

## Kenya: Impact of the ICC Proceedings

### I. OVERVIEW

Although the mayhem following the disputed December 2007 elections seemed an exception, violence has been a common feature of Kenya's politics since the introduction of a multiparty system in 1991. Yet, the number of people killed and displaced following that disputed vote was unprecedented. To provide justice to the victims, combat pervasive political impunity and deter future violence, the International Criminal Court (ICC) brought two cases against six suspects who allegedly bore the greatest responsibility for the post-election violence. These cases have enormous political consequences for both the 2012 elections and the country's stability. During the course of the year, rulings and procedures will inevitably either lower or increase communal tensions. If the ICC process is to contribute to the deterrence of future political violence in Kenya, the court and its friends must explain its work and limitations better to the public. Furthermore, Kenya's government must complement that ICC process with a national process aimed at countering impunity and punishing ethnic hate speech and violence.

In the past, elites have orchestrated violence to stop political rallies, prevent opponent's supporters from voting, and – as in the 2007-2008 events – intimidate rivals. In the aftermath of the crisis, a Commission of Inquiry into Post-Election Violence (CIPEV), chaired by Kenya Court of Appeal Judge Philip Waki, was established to investigate the facts and circumstances of the election violence. Among its major recommendations was creation of a Kenyan special tribunal to try the accused organisers. Mindful of the history of political impunity, it recommended that if the government failed to establish the tribunal, the Panel of Eminent African Personalities that under Kofi Annan's chairmanship mediated the political crisis should hand over a sealed envelope containing the names of those who allegedly bore the greatest responsibility for the violence to the ICC for investigation and prosecution. President Mwai Kibaki and Prime Minister Raila Odinga signed an agreement for implementation of CIPEV's recommendations on 16 December 2008, and parliament adopted its report on 27 January 2009.

A bill to establish a special tribunal was introduced twice in parliament but on both occasions failed to pass. Not even last-minute lobbying by the president and prime minister

convinced parliamentarians. Annan consequently transmitted the sealed envelope and the evidence gathered by Waki to the ICC chief prosecutor, Luis Moreno-Ocampo, on 9 July 2009. Four months later, on 5 November 2009, the prosecutor announced he intended to request authorisation to proceed with an investigation to determine who bore greatest responsibility for crimes committed during the post-election violence.

When Moreno-Ocampo announced, on 15 December 2010, the names of the six suspects, many of the legislators who had opposed the tribunal bill accused the court of selective justice. It appears many had voted against a Kenyan tribunal on the assumption the process in The Hague would be longer and more drawn out, enabling the suspects with presidential ambitions to participate in the 2012 election. To many Kenyans, however, the ICC's involvement sends a signal that entrenched impunity for wealthy and powerful politicians will not be permitted to endure. If national courts are unable or unwilling to prosecute perpetrators of gross electoral violence, the international court can. For a political class used to impunity, this is a likely game changer for how politics are conducted in the country.

The 2012 presidential and legislative elections will play out against the backdrop of a significant ICC role that Kenyan politicians will be unable to influence. Other factors also will come into play. The incumbent president, Mwai Kibaki, will not run. The constitution promulgated on 27 August 2010 has created powerful new positions, including that of an independent chief justice, and raised the bar for presidential aspirants. A successful candidate must obtain an absolute majority of votes as well as more than a quarter of the votes in at least 24 of the 47 counties. Political jockeying and alliance formation have already begun in earnest, in part as a response to the ICC proceedings.

The two most prominent suspects, Uhuru Kenyatta (the deputy prime minister, finance minister and son of Kenya's first president) and William Ruto (the former agriculture and higher education minister), as well as the vice president and many other like-minded politicians, are exploring the possibility of uniting behind one candidate. The ICC is expected to announce in late January 2012 whether it has confirmed charges against each of the six suspects and will proceed to trials. The court's rulings will introduce an ad-

ditional – possibly crucial – factor into an already pivotal election.

If the court confirms charges for both cases on the same day, this could be a crucial step to help defuse a rise in ethnic tensions. There are real fears that if charges are dropped for suspects of one ethnicity and confirmed for those of another, ethnic tensions could increase sharply, regardless of the legal merits. The ICC's decisions will continue to play a pivotal role in Kenya's political process, especially in the crucial 2012 election. The court appears cognisant that these will not be viewed by many Kenyans simply as legal decisions and that the timing and framing of proceedings and rulings will inevitably have an impact in heightening or tamping down tensions. Accordingly:

- The International Criminal Court should recognise that public statements warning suspects and other politicians not to politicise the judicial proceedings, such as Judge Ekaterina Trendafilova's on 5 October 2011 noting that continued hate speech would be considered in the pre-trial deliberations, can dampen and deter aggressive ethnic and political rhetoric.
- While the ICC is still popular, the Kenyan public's approval of its role has been declining, due to deft media engagement by the suspects. In order to counter misconceptions of the court's decisions, the court and its supporters, including civil society and other friends, should intensify public information and outreach efforts to explain its mandate, workings and process.
- The Kenyan government must recognise that the fight against political violence and impunity is its responsibility. It needs to close the impunity gap by complementing the ICC process with a parallel national process. It should begin by directing the attorney general to investigate other individuals suspected of involvement in the violence that followed the 2007 elections with a view to carrying out prosecutions in the domestic courts.
- The government should also support Willy Mutunga, the new chief justice, in his efforts to reform the judiciary and restore public faith in Kenya's system.

## II. IMPUNITY AND THE 2007-2008 POST-ELECTION VIOLENCE

Impunity has allowed the cycle of electoral violence to endure.<sup>1</sup> The judiciary rarely prosecuted earlier "political"

cases.<sup>2</sup> When it refused or was unable to do so during past crises, the state would often form a commission of inquiry. Most of those commissions were little more than ploys to deflect public pressure and achieved little.<sup>3</sup> In some cases they were disbanded even before they began their work.<sup>4</sup> Such recommendations as they came up with were rarely implemented. The Commission of Inquiry into Post-Election Violence was an exception because it was an internally-driven process that received considerable support – and protection from political pressure – from Kenya's outraged public, its human rights community and diplomats.<sup>5</sup>

### A. THE 2007-2008 POST-ELECTION VIOLENCE

The December 2007 election, the fourth since the re-introduction of multiparty politics in 1991, was highly anticipated and saw a record turnout, particularly of young voters.<sup>6</sup> This was because the 2002 elections, which most prominently resulted in the defeat of President Daniel Arap Moi's

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2008; "On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence", National Commission on Human Rights, 15 August 2008.

<sup>2</sup> Raila Odinga spoke for many when, following the disputed 2007 elections, he said that "in Kenya [the judiciary is] part of the executive, and we do not want to subject ourselves to a kangaroo court". "World leaders pile pressure as Kenyans pray", African Press International, 7 January 2008. For more see Jacob Butler, "Evolving Political Accountability in Kenya", Center for African Studies, University of Illinois.

<sup>3</sup> "Lest We Forget: The Faces of Impunity in Kenya", Kenya Human Rights Commission (2011), p. 3. For more, see Jacqueline M. Klopp, "Kenya's Unfinished Agendas", *Journal of International Affairs*, Spring/Summer (2009), vol. 62, no. 2, p. 8; also, "Turning Pebbles: Evading Accountability for Post-election Violence in Kenya", Human Rights Watch, December 2011, pp. 10-13.

<sup>4</sup> The Commission of Inquiry into the Death of Dr Robert Ouko (1990) was disbanded before it finished. Kenya has a history of unpunished political and economic crimes. Political crimes include the assassinations of politicians Tom Mboya (1969), Pio Gama Pinto (1965), JM Kariuki (1975) and Bishop Alexander Muge (1990), as well as the murder of Professor Crispin Odhiambo Mbai (2003). Major economic crimes include the "Goldenberg scandal", which cost the country an estimated 10 per cent of GDP during the 1990s; and the "Anglo-Leasing scandal", which involved plans to buy a 30 million euros passport printing system from France in 1997. All three post-independent regimes, of Kenyatta, Moi and Kibaki, suffered major unresolved scandals.

<sup>5</sup> The commission emerged directly from the Kenya National Dialogue and Reconciliation process and was agreed to by the negotiators of both the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) on 4 March 2008.

<sup>6</sup> An unprecedented 14.2 million Kenyans registered to vote, 82 per cent of the total eligible, and 72 per cent voted in the 2007 general elections. There were 2,547 candidates for 210 parliamentary seats and nine presidential candidates. "On the Brink of the Precipice", op. cit.

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<sup>1</sup> For additional analysis on Kenya's cycle of electoral violence, see Crisis Group Africa Report N°137, *Kenya in Crisis*, 21 February 2008; "Ballot to Bullet: Organized Political Violence and Kenya's Crisis of Governance", Human Rights Watch, 17 March

chosen successor, Uhuru Kenyatta, had restored citizens' faith in the electoral process.<sup>7</sup>

The 2002 elections brought the National Rainbow Coalition (NARC)<sup>8</sup> government, headed by Mwai Kibaki, to power. But the coalition government failed to honour some of its key election pledges, including to fight official corruption,<sup>9</sup> which led to massive disaffection. In addition, the Liberal Democratic Party (LDP) wing of the NARC government, headed by Raila Odinga, accused Kibaki's National Alliance Party of Kenya (NAK) of reneging on a pre-election memorandum of understanding on how to share government positions. The differences between the coalition partners were further exacerbated during the 2005 referendum on a new draft constitution.<sup>10</sup> The LDP formed the Orange Democratic Movement (ODM)<sup>11</sup> and campaigned against the draft document, while the NAK campaigned for it. The LDP argued that as published by Attorney General Amos Wako, with explicit support of the NAK, the proposed constitution differed greatly from the one agreed at the constitutional conference. ODM carried the day: 57 per cent voted to reject the draft.<sup>12</sup>

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<sup>7</sup> In both the 1992 and 1997 elections, President Moi fell short of an absolute majority but won because the opposition parties' votes were split. Stephen Brown, "Authoritarian Leaders and Multiparty Elections in Africa: How Foreign Donors Help to Keep Kenya's Daniel Arap Moi in Power", *Third World Quarterly* (2001), vol. 22, no. 5, pp. 725-739. Moi and his Kenya Africa National Unity party (KANU) also used unlimited access to state resources to win the elections. In addition, they intimidated and threatened the opposition candidates, using the provincial administration, and denied them access to crucial institutions like the media. In 2002, Moi's chosen successor, Uhuru Kenyatta (the son of Kenya's first president), was beaten by a coalition of opposition parties that united under an umbrella party, the National Rainbow Coalition (NARC), led by now President Kibaki. Kibaki garnered 61.3 per cent of the votes against Kenyatta's 20.2 per cent.

<sup>8</sup> The principal parties were the National Alliance Party of Kenya (itself a coalition) and the Liberal Democratic Party.

<sup>9</sup> In his inauguration speech on 30 December 2002, President Kibaki promised: "Corruption will now cease to be a way of life in Kenya, and I call upon all those members of my government and public officers accustomed to corrupt practice to know and clearly understand that there will be no sacred cows under my government". During his term, several high-level corruption affairs involving government officials were uncovered, but not adequately addressed, including the multi-million dollar Anglo-Leasing passport contract scandal.

