

The rise of a mediated state in northern Kenya: the Wajir story and its implications for state-building

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In an anarchic corner of northern Kenya in the mid-1990s, a collection of local non-state actors led by a women's market group created an umbrella movement that came to establish an impressive level of peace and security across an entire region. The Kenyan government forged a formal relationship with this group in Wajir, essentially sub-contracting out important functions of local government to local civic leaders, and using its partnership with the Wajir group as a template for similar state-sanctioned governance arrangements in other troubled border areas of the country. The Wajir story is examined in this article as an example of a "mediated state" approach to rebuilding rule of law through non-state actors in a conflict and post-conflict setting.

Key words: mediated-state, state-building, civil society, peace-building, failed state, northern Kenya

Introduction

An intriguing but largely overlooked transformation in governance and security has taken place in northern Kenya over the past decade, one which has implications for alternative state-building approaches in zones of state failure.

In the early to mid-1990s, the Somali-inhabited portion of northern Kenya was one of the most insecure and ungoverned zones of the Horn of Africa. The Kenyan government had never established a strong presence in this isolated and impoverished frontier zone, and when it ended a long period of emergency rule there in the early 1990s, its capacity to impose basic governance declined even further. Spillover from the Somali civil war and state collapse produced a massive flow of refugees, small arms, violent criminality, and clan tensions in northern Kenya. Local Somali Kenyans were essentially on their own, trying to cope with serious deterioration of security in their home areas.

By the late 1990s, the security and governance climate in much of northern Kenya had improved dramatically. Violent crime, including livestock raiding, was rare; towns were safe; regional commerce flowed with minimal risk of banditry; communal clashes were prevented or quickly managed; and cross-border diplomatic initiatives with communities on the Somali side of the border successfully reduced spillover of lawlessness and conflict into northern Kenya. A major clash between the Garre and Marehan clans

at the border town of El Wak in 2004 constituted a troubling setback in this trend, but it was the exception that proved the rule. Overall the region was not only much safer than before, it was arguably safer than the rest of Kenya. According to a public opinion survey conducted by Afro-barometer in 2006, its residents reported less crime and less fear of crime than any other region of Kenya.

This dramatic turnaround in northern Kenya was not due to a robust Kenyan government initiative to reclaim control over the territory. Its physical presence and capacity to govern in the region remains weak; the only major improvement has been in its US-backed military patrols of the border since 2006, in response to renewed political crisis and threat of spillover from neighboring Somalia. Instead, the improvement in governance and security has emanated from coalitions of non-state actors in the local community who have formed hybrid systems of governance in partnership with the Kenyan state.

These informal governance and security arrangements, and the willingness of the Kenyan government to treat them as partners rather than rivals to be marginalized or tools to be manipulated as a form of “indirect rule,” are the subject of this article. Northern Kenya constitutes one of the most interesting cases of the rise of “mediated state” arrangements in contemporary Africa, and raises a host of questions about the advisability and feasibility of the mediated state model as either a temporary coping mechanism or a long-term alternative approach to reviving rule of law in failed states.

A Troubled Region

The instability which periodically plagues the Kenya-Somalia border area is part of a broader, complex pattern of state failure and communal violence afflicting much of the Horn of Africa. Violence and lawlessness are particularly acute in remote border areas where states in the region have never projected much authority. When they have, state authorities have sometimes been the catalysts of insecurity rather than promoters of peace. On the Somali side of the border, the central government collapsed in January 1991 and has yet to be revived.¹ In Kenya, the vast, remote, and arid frontier areas bordering Somalia, Ethiopia, Sudan, and Uganda were never entirely brought under the control of the state in either colonial or post-colonial eras. Thousands of Kenyans have died in periodic communal violence in these border areas over the past fifteen years, in clashes which sometimes produce casualties levels normally associated with civil wars. Kenyan government administration of its peripheral territory ranges from weak to non-existent. There, government outposts are essentially garrisons; police and military units are reluctant to patrol towns after dark, and are badly outgunned by local militias. “Even the police are never safe here,” lamented one Kenyan newspaper headline in reference to Kenya’s northern provinces.²

