directives. He 'habitually values loyalty above competence'⁸ Patronage and loyalty have, therefore, remained some of the central characteristics of Moi's leadership style which have enabled him to centralise and personalise his rule.⁹ For more than two decades as Head of State – one of the longest sitting Presidents in Sub-Saharan Africa – Moi has remained what has been described as a tribal paramount chief *writ large*.¹⁰ He enjoys praise directed at him by Ministers, civil servants and KANU officials even when such public statements may be considered embarrassing. For example, in one of the numerous public functions he attended, a Senior Minister stated while pointing at him: 'There, is enshrined in human form the popular will ... Even lobsters and fishes of the sea, out to the 200-mile limit and even beyond, pay obeisance to our great president the Honourable Daniel arap Moi.'¹¹ It is this level of patronage that has influenced his Presidential style of leadership. What is more important to stress is that he personalises criticisms and opposition to his leadership, particularly because he is suspicious of the people around him. He hardly delegates responsibilities and gets personally involved in

almost everything in the country – to the extent that on many occasions he contradicts and overrules Ministers and Government officials.

The Institutionalised Centralisation and Personalisation of the Presidency

A series of decisions and Constitutional amendments were carried out since Moi took over the leadership, establishing what can best be characterised as an institutionalised, centralised and personalised imperial presidency. Apart from the Constitution of Kenya, Amendment Act, Number 7 of 1982, which introduced Section 2(A) and transformed the country into a *de jure* one-party state, Parliament reinstated the detention laws that had been suspended in 1978. Specifically, the detention laws provided for in the Chief's Authority Act, the Public Order Act, the Preservation of Public Security Act, and the Public Order Act conferred on the president, among other things, the right to unilaterally declare security zones in any part of the republic.¹² The parliamentary privilege which gave the sitting representatives the right to obtain information from the Office of the President was also revoked. This meant that Members of Parliament and by extension their constituents surrendered their constitutional rights in favour of the Presidency. Parliamentary supremacy became subordinated to the President and KANU, with the party increasingly becoming the mouthpiece of the Executive.¹³

For the first time in Kenya's post independence history, the provincial administrators – the Provincial Commissioners (PCS), the District Commissioners (DCs), and District Officers (DOs) – who are civil servants, were directed by the Office of the President to become involved in the internal affairs of KANU. They were mandated to review and clear KANU meetings throughout the country as well as issue licences for public meetings. KANU officials and Members of Parliament were henceforth subjected to these administrative procedures, undermining the meaning and legitimacy of representation in Kenya's August House. These reorganisations and restructuring had a number of implications within the country. First, the structures of representation both within KANU and Parliament as well as those of maintaining public order were obscured. It meant that the Provincial Administration had power to prevent an elected Member of Parliament from addressing his or her own constituents. Second, patronage and loyalty to the President were not only encouraged but were also used as the barometers for measuring a leader's political power. In many cases KANU leaders as well as some Members of Parliament were not elected but selected.¹⁴ One of the first victims to fail the loyalty test was the man behind Moi's smooth ascendancy to the Presidency, Charles Njonjo, the former Attorney-General and Minister for the Constitutional Affairs, accused of plotting to overthrow Moi's government.¹⁵ Third, those perceived to be against the President and KANU policies were denied the right to contest electoral seats.

By early 1980s all the ethnic-centred welfare associations – the Luo Union, the Gikuyu, Embu, and Meru Association (GEMA), and the Kalenjin Union – as well as the Civil Servants Union (CSU) and the Nairobi University Academic Staff Union (UASU), among others, were banned. In 1986 Mo gave a directive for the *Maendeleo Ya Wanawake* Organization (MYWO), a national non-governmental organisation for women, to be affiliated to KANU, and thereafter officially changed its name to KANU MYWO in 1987.¹⁶ The Central Organization of Trade Unions (COTU), the umbrella body for most of the trade unions in Kenya, had been an ally of KANU for more than two decades, with most of its top leadership frequently selected by KANU, particularly in the 1980s to 1990s. These changes strengthened party-state relations and solidified presidential control of the state and were legitimised by the Amendments incorporated in the Constitution. Between 1964 to 1990, there were 24 Constitutional Amendments enacted by Parliament. We shall, however, only identify the ones enacted during the reign of President Moi which are relevant for the study.

The attempted military coup in August 1982 by some Airforce officers, estimated to have claimed between 600 to 1,800 lives, accelerated the process of the control of the state and solidified Moi's rule.¹⁷ The 1986 Act No. 14 and the 1988 Act No.4, imposed limitations on the independence of the Judiciary, with far reaching human rights implications. Sections 61(1) and (2) of the Constitution empower the President to appoint the Chief Justice and puisne judges respectively. The 1986 and 1988 Constitutional Amendments which provided for the removal of the security and tenure of the Attorney-General, the Controller and Auditor General, the judges of the High Court and the Court of Appeal were never resisted by Parliament, which at this time was under the tutelage of the Executive Branch of the Government. The control of Parliament and the Judiciary meant that the Office of the President was in a position to manipulate the functions of the two branches of government. Both Parliament and the Judiciary ceased to have the Constitutional prerogatives to control the excesses of the Executive.