<sup>10</sup> The referendum followed the collapse of the national constitutional conference.

<sup>11</sup> On the referendum ballot, the "yes" vote symbol was a banana, the "no" vote's an orange.

<sup>12</sup> "The preliminary Report of the Committee of Experts on constitutional review issued on the publication of the harmonised draft", 17 November 2009, p. 12.

Upset by the result, President Kibaki dissolved his cabinet and expelled LDP members from the government. The LDP then allied with rebel Kenya Africa National Union (KANU) parliamentarians and turned the ODM into a formal political coalition to contest the 2007 elections.<sup>13</sup> Kibaki also cobbled together an alliance of parties under the umbrella Party of National Unity (PNU). During the campaign ODM reinforced the messages used during the referendum. Its leaders accused Kibaki of surrounding himself with people from his Kikuyu ethnic group, framing the election as one of Kikuyus against the rest of Kenya. Thus, the election was held against a backdrop of massive disenchantment with the president and the political system, as well as an anti-Kikuyu narrative that tapped into long-held historical grievances that post-independence governments had failed to address and that had finally found an outlet.

The opposition's overriding campaign message was that Kibaki, who had been elected in 2002 by voters from all ethnic groups on a platform to fight graft, had favoured the Kikuyu and failed to combat corruption. The ODM cast itself as the egalitarian party of reform opposed to a PNU that catered to the interests of a small, wealthy elite that it labelled the Mount Kenya Mafia.<sup>14</sup>

Both parties left nothing to chance in the scramble for votes. Some politicians even used helicopters to canvas the country, signalling the arrival of an even bigger money era in Kenyan politics. Regions previously regarded as of low importance in national elections, like the north, were intensely targeted. ODM struck a chord with voters by fashioning the contest as the party of reform against the party of the status quo, and many sitting members of parliament, including cabinet ministers, were defeated. Opinion polls conducted by the Steadman Group a few days before the election gave Odinga, the ODM presidential candidate, a small lead.<sup>15</sup> This, coupled with lethargic and sometimes incoherent messaging from the president's camp, made the opposition sense victory.

The campaign had been largely peaceful, but tensions rose shortly after voting was concluded on 27 December, when, during the count, the chairman of the Electoral Commission of Kenya (ECK), Samuel Kivuitu, began sending mixed signals. Alarm bells went off when he said in a live broadcast that he was unable to locate some of the returning elections officers because they had switched off their

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<sup>13</sup> KANU pulled out of the coalition in July 2007 and endorsed Kibaki's re-election, although some members stayed in ODM.

<sup>14</sup> Mount Kenya is in the traditional Kikuyu homeland; the ODM used the name to make its point that the government had been captured and catered to the interest of the Kikuyu people.

<sup>15</sup> "Steadman releases its last poll before election", *The East African Standard*, 19 December 2007.

phones.<sup>16</sup> Most of those officers were from Central and Eastern Province, the bedrock of the president's support. This fuelled suspicion that there were plans to manipulate the vote. Matters were not helped when Kivuitu said in a separate broadcast he hoped "the books were not being cooked".<sup>17</sup> Although ODM highlighted serious discrepancies between the results announced at the tallying centre and those filed by returning officers from the field, the ECK decided to announce Kibaki the winner.<sup>18</sup>

Initially, this was to be done from the ECK's temporary headquarters at the Kenya International Conference Centre, but to avoid a live TV showdown after it emerged the ODM would contest the results, Kivuitu was whisked away by security officers to an undisclosed location from where he made the announcement. Kibaki was then sworn in at a hastily convened ceremony late in the evening of 30 December. In a parallel press conference, ODM rejected the results and presented an election officer who said the announced figures had been made up at the tallying centre. This triggered both spontaneous and premeditated violence in various parts of the country, especially ODM strongholds. Efforts by the security forces to contain the situation turned counter-productive. Increasingly angry demonstrators murdered PNU supporters and destroyed their property. This led to revenge killing by PNU supporters.<sup>19</sup>

While the violence was still raging, President Kibaki appointed his new cabinet on 9 January 2008. It excluded the ODM but included members from the splinter Orange Democratic Movement-Kenya (ODM-K), led by Kalonzo Musyoka. ODM called for mass action, a move the government deemed illegal because at that time all public gatherings were banned on public security grounds.<sup>20</sup>

## B. MEDIATION ATTEMPTS

The election crisis had broader implications. Escalating violence closed the port of Mombasa, the main transportation corridor for goods to East and Central Africa, creating shortages and pushing up the price of fuel and other essential items in the entire region. This, combined with Kenya's position as a steadfast Western ally, regional business hub and centre for relief and humanitarian operations in Africa, prompted almost immediate external intervention.

The PNU initially rejected internationalisation of the crisis, claiming it was a local affair, while the ODM maintained it would accept nothing short of international mediation.

South Africa's Archbishop Desmond Tutu was the first prominent figure to arrive on the scene, on 2 January 2008. He was shortly followed by U.S. Assistant Secretary of State for African Affairs Jendayi Frazer. She tried and failed to break the impasse<sup>21</sup> and was followed in turn by four former African presidents in a joint visit: Tanzania's Benjamin Mkapa, Mozambique's Joaquim Chissano, Botswana's Ketumile Masire and Zambia's Kenneth Kaunda.<sup>22</sup> Eventually, the then AU Chairman and President of Ghana John Kufuor laid the groundwork for an international mediation under the auspices of the continental body.<sup>23</sup> Both sides ultimately accepted the appointment on 10 January 2008 of former UN Secretary-General Kofi Annan as the AU Chief Mediator, under the auspices of the Panel of Eminent African Personalities that included Mkapa and Graça Machel.<sup>24</sup>

## C. THE KENYA NATIONAL ACCORD

The panel worked with negotiators from both sides.<sup>25</sup> An agenda was agreed that included: (1) immediate action to stop the violence and restore fundamental rights and liberties; (2) immediate measures to address the humanitarian crisis and promote reconciliation, healing and restoration; (3) measures to overcome the current political crisis and; (4) long-term issues and solutions. The latter were critical. Kenya had always been viewed as an oasis of peace in a region plagued by incessant conflict. It had a robust media,

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<sup>21</sup> Elisabeth Lindenmayer and Josie Lianna Kaye, "A choice for peace? The story of forty-one days of mediation in Kenya", International Peace Institute, August 2009, p. 11.

<sup>22</sup> Kibaki and people around him were seen as an impediment by the mediation team. They also rebuffed efforts from the World Bank delegation of senior African envoys such as Cyril Ramaphosa.

<sup>23</sup> Kufuor visited Kenya from 8-10 January, at the invitation of President Kibaki. Lindenmayer and Kaye, "A choice for peace?", op. cit., p. 13.

<sup>24</sup> Ibid. Some in the president's inner circle were uncomfortable with an external mediation. Minister John Michuki, a close Kibaki ally, said, "There was no need for former UN chief Kofi Annan to visit Kenya on Tuesday to lead fresh mediation efforts". "Kenya rulers reject outside help", BBC, 14 January 2008. Machel, a Mozambican and the wife of former South African President Nelson Mandela, is a prominent international advocate for women's and children's rights and a long-time social and political activist.

<sup>25</sup> The PNU side was represented by Martha Karua (justice, national cohesion and constitutional affairs minister), Sam Ongeru (education minister), Moses Wetangula (foreign minister) and Mutula Kilonzo (Mbooni member of parliament) and Gichira Kibara (liaison officer). ODM was represented by parliamentarians Musalia Mudavadi, William Ruto, Sally Kosgey and James Orendo and Caroli Omondi (liaison officer).

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<sup>16</sup> Crisis Group Report, *Kenya in Crisis*, op. cit., p. 7.

<sup>17</sup> Crisis Group witnessed the statement. For more, see *ibid*, pp. 6-8.

<sup>18</sup> For more on the rigging of the presidential elections, see *ibid*, pp. 6-9. See also the "Report of the Independent Review Commission on the general elections held in Kenya", 17 September 2008, which investigated all aspects of the elections and made important recommendations to avoid future electoral crises.

<sup>19</sup> For more on the violence, see Crisis Group Report, *Kenya in Crisis*, op. cit., pp. 9-16.

<sup>20</sup> For more on events after Kibaki was sworn in, see *ibid*, pp. 12-24.

strong civil society and an expanding middle class. However, myriad systemic, historical and structural imbalances had been festering since independence. The 2007 elections and their immediate aftermath unleashed an eruption of grievances over land, economic inequality and other injustices that had been decades in the making.<sup>26</sup>

The overarching problem was that it was difficult to establish with certainty who had won the elections. A quick way to solve the crisis was to establish a grand coalition government of national unity that included both the ODM and the PNU.<sup>27</sup> This was achieved through signing of the National Accord on 28 February 2008. To make the deal acceptable to both parties, the constitution was amended, and the positions of prime minister and two deputy prime ministers were created.<sup>28</sup> Mwai Kibaki and Kalonzo Musyoka (ODM-K) remained president and vice president respectively, while ODM leader Raila Odinga was appointed prime minister. Another ODM member, Musalia Mudavadi, was appointed deputy prime minister and local authority minister, while PNU member Uhuru Kenyatta became the other deputy prime minister as well as finance minister.<sup>29</sup>

#### D. THE COMMISSION OF INQUIRY INTO POST-ELECTION VIOLENCE

The parties agreed to the establishment of a Commission of Inquiry into Post-Election Violence, commonly known as the Waki Commission after its chair, Court of Appeal Judge Philip Waki.<sup>30</sup> Its mandate was to investigate the facts and circumstances surrounding the violence and the conduct of state security agencies in their handling of it and to make recommendations concerning these and other matters. In

order to avoid the fate of previously ignored commissions of inquiry, the two parties also agreed to the Waki Commission's suggestions that they establish a Kenyan tribunal to try the suspected perpetrators of the violence and, if that did not happen, that consideration be given to referring the matter to the ICC.<sup>31</sup>

The report the commission delivered to President Kibaki on 15 October 2008 underscored the gravity of the events, but noted they were "an episode in a trend of institutionalisation of violence in Kenya over the years".<sup>32</sup> It drew an analogy between the post-election violence and the ethnic clashes of the 1990s and blamed the armed militias formed during that period, never demobilised and then reactivated by political and business leaders in 2007. Additionally, the commission revealed, while the deaths of some victims were caused by civilian-to-civilian fighting, a disproportionate number were killed by the police.<sup>33</sup>

One finding was that the violence was spontaneous in some places and a result of "planning and organisation in other areas, often with the involvement of politicians and business leaders".<sup>34</sup> Some areas experienced both: a spontaneous violent reaction to the vote rigging that evolved into well-organised and coordinated attacks on members of ethnic groups associated with President Kibaki or the PNU party. Also, PNU supporters carried out reprisal attacks on suspected ODM supporters, the report said, that were "systematic" and targeted people based on their ethnicity and political leanings.<sup>35</sup>

The commission highlighted that:

[Impunity] lies at the heart of preventing the kind of violence that has been witnessed in this country time and time again. The eradication of impunity will, therefore, not only blow ... off the cover for persons who

<sup>26</sup> Donald Rothchild, "Ethnic Inequalities in Kenya", *Journal of Modern African Studies* (1969), vol. 7, pp. 689-711.