The broader nature of the crisis of Kenya’s border areas was made painfully clear

1 A Transitional Federal Government was declared for Somalia in October 2004 but has yet to become operational.

2 “Even the Police Are Never Safe Here,” *The East African Standard* (July 17 2005). Accessed via Lexis-Nexus.

in July 2005, when tensions between the Gabra and Borana in Marsabit, Kenya (near the Ethiopia border) exploded in what some observers claim is the single worst incident of communal violence in the history of post-colonial Kenya. The massacre at Marsabit resulted in over 90 Gabra deaths and 9,000 displaced persons. It also produced an outburst of soul-searching in the Kenya media and parliament over “Kenya’s killing fields” in its border regions and the costs incurred for the failure of the government to extend its authority into what many Kenyans still refer to as the country’s “frontier.”³ “That hundreds of armed criminals can terrorize a town for hours without the intervention of the country’s security forces is a clear indication that the government has little or no authority in the North Eastern region,” argued the Kenya Human Rights Commission (KHRC).⁴

The Wajir Case: Conflicts of 1992-93 and 2000-01

Wajir district is shared by a number of Somali clans, principally the Ajuraan, Degodia, and Ogaden. The Ajuraan consider themselves to be the “original” inhabitants of much of the land, and enjoyed protected access to Wajir-West under the British colonial system. Since independence they have faced long-term migratory pressure and changing demographics from westward-expanding neighbors, especially the Degodia (Goldsmith 1997: 30). The district has historically been almost entirely rural and pastoral, with only four settlements in the entire district in 1940. Today, there are 71 settlements, of which 26 are new since 1996; a total of about 380,000 live in the district.⁵

Migratory pressures on the Wajir rangeland have been exacerbated by the firepower and changed clan demographics arising from the Somali civil war, and have led to endemic tensions between the three clans over rights to pasture and wells. Land pressure was worsened in the 1980s when the Degodia were pushed out of Isiolo district and into Wajir by the Borana. Anxiety over land access is clearly a major underlying factor in district conflicts. But the clashes which erupted in 1992 and 1993 between the Degodia, Ajuraan, and Ogaden clans were triggered by the arrival of multi-party politics and competition over MP constituencies. As noted above, these elections were viewed as high-stakes, zero-sum contests by clans fearful that victory by rival clans would institutionalize the rival’s hold on resources and eventually disenfranchise the losers. In 1992, general elections led to heightened tensions in a number of electoral districts (“constituencies” in the Kenyan system) where two or more clans shared residency and where demographics were either shifting or were actively manipulated to produce a desired outcome for a clan and its MP candidate.

In Wajir-West constituency, tensions between the Degodia and Ajuraan had already led to an alarming level of assassinations in the 1980s, rendering the area one of the most unstable in Kenya. In 1992, the demographically ascendant Degodia clan sought

3 “Kenya’s Killing Fields,” *The Nation* (July 14 2005). Accessed via Lexis-Nexus.

4 “Thousands Flee as New Clan Attacks Hit Northern Kenya after Village Massacre,” *Agence France Presse* (July 14 2005). Accessed via Lexis-Nexus.

5 Robert Walker and Hassan G. Omar, “Pastoralists Under Pressure: The Politics of Sedentarisation and Marginalisation in Wajir District, Northeast Kenya” (Nairobi: Oxfam-GB, July 2002), pp. 9, 18.

to increase its numbers by bringing in Degodia from outside the constituency to vote, in some cases even from Ethiopia. It won the seat, and the Ajuraan loss was seen as a sign of the declining fortunes of the Ajuraan. Degodia chiefs were subsequently appointed to an exploding number of new locations, thanks to the influence of the MP. For the Degodia, this was merely a function of time-honored political patronage by an MP in service to his base. For the Ajuraan, it appeared to be a large-scale, politically-sanctioned land grab at their expense. The ethnic clashes which ensued rocked much of Wajir district, spreading to other clans and overwhelming local government. Violence even spread among the market women in Wajir town. From 1992 to 1995, a total of 500 businesses in Wajir were looted or destroyed; livestock estimated at a value of \$900,000 were lost to rustling; and Wajir town was nearly emptied of professionals and middle-class residents. During that period, 165 civil servants and teachers either left their posts or refused to go when assigned to Wajir (Ibrahim 1997). Wajir was the epicenter of the descent of much of North-east Province into anarchy.