Act 14 of 1986 and Act 4 of 1988, among others, were incorporated in the Constitution to block any loopholes that would curtail the process of the centralisation and personalisation of Moi's rule. Two things had happened before Act 14 of 1986 was passed in Parliament. In his ruling in a case in which an American marine had murdered a Kenyan woman in Mombasa, a judge found the accused guilty but fined the marine only Kenyan shillings 500 (about \$50) and bonded him for one year probation.¹⁸ The issue was raised in Parliament thereafter because of the light sentence imposed by the judge and the Attorney-General, as the chief legal advisor to the government, responded by criticising the decision of the judge. What was more embarrassing to the Government was that the Controller and Auditor General questioned why a state owned corporation engaged the services of a lawyer in this particular case.¹⁹

Moi interpreted these actions as direct threats to his leadership and thus pressured Parliament to enact the Amendments to give him more authority over the Judiciary. The police had, through Act 14 of 1988, the prerogative to detain the critiques of the regime for 14 days while coercing them into submission. By this time Parliament was functioning merely as a rubber stamp of policies initiated by the Presidency. President Moi's control of Parliament and the hierarchy of the party, KANU, was also enhanced by the new electoral procedures introduced by his Administration.

The Queue voting system introduced by KANU in 1986 ensured that a number of candidates sympathetic to the regime were nominated and elected. The system required that the electors lined-up behind the candidates during the nominations and that candidates who secured more than 70% of the votes did not have to go through the process of the secret ballot in the general elections. This system encouraged electoral rigging and paved the way for what has been described elsewhere as 'selection within election'.²⁰ For example, in a situation where there was a dispute over head-count, a repeat of the same process was not possible at the end of the exercise. In many instances, the Provincial Administrators, who were the returning officers and also answerable to the Presidency, usually declared candidates favoured by the regime as the winners. What is more important to note is that disputes arising out of nominations were often referred to the President as the final remedial authority over matters pertaining to the party, KANU, with the Courts of Law frequently invoking lack of jurisdiction over such petitions. Both Parliament and the Judiciary could not function independently under these circumstances.

The British judges who have continued to serve Kenya as part of the British Overseas Development Aid, are more susceptible to manipulation than their Kenyan counterparts because they are seconded on contracts.²¹ Under the terms of the agreement between Kenya and the United Kingdom, the renewal of contracts is at the discretion of the Executive which in some cases forced them to make rulings in favour of the state, with Justices Dugdale and Porter and Chief Justice Robin Hancox being good examples in the 1980s and early 1990s.²² A former British expatriate judge in Kenya, Eugene Cotran, has reiterated that in cases in which the President has a direct interest, the Government normally put pressure on the expatriate judges to make rulings in favour of the state.²³ It was as a result of similar circumstances, that two expatriate judges, Justices Derek Schofield and Patrick O'Connor, resigned because of what they called a judicial system 'blatantly contravened by those who are supposed to be its supreme guardians'.²⁴

The attempts by the Law Society of Kenya (LSK) to achieve the repeal of the restrictions and to handle legal cases in the courts of law without interference and intimidation landed some of the outspoken ones such as Gibson Kamau Kuria, Paul Muite, James Orenge, Gitobu Imanyara, Mirugi Kariuki, John Khaminwa, among others, in detention in the 1980s. In 1990, the Office of the

President succeeded in manipulating the LSK elections which saw its sponsored candidate, Fred Ojiambo, the incumbent, defeating the pro-multiparty supporter, Paul Muite, for the chairmanship.²⁵ This move was designed to control the legal profession by the Executive. To bolster his grip on power, Moi also embarked on the gradual *Kalenjinisation* of the public and private sectors from the 1980s. Moi, a Tugen, of the larger Kalenjin ethnic group, began to *de-Kikuyunise* the civil Service and government owned parastatals originally dominated by the Kikuyu ethnic group during Kenyatta's regime. He appointed Kalenjins in key posts in, among others, the Agricultural Development Corporation (ADC), Kenya Commercial Bank (KCB), Kenya Posts and Telecommunications (KPT), Central Bank of Kenya (CBK), Kenya Industrial Estates (KIE), National Cereals and Produce Board (NCPB), and the Kenya Grain Growers Cooperative Union (KGGCU) and created Nyayo Tea Zones (NTZ), Nyayo Bus Company (NBC) and Nyayo Tea Zones Development Corporation (NTZDC).²⁶

The NBC was established to neutralise the influence of the Matatu Vehicle Owners Association (MVOA) and the Matatu Association of Kenya (MAK), founded by the public transport owners.²⁷ What is important to note is that the *Kalenjinisation* of the public and private sectors paved the way for the Presidency to permeate the socio-economic and political lives of Kenyans, particularly when the impact of the Constitutional Amendments discussed earlier is added. The only remaining major worry for the Presidency was the church, particularly the Anglican Church (Church of the Province of Kenya-CPK), the Catholic Church and the Presbyterian Church of East Africa, which together account for over 70% of the church members. Together with the umbrella organisation, the National Council of Churches of Kenya (NCCCK), the church has persistently and consistently used the pulpit to criticise Moi's authoritarian regime.²⁸