<sup>27</sup> "Annotated Agenda for Kenya National Dialogue and Reconciliation", 1 February 2008.

<sup>28</sup> The agreement was approved by parliament on 18 March 2008. However, it lacked a clear delineation of power and responsibility, resulting in bureaucratic and protocol uncertainties. While in theory the prime minister supervises other ministers, his role was not clearly defined, leading to open defiance of his directives by cabinet members from other parties, who argued that he had no authority over them. The undefined protocol relationship between the vice president and the prime minister has led to several mix-ups as well as uncertainty over who is in line to succeed the president in the event of his death or disability.

<sup>29</sup> The grand coalition cabinet was announced on 13 April 2008.

<sup>30</sup> Other members of the commission were Gavin Alistair McFadyen, a former police assistant commissioner in New Zealand, and Pascal K. Kambale, a lawyer from the Democratic Republic of the Congo. The commission secretary was George Mong'are Kegoro, an advocate of the High Court of Kenya and director of the Kenyan chapter of the International Commission of Jurists. The assisting counsel was David Shikomera Majanja, an advocate of the High Court of Kenya.

<sup>31</sup> On 5 February 2008, the ICC Prosecutor said his office had begun a preliminary investigation of the post-election violence. "OTP statement in relation to events in Kenya", 5 February 2008, at [www.icc-cpi.int](http://www.icc-cpi.int). The Office of the Prosecutor (OTP) also wrote to various parties in Kenya seeking further information about alleged crimes.

<sup>32</sup> Reportedly 1,333 people were killed, hundreds of thousands displaced, hundreds of women raped and large amounts of private and public property destroyed. "Commission of Inquiry into Post-Election Violence", 15 October 2008, pp. 8, 247, 272, 305.

<sup>33</sup> *Ibid.*, p. 354.

<sup>34</sup> *Ibid.*, p. 70.

<sup>35</sup> *Ibid.*, p. 80. The killings by province were Nyanza (347), Western (146), Rift Valley (2,193), Mombasa (135) and Nairobi (342). "Commission of Inquiry into Post-Election Violence", 15 October 2008, p. 353. Victims by ethnic group were Kalenjin (158), Kikuyu (268), Kamba (11), Kisii (57), Luhya (163), Luo (278) and Maasai (seven). For more, see "Commission of Inquiry into Post-Election Violence", *op. cit.*, p. 355.

break the law of the land but also deter others who may contemplate similar deeds in future. A firm foundation in the rule of law would also promote national reconciliation .... The elements of systemic and institutional deficiencies, corruption, and entrenched negative socio-political culture have, in our view, caused and promoted impunity in this country. Election related violence provides the best illustration of the malady where, in five-year cycles since 1992 when multiparty politics was introduced, pre- and post-election violence has rocked various parts of the country despite official inquiries and identification of the root causes being made”.<sup>36</sup>

It recommended creation of a special domestic tribunal to try individuals believed to bear the greatest responsibility for crimes, particularly “crimes against humanity”, committed during the post-election violence. This tribunal, it specified, should apply Kenyan law, including the International Crimes Bill that was in the process of being passed by the legislature. It urged that: “An agreement for the establishment of the Special Tribunal shall be signed by representatives of the parties to the Agreement on National Accord and Reconciliation within 60 days of the presentation of the report of the [commission] to the Panel of Eminent African Personalities or the Panel’s representative”.<sup>37</sup> Lastly, it recommended that:

... if either an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted, or the Special Tribunal fails to commence functioning as contemplated above, or having commenced operating its purposes are subverted, a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Chief Prosecutor of the ICC.<sup>38</sup>

The Waki Commission was credited for correctly identifying and addressing head-on a fatal flaw in most previous commissions of inquiry that had “always appealed to suspected perpetrators of crimes and their friends to investi-

gate and prosecute themselves. It therefore went over its suspects’ heads and brought in the international justice system over which the government had no control”.<sup>39</sup> Additionally, “it showed astonishing ingenuity in anticipating and sealing every potential loophole that could serve as an escape hatch. It even imposed time-lines”.<sup>40</sup>

## E. WHY THE SPECIAL TRIBUNAL FAILED

The actions of two diametrically opposed groups as well as government disunity defeated the special tribunal bill.<sup>41</sup> One group, mainly composed of reform-minded parliamentarians, primarily backbenchers, whose goal was to end impunity, voted against the bill because it genuinely had no faith in the national judicial process.<sup>42</sup> It believed that this could be manipulated by those with vested interest, and the judiciary could not be relied on to deliver justice, especially in an electoral dispute. Because in its view the only way justice could be done was through an external process, it opposed the establishment of the Kenyan tribunal.

This group was joined by a second, closely aligned with former Education Minister William Ruto and Deputy Prime Minister (and finance minister) Uhuru Kenyatta, that miscalculated the timing of the ICC process. Its members believed that process would take a long time, as it has elsewhere on the continent,<sup>43</sup> so nothing would happen before

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<sup>39</sup> “Waki - in memory of the commission that broke the backbone of impunity”, AllAfrica.com, 1 September 2011.

<sup>40</sup> Ibid.

<sup>41</sup> Crisis Group interview, human rights activist, Nairobi, August 2011. On 24 December 2008, the Kenyan parliament approved the International Crimes Act, which brought the ICC’s Rome Statute into domestic legislation applicable under the regular court system. But the act could not be applied to the 2007-2008 crimes, since that would contravene Section 77(4) of the constitution on non-retroactivity. See Christine Alai and Njonjo Mue, “Kenya: Impact of the Rome Statute and the International Criminal Court”, International Center for Transitional Justice (ICTJ), 1 June 2010, p. 3.

<sup>42</sup> Public Service Assistant Minister Aden Sugow and Johnson Muthama, a member of parliament from Kangundo, were among the leaders of the group. Kenyan civil society was largely supportive of its efforts.

<sup>43</sup> Jean-Pierre Bemba (Central African Republic case involving a Democratic Republic of Congo (DRC) political figure) warrant/summons was issued May 2008, and trial began November 2010; Thomas Lubanga (DRC), warrant/summons was issued February 2006, and trial started January 2009; Bosco Ntaganda (DRC), warrant/summons was issued August 2006; the defendant is still a serving general in the army; Germain Katanga and Mathew Ngudjolo Chui (DRC), warrant/summons was issued July 2007, and trial started November 2009; and Calixte Mbarushimana (a DRC case involving a Rwandan rebel leader) warrant/summons was issued September 2010; his case was dismissed and he was ordered released by a Pre-Trial Chamber,

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<sup>36</sup> Ibid, p. 444.

<sup>37</sup> Ibid. It went on to say that “a statute (to be known as ‘the Statute for the Special Tribunal’) shall be enacted into law and come into force within a further 45 days after the signing of the agreement”. The report also recommended that the bill establishing the tribunals be “insulated” against objections on constitutionality and be anchored in the constitution. The bill was also to provide that the special tribunal consist of four organs: the Chambers (including an Appeal Chamber) and the Prosecutor, to be independent of each other, the Registry, and the Defence Office.

<sup>38</sup> The ICC prosecutor will be asked to analyse the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons, the report explained. Ibid, p. 484.

the 2012 elections.<sup>44</sup> Mostly powerful individuals whose interest was to avoid accountability, they hoped that international proceedings would drag on so that the principal suspects could participate in those elections. They calculated that whoever won or did well could refuse to cooperate with the court or, at a minimum, continue to delay the prosecution. The assumption that the process to involve the ICC would take long proved to be a massive miscalculation.<sup>45</sup>

Factionalism within the grand coalition cabinet also played a part. The ODM and PNU pulled in different directions, as their attention was firmly focused on winning the next elections, not countering impunity. President Kibaki and Prime Minister Odinga tried late in the legislative process to rally their supporters to pass the Kenyan special tribunal bill, but in a political system devoid of discipline, a parliamentarian could – and many did – defy party positions without any consequence.<sup>46</sup>

### III. KOFI ANNAN'S DECISION

The government initially agreed with the mediation team that the tribunal needed to be established by 1 February 2009. When the first bill failed, Kibaki and Odinga assured the Panel of Eminent African Personalities that they would re-engage the parliament. They agreed that the tribunal would be set up by the end of August. However, on 3 July, a delegation of government officials met with the ICC's chief prosecutor to seek even more time to investigate and prosecute suspected perpetrators of the violence.<sup>47</sup> He agreed, provided the Kenyan government committed to initiate national proceedings within a year, to report by the end of September on the status of investigations and

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pending a possible appeal by the prosecutor, on 12 December 2011. "Cosy club or sword of righteousness", *The Economist*, 26 November 2011.

<sup>44</sup> Their rallying cry was, "Don't be vague, let's go to The Hague". Crisis Group interview, political analyst, Eldoret, August 2011.

<sup>45</sup> Crisis Group interview, Nairobi, 28 July 2011. This point was reinforced in multiple Crisis Group interviews conducted in Nairobi, Eldoret, Nakuru, Naivasha, Nyeri, Karatina, Embu and Meru in August 2011.

<sup>46</sup> Many did not mind. As an observer noted, "the M[embers of]P[arliament]'s failure to pass the bill could be good in the fight against impunity because for the first time 'top dogs' in Kenya's politics will be held to account". Crisis Group interview, international human rights lawyer, Nairobi, August 2011.

<sup>47</sup> The delegation was Justice, National Cohesion and Constitutional Affairs Minister Mutula Kilonzo; Lands Minister James Orengo, Attorney General Amos Wako, Assistant Justice Minister William Cheptumo Kipkorir, Prime Minister's Adviser on Coalition Affairs Miguna Miguna and the permanent secretary, in the justice, national cohesion and constitutional affairs ministry, Ambassador Amina Mohamed.

prosecutions arising out of the post-election violence and provide any other information requested by the ICC prosecution to help it perform its preliminary examinations.<sup>48</sup>

Given the agreement, including that the Kenyan government would provide information to the ICC, the panel decided the extension of the time limit to transmit the envelope containing the Waki Commission's list of chief post-election violence suspects to the ICC was moot. The panel members felt the agreement made it inappropriate to keep the envelope and the supporting evidence in its custody. Moreover, in light of the agreement, the prosecutor had declared he was ready to receive the materials.<sup>49</sup> The panel took steps to hand over the envelope and the accompanying materials, on 9 July 2009, in line with the Waki Commission's recommendations and subsequent actions of the Kenyan government. According to the panel, this was done to preserve the integrity of the national procedure, the ICC and indeed of the panel itself.<sup>50</sup>

After the Kenyan government submitted its first progress reports in September, and it became clear that it would not be able to initiate proceedings within a year, as promised, the prosecutor decided to proceed with his investigation. On 5 November 2009, Moreno-Ocampo met with President Kibaki and Prime Minister Odinga in Nairobi and informed

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<sup>48</sup> The Kenyan delegation agreed to provide the prosecutor by the end of September 2009 the following: a) a report on the current status of investigations and prosecutions arising out of the post-election violence and any other information requested by the ICC prosecution to assist it in performing its preliminary examinations; b) information on measures put in place to ensure the safety of victims and witnesses pending the initiation and completion of suitable judicial proceedings; and c) information on modalities for conducting national investigations and prosecutions of those responsible for the 2007 violence through a special tribunal or other judicial mechanism adopted by the parliament, with clear benchmarks over the next twelve months. In the alternative and in the absence of parliamentary agreement, and in accordance with the commitment to end impunity of those most responsible for the most serious crimes, the government was to refer the situation to the prosecutor in accordance with Article 14 of the Rome Statute. "Agreed minutes of the meeting between Prosecutor Moreno-Ocampo and the delegation of the Kenyan Government", Office of the Prosecutor, International Criminal Court, 3 July 2009, at [www.icc-cpi.int/NR/rdonlyres/6D005625-2248-477A-9485-FC52B4F1F5AD/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf](http://www.icc-cpi.int/NR/rdonlyres/6D005625-2248-477A-9485-FC52B4F1F5AD/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf).