What happened next is one of the more extraordinary turns of events in Kenya's troubled frontier violence, and is well-documented in print and now film.⁶ An initially small women's civic group helped set in motion a peace process which eventually culminated not only in a relatively durable peace among the three main clans in Wajir, but also helped produce a new type of civic-government partnership for conflict management that went on to become a model for peace committees throughout much of Kenya.

Two women intervened to stop the market violence. The Wajir Women for Peace Group was formed out of those talks, which expanded to include other women in the town.⁷ This women's group was then joined by a group of professionals who formed the multi-clan Wajir Peace Group (WPG), with members from all clans in the district. They facilitated a meeting of clan elders from all the lineages in the district which culminated in the Al Fatah declaration, which set out guidelines for the return of peace and future relations between the clans. Other groups also began to form, involving elders and youth, while a group of businessmen began raising money for peace activities.

In April 1994, a new DC was appointed to Wajir, who sought to partner with local civic groups and traditional authorities to keep the peace. A rapid response team composed of both government and civic leaders was formed on the assumption that early response could prevent many manageable conflicts from spiraling out of control. Disputes were handled not according to the letter of Kenyan penal code, but "the Somali way" – customary law and blood compensation payment was utilized to manage murders, and collective punishment in the form of confiscation of a clan's cattle until a culprit was apprehended and stolen animals or goods returned. The result was a steady decline in banditry and crime. While the deeper, underlying conflict drivers were not addressed, at least one of the main triggers of communal violence – violent crime – was greatly reduced.

6 A documentary film entitled "The Wajir Story" was produced by Trojan Horse Productions and commissioned by Responding to Conflict.

7 This section draws extensively on Ibrahim and Jenner (1997).

The Wajid experiment in civic-governmental collaboration – or, in some respects, government sub-contracting out of key functions to local civic and traditional authorities – was formalized via a decision to unite the peace groups as a sub-committee of the District Development Committee (DDC), a forum within the district administration bringing together government and civil society. The Wajir Peace and Development Committee (WPDC) was also established in 1995. Chaired by the District Commissioner, it includes representatives from the District Security Committee, heads of government departments, NGOs, elders, women, youth, religious leaders, the business community, and the district's four MPs. The committee thus forms an umbrella of different peace activities in the district, enshrining civic-local government collaboration while giving official government blessing to largely autonomous civic and traditional action on matters normally considered core functions of the state – policing, the judiciary (even over capital offenses like murder, employing extra-constitutional customary law), and cross-border diplomacy, to name a few. In the process, social groups not normally given voice in formal government – elders, women, and youth – were accorded a central place in the civic-government collaboration. The WPDC also catalyzed traditional clan elders in the district to form a robust ten-man “Council of Elders,” allowing them to routinize communication and collaboration. Over time, the WPDC received support from international donors.

The implications of the WPDC experiment are considered below. Here, several points are worth highlighting:

- the WPDC was unquestionably instrumental in the remarkable turnaround of Wajir district from one of the most anarchic to one of the more stable border zones of Kenya;
- the WPDC is a model for similar experiments with peace committees throughout other troubled rural areas of Kenya, a policy shift that is now in the process of being enshrined in a national policy on conflict management and peace-building;
- crucial to the WPDC's success was the combined commitment of a top local government administrator and local civic leaders. The absence of either would likely have doomed the WPDC to failure;
- the WPDC's success is also due to the fact that it combines both traditional elders and civic leadership (professionals, businesspeople, local NGO figures, etc). Though the two are often rival sources of non-state authority, the WPDC demonstrates that they can work together and that when they do, the partnership is much more effective;
- the WPDC's chief success has been in reducing incidents of violent crime and banditry, and facilitating rapid, effective conflict management response where conflicts have emerged;
- the WPDC has not, however, been in a position to prevent large-scale communal clashes (as the following case studies will demonstrate) nor address the underlying causes of armed conflict in the region. It is, in other words, more effective at conflict management and crime prevention than conflict prevention.