The Human Rights Situation in Kenya under the Leadership of Moi, 1980s-1990s

This section is not based on the narrative and chronological order of human rights violations in Kenya during Moi's presidency. Instead, it is centred on a critical analysis of human rights violations in relation to Moi's institutionally centralised Presidency. When the Kenya African Democratic Union (KADU), of which Moi was the chairman, crossed the floor and joined KANU in 1964, Moi was appointed by Kenyatta as the Minister for Home Affairs. He retained the Ministry when he became the Vice-President in 1967. What is important to stress is that the police force – which at the time of independence outnumbered the defence force – was under the jurisdiction of Moi as the Minister for Home Affairs. The police force which includes the National Police, the Criminal Investigation Department (CID), the paramilitary General Service Unit (GSU), and the Directorate of Security and Intelligence (DSI) was responsible for the

application of, among others the public Security Act inherited from the colonial period. Moi was, therefore, exposed to the structure and functions of the police force for 14 years before he became the President. Directed by Kenyatta, Vice-President Moi invoked his administrative prerogatives to detain Oginga Odinga and other eight leaders of the Kenya People's Union (KPU) in 1969. KPU was proscribed by Kenyatta following an exchange between Odinga and the President. Moi explained that the KPU leaders were detained because 'any government worth its salt must put the preservation of public security above the convenience of a handful of persons who are doing their utmost to undermine it'.²⁹ As the person in charge of the internal security for 14 years, he established a network of supporters within the ranks of the intelligence community. It was one of his counter intelligence supporters, James Kanyoto, who telephoned him when Kenyatta died.³⁰

Detentions and political trails, tortures, arbitrary arrests and police brutality reminiscent of the colonial era have been common during Moi's tenure. He perceives human rights generally as alien and Eurocentric conceptions inconsistent with African values and norms and socio-cultural *modus operandi*. This is the guiding principle which has consistently influenced Moi's behavioural patterns internally *vis-a-vis* pro-democracy and human rights movement. He views the pro-democracy and human rights advocates in Kenya as unpatriotic, disloyal, and ungrateful individuals influenced by what he calls 'foreign masters'.³¹ A few years after taking over the Presidency, Moi began to exercise his style of authoritarianism by detaining a number of Kenyans critical of his government. He consistently used detention as an instrument for suppressing his opponents. Moi proscribed UASU in 1980 and detained, among others, Willy Mutunga and Katama Mukangi for what he called 'over-indulgence in politics'.³² This was just the beginning of the crackdown on Kenyans by his Administration in the 1980s. Apart from detaining the UASU leaders, the passports of the lecturers considered to be critical of his rule – Micere Mugo, Oki Ooko Ombaka, Michael Chege, Mukaru Nganga, Okoth Ogendo, Atieno Odhiambo, P. Anyan'g Nyong'o and Shadrack Gutto – were seized.³³

The August 1982 coup attempt by some Airforce personnel who called themselves the People's Redemption Council led to the dismissal of all 2,000 Airforce Officers. A number of them were court-martialled, detained, and sentenced to death, with many of the students who supported the coup leaders also arrested and detained. Moi's actions were meant to silence the intelligentsia perceived to be critical of his authoritarian rule. The emergence of the little-known clandestine London based movement, *Mwakenya*, in the 1980s set the stage for the widespread human rights violations by his Administration. In 1986 alone, 100 people were arrested and detained for their alleged association with *Mwakenya*. The movement, started by some Kenyans in Europe who had fled Moi's oppression, demanded, *inter alia*, social justice and respect for human rights.³⁴ Even though Moi made a big issue out of the movement, there

was no tangible evidence of a well organised group in the country or anywhere else in the world that threatened Kenya's national security and which would have warranted the massive arbitrary arrest, torture and detention without trial of the suspects. President Moi used the *Mwakenya* issue as a pretext to implement dictatorial laws.

With the Constitutional provisions regarding the separation of powers skewed in favour of the Presidency, Moi is able to decide which circumstances constitute an emergency.³⁵ The internal and international pressure that intensified against the regime between 1989 to 1991, only re-inforced the authoritarian trend. Moi did not acquiesce in multipartism without consequences to the pro-democracy and human rights movement. A number of the advocates for multipartism, John Khaminwa, Raila Odinga, Mohamed Ibrahim, Gitobu Imanyara, Kenneth Matiba and Charles Rubia, among others, were detained. Human rights lawyers, Gibson Kamau Kuria and Kiraitu Murungi, managed to flee to the United States to avoid detention.