<sup>49</sup> The contents of the envelope and the accompanying material were important for the preliminary examinations and for assessment of the extent to which the requirements of the complementarity principle were met.

<sup>50</sup> Hans Corell, legal adviser to the African Union Panel of Eminent African Personalities, "Note on the handover of [Commission of Inquiry into Post-Election Violence] CIPEV material to the Prosecutor of the ICC", July 2009, at [www.dialogueke.org](http://www.dialogueke.org).

them it was his duty to open an investigation. In a joint press conference, he announced his intention to request authorisation to proceed. The government stated that it remained fully committed to cooperating with the ICC within the framework of that tribunal's Rome Statute and the Kenyan International Crimes Act. That same day, the prosecutor notified the President of the ICC, by letter, of his intention to submit a request for the authorisation of an investigation into the situation in Kenya pursuant to Article 15(3) of the Rome Statute.<sup>51</sup> It was the first time the prosecutor had brought a case *proprio motu* (on his own motion) under Article 15 of the Rome Statute.<sup>52</sup>

#### IV. THE KENYAN GOVERNMENT'S CAMPAIGN FOR NATIONAL JURISDICTION OR DEFERRAL

When Moreno-Ocampo released the names of the six suspects in December 2010, Vice President Stephen Kalonzo Musyoka and some cabinet ministers began lobbying the UN Security Council members, the African Union (AU)<sup>53</sup> and countries across Africa to support a national criminal trial or deferral of the international proceedings for at

least a year.<sup>54</sup> They used two sets of arguments. First, the preamble of the Rome Statute and Article 1 refer to the ICC as an international institution, "that shall be complementary to the national criminal jurisdiction".<sup>55</sup> Not having primary jurisdiction, the ICC can only intervene if the national judiciary is unwilling or unable to investigate or prosecute. Secondly, Article 16 of the Rome Statute permits the Security Council, pursuant to a Chapter VII resolution, to request the ICC to defer investigation or prosecution for a renewable twelve-month period.

While these efforts were sanctioned by President Kibaki, the ODM did not support them. The justice minister also refused to support deferral.<sup>56</sup> Odinga, the ODM party leader, was equivocal. Three of the six suspects are Kalenjins, members of a large ethnic community from the Rift Valley, and he is keen not to alienate a community that overwhelmingly supported him in 2007. Nor does he want to anger the largest ethnic group in Kenya, the Kikuyu (from which Kenyatta comes).<sup>57</sup> But, at the same time he wants to be seen as a reform candidate, supporting the ICC in the fight against impunity. The prime minister therefore did not publicly oppose the government's attempts to slow down the international court, but he privately may not be averse to seeing two of his main political rivals accused before it.

<sup>51</sup> Letter from Prosecutor Luis Moreno-Ocampo to President Sang-Hyun Song, 5 November 2009, at [www.icc-cpi.int/NR/rdonlyres/9EB64D7E-D6F0-4D1B-A0DE-360832C66E7B/281186/AnnextothePresidencyDecision4.pdf](http://www.icc-cpi.int/NR/rdonlyres/9EB64D7E-D6F0-4D1B-A0DE-360832C66E7B/281186/AnnextothePresidencyDecision4.pdf).

<sup>52</sup> This authority, however, is constrained by the requirement that the prosecutor must obtain leave to institute such investigations from an ICC Pre-Trial Chamber (PTC). The PTC will grant this based on two considerations: reasonable grounds warranting the investigations and existence of the court's jurisdictional triggers. Abraham Korir, "The ICC as Arbiter in Kenya's Post-Electoral Violence", *Minnesota Journal of International Law*, vol. 19 (2010), p. 6. The ICC is actively pursuing seven cases in African countries: Uganda, Central African Republic, Democratic Republic of Congo (cases referred to the ICC under Article 14 by those states themselves, which are parties to the Rome Statute); Sudan, for crimes committed in Darfur, and Libya for events in connection with the 2011 rebellion (case referred to the ICC by the UN Security Council, acting under Chapter VII of the UN Charter although neither country is a party to the Rome Statute); Kenya and Côte d'Ivoire (cases in which the prosecutor requested authorisation from an ICC Pre-Trial Chamber to initiate investigations).

<sup>53</sup> The case for deferral attracted its first high-level support at the Seventeenth Extraordinary Session of the Intergovernmental Authority on Development (IGAD) Assembly. The Communiqué of Heads of State and Government on Sudan, Somalia and Kenya "Decide[d] to support Kenya's deferral of the ICC investigations and prosecutions in line with Article 16 of the Rome Statute to enable affirmation of the principle of complementarity", Addis Ababa, 30 January 2011. IGAD's support in effect ensured the subsequent backing of the African Union summit that met on 30-31 January 2011.

<sup>54</sup> Other members of the group included Robinson Njeri Githae (Nairobi metropolitan development minister), Sally Kosgey (agriculture minister), Hellen Sambili (East African Community minister), George Saitoti (internal security minister), Chirau Ali Makwere (trade minister) and Richard Onyonka (assistant foreign minister). Vice President Kalonzo Musyoka joined the campaign to defer the cases perhaps because at a personal level he has a feud with Odinga. Musyoka's party, ODM-K, is a break-away from Odinga's ODM. He left the ODM after he realised he would not be on its presidential ticket in 2007. He came third in the election. When the ODM disputed the results, he was the first to accept them, which gave Kibaki's election an aura of legitimacy. For that he was appointed vice president by Kibaki to the chagrin of ODM. Since then relations between Odinga and Musyoka have been tense.

<sup>55</sup> Markus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity", in A. Von Bogdandy and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, vol. 7, (2003), p. 2.

<sup>56</sup> "For the avoidance of doubt, I have not and I will not support deferral. My position is deferral at the very least would place the ICC cases on the Kenyan political map during an election year, namely 2012 leading to unwarranted politicisation of the judicial process at the time when the country is looking forward to a new judicial dispensation". Crisis Group email correspondence, Mutula Kilonzo, minister for justice, national cohesion and constitutional affairs, Nairobi, 7 September 2011.

<sup>57</sup> The other two suspects in the case involving Kenyatta are from the Meru (Francis Muthaura) and Somali (Hussein Ali) ethnic groups.



## A. DEFERRAL PURSUANT TO A THREAT TO PEACE ARGUMENT

On 8 February 2011, the Permanent Mission of the Republic of Kenya forwarded to all Permanent and Observer Missions to the United Nations an aide-mémoire regarding “Kenya’s Reform Agenda and Engagement with the International Criminal Court (ICC)”. The document sought to justify the government’s case for deferral ahead of any consideration of the matter by the Security Council. On 4 March, the permanent mission wrote to the president of the Security Council requesting that body to consider an Article 16 deferral of the investigation opened by the Office of the Prosecutor (OTP). This was followed by a meeting between Secretary-General Ban Ki-moon and Vice President Musyoka on 8 March. Three days later ODM sent a letter opposing the request to the president of the Security Council and the missions of its members.<sup>58</sup>

The Kenyan government argued that an Article 16 deferral was necessary because the ICC process would threaten the country’s and thus the region’s peace and security.<sup>59</sup> ODM countered, among other things, that the prosecution did not “pose any threat to peace and security. To the contrary, failure to bring to justice the perpetrators of post-election violence poses grave danger to Kenya’s internal peace and security”. It also raised concerns the judiciary was not independent, and local trials would be manipulated.<sup>60</sup>

The Council held a closed door “interactive dialogue” with the Kenyan delegation on 18 March.<sup>61</sup> The threat to peace and security argument did not persuade the Council; members also apparently considered the lack of agreement within the government coalition as a further reason not to take up the issue for formal debate. The Kenyan permanent mission then sent a further letter (on 29 March, though dated 23 March) requesting the Council to reconsider deferral based on the ODM National Executive Council/Parliamentary Group’s decision, on 22 March, “to push for the International Criminal Court cases relating to Kenya to be handled locally through a credible local mechanism”.<sup>62</sup> On 8 April, the Council held informal consultations to dis-

cuss this letter. The President of the Council (Colombia) remarked to the press at their conclusion:

Having received a request from the Kenyan Permanent Representative for a twelve-month deferral of the cases against six Kenyan nationals under Article 16 of the Rome Statute of the ICC, and taking into account the position expressed by the African Union, the Security Council held an informal dialogue on 18 March and informal consultations on 8 April 2011 in order to consider the issue. After full consideration, the members of the Security Council did not agree on the matter.<sup>63</sup>

## B. DELAY BASED ON THE PRINCIPLE OF COMPLEMENTARITY

While the Security Council did not accept the Kenyan request that it ask the ICC to defer the cases for a year pursuant to Article 16 of the Rome Statute, it noted that the government could consider appealing to the ICC under Article 19 (“challenges to the jurisdiction of the Court or the admissibility of a case”).<sup>64</sup> Pursuant to the Rome Statute and as noted above, the ICC is the court of last resort, only able to exercise jurisdiction if a state party is “unwilling” or “unable” to prosecute the crime. “Inability” occurs when the judicial system of a state is unavailable or has suffered total or substantial collapse, so that the state cannot realistically carry out its duties to investigate and prosecute. “Unwillingness” refers to a situation in which national proceedings regarding the accused are being conducted or have been conducted in a manner to suggest that the individual is being shielded from justice, there has been an unjustified delay or the proceedings were not or are not being conducted independently or impartially.<sup>65</sup>

The parliamentary defeat of the tribunal bill persuaded many Kenyans this was the situation. The government was given more than nine months to establish a tribunal.<sup>66</sup> It

<sup>58</sup> Peter Anyang’ Nyong’o, ODM Secretary General, “Petition to the members of the UN Security Council regarding the Kenyan case at the ICC”, 11 March 2011, at [www.standardmedia.co.ke/downloads/ODM\\_statement\\_to\\_UN\\_security\\_council.pdf](http://www.standardmedia.co.ke/downloads/ODM_statement_to_UN_security_council.pdf).