As for the conflict which prompted the creation of the WPDC, relations between the Ajuraan and Degodia were stabilized and no armed clashes have occurred between the two since 1994. In an effort to resolve the source of the conflict – the MP seat over which the two clans fought – the Kenyan government created a new parliamentary constituency, Wajir-North, intended to give the Ajuraan their “own” seat in parliament. This tactic, embraced at the urging of many Somali Kenyan politicians, has resulted in Wajir district sporting four constituencies: Wajir-North (Ajuraan); Wajir-East (Degodia); Wajir-South (Ogaden); and Wajir-West (split between Ajuraan and Degodia). The Ajuraan were split over the proposal to assign them a constituency; some worried that the this not only failed to address the underlying cause of the conflict – grazing land and access to resources – but actually institutionalized the loss of Ajuraan of land to the Degodia, who, as one Ajuraan figure put it to the Kenyan media, “are aliens to the area” (Umar 1997: 18).

The 1992-1993 Wajir conflict left a legacy of secondary conflict issues which were not resolved and eventually produced armed clashes between the Ajuraan and Garre in 2000. The fact that the Garre clan had quietly sided with the Degodia in the 1992 election and clashes remained a festering grievance within the Ajuraan; the Ajuraan responded by using their new power in Wajir-North constituency to push the Garre out of the area, employing the same misuse of administrative (or in this case electoral) units to engage in ethnic cleansing that they feared would occur at their expense in Wajir-West.

In July 2000, clashes erupted between the Garre and Ajuraan in northern Wajir district. The clashes were sparked by a spiraling cycle of banditry raids and counter-raids, involving as many as 100 armed men and producing 30 deaths.⁸ The violence continued into early 2001, when Ajuraan residents of north Wajir were the victims of a cross-border raid, reportedly involving gunman dressed in Ethiopian military uniforms (suspected to be Ethiopian Garre). Fifteen villagers died, 3,300 were displaced, and 15,000 cattle were stolen and moved back across the Ethiopian border in the attack.⁹ Garre and Ajuraan tensions over grazing land, control of constituencies and locations, and ethnic cleansing in Wajir-West were sparked in the latter case by a dispute over a newly declared location along the border of Wajir and Mandera districts. Garre clan leaders and administrators sought to settle Garre there, while the Ajuraan expected that the location would be theirs to govern by dint of their control over Wajir-West constituency. Because the Ires Teno location is the site of valuable grazing land, the stakes were high for the two clans, helping to spark renewed violence. Adding to the conflict is the fact that the disputed territory is adjacent to the Ethiopian border. The two clans (especially the Garre) can call on Ethiopian kinsmen for aid against their rivals introduces outside elements into the conflict who are not stakeholders in local peace, who are principally motivated by the opportunity to loot, and who can return across the Ethiopian border to avoid retaliation or arrest. This places the conflict beyond the ability of both the WPDC and the Kenyan government to manage. The international or cross-border dimension to the conflict is complicated still

8 Tervil Okono, “Kenya Clan Fight Leaves 30 Dead,” PANA news service ((July 21 2000).

9 “Life in the Shadow of Bandit Attacks,” Kenyan Daily Nation (January 13, 2001).

further by the fact that the Garre accuse the Ajuraan of harboring OLF militia, which the Ajuraan deny, but which is likely a factor in Ethiopian government tacit support of or acquiescence to Ethiopian Garre irregulars engaging in the cross-border attacks (*Ibid.*).