The arrests and detentions followed Moi's warning against his critics. As has been the practice throughout his leadership, the police moved quickly and arrested those in the forefront of the struggle for democracy. The Judiciary merely gave its sanction to government action. To Kenyans it was what are commonly known in the country as a *political case*.³⁶ A case becomes *political* when Moi makes a direct statement regarding the case in question even if it has sub judice implications.³⁷ The Court rulings delivered against this writer as well as the Universities Academic Staff Union (UASU) and its officials between 1993 to 1995 serve as good examples of the level of state interference in *political cases*.³⁸ The submission of the dismissed UASU cases by human rights lawyers, Pheroze Nowrojee, James Orenge, Gibson Kamau Kuria, Paul Muite, Kiraitu Murungi, and Kathurima M'Inoti, among others, before the Courts of Appeal for further legal redress never succeeded. The suppression of freedom of the press, assembly, association, expression and movement and other fundamental rights of individuals provided for in Chapter V of the Constitution is a common feature in Kenya under Moi's leadership.

In 1991 Moi banned the production of George Orwell's *Animal Farm*. Also prohibited was Ngugu Wa Thiong's *Ngaahika Ndeenda* (Kikuyu for, I Will Marry When I Want), considered by the regime to be subversive because it attacked post-independence African dictators.³⁹

At the forefront against human rights violations has been civil society, with the church and the LSK taking the lead. However, since the 1980s the church has remained the central locus for discussions against the regime, with the pro-democracy and human rights movements using cathedrals and compounds of churches as venues for expressing their views and drawing up plans for action. As many Kenyans have witnessed over the years, using the church as a refuge has not deterred the regime from arresting, assaulting and detaining its critics within church compounds. Some church leaders critical of Moi, for

example Bishop Henry Okullu, Alexander K Muge and David Gitari of the CPK, Rt. Rev. Timothy Njoya (PCEA) and Rt. Rev. Ndingi Mwana a' Nzeki of the Roman Catholic, among others, have not been spared by the regime. In one of his sermons Bishop Muge emphasised that the church has a moral obligation to 'protest when God-given rights and liberties are violated' and to 'give voice to the voiceless'.⁴⁰ Even though some politicians and the Office of the President condemned his criticism of queue voting system, Bishop Muge maintained that: 'I shall not protest against violations of human rights in South Africa if I am not allowed to protest the violation of human rights in my own country'.⁴¹

Bishop Muge's statements broadened the criticism of Moi's regime by the church, with Rev. Njoya being arrested in 1988 for suggesting that Kenyans should hold discussions on critical questions affecting the country. Muge's death in a car crash in August 1990 is still clouded in mystery. The government's intransigence on the question of the repeal of Section 2(A) to allow multipartism was already weakened as a result of the unresolved mysterious death of Kenya's Foreign Affairs Minister, Dr Robert Ouko, in February, 1990. His death accelerated the demands for pluralism and respect for human rights. To save his regime from collapse, Moi adopted even greater authoritarian tactics arguing on a number of occasions that multipartism would cause chaos in the country because Kenya was not cohesive enough. Clergymen, lawyers and other pro-democracy and human rights advocates were persistently arrested and harassed, forcing Rev Henry Okullu to flee to the United States in 1990. The crackdown intensified during the *Saba Saba* (July 7) 1990 meeting, organised by the pro-democracy and human rights advocates. Some of these leaders, Oginga Odinga, Musinde Muliro, Martin Shikuku, George Nthenge, Philip Gachoka, and Ahmed Bamahriz later founded the Forum for the Restoration of Democracy (FORD). They were later joined by James Orengo, Paul Muite, Gitobu Imanyara, Raila Odinga, Pheroze Nowrojee, Kenneth Matiba and Charles Rubia. The attempt by the American Embassy to broker a negotiated permission for FORD to hold its first public meeting scheduled for 16 November, 1991 failed. Moi refused to issue a permit and instead arrested Oginga Odinga and Gitobu Imanyara, with Masinde Muliro, Martin Shikuku, James Orengo, and Paul Muite managing to go into hiding. The FORD leaders, however, later went ahead with the meeting but were arrested by the police who forcefully dispersed the gathering.

The arrested leaders were charged under section 5(10)(d) of the Public Security Act, which stipulates, *inter alia*, that 'any person who prints, publishes, displays, distributes or circulates notice of, or in any other manner advertises or publicises, a public meeting or public procession which has not been licensed under this section, shall be guilty of an offence'.⁴² The Public Security Act is frequently invoked by the regime to suppress freedom of assembly and speech. The government launched a virulent condemnation of the US Ambassador, Smith Hempstone, for supporting the pro-democracy and human rights move-

ment in Kenya.⁴³ The US Congress, concerned with human rights violations and corruption, passed the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1991 requiring Kenya to meet certain conditions before \$15 million economic and military aid could be disbursed.⁴⁴ These conditions were based on the provisions that Kenya: 'charge and try or release all prisoners, including any persons detained for political reasons; cease any physical abuse or mistreatment of prisoners; restore the independence of the judiciary; and restore freedoms of expression.'⁴⁵ The Congressional concern for human rights violations in Kenya gained momentum in the 1990s, culminating into the fact finding mission to Kenya by high ranking Senators and the release of Kenneth Matiba, Charles Rubia, Raila Odinga, and Gitabu Imanyara.