<sup>59</sup> Inter alia, Kenya is a major regional transport corridor for the landlocked counties. Ibid.

<sup>60</sup> Peter Anyang’ Nyong’o, “Petition”, op. cit.

<sup>61</sup> There was no meeting record, and no official statement was issued.

<sup>62</sup> Letter dated 23 March 2011 from the Permanent Representative of Kenya to the United Nations addressed to the President of the Security Council”, S/2011/201, 29 March 2011.

<sup>63</sup> See Security Council President Néstor Osorio, “Press Statement on the request of Kenya for deferral under Article 16 of the Rome Statute of the International Criminal Court (S/2011/201)”, UN Webcast, 8 April 2011, at [www.unmultimedia.org](http://www.unmultimedia.org).

<sup>64</sup> “Insights on Kenya and ICC”, <http://whatsinblue.org>, 22 March 2011.

<sup>65</sup> Abraham Korir, “The ICC as Arbiter”, op. cit., pp. 11-12. See also Rome Statute of the International Criminal Court, Article 17(1) and (2). In addition, “In order for the ICC to commence investigations into the violence, the Pre-Trial Chambers (PTC) would need to determine whether the substance or gravity of the crimes meet the Statutory threshold”. Mba Chidi Nmaju, “Violence in Kenya: Any role for the ICC in the quest for accountability”, *African Journal for Legal Studies*, vol. 3, no. 1 (2009), p. 91.

<sup>66</sup> After the Waki report was released on 15 October 2008, the government had until 30 January 2009 to establish the tribunal.

did not. Instead it began exploring with the prosecutor yet another attempt to set up a local process and possibly delay the court for at least a year. Those trying to avoid or at least slow the ICC process asserted that the post-election violence could be handled under the new (2010) constitution that provided for a more independent judiciary. Part of the argument presented to the Security Council had been that deferral of the ICC case for a year would allow time for a “national mechanism to prosecute the cases under a reformed judiciary”,<sup>67</sup> since Kibaki had unilaterally nominated a new chief justice, a new attorney general and a new director of public prosecutions in an effort to highlight that Kenya could try the accused by international standards. Unpersuaded and slighted, ODM argued that its coalition partner’s action negated the spirit of the new constitution, which requires judicial appointments to be vetted by the Judicial Service Commission.<sup>68</sup>

The government did file an Article 19 admissibility challenge on 31 March 2011, requesting the ICC to dismiss the case, but Pre-Trial Chamber II rejected this on 30 May; on 30 August, the Appeals Chamber rejected the government’s appeal for dismissal. The cases could thus proceed. “Lack of willingness from the Kenyan government made the ICC ... intervene in the Kenyan case”.<sup>69</sup>

## V. THE ICC’S IMPACT ON KENYA’S POLITICAL PROCESS

The ICC’s actions are now in effect an inescapable element of the political process as Kenya heads to elections.<sup>70</sup> Political jockeying and alliance formation have already begun. All key actors are making their calculations based on an-

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When it could not, it was given an additional six months, until July 2009.

<sup>67</sup> Lucas Barasa, “Kenyan Vice President off for ICC deferral mission”, *African Review*, 6 March 2011.

<sup>68</sup> According to ODM, the attorney general nominee, Githu Muigai, and the director of public prosecutions nominee, Kioko Kilukumi, were on record as lawyers for two of the ICC suspects. Furthermore, an ICC suspect chaired the panel that identified Justice Alnashir Visram for the Chief Justice position. Peter Anyang’ Nyong’o, “Petition”, op. cit. The three nominations were withdrawn following public and parliamentary protest.

<sup>69</sup> Crisis Group interview, international human rights lawyer, Nairobi, 1 August 2011. Odinga said, “We did not invite Moreno-Ocampo here; neither did Moreno-Ocampo invite himself here. He came here due to our failure to set up a local tribunal”, *The Star*, 17 December 2010. Moreno-Ocampo said, “If Kenya cannot do it, I will do it. There will be no impunity”, Reuters, 7 July 2009.

<sup>70</sup> The ICC prosecutor was undoubtedly aware of this when he decided to prosecute three suspects who are members or considered supporters of ODM and three who are members or considered supporters of PNU.

anticipated decisions in The Hague. Even if an early confirmation of the charges may not legally prevent the suspects from running for office, the risk of conviction would affect supporters and allies. The timing and framing of proceedings and decisions can lower or increase volatile tensions. The current Pre-Trial Chamber (PTC) appears to be aware of this. For example, the announcements whether the charges will be confirmed in the two cases reportedly will be made on the same day. When Judge Ekaterina Trendafilova, on 5 October 2011, in the final statement in the hearings to determine whether the cases proceed to trial, observed that continued hate speech would be considered in the PTC’s deliberations, her words temporarily dampened the aggressive ethnic rhetoric back home of the main suspects.<sup>71</sup>

## A. ETHNIC POLARISATION

No facet of Kenya escapes ethnicity, not even an externally driven process like the ICC’s. Unsurprisingly, the court’s intervention, just before a round of elections, has invited the charge it is being used by politicians to “fix” – undermine – opponents. This narrative finds resonance, as indicated by the significant decrease in support for the ICC among some ethnic groups since the naming of the suspects.<sup>72</sup> According to the Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, “[t]he reduction may be attributed to the perception that the court failed to include all the perpetrators from regions which experienced violence, which implies failure to include leaders of other ethnic groups”.<sup>73</sup>

Initially at least, the ICC enjoyed tremendous goodwill in the national media. Because of the history of impunity, the

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<sup>71</sup> She said, “I want to assure the citizens of Kenya that the Justices of this chamber ... Justice Hans Kaul, Justice Cuno Tarfusser and myself, Ekaterina Trendafilova, will take our decision independently and impartially and only after having carefully examined all pieces of evidence presented by both parties so that justice will be served to everyone concerned”. Bernard Ngunjiri, “ICC warns Kenya suspects against intimidation”, *African Review*, 5 October 2011.

<sup>72</sup> “Progress in implementation of the Constitution and other reforms, Review Report”, The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, October 2011, p. 53. According to an August 2011 opinion poll by the Synovate research firm, support for the ICC had dropped to 56 per cent from 68 per cent in October 2010. The decline was apparently due to much lower support for the ICC process in the home regions of four of the suspects: Central (Uhuru Kenyatta) and Rift Valley (William Ruto, Joshua Sang and Henry Kosgey). Cornelius Mwau, “Citizens support for ICC declines”, *The Star*, 19 August 2011.

<sup>73</sup> “Progress in implementation of the Constitution and other reforms, Review Report”, op. cit. That neither Odinga nor anyone else from Odinga’s Luo ethnic group has been charged is offered as proof by defenders of the suspects that the ICC is engaged in selective prosecution.

media felt that supporting international trials was a public duty. However, immediately after they were identified, the six suspects embarked on an extensive and sophisticated media campaign to cast themselves as victims of the court and of machinations by political opponents intent on preventing their participation in the 2012 elections.<sup>74</sup> Their campaign has been effective, not least because the main suspects own media outlets in part or in whole, particularly in their home areas. Two radio stations – Kass FM, a Kalenjin vernacular broadcaster in which Ruto has shares, and Kameme FM, a Kikuyu broadcaster in which Uhuru Kenyatta has a controlling interest – have played a huge role in portraying the suspects as victims. During the recent hearings in The Hague, the national media picked up this theme, covering the cases as if Moreno-Ocampo was prosecuting Kenya, not the individual suspects.

Kenyatta and Ruto also toured the country in alliance, holding rallies in which they claimed they had been framed by their political opponents. In a country where political parties are not anchored on strong ideologies, mobilisation based on ethnicity is a convenient tactic for politicians.<sup>75</sup>

The Rift Valley is not only the region from where half the suspects come, but also the location of much of the 2007-2008 violence. The general perception among Kalenjins of the Rift Valley is that they have been singled out as “aggressors”, while others are seen as victims. Kalenjins felt this narrative from the beginning of the violence, including in the Waki report,<sup>76</sup> and see the ICC as its continuation.<sup>77</sup> Ruto has cast himself as the person who will restore their collective dignity.<sup>78</sup>

Odinga has been painted as the person behind Ruto’s woes, although Kalenjins supported him in the last election, and most of the evidence against him was provided in the National Security Intelligence submission to the Waki Commission. The prime minister has maintained stoic silence, not by choice but circumstance, refraining from publicly objecting to the accusation because any vigorous intervention would allow Ruto to say it only showed Odinga had been out to get him from the beginning and would ruin the prime minister’s already tenuous relationship with the Kalenjin.

<sup>74</sup> Crisis Group interview, civil society activist, Nairobi, August 2011.

<sup>75</sup> Crisis Group interview, human rights lawyer, Nairobi, August, 2011. Also see Emeka-Mayaka Gekara, “The Raila question at ICC”, *Daily Nation*, 3 September 2011

<sup>76</sup> Ibid.

<sup>77</sup> Crisis Group interview, human rights lawyer, Nairobi, August 2011.

<sup>78</sup> Crisis Group interview, human rights activist, Nairobi, August 2011.

## B. POLITICAL ALLIANCES BASED ON OPPOSITION TO THE ICC

The quest for a Security Council deferral helped lead to the founding of a Kikuyu (Kenyatta), Kalenjin (Ruto) and Kamba (Musyoka) “KKK” political alliance. This morphed into the Group of Seven (G7).<sup>79</sup> The calculation was that an umbrella party would make it easier to cross the new threshold for winning the presidency, since it has become virtually impossible for a single candidate or party to win the office on its own. The G7 is a powerful alliance,<sup>80</sup> with important implications for 2012, when all presidential candidates will try to build ethnic alliances. It considers that if it wins the elections and controls the government, it will at a minimum be able to delay the ICC process.

But Kenyan political alliances are fickle, based purely on convenience. Ruto was Odinga’s point man in the Rift Valley in 2007 and an ODM negotiator during the Annan-led mediation in 2008. Henry Kosgey was and remains the ODM chairman. In 2007, Odinga was heralded by Kalenjins as *Arap Mibei* (hero),<sup>81</sup> now he is referred to as *Chemosit* (a mythological beast in Kalenjin folklore).<sup>82</sup> It is not yet clear if the alliances between Ruto and Kenyatta and by extension the Kalenjin and the Kikuyu will endure until election time, since the underlying issues that triggered the 2007-2008 violence, such as the land question, have not been solved. If the alliance does endure, there may be less violence in the Rift Valley in 2012, but continued attempts by the suspects to play the ethnic card may increase ethnic tensions in other parts of the country, particularly between the Kalenjin and Luo.<sup>83</sup> Much of the uncertainty revolves around the decision of the PTC to confirm or drop the charges against the suspects.

<sup>79</sup> The G7 include, Uhuru Kenyatta, William Ruto, Kalonzo Musyoka, Eugene Wamalwa, Omingo Magara and Aden Duale. The seventh member, Najib Balala, has since gone back to ODM.