Promise and Limits of the “Mediated State”

The development of a government-civic partnership to execute core state functions in the Kenyan border area is very significant, not only in the immediate region but also as perhaps the most advanced and formalized variation of a broader trend in governance by weak states in their frontier areas. This trend has been until recently largely invisible to outside observers and remains poorly understood, both in Kenya and elsewhere.¹⁰ Observers are gradually becoming more aware of the new phenomenon, but have struggled to explain it and adequately convey its significance. A recent article by Letitia Lawson and Donald Rothchild (2005: 228) captures both the new awareness of this trend and the difficulty of translating it into words:

“Africans have begun moving away from colonially designed juridical statehood to fashion empirical formulas that respond to the messiness of their current realities. Only time will reveal whether these new, flexible structures prove an effective response to state weakness.”

In northern Kenya, where communities are further along in this process of fashioning new formulas to respond to the “messiness of their current realities,” observers have also struggled to explain exactly the state-civic partnership is and is not, producing sometimes clumsy descriptions which tend to obscure and understate the importance of this experiment. Some have described it as an “*ad hoc*” arrangement by local officials overwhelmed by borderland lawlessness. Those coming from a peace-building and NGO perspective have tended to explain it as local or grassroots movement to which government has acquiesced on limited matters of conflict management. Those not following developments in the peace-building sector are thus apt to miss it entirely.

It is the conclusion of this study that the governance model being negotiated, implemented, and experimented with in northern Kenya is more than an *ad hoc* peace-building strategy, more than a post-colonial version of “indirect rule,” and more than a convenient division of labor between local government, civic groups, and traditional authorities. It is better understood as a type of “mediated state,” a concept initially used to explain state-frontier governance in early modern Europe. Far from being a relic of medieval Europe, however, the mediated state model in Kenya today may be at the forefront of an emerging, largely unrecognized, hybrid form of state-building in weak states.

¹⁰ There are several reasons why this is so. Reliance on non-state sources of governance is viewed by many observers as a symptom of state failure, not an emerging mode of governance. Second, it is essentially an indigenous process, beyond the purview of most formal state-building projects sponsored by the World Bank and UNDP. To the extent that it has been documented, it has tended to be seen through the more limited lens of grassroots peace-building. Finally, it transpires in remote, dangerous border areas where few journalists and analysts spend time.

The Mediated State as Concept and Explanatory Theory

The concept of the mediated state is rooted in the study of pre-modern and early-modern state formation in Europe, where ambitious monarchs with limited power were forced to manipulate, maneuver, and make deals with local rivals to their authority. Those rivals, notes Swen Voekel, “often mediated state authority, and did so both as over-powerful purveyors of royal prerogatives, as ‘private’ citizens exercising ‘public’ jurisdiction, or as members of extra-national bodies like the Catholic Church.”¹¹ This produced situations in early modern Europe that sound oddly familiar in contemporary Somalia – France, for instance, is described as “a nation characterized by parcellized and overlapping jurisdictions, multiple legal codes, and a plethora of internal tariffs and taxes” (*ibid.*). As such, the mediated state is considered by historians as a major obstacle to state-building, a syndrome to be overcome, usually by superior force of arms. Charles Tilly observes that European state formation “consisted of the states’ abridging, destroying, or absorbing rights previously lodged in other units.”¹² Whether the mediated states is in an obstacle to state-building or a possible route to state-building is an intriguing question in contemporary zones of weak and collapsed state authority.

Though extreme caution must be taken in drawing historical parallels between state formation in early modern Europe and contemporary Africa, the general concept of a mediated state appears to have some utility in explaining actual politics on the ground from Kenya to the DRC to Mozambique.¹³ In these locations, central governments with very limited power rely on a diverse range of local authorities to execute core functions of government and “mediate” relations between local communities and the state. It is usually an unspoken strategy, not enshrined in a national policy as may soon be the case in Kenya.¹⁴

Until recently, there were compelling reasons why weak African states did not attempt some variant on a mediated state. One reason was ideological – the project of the modern nation-state in independent Africa could not accept less than the full range of sovereignty and monopoly on the legitimate use of violence within its borders that the West and East bloc enjoyed. Modernization theories which infused thinking about political development were predicated on the “passing of traditional society” and the paramount authority of the state; to the extent that customary law was employed in remote areas, it was tolerated but not sanctioned by the state, and at any rate viewed as a dying