The repeal of Section 2A of the Constitution which made Kenya a *de jure* one-party state came as a result of the directive by Moi during the December 1991 KANU National Governing Council meeting and thereafter endorsed by the KANU National Delegates Conference and Parliament. Section 2A of the Constitution stipulated that 'there shall be in Kenya only one political party, the Kenya African National Union'.⁴⁶ This repeal paved the way for the formation of political parties namely, FORD led by the opposition veteran, Oginga Odinga; the Democratic Party of Kenya (DP) – Mwai Kibaki; Kenya National Democratic Alliance (KENDA) – Mukaru Nganga; and Kenya Social Congress (KSC) – George Anyona, among others. However, since 1992, the opposition has disintegrated into more than 30 political parties, making it possible for Moi to manipulate their activities, and to continue the domination of the electoral process and the violation of human rights.

The 1992 ethnic conflict, which pitted the Kalenjins (Moi's ethnic group) in the Rift Valley and other ethnic groups, the Kikuyus, Luos and Luhyas and claimed more than 1,000 lives and created over 260,000 refugees, was reportedly instigated by the state.⁴⁷ A task force appointed by KANU as well as the Parliamentary Committee reaffirmed the findings of the NCK that the state was involved in widespread ethnic cleansing in the Rift Valley.⁴⁸ As ethnic conflict and other forms of human rights violations intensified in the early 1990s, the church issued many pastoral letters protesting against the government's actions. In one of their pastoral letters addressed to Moi, the Roman Catholic Church wrote:

Although our pleas, requests and advice... seem to have been ignored by you, we on our side will not abandon our responsibilities... We have seen and heard of so much wickedness perpetrated in Kenya since the clashes began... Innocent people, peaceful and humble... and even churches and mosques have been attacked and destroyed... All these abominations are done in your name, by some of your Cabinet Ministers, your DCs, DOs, your GSU and your police.⁴⁹

The fact that the Provincial Administrators, the GSU and the police were involved in the conflict, was a clear indication of the government's complicity regarding human rights violations in the area.

One of the main objectives of the regime in instigating ethnic cleansing was to prove to Kenyans and the world that multipartism was not suitable for a multi-ethnic country like Kenya. Detention, arbitrary arrests and torture of ordinary people, particularly the pro-democracy and human rights advocates and the Opposition Members of Parliament by the Moi regime continued throughout the 1990s. Table 1 indicates the extent to which Moi's regime persistently engaged human rights violations.

Table 1: *Repression of Kenyans by the Moi Regime*

CATEGORY OF EXPRESSION	1994	1995	1996
Extra-Judiciary police killings	45	120	88
Police	42	101	90
Arbitrary Arrests	392	2104	1086
Freedom and Rights of Movement	71	18	22
Torture	308	76	N/A
Freedom of Assembly and Association	71	81	31
Arrests and Interference of Opposition MPs	56	–	19

Sources: Compiled from:

Kenya Human Rights Commission, *Quarterly Repression Report, October-December 1995*. Nairobi: Kenya Human Rights Commission and Kenya Human Rights Commission, *Quarterly Repression Report, July-September 1996*. Nairobi: Kenya Human Rights Commission, 1996

The continued arrests of Members of Parliament, 56 and 19 in 1994 and 1996 respectively, undermined the right of representation. Members of Parliament have been frequently arrested for addressing what the regime calls *illegal* meetings even in cases where such meetings are licenced by the government.⁵⁰

In one of its reports on Kenya submitted to the United Nations in 1993, the Committee on Economic, Social and Cultural Rights (CESCR) stated that although Kenya has been a party to the Convention since 3 January 1976, it had not submitted a single report as stipulated under Articles 16 and 17 of the Covenant. Specifically, the CESCR was concerned that Kenya had not incorporated the rights in its Constitution that it had recognised as a contracting party to the Covenant. The Committee also observed that there was no institutional mechanism in Kenya responsible for the enforcement of human rights, with the High Court performing no Constitutional role in this regard.⁵¹ In the so-called *politi-*

cal cases it is a common practice for the state to interfere with Court evidence as in the case of Koigi wa Wamwere where his defence attorneys discovered that the Magistrate, William Tuiyot, had interfered with the proceedings.⁵² What is central to note, as we have explained, is that the powers and the independence of the Judiciary have been usurped by the Presidency.

Irrespective of the pressure mounted by the internal pro-democracy and human rights movements and the external forces under the rubric of political conditionalities, Moi has maintained his authoritarian tactics in Kenya's second wave of multipartism. Although the adoption of what can be called *informal repression* by the state, that is, the use of proxy agencies and groups to attack the pro-democracy and human rights supporters by the state is not new in Kenya's independence history, it is becoming an important phenomenon under Moi in the multipartty era.⁵³

After the 1997 elections in Kenya, violence erupted once again between Kalenjins and Kikuyus in a number of areas in the Rift Valley, particularly in Mirgwit, Magande, Survey, Motala, Milimani and Njoro, leaving more than 100 people dead and displacing over 1,000 people as refugees. What is important to note is that the Kalenjin supporters of KANU attacked the Opposition strongholds dominated by the Kikuyus.