<sup>80</sup> Pre-election alliance is nothing new in Kenya’s politics, but in most cases it is undone once the goal of winning election is achieved. In 2002 the opposition parties joined hands and won against the incumbent KANU. But immediately after the election, the LDP, headed by Odinga, cried foul over fulfilment of the terms of the pre-election memorandum of understanding. This led to the breakup of the coalition and set the stage for a tightly-fought 2007 election.

<sup>81</sup> Crisis Group interview, political activist, Nairobi, August 2011.

<sup>82</sup> During the last election, Odinga, a Luo, was symbolically adopted by the Kalenjins. Crisis Group interview, political activist, Nairobi, August 2011. The Kalenjins now accuse Odinga of betraying Ruto to the ICC after Ruto delivered the Kalenjin vote for him. Biketi Kikechi, “Kalenjin MPs ready to ditch Raila’s party”, *The Standard*, 12 January 2011.

<sup>83</sup> The Luo are a large ethnic group from western Kenya. Prime Minister Odinga is the most prominent Luo politician.

Simultaneously, Kenyatta, Ruto and Musyoka have been building their individual political parties in case the G7 fails. Ruto has toured the country building support for his United Democratic Movement. Musyoka is still firmly in ODM-Kenya (renamed Wiper Democratic Party, WDP, in November 2011), the party he used in 2007. Kenyatta, who is a member of the PNU but also still the chairman of KANU, has made clear that he will run for president, although he is coy about which party he will use.<sup>84</sup> Should he be told by the Kenyan courts or his supporters that he cannot run because the ICC has confirmed the charges against him, Internal Security Minister George Saitoti is waiting in the wings as a backup PNU presidential candidate.

### C. REALIGNMENT OF POLITICAL ALLIANCES AROUND THE PTC'S DECISION ON THE CHARGES

The ICC is expected to announce its decision on the charges against the six suspects before the end of January 2012. The three likely scenarios are: the charges against all are confirmed; the charges against all are dismissed; or the charges against some are confirmed and against others are dropped.<sup>85</sup> Each outcome has implications for Kenyan politics. While the cases before the ICC involve six suspects, two key individuals, Kenyatta and Ruto, have indicated they will contest the presidency in 2012. The rulings on

the charges against them will have the greatest political significance.

#### 1. If the charges are all confirmed

If the charges are confirmed, particularly for Uhuru Kenyatta and William Ruto, their political prospects and by extension the political prospects of their ethnic groups (Kikuyu and Kalenjin respectively) could be tied together for the 2012 elections. Talk of formalising the Kikuyu-Kalenjin alliance for the elections may become a reality.

Kenyatta and Ruto say that regardless of the PTC's decision, they will contest the elections because the constitution does not forbid an individual against whom there are legal proceedings from doing so.<sup>86</sup> It would be at the court's discretion whether during the course of legal proceedings they could remain free in Kenya or would be detained at The Hague. If they were found, for instance, to be interfering with a witness or demeaning the court, they might well be detained. But since returning from the hearings on the charges, the suspects have avoided speaking ill of the court in public rallies. A Kenyatta-Ruto ticket would have much going for it. A Kalenjin-Kikuyu ethnic voting bloc would be very large.<sup>87</sup> With Kibaki retiring, Odinga is the candidate to beat, but he could be the first casualty of such a ticket, since his previous Kalenjin support would be weakened.

To counter this alliance, Odinga has embarked on three approaches. First, he has co-opted a fair number of Kalenjin parliamentarians not aligned with Ruto, rewarding their loyalty with ministerial positions. Those who failed to support him have been demoted. Secondly, he has reached out to former President Moi. While the old man no longer commands his former power, he retains some residual influence within the Kalenjin community. By aligning himself with Moi, Odinga hopes to chip into some of Ruto's

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<sup>84</sup> Vice President Kalonzo Musyoka and Deputy Prime Minister Uhuru Kenyatta attended the Party of National Unity Alliance National Executive Council and Parliamentary Group meeting. They, as well as William Ruto, endorsed the process for drawing up regulations for joint nomination that create room for one of them to be selected without much acrimony in January 2012. Moses Njagih and Vitalis Kimutai, "PNU drafts rules to nominate one presidential candidate", *The Standard*, 23 December 2011. Kenyatta is said to have told the meeting that he would seek to revitalise KANU and conduct recruitment drives across the country. He defended his move to strengthen the alliance, saying "we may belong to different parties, but we share a common vision for this country, and that is why we have come together, even as we continue strengthening our parties", *ibid*.

<sup>85</sup> It is also possible that some, but not all, of the charges against each individual will be dropped. In its December 2010 request for summonses, the prosecutor sought counts against Muthaura, Kenyatta and Ali for allegedly instructing the police to target perceived ODM supporters and to suppress their protests in Kisumu, Nyanza, and Kibera, a slum in Nairobi. The PTC did not find reasonable grounds to support these charges and faulted the prosecutor for failing to provide a legal or factual submission that would require it to consider whether these acts of violence were committed pursuant to state policy. In addition, it considered "even more compelling" that there were not reasonable grounds to find any of the three accused – Kenyatta, Muthaura and Ali – responsible for events in Kisumu and Kibera. "Kenya: Pre-Trial Hearing in Second ICC Case: Questions and Answers", Human Rights Watch, September 2011.

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<sup>86</sup> Francis Mureithi, "Uhuru, Ruto in 2012 race even if ICC proceeds", *The Star*, 24 August 2011. While Article 147 of the new constitution is not explicit with regard to who may contest an election, it should be read concurrently with Chapter Six of the constitution, which lays out clear grounds and procedures for impeachment of the president. A motion to impeach a sitting president requires at least a third of the members of parliament to constitute a quorum and the votes of two thirds of all members to pass. A president elected while under investigation or after being charged would be aware of his potential vulnerability to impeachment. Crisis Group interview, lawyer, Nairobi, August 2011.

<sup>87</sup> It is possible that if both Kenyatta and Ruto have the charges against them confirmed they may lose their leadership positions within their respective communities to individuals not before the court. Alternatively, confirmation of the charges could be used to rally ethnic support behind them.

votes.<sup>88</sup> Finally, he has held a series of meetings with various political actors, mostly professional groups from outside his Nyanza stronghold.

Vice President Musyoka could be a casualty of a presidential campaign that has Ruto and Kenyatta on a combined ticket. He has been in talks with both about fielding a joint presidential candidate. If charges are confirmed against them, Ruto and Kenyatta would probably rather be on a ticket together than with someone not at The Hague. A joint ticket would be their only card. They have a huge incentive to win or at a minimum do well at the polls, because government positions would increase their leverage at least to drag out their cases. But a Ruto-Kenyatta ticket could be branded an “Axis of Impunity” by opponents, who could argue that all that binds them together are anti-reform, pro-impunity credentials.

Those seeking to address impunity, including in civil society, could gain from this scenario. Judicial complacency about electoral violence has hindered the fight against impunity, but proceedings in The Hague against powerful and wealthy people would send a signal that if national courts fail to prosecute such cases, the ICC will. This could deter those who might contemplate causing violence in the future. However, the chorus of those who accuse the ICC of being a court for use against Africans only would be further amplified, particularly among the ethnic communities of those on trial.<sup>89</sup>

## 2. If the charges are all dropped

If the charges are dropped, the suspects would be politically strengthened. They have repeatedly professed their innocence and that the cases against them were orchestrated by their political opponents. They would argue that despite this, a fair legal process had vindicated them, and their political careers would be redeemed.

However, the glue that binds Ruto and Kenyatta together would be no more. Since their alliance was one of opportunism, based on opposition to the ICC, the decision would break their unity. Each probably would eye the presidency and believe he could win without the other. Alternatively, Ruto could again back Odinga. With Kibaki not running, Kenyatta would be seen as the bona fide Kikuyu leader. There is a growing sentiment, however, that the Kikuyus have had their fair share of presidents, and it is another

community’s turn.<sup>90</sup> This could make it hard for Ruto to back Kenyatta. Also part of Ruto’s dilemma is that Kikuyus generally do not support a presidential candidate from another community. To complicate matters further, either Kenyatta or Ruto could ally with Musyoka, the likely Kamba candidate, who has also indicated his presidential ambition. This means ultimately either Kenyatta or Ruto would have to defer his presidential ambition, at least for now, which at the moment looks unlikely.

As for Odinga, if the Kenyatta-Ruto axis is broken, the presidential field would become crowded, but he would have more room to craft a coalition. In this case, the candidate who stands the best chance is the one who can build a cross-ethnic coalition. In the past, Odinga has demonstrated he can do so. However, in the event of a run-off, fringe candidates like Martha Karua and Peter Kenneth could prove vital, since they might be able to influence decisive swing voters.

Although this scenario would demonstrate the ICC’s impartiality and independence, it would be viewed as a setback for efforts to combat impunity and deter political violence in Kenya. The six suspects have on various occasions accused Moreno-Ocampo and the ICC of selective justice because charges were not brought against anyone from the Luo community, even though Luo Nyanza was also affected by the 2007-2008 violence. During the hearings on the charges, the suspect’s lawyers, particularly Kenyatta’s team, argued that the prosecution built its cases on civil society reports and newspaper clippings that do not constitute legal proof.<sup>91</sup> Feeling vindicated, the former suspects would undoubtedly repeat on the campaign trail their claims of having been targeted by their political enemies, which would not be promising for peaceful elections.

## 3. If charges are confirmed for some suspects

If charges are confirmed for only Kenyatta or Ruto and he in turn is unable or decides not to contest the elections,<sup>92</sup> two things might happen: he might endorse another, and much of his ethnic voting bloc might vote for that individual out of loyalty to and respect for their “hero”; or his community might decide that in the absence of “their” man,

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<sup>88</sup> However, an alliance with Moi comes with baggage. During 24 years in office, Moi oversaw massive repression of pro-reform groups and politicians and presided over a deeply corrupt regime.

<sup>89</sup> The Africa-only complaint may be modified somewhat with the election of Fatou Bensouda, from Gambia, to succeed Moreno-Ocampo as prosecutor in 2012.

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<sup>90</sup> Uhuru Kenyatta’s father, the late President Jomo Kenyatta, was Kikuyu, as is Mwai Kibaki. President Moi, a Kalenjin, held the highest office for 24 years.

<sup>91</sup> A further strategy is to argue that Raila Odinga, who was the leader of ODM, should also be held criminally liable for the first round of violence, which occurred after he disputed the outcome of the election results. “ICC upsets presidential candidate’s diaries”, *Indian Ocean Newsletter*, 1 October 2011, p. 1.

<sup>92</sup> Both Kenyatta and Ruto have said they will run regardless of the outcome of the court’s ruling, Francis Mureithi, “Uhuru, Ruto in 2012 race even if ICC proceeds”, *The Star*, 24 August 2011.

they would vote for someone else. If they vote for the candidate that the detained individual asks them to support, Musyoka would probably be the beneficiary, since he would most likely become the running mate of the suspect whose case was dropped, namely either Ruto or Kenyatta.