11 Swen Voekel, “Upon the Suddaine View: State, Civil Society, and Surveillance in Early Modern England,” *Early Modern Literary Studies* 4, 2 (September 1999), pp. 1-27. Accessed at <http://purl.oclc.org/emls/04-2/voekupon.htm>

12 Charles Tilly, “Reflection on the History of State Making” in *The Formation of Nation States in Western Europe* ed. Charles Tilly (Princeton: Princeton University Press, 1975), p. 35. Importantly, the use of coercion by emerging states in Europe had the essential secondary effect of consolidating actual administration (as opposed to mere warlordism) over the citizenry, in order better to tax it to finance the war efforts. That salutary political effect of war-waging is absent in cases like Somalia, where armed conflict is financed largely by a combination of international funding and pillaging.

13 To be precise, the mediated state is concentrated in but not limited to Africa – one of the most routinized forms of the mediated state is in Yemen, where the government must work through tribal leaders for access to and control of the entire rural northern portion of the country.

14 “Conflict Management Policy Framework Unveiled,” *Peace Bulletin* no 5 (Sept. 2004), pp. 1, 3.

system to be replaced in due course by the expanding modern state, not as a building block for state-building. The other reason, as described by Jeffrey Herbst, is that African states – unlike early modern European states – inherited fixed boundaries firmly protected by international law from encroachment by more ambitious or effective neighbors or break-away secessionists (Herbst 2000). In an earlier period, failure to extend and maintain authority in frontier areas risked loss of that territory, leading rulers to devote considerable treasure and manpower to protecting (and expanding) borders. Today, African state authorities have in some respects pursued a rational strategy by allowing frontier zones to go ungoverned, especially if the frontier has little economic value, the cost of establishing rule of law is higher than whatever revenue can be earned from the area, the state faces a serious shortage of money and capacity, and negative spillover of anarchy in the frontier does not unduly impact the core areas of the state. The result has been enormous tracts of territory in the hinterlands of many African states that are in a condition of *de facto* state collapse. The retreat of the state from its frontier areas and the armed anarchy which ensued in Kenya in the early 1990s was particularly shocking only because it occurred in a “middle-income” country with greater governmental capacities than in most of the rest of the continent.

This explanation for the governance vacuum in African border areas emphasizes the role of state indifference or disinterest in border areas, though lack of state capacity is also a factor. But when that “frontier governance” calculus changes – when state authorities develop an interest in asserting or reasserting security and rule of law in their hinterland, but lack the *capacity* – conditions improve for an alternative, “mediated state” approach.

In the case of Kenya, several factors increased government interest in expanding law of rule in its border areas. These included the enormous costs of spillover of crime, displacement, and arms flows into the “core” of Kenya from the running sores in its frontier area; a sense of professional duty on the part of a small number of committed civil servants; pressure to “do something” about the violence and lawlessness in Kenya’s borderlands from international donors, the national media, civic groups, and religious leaders; and, in the aftermath of multiple terrorist attacks in Kenya in 1998 and 2000 and the 9/11 attacks, a heightened security concern that terrorists were exploiting Kenya’s porous borders and lawless interior.

State authorities which are willing but unable to govern their remote hinterland are forced to pursue a mediated state strategy, not out of sudden enlightened appreciation for the virtues of civil society and traditional authority, but because it is *their only effective option*, at least in the short-term. This aspect of the mediated state – that it is not a policy preference but rather a default position for weak states seeking to promote governance and security in its frontier areas – sets it apart from other contemporary forms of state “outsourcing” of governance. The key difference is that state’s opting to contract out functions to non-state actors (such as corporations operating seaports or non-profits delivering social services paid for by the state) usually do so as a matter of public policy choice, and ostensibly with the objective of providing the service more efficiently. This is

the choice of a state authority which “has acquired the competence to decide the limits of its own competence” (Reinhold 1999: 1). By contrast, a mediated state strategy is the recourse of a state authority which lacks options. It has no choice but to work through local intermediaries if it is to have even token jurisdiction in an area within its borders.