Protection of Human Rights Abroad: Moi's Inconsistent Pattern

Kenya's contribution to the CMFZ, 1979-1980 was the beginning of Moi's commitment to participate in the protection of democracy and human rights principles outside Kenya's borders. Whereas the immediate central concern for the Commonwealth was the independence of Zimbabwe following the Lancaster House negotiations, the organisation was also concerned with the humanitarian and human rights issues. The CMFZ was not only mandated to ensure the smooth transition to the Zimbabwean independence but also to safeguard, among other things, a meaningful electoral process.⁵⁵ The CMFZ mission marked the beginning of Kenya's frequent involvement in multilateral peace-keeping operations throughout the 1980s to the 1990s. Apart from participation in the OAU Chad I and Chad II, 1981-1982 missions, Kenya has been involved in nearly 20 UN-mandated operations in Africa, Asia and Europe between 1988-1998, one of the highest in the continent. The central purpose of this section is to put into proper context the Moi Administration's involvement in the maintenance of the sanctity of human rights principles abroad. Specifically, it examines the central objectives of the UN-mandated peace keeping operations in which Moi committed the Kenyan police, military observers, and troops. The study is not concerned specifically with the success or failure of such missions. It is also not concerned with all the peacekeeping missions in which Kenya has been involved. Only a few will be examined for purposes of illumination.

Before being deployed to participate in peacekeeping operations abroad, the Kenyan personnel undergo thorough and intensive training for three months at the Kenya National Staff College/Defence Staff College, Karen, Nairobi. They are taught courses which include, *inter alia*, International Law of Armed Conflict, the Military in Human Rights, International Humanitarian Law, the Charters of the OAU and the UN, Civil-Military Relations, and Negotiation and Mediation. A number of academics at the University of Nairobi, as well as experts from the UN missions based in Nairobi, Kenya, such as the United Nations Development Programme (UNDP) are contracted by the Department of Defence, Office of the President, to train the personnel. The police, military observers, and troops are therefore exposed to the values entailed in humanitarian and human rights principles before they are dispatched abroad. The UN peacekeeping missions are co-ordinated by, among others, the UN Department of Political Affairs (DPA) in conjunction with the Department of Humanitarian Affairs (DHA), the UN High Commission for Refugees (UNHCR), and the UN Commissioner for Human Rights (UNHCR).⁵⁶

The number of the UN peacekeeping operations world-wide have increased markedly from the 1980s. Between 1987 and 1994, for example, the military forces engaged in the UN peacekeeping operations increased from 10,000 to 70,000, with an annual budget rising from \$230 million to \$3.6 billion.⁵⁷ The increased involvement of the UN in matters such as civil wars, traditionally considered to be the preserve of sovereign states, has provided an avenue for the organisation to deal with humanitarian and human rights questions. The post-Cold War international environment is globalising human rights values to the extent that they are no longer viewed as merely Western-oriented conceptions but rather as principles of global governance.

One of the five main responsibilities of the DPA is to alert the UN in conflict situations where human rights violations are common and which may require the involvement of the UN peacekeeping operations.⁵⁸ Indeed, the intensive training to which the Kenya personnel are exposed prior to their deployment in the UN-peacekeeping operations abroad conforms to the UN's concerns for human rights violations. Apart from its participation in many peacekeeping missions abroad, Kenya is also party to a number of international human rights treaties. Kenya has ratified, among others, the African Charter on Human and People's Rights (ACHPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the International Labour Organisation Convention No.98 (the Right to Organise and Collective Bargaining); and Convention and Covenant No.105 (the Abolition of Forced Labour Convention). However, it needs to be noted that Kenya has not adhered to the convention against Torture and Other Cruel Inhuman or Degrading Treatment and Punishment.⁵⁹ Yet, Kenya has been an active participant in the protection of human rights abroad. Kenyan participation in the UN-mandated operations in Mozambique, Liberia, and Angola are examined as examples for illumination.

The peacekeeping missions in these countries are neither more important than others nor similar but are discussed mainly for analytical and illustrative purposes.

After a sporadic civil war involving the government of the Front for the Liberation of Mozambique (FRELIMO) and the *Resistencia Nacional Mocambicana* (RENAMO), a successful truce was negotiated in Nairobi, Kenya, 1989, but was never upheld by the parties. However, FRELIMO and RENAMO signed the General Peace Agreement (GPA) in 1992 which paved the way for the establishment of the United Nations Operations in Mozambique (ONUMOZ) under the Security Council Resolution 707 of December, 1992. The civil war had claimed up to 1 million lives, with nearly 2 million refugees and 5 million internally displaced persons.⁶⁰ One of the central concerns of ONUMOZ, therefore, was to resettle the refugees and the internally displaced peoples. It was also responsible for monitoring elections and to ensure that the parties to the conflict observed human and political rights of the Mozambicans. By the end of its mandated period, ONUMOZ had spent more than \$472 million to maintain 6,625 troops, 354 military observers, 1,144 civilian police, and 900 electoral observers.⁶¹