Raila Odinga, a Luo, would still be a loser, although nothing like if the charges were dropped against both Kenyatta and Ruto. An election face-off against a weakened ticket that might involve either of those two, with Musyoka as a running mate, would be winnable. But if charges are dropped against Ruto and he were to be on the ticket, he would pose a much greater threat to Odinga, because Kikuyus customarily do not vote for a candidate of another ethnicity and certainly not a Luo. Another factor would be that there is a general sense that electing a third Kikuyu president would be a hard sell in other regions.

The differentiated treatment of suspects would demonstrate the care with which the court performed its functions, while also signalling to would-be perpetrators that they face a risk of being tried and convicted at The Hague. This would go some way to addressing the culture of impunity. However, much like if the announcements of the decisions on the charges were to be poorly coordinated or framed, unequal treatment of the suspects could also exacerbate tensions, especially between those groups that might feel persecuted and those that had no leaders before the court. The PTC, therefore, should carefully present the evidence on which its decisions are based.

## VI. THE WAY FORWARD

### A. WHAT THE COURT AND ITS ALLIES SHOULD DO

The ICC's rulings are driven by the law, not politics, though during an election year in which some of the suspects are key actors, they inevitably will have considerable political consequences. From previous media engagements of the prosecutor, some received an impression that convictions of the suspects were a foregone conclusion. This heightened expectations. Before the hearings on the charges, the court was roundly praised in Kenya. That has changed. During the hearings, the defendants' lawyers demonstrated that the prosecution's cases might not be watertight. The ICC now appears to be seen by large sections of the public as not living up to their original expectations. It is possible many Kenyans are not fully aware of the distinctions between confirmation hearings and actual trials, including the different thresholds of proof that need to be satisfied. A robust public information campaign is needed to combat misperceptions.

While ICC officials feel it is beyond the court's mandate to conduct such a campaign,<sup>93</sup> those who support the process are not so constrained and should improve their media and public outreach in Kenya. Moreover, the ICC's Assembly of States Parties has repeatedly called on the court itself to intensify its public information and outreach efforts. The court should heed this call, because if the nature and limits of the legal proceedings are not better explained, public opinion could turn further against its work, and politicians could exploit this with serious consequences.

The prosecution has relied on witnesses both known and unknown for its evidence. Once the charges against the suspects are confirmed or not, these witnesses could be threatened by some of the suspects or their supporters. The Registry should ensure they are kept safe. Some key witnesses have been moved to other countries, but if trials proceed, even greater care needs to be exercised to protect these individuals, and their families, as well as other potential witnesses still living in Kenya.<sup>94</sup>

### B. WHAT THE KENYAN GOVERNMENT SHOULD DO

First and foremost the fight against impunity is the government's responsibility. It needs to supplement the ICC process with a parallel national legal mechanism to fight impunity, particularly at lower-levels. The director of public prosecutions should be mandated to investigate and seek criminal prosecution of suspects in the 2007-2008 post-election bloodshed (other than those already being prosecuted by the ICC), so as to send a clear message to would-be perpetrators of political violence that impunity will no longer be tolerated in Kenyan politics.<sup>95</sup> The government also needs to review the credibility of and increase funding for the Witness Protection Agency.<sup>96</sup> Since it was launched, the agency has done very little, but its 2011 budget is only \$413,000, while it requires \$11.8 million.<sup>97</sup>

<sup>93</sup> Crisis Group interview, ICC officials, The Hague, 25 October 2011.

<sup>94</sup> The ICC has highlighted the issue of victims. Two lawyers were able to represent them at the confirmation hearings. It should allow victims to continue to play a role in the proceedings, in order to highlight that they are about more than the six suspects.

<sup>95</sup> For more, see "Turning Pebbles", Human Rights Watch, op. cit.

<sup>96</sup> The Witness Protection Act was introduced and passed in parliament in 2006 and came into effect in September 2008. It was established to provide the framework and procedures for giving special protection to persons in possession of important information and facing potential risk or intimidation due to their cooperation with the prosecution and other law enforcement agencies.

<sup>97</sup> Nompumelelo Sibalukhulu, "Lack of Political Will Undermines Witness Protection in Kenya", Institute for Security Studies, 30 March 2011.

Additional budgetary support is crucial for protecting witnesses and delivering justice.

Likewise, as the 2012 elections approach, the government should widen the mandate and strengthen the capacity of the National Cohesion and Integration Commission for dealing with hate speech.<sup>98</sup> Until now, it has been limited to issuing symbolic statements. Furthermore, prosecution of those engaged in hate speech needs to be expedited to serve as a deterrent to others.

### C. WHAT THE INTERNATIONAL COMMUNITY SHOULD DO

The international community played a major role in ensuring that ODM and PNU signed the National Accord that culminated in the formation of the government of national unity that ended the 2007-2008 post-election violence. Similar collective engagement with the Kenyan government is needed today, making use of all available avenues. An area in which some countries and organisations have played a positive role but where more could be done is witness protection, including helping the government increase the Witness Protection Agency's credibility and cope with its resources deficit. Nairobi embassies should make clear that they will watch politicians very carefully in 2012 and use all their leverage to deter fear mongering and instigation of communal violence.

## VII. CONCLUSION

Kenya's democracy has been corroded by impunity. The result is no-holds-barred politics in which violence is common-place. Inevitably violence escalated over the past decades, and it reached crisis proportions in 2007-2008. The nexus of an unaccountable political class and unwilling judiciary has prevented the country from ending this cycle of violence. As the cases against the six suspects in The Hague progress, the ICC may inaugurate a new era

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<sup>98</sup> The commission was established on 10 September 2009. President Kibaki, pursuant to Section 17(4) of the National Cohesion and Integration Commission Act 2008, appointed commissioners of the national cohesion and integration, who serve for three years. Its role is primarily to facilitate and promote equality of opportunity, good relations, harmony and peaceful coexistence between persons of different ethnic and racial communities in Kenya and to advise the government on all aspects thereof. It seeks to provide a mechanism for addressing, on a continuing basis, the ethnic conflicts that are part of multi-ethnic/plural societies. The act was initially drafted by the Kofi Annan-led mediation and reconciliation team and subsequently developed by the Parliamentary Committee on Legal Affairs and the Administration of Justice.

of accountability that serves to deter political violence.<sup>99</sup> At the same time, it has also increased the stakes of the pivotal 2012 elections for major politicians, which means that the timing and framing of legal measures and proceedings will inevitably have a major impact on ethnic tensions in and around those elections.

**Nairobi/Brussels, 9 January 2012**

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<sup>99</sup> "Unlike an ad hoc tribunal, the Court is a permanent institution, which ensures that the international community can make immediate use of its services in the event of atrocities occurring, and also acts as a deterrent to those who would perpetrate such crimes", "Objectives", Rome Statute of the International Criminal Court, 17 July 1998, [www.un.org/millennium/law/xviii.17.htm](http://www.un.org/millennium/law/xviii.17.htm). See also, "General Assembly President says Permanent International Criminal Court will provide Much Stronger Deterrence than ad hoc tribunal", GA/SM/282, 12 April 2002.

## APPENDIX A

### MAP OF KENYA





## APPENDIX B

### TIMELINE

#### 28 February 2008

The National Accord and Reconciliation Act is signed establishing a coalition government with Kibaki as president and Odinga as prime minister. It also established the Commission of Inquiry into Post-Election Violence (CIPEV).

#### 15 October 2008

CIPEV submits its report and recommendations to the government of Kenya; recommendations include the establishment of a special tribunal of national and international judges to investigate and prosecute perpetrators of the post-election violence. The report also states that if the tribunal is not set up within six months, information collected by the commission will be passed to the ICC, including a sealed envelope of names of those suspected to be most responsible for the violence.

#### 16 December 2008

An agreement for the implementation of the CIPEV recommendations is signed by the president and prime minister.

#### 27 January 2009

The CIPEV report is adopted by the National assembly (parliament).

#### 12 February 2009

The Kenyan parliament votes against the establishment of the proposed tribunal to address the post-election violence.

#### 3 July 2009

Three cabinet ministers sign an agreement with the ICC committing Kenya to establish a credible and independent tribunal to try perpetrators of post-election violence by August. The Kenyan delegation agrees to provide the prosecutor a report on the status of investigations and prosecutions arising out of the post-election violence, as well as information on victim/witness protection mechanisms, by the end of September 2009. It also agrees to provide the prosecutor with information on modalities for conducting national investigations and prosecutions of those responsible for the 2007 violence through a special tribunal or other judicial mechanism adopted by the parliament with clear benchmarks over the

next twelve months; in the alternative, if there is no parliamentary agreement, and in accordance with the commitment to end impunity of those most responsible for the most serious crimes, the government is to refer the situation to the prosecutor in accordance with Article 14 of the Rome Statute.

#### 9 July 2009

The prosecutor is sent six boxes containing documents and supporting materials compiled by the Waki Commission during its investigations. The documentation includes a sealed envelope that contains a list of suspects identified by the Commission as those most responsible for the violence.

#### 30 July 2009

A bill to use the ordinary criminal courts and enhance the mandate of the Truth, Justice and Reconciliation Commission to investigate and prosecute post-election violence, introduced by the justice minister, is rejected by the cabinet. A third attempt also fails when a private member's bill, again to establish a local judicial mechanism, is unable to proceed because of a persistent lack of a quorum in parliament. The rejection by parliament of the bills to establish a special tribunal are accompanied by the slogan "don't be vague, go to The Hague".

#### 9 November 2009

Parliament starts debating another constitutional amendment to form a special Kenyan tribunal. That debate has never concluded.

#### 26 November 2009

ICC Prosecutor Moreno-Ocampo files a request seeking authorisation from Pre-Trial Chamber II to open an investigation in relation to the crimes allegedly committed during the 2007-2008 post-election violence in Kenya.

#### 31 March 2010

The three-member Pre-Trial Chamber II issues a majority decision that there is a reasonable basis to proceed with an investigation into the situation in Kenya in relation to crimes against humanity within the jurisdiction of the Court

committed between 1 June 2005 and 26 November 2009.

#### 15 December 2010

The ICC Prosecutor requests the issuance of "summons to appear" for six individuals alleged to be responsible for the commission of crimes against humanity in the Kenya investigation: William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (case one) and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali (case two).

#### 8 March 2011

Pre-Trial Chamber II issues the "summons to appear" for the six individuals, as it finds reasonable grounds to believe that they committed the crimes alleged by the Prosecutor.

#### 31 March 2011

The Kenyan government files an application challenging the ICC's jurisdiction over the cases.

#### 7 April 2011

The first three suspects (Ruto, Kosgey and Sang) make their initial appearance before the Court in The Hague.

#### 8 April 2011

The second group of three suspects (Muthaura, Kenyatta and Ali) make their initial appearance.

#### 1 September 2011

The hearing to confirm or reject the charges begins for the first three suspects (Ruto, Kosgey and Sang).

#### 21 September 2011

The hearing to confirm or reject the charges begins for the second three suspects (Muthaura, Kenyatta and Ali).