Sub-contractors, moreover, operate within the legal framework of the state. Sub-contracting firms and NGOs work for the state. By contrast, local authorities in a mediated state arrangement operate beyond the state, its legal code, and its most coveted possession – its “monopoly on the legitimate use of violence within its territory.” The fact that government-civic partnership in northern Kenya includes implicit government acceptance of the application of extra-judicial legal codes by non-state actors and the use of local home-guards to employ lethal force in defense of public security is no mere “sub-contracting” exercise. It is a fundamental revision of basic precepts of sovereign state authority; a forfeiting of a state’s claim to “omni-competence” within its borders; a new, flexible way to deal with the current “messiness” that conventional inherited political structures have had great difficulty managing.

State interest is a necessary but not sufficient condition for mediated governance. Whether a mediated state strategy is actually an option then depends on the presence of reasonably authoritative local actors which the state can accept (a secessionist polity, for instance, would not be acceptable; nor would a liberation or radical movement bent on the overthrow of the government or entire political system). Finally, for a mediated state strategy to *succeed* as a peace-building and governance strategy, the sources of local authority must be relatively legitimate and committed to peace and good governance, not predatory or corrupted local elites. Otherwise, the strategy produces a patch-quilt of state-sponsored warlord fiefdoms.

In the case of northern Kenya, the very fortunate combination of revived customary law and role of traditional clan elders and the ascendance of capable, responsible, and dedicated civic leadership within the region’s small urban professional provided the ideal conditions for a mediated state to work since the mid-1990s.

A hallmark of the mediated state as it evolved in early modern Europe was flexibility and pragmatism. State rulers brokered deals with whatever authorities existed in the periphery of their realm. The approach by definition defies templates and standardization. The same characteristic obtains in northern Kenya. There, the types and combinations of local actors in peace committees, and the types of relationships developed between these local authorities and the state, have varied considerably from place to place.¹⁵

By viewing the current government-civic partnership to conduct core functions of the state in Kenya’s border areas through the lens of the “mediated state” model, we accord this hybrid governance approach the significance it is due. Though its initial purpose was to promote peace-building, the mediated state in Kenya has expanded into core functions of the state – the judiciary, police, cross-border diplomacy. The Kenyan state is also employing the approach to promote range-land management (Haro et al. 2005).

15 The range of peace committee models in Kenya is surveyed and assessed in Walker, Ibrahim, and Shurio (2003).

Because the strategy involves ceding responsibility to non-state actors, it is difficult to cast this trend as a contribution to “state-building.” But it may well be a form of “governance-building.” Since the objective of state-building projects is not to strengthen state capacity for its own sake, but rather as a means of promoting good governance, the possibility that the mediated state can help promote the latter by by-passing the former is an interesting challenge to standard state-building interventions, which tend to conflate reviving formal state capacity with promotion of governance.

The Mediated State and Strategies of Peace-building and Governance-building

The mediated state model is thus a more satisfactory and comprehensive theory to explain what is already occurring on the ground in Kenya’s border areas. But it is also useful as a state-building strategy? Is mediated governance trend to support and encourage, or are criticisms of the approach serious enough to warrant caution?

There is now adequate documented evidence from northern Kenya to sustain two not entirely incompatible claims – first, that the government-civic partnership there has unquestionably produced impressive gains in public security and conflict management, and second, that the approach has serious shortcomings. The achievements of the mediated state in Kenya’s border areas have been documented above and need not be repeated. As for concerns and criticisms, several stand out as especially noteworthy:

- Allowing customary law to be applied above the laws of the state by non-state actors, in which collective responsibility is privileged over individual rights and responsibilities and in which not all are equal before the law is a serious erosion of civil liberties, human rights, and rule of law. It is also illegal and extra-constitutional and cannot be sanctioned by the Kenyan government.
- These objections aside, customary law also has a limited reach and is often overwhelmed by the scale of current armed conflicts.
- The peace committees serving as umbrella groups for local actors are very uneven in capacity, lack an independent, sustained flow of resources, and are plagued by high turnover.
- Some peace committees are politically compromised and not neutral.
- No local authorities are in a position to cope with conflicts instigated by powerful outsiders in Nairobi and elsewhere.
- Some border regions lack the key prerequisite of legitimate, capable local authorities and are instead either zones of leadership vacuum or are dominated by predatory politicians and warlords.
- The entire enterprise of constructing mediated governance in northern Kenya has been designed to manage conflict, but lacks any real capacity to address underlying causes of armed conflict, which require effective and sustained central state engagement.¹⁶

16 Several studies provide thoughtful critiques of the strengths and weaknesses of peace committees and the government-civic partnership we are calling a mediated state. See Walker, Ibrahim, and Shuria (2003); Haro et al (2005); Goldsmith (1997), and Nyunya, Joshua. “Reports by National Experts: Kenya. Conflict Prevention, Man-

The fact that mediated governance is problematic and limited and yet the sole source of security in weak state frontier areas makes it the “best of bad options,” a position that both its advocates and detractors can share. How then to view the long-term prospects of mediated governance? If its shortcomings are intrinsic (legal and human rights objections, for instance), and if better options are on the horizon, then the only justification for support to mediated governance is as a stop-gap measure, designed to provide short-term improvements in security and conflict prevention.

If, on the other hand, the prognosis for state expansion and consolidation in the border areas of weak states is poor, then a different set of policy considerations emerge. In that case the trend toward mediated governance is longer-term in nature, a fact which citizens and international observers may not prefer but which is not a matter of preference. Realistically, the focus then becomes improving the mediated state as a governance and peace-building strategy in frontier zones – taking the rough edges off of a governance structure that is and will remain flawed and messy. This can be done in a number of ways. First, support to peace committees (or whatever other permutation of local authority emerges by district) is vital if they are to be sustainable. Training and financial support for appropriate operational expenses are two of the most important types of support. Recognition is also important – these are mainly voluntary efforts, by civic figures willing to put themselves in harm’s way in very difficult circumstances. Second, external efforts can help to harmonize, at least partially, the inconsistencies between customary, sharia, and national legal codes.¹⁷ Clarification of the jurisdiction of customary law is also essential – is a Kenyan Somali living in Nairobi subject to *xeer*, the Kenyan legal code, or both?

Importantly, the mediated state as peace-building and governance-building strategy offers opportunities to international aid agencies, not merely Faustian choices. In the past, agencies engaged in “capacity-building” frequently found themselves working at cross-purposes. Projects building capacity of local civic and non-governmental organizations was viewed by other actors as working against state-building, by diverting human resources, money, and roles to non-state actors. This debate over whose capacity is being built has plagued governance projects in Somalia, Kenya, and elsewhere for years. In a mediated state, however, there is no contradiction between improving the governance capacity of non-state authorities in border area and simultaneous efforts to build formal state capacity. One is part of a short to medium-term governance and peace-building strategy, the other is part of the long-term state-building project which, under the right

agement, and Resolution: Capacity Assessment Study for the IGAD Sub-Region.” Leeds: University of Leeds, Centre for Development Studies, October 2001).

17 A few analysts and organizations have recently produced excellent reports calling for “harmonization” of traditional/informal and formal governance in the Somali judicial sector; this is an especially important topic in any discussion of a mediated state because almost all justice in Somalia is meted out via non-formal mechanisms (customary law and blood payments, or sharia courts). See Andre Le Sage, “Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives,” (Geneva: Centre for Humanitarian Dialogue, January 2005), and Puntland Development Research Centre, “Pastoral Justice: A Participatory Action research Project on Harmonization of Somali Legal traditions: Customary Law, Sharia, and Secular Law” (Garowe Somalia: PDRC, 2002).

circumstances, may eventually displace mediated governance. Whether mediated governance is in fact an interim strategy or part of long-term alternative form of governance in parts off Africa and the developing work is a decision which citizens of these states must make for themselves.

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