While the Administration of Moi was concerned with the implementation of the ONUMOZ objectives, thousands of Kenyans were being slaughtered in his political backyard, the Rift Valley Province in the same period. By October 1999 more than 1,000 families and 800 orphans of the state-instigated 1992-1994 and 1997 ethnic cleansing in the Province were still languishing in camps around Subukia, Bahati, Dundori and Solai.⁶²

The United Nations Observer Mission in Angola (MONUA) was established by the UN Security Council Resolution 1118 of 1997 to replace the United Nations Angola Verification Mission III (UNAVEM III – 1995-1997). The UNAVEM III replaced UNAVEM I, 1989-1991 and UNAVEM II, 1991-1995 with the mandate to restore peace between the Popular Movement for the Liberation of Angola (MPLA) led government and the National Union for the Total Independence of Angola (UNITA) under Jonas Savimbi. The UNAVEM III was also mandated to perform certain functions on the basis of the May 31, 1991 Peace Accords for Angola and the November 20, 1994 Lusaka Protocol signed by the Government of Angola the UNITA. The functions included, among others, the facilitation, co-ordination and support for humanitarian activities in the country. When MONUA took over the mandate from UNAVEM III in 1997, the mission had 4,220 troops, 238 military observers, 288 police, with Kenya contributing 10 military observers to the contingent. Both the UNAVEM III and MONUA did not have the mandate to 'use force in self-defence, including against forcible attempts to impede the discharge of the operations'⁶³ Apart from its humanitarian responsibilities, MONUA was also mandated to help warring parties to consolidate peace and reconciliation in the country and to help the parties to establish an environment

necessary for democratic development. The enfranchisement of thousands of the refugees with the help of UNAVEM II, the International Foundation for Electoral Systems (IFES), the International Republican Institute (IRI) and the National Democratic Institute for International Affairs (NDI), among others, provided an opportunity for the displaced peoples of Angola to participate in the elections. Even though the 1992 electoral outcome was later rejected by UNITA, what is important to stress is that the displaced people were given an opportunity to exercise their democratic and Constitutional rights. In contrast, the regime of President Moi not only disenfranchised the internally displaced peoples and the refugees, but that the majority of Kenyans who had turned 18 years of age just prior to the 1992 elections were not given enough time to register to vote. In the process, thousands of eligible voters were disenfranchised by his Administration mainly because he was uncertain about his popularity among the youth.

The atrocities in Liberia which forced the Security Council under its Resolution 788 of 1992 to impose embargo on all deliveries of weapons and military equipments to Liberia, except for the Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG), also reveal President Moi's concerns for human rights violations abroad. Following the 1993 massacre of more than 600 Liberians, mainly the internally displaced people, particularly women, children and the elderly near Harbel, Liberia, the UN mandated the Secretary-General, to investigate the massacre. The Secretary-General, Boutros-Boutros Ghali, instituted a Panel of Inquiry in 1993 and appointed Amos Wako (Kenya's Attorney-General) as its Chairman, Robert Gersony of the United States and Mahmoud Kassem of Egypt as members to investigate the atrocities. In their findings submitted to the Secretary-General on 10 September, 1993 the panel concluded that the massacre was planned and carried out by the Armed Forces of Liberia (AFL) of the Interim Government of National Unity (IGNU) led by Amos Sawyer. The Wako Committee exonerated the National Patriotic Front of Liberia (NPFL) led by Charles Taylor – now the President of Liberia – from blame.⁶⁴

After the submission of the Wako Committee report to the UN Secretary General, the Security Council, in its September 22, 1993 Resolution 866 established the United Nations Observer Mission in Liberia (UNOMIL) to work in conjunction with ECOMOG in Liberia. By 1994 nearly 2 million Liberians were in need of humanitarian assistance, with more than 750,000 refugees and 800,000 who were internally displaced largely because of the continued factional fighting. The deteriorating humanitarian situation necessitated the involvement of the UNHCR as well as the International Committee of Red Cross (ICRC) and other international non-governmental organisations. The atrocities and other forms of human rights violations committed by Liberia's nearly 60,000 combatants, 25% of whom were child soldiers, slowed the implementation process of the UNOMIL mandate. Apart from supporting the

ECOWAS peace process, the UNOMIL was mandated to report to the Secretary-General matters pertaining to human rights violations and to assist human rights groups in their activities in Liberia.⁶⁵ The establishment of a Special Representative by the UN Security Council Resolution 1020 of 1995 to deal with human rights issues within the framework of the UNOMIL mandate increased the capacity of UNOMIL to monitor the situation. With the help of ECOMOG and human rights NGOs, UNOMIL concluded that there was widespread human rights violations by the belligerents.