## APPENDIX C

### CHARGES AGAINST THE KEY SIX SUSPECTS

*The information in this appendix is drawn from the ICC document "Situation in the republic of Kenya", which can be found at [www.icc-cpi.int](http://www.icc-cpi.int).*

#### **William Ruto**

Former Higher Education Minister William Ruto, a Kalenjin, enjoys considerable support among that ethnic group in the Rift Valley Province. He was born in 1966 in the Rift Valley Province of western Kenya. He is accused of planning, even before the election, to set up militias to attack Kikuyu supporters of President Kibaki and to have urged his supporters to uproot the "weeds from the fields", referring to Rift Valley communities whose residents have origins elsewhere in the country.

#### *Charges*

Pre-Trial Chamber (PTC) II found reasonable grounds to believe that Ruto, together with Kosgey, is criminally responsible as an indirect co-perpetrator pursuant to Article 25(3)(a) of the Rome Statute for the crimes against humanity of:

- Murder (Article 7(1)(a));
- Forcible transfer of population (Article 7(1)(d)); and
- Persecution (Article 7(1)(h)).

#### **Henry Kosgey**

A member of the Kalenjin community, industrialisation minister and chairman of Odinga's ODM, Henry Kosgey is accused of planning to set up militias to attack Kibaki supporters. The worst atrocity for which he is alleged to bear responsibility was the burning of a church near Eldoret where ethnic Kikuyus were sheltering.

#### *Charges*

Pre-Trial Chamber II found reasonable grounds to believe that Kosgey, together with Ruto, is criminally responsible as an indirect co-perpetrator pursuant to Article 25(3)(a) of the Rome Statute for the crimes against humanity of:

- Murder (Article 7(1)(a));
- Forcible transfer of population (Article 7(1)(d)); and
- Persecution (Article 7(1)(h)).

#### **Joshua Sang**

As radio producer at Kass FM, he hosted morning shows on a Kalenjin-language station during the post-election violence in 2007/2008. He faces charges of planning attacks with Kosgey and Ruto, as well as whipping up ethnic hatred on the airwaves.

#### *Charges*

Pre-Trial Chamber II found that there are not reasonable grounds to believe that Sang is an indirect co-perpetrator, because his contribution to the commission of the crimes was not essential. Instead, the Chamber was satisfied that there were reasonable grounds to believe that he otherwise contributed (within the meaning of Article 25(3)(d) of the Rome

Statute) to the commission of the following crimes against humanity:

- Murder (Article 7(1)(a));
- Forcible transfer of population (Article 7(1)(d)); and
- Persecution (Article 7(1)(h)).

#### **Uhuru Kenyatta**

A member of the Kikuyu community and son of Kenya's founding president, Deputy Prime Minister and Finance Minister Uhuru Kenyatta faces charges of developing a plan to take revenge for Kikuyus and keep Kibaki in power. He was allegedly the focal point between the government and the Kikuyu Mungiki sect, which was sent to the Rift Valley, set up road blocks and went house-to-house, killing some 150 suspected Odinga supporters.

#### *Charges*

Pre-Trial Chamber II found reasonable grounds to believe that Kenyatta – together with Muthaura – is criminally responsible as an indirect co-perpetrator pursuant to Article 25(3)(a) of the Rome Statute for the crimes against humanity of:

- Murder (Article 7(1)(a));
- Forcible transfer (Article 7(1)(d));
- Rape (Article 7(1)(g));
- Persecution (Articles 7(1)(h)); and
- Other inhumane acts (Article 7(1)(k)).

#### **Francis Muthaura**

The head of the civil service and cabinet secretary, he is from the Meru community, which is aligned with President Kibaki's Kikuyu group. He is charged with developing a plan, together with Kenyatta, to carry out revenge for attacks on Kikuyus and keep Kibaki in power. Muthaura allegedly met Mungiki leaders and ordered the police to let Mungiki members using excessive force against supporters of Raila Odinga through road blocks.

#### *Charges*

Pre-Trial Chamber II found reasonable grounds to believe that Muthaura – together with Kenyatta – is criminally responsible as an indirect co-perpetrator pursuant to Article 25(3)(a) of the Rome Statute for the crimes against humanity of:

- Murder (Article 7(1)(a));
- Forcible Transfer (Article 7(1)(d));
- Rape (Article 7(1)(g));
- Persecution (Article 7(1)(h)); and
- Other inhumane acts (Article 7(1)(k)).

### **Hussein Ali**

The then police chief, Hussein Ali, from Kenya's ethnic Somali community, is accused of co-developing a plan with Kenyatta and Muthaura to conduct revenge attacks on Kikuyus. Acting on instructions from Muthaura, he allegedly gave a "shoot-to-kill" order that resulted in the killing of at least 100 Odinga supporters.

### *Charges*

Pre-Trial Chamber II found that there are no reasonable grounds to believe that Ali is an indirect co-perpetrator, because his contribution to the commission of the crimes was not essential. Instead, the Chamber was satisfied that there were reasonable grounds to believe that Ali otherwise contributed (within the meaning of Article 25(3)(d) of the Rome Statute) to the commission of the following crimes against humanity:

- Murder (Articles 7(1)(a));
- Forcible transfer (Article 7(1)(d));
- Rape (Article 7(1)(g));
- Persecution (Article 7(1)(h)); and
- Other inhumane acts (Articles 7(1)(k)).

## APPENDIX D

### ABOUT THE INTERNATIONAL CRISIS GROUP

The International Crisis Group (Crisis Group) is an independent, non-profit, non-governmental organisation, with some 130 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict.

Crisis Group's approach is grounded in field research. Teams of political analysts are located within or close by countries at risk of outbreak, escalation or recurrence of violent conflict. Based on information and assessments from the field, it produces analytical reports containing practical recommendations targeted at key international decision-takers. Crisis Group also publishes *CrisisWatch*, a twelve-page monthly bulletin, providing a succinct regular update on the state of play in all the most significant situations of conflict or potential conflict around the world.

Crisis Group's reports and briefing papers are distributed widely by email and made available simultaneously on the website, [www.crisisgroup.org](http://www.crisisgroup.org). Crisis Group works closely with governments and those who influence them, including the media, to highlight its crisis analyses and to generate support for its policy prescriptions.

The Crisis Group Board – which includes prominent figures from the fields of politics, diplomacy, business and the media – is directly involved in helping to bring the reports and recommendations to the attention of senior policy-makers around the world. Crisis Group is chaired by former U.S. Ambassador Thomas Pickering. Its President and Chief Executive since July 2009 has been Louise Arbour, former UN High Commissioner for Human Rights and Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

Crisis Group's international headquarters are in Brussels, with major advocacy offices in Washington DC (where it is based as a legal entity) and New York, a smaller one in London and liaison presences in Moscow and Beijing. The organisation currently operates nine regional offices (in Bishkek, Bogotá, Dakar, Islamabad, Istanbul, Jakarta, Nairobi, Pristina and Tbilisi) and has local field representation in seventeen additional locations (Baku, Bangkok, Beirut, Bujumbura, Cairo, Damascus, Dili, Guatemala City, Jerusalem, Johannesburg, Kabul, Kathmandu, Kinshasa, Port-au-Prince, Sarajevo, Seoul and Tunis). Crisis Group currently covers some 60 areas of actual or potential conflict across four continents. In Africa, this includes Burundi, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Democratic Republic of the Congo, Eritrea, Ethiopia, Guinea, Guinea-Bissau, Kenya, Liberia, Madagascar, Nigeria, Rwanda, Sierra Leone, Somalia, Sudan, Uganda and Zimbabwe; in Asia, Afghanistan, Bangladesh, Burma/Myanmar, Indonesia, Kashmir, Kazakh-

stan, Kyrgyzstan, Nepal, North Korea, Pakistan, Philippines, Sri Lanka, Taiwan Strait, Tajikistan, Thailand, Timor-Leste, Turkmenistan and Uzbekistan; in Europe, Armenia, Azerbaijan, Bosnia and Herzegovina, Cyprus, Georgia, Kosovo, Macedonia, Russia (North Caucasus), Serbia and Turkey; in the Middle East and North Africa, Algeria, Egypt, Gulf States, Iran, Iraq, Israel-Palestine, Jordan, Lebanon, Libya, Morocco, Saudi Arabia, Syria, Tunisia and Yemen; and in Latin America and the Caribbean, Bolivia, Colombia, Ecuador, Guatemala, Haiti and Venezuela.

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January 2012

## APPENDIX E

### CRISIS GROUP REPORTS AND BRIEFINGS ON AFRICA SINCE 2009

#### Central Africa

*Chad: Powder Keg in the East*, Africa Report N°149, 15 April 2009 (also available in French).

*Congo: Five Priorities for a Peacebuilding Strategy*, Africa Report N°150, 11 May 2009 (also available in French).

*Congo: A Comprehensive Strategy to Disarm the FDLR*, Africa Report N°151, 9 July 2009 (also available in French).

*Burundi: réussir l'intégration des FNL*, Africa Briefing N°63, 30 July 2009.

*Chad: Escaping from the Oil Trap*, Africa Briefing N°65, 26 August 2009 (also available in French).

*CAR: Keeping the Dialogue Alive*, Africa Briefing N°69, 12 January 2010 (also available in French).

*Burundi: Ensuring Credible Elections*, Africa Report N°155, 12 February 2010 (also available in French).

*Libye/Tchad : au-delà d'une politique d'influence*, Africa Briefing N°71, 23 March 2010 (also available in Arabic).

*Congo: A Stalled Democratic Agenda*, Africa Briefing N°73, 8 April 2010 (also available in French).

*Chad: Beyond Superficial Stability*, Africa Report N°162, 17 August 2010 (only available in French).

*Congo: No Stability in Kivu Despite a Rapprochement with Rwanda*, Africa Report N°165, 16 November 2010 (also available in French).

*Dangerous Little Stones: Diamonds in the Central African Republic*, Africa Report N°167, 16 December 2010 (also available in French).

*Burundi: From Electoral Boycott to Political Impasse*, Africa Report N°169, 7 February 2011 (also available in French).

*Le Nord-ouest du Tchad : la prochaine zone à haut risque ?*, Africa Briefing N°78, 17 February 2011.

*Congo: The Electoral Dilemma*, Africa Report N°175, 5 May 2011 (also available in French).

*Congo : The Electoral Process Seen from the East*, Africa Briefing N°80, 5 September 2011 (also available in French).

*Africa without Qaddafi: The Case of Chad*, Africa Report N°180, 21 October 2011 (also available in French).

*Implementing Peace and Security Architecture (I): Central Africa*, Africa Report N°181, 7 November 2011 (also available in French).

*The Lord's Resistance Army: End Game?*, Africa Report N°182, 17 November 2011.

#### Horn of Africa

*Sudan: Justice, Peace and the ICC*, Africa Report N°152, 17 July 2009.

*Somalia: The Trouble with Puntland*, Africa Briefing N°64, 12 August 2009.

*Ethiopia: Ethnic Federalism and Its Discontents*, Africa Report N°153, 4 September 2009.

*Somaliland: A Way out of the Electoral Crisis*, Africa Briefing N°67, 7 December 2009.

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