The UNOMIL established that human rights violations ranged from decapitation, castration, blunt object trauma, and gunshot wounds. The UNOMIL, with the help of other UN agencies, human rights NGOs, and ECOMOG, also monitored the status of prisoners of war and civilian detainees. Apart from the Special Representative responsible for human rights issues, the Secretary-General also appointed a United Nations Humanitarian Coordinator for Liberia to work in collaboration with, among others, the UNHCR, UNDP, the United Nations International Children Emergency Fund (UNICEF), the World Food Programme (WFP), Food and Agriculture Organisation (FAO) and World Health Organisation (WHO). The appointment of Major-General Daniel Ishmael Opande, a Kenyan, by the Secretary-General as Chief Military Observer of UNOMIL, 1993 to 1995 and Col. David Magomere, a Kenyan, in 1996 as an Acting Chief Military Observer of UNOMIL was a clear indication of the readiness and willingness of the Moi Administration to protect human rights in Liberia. Kenya also contributed troops and military observers to the UNOMIL mission.

As in the cases of peacekeeping missions already examined in this study, Kenya's participation in the UN operations established to protect human rights is questionable. While Moi acquiesced to the deployment of his Attorney-General and high-ranking military officers to Liberia because of his concerns for human rights violations, thousands of Kenyans were in a similar situation. The military personnel trained at the Defence Staff College, Karen, Nairobi, and frequently sent abroad to deal with such cases were not deployed in the Rift Valley to contain the conflict. Prior to his appointment as Kenya's Attorney General, Wako had worked with the United Nations agencies and Amnesty International. Initially, there was a tacit applause among some sections of the Kenyan legal profession that Wako would use his liberal background and experience on human rights issues to revamp the Kenyan Judiciary. However, he has failed to meet the expectations of Kenyans, particularly because human rights violations have continued with impunity during his tenure, with the Judiciary doing nothing to uphold the fundamental human liberties enshrined in the Constitution.

What needs to be reiterated is that Moi is consistent in his practice of violations of human rights at home while upholding the sanctity of the same principles abroad. For example, in 1992 violence erupted in the Rift Valley and in

1997 in the Coast Province prior to the elections of that year. In both cases it was the so-called up-country and non-indigenous people who were targeted. The objectives were to *de-oppositionise* the Coast Province. The so-called up-country people are viewed by KANU to be largely sympathetic to the Opposition. In both the 1992 and the 1997 cases, the pre-election violence disenfranchised thousands of Kenyans, with the Government doing little to protect the victims. Moi has since then instituted an enquiry, the Akiwumi Commission, to investigate, among other things, those behind the violence. As a party to the International Covenant on Civil and Political Rights since 1966, Kenya is obligated to adhere to the provisions contained therein. Article 25 of the Covenant clearly provides for the right of political participation and considers it as a fundamental human right.⁶⁶ This right applies to internally displaced people as well as refugees.

Summary and Conclusions

President Moi's unwillingness to institute tangible and comprehensive constitutional reforms since the introduction of multipartism has created a stalemate between the most of the Opposition Members of Parliament, church leaders and other pro-democracy and human rights advocates. Despite the enactment of the 1997 Inter-Party Parliamentary Group (IPPG) which provided for the removal of, *inter alia*, the Public Order Act (Cap 56) to facilitate freedom of assembly, the crackdown on the critics of the regime continued unabated. The Chairman of the Kenya Magistrates' and Judges' Association (KMJA) in his address to the members, March 1997, expressed his concern about the frequent interference by the Office of the President on matters pending in the Courts of Law and complained of directives prohibiting KMJA members from interacting with members of the LSK and the international Commission of Jurists (ICJ) as well as speaking in seminars on matters pertaining to the rule of law, human rights, the independence of the Judiciary and judicial accountability.⁶⁷ What needs to be noted is that Moi still controls the other branches of Government. As we have explained, his style of leadership, bolstered by the Constitutional amendments during his tenure, has led to the subordination of the functions of the Judiciary and Parliament. We have argued that there is consistency in the Moi Administration's policies of up-holding the sanctity of human rights abroad while on the contrary violating the same principles at home. Third, as was the case during the *de jure* one-party state rule, human rights violations by his Administration have not abated even in the post-1992 and 1997 multiparty elections. Between 1997 and 1998 more than 200 people were killed and thousands rendered homeless in the Rift Valley (mainly around Laikipia and Nakuru). At the Coast Province, particularly Mombasa and Kwale, a wave of violence left more than 300 people dead and over 100,000 homeless.⁶⁸

Whereas Kenya has participated in many UN-mandated peacekeeping operations established to protect and promote human rights, Moi has persistently

demonstrated unwillingness to uphold the sanctity of human rights at home. His Administration has shown ambivalence in dealing with violence which has persisted in the country, particularly in the Rift Valley and the Coast Provinces. In this era of globalisation as well as the emerging trends of the Second Liberation it is imperative for the UN to be more concerned about human rights issues than it was during the Cold War period. Specifically, the UN should not be party to human rights violations by way of allowing member states that commit the same atrocities within their internal affairs to participate in its missions abroad established to uphold human rights. This is an important, though contentious, issue that the UN needs to address when revamping its Charter.

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