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TRANSITIONAL JUSTICE IN KENYA? AN ASSESSMENT OF THE ACCOUNTABILITY PROCESS IN LIGHT OF DOMESTIC POLITICS AND SECURITY CONCERNS

THOMAS OBEL HANSEN*

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* Assistant Professor of International Law, International Relations Programme, United States International University, Nairobi, Kenya; Ph.D. in Law (Transitional Justice), Aarhus University Law School, Department of Jurisprudence, Denmark, 2010; L.L.M., Aarhus University Law School, Denmark, 2007; B.A. in Law, Aarhus University Law School, Denmark, 2005; B.A. in Law and Business Administration, University of Aalborg, Denmark, 2003. The author wishes to thank Susanne D. Mueller of Harvard University for her constructive comments on a draft version of this article. The author also wishes to thank the reviewers and editors of *California Western International Law Journal* for their help preparing this article for publication.

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INTRODUCTION

The field of transitional justice has expanded beyond dealing with accountability, truth, victims’ redress, and a number of related issues in the context of democratization processes. It now addresses a much wider variety of cases where the international community, states, local communities, or other actors implement various measures to confront (sometimes still ongoing) human rights abuses and other forms of injustices.¹ While early transitional justice scholarship focused primarily on the judicial and quasi-judicial processes launched to deal with massive human rights abuses *following* a fundamental political transition,² scholars now increasingly seem to expect that transitional justice mechanisms will *bring about* transformation—political or otherwise.³ Yet, it is often unclear what purposes transitional justice

1. See, e.g., Christine Bell, *Transitional Justice, Interdisciplinary and the State of the ‘Field’ or ‘Non-Field’*, 3 INT’L J. TRANSITIONAL JUST. 5 (2009) (discussing development in the field of transitional justice).

2. See generally RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

3. See, e.g., Fionnuala N. Aoláin & Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 HUM. RTS. Q. 172 (2005) (arguing that

serves, how the use of these mechanisms impacts the prospects of transition, and which stakeholders promote or discourage the establishment of transitional justice processes.⁴ Using the Kenyan government's reaction to the 2008 post-election violence as a case study, this article examines some important aspects of transitional justice in Kenya. More specifically, the article identifies and discusses the drivers and obstacles to accountability for the post-election violence as well as the question of how the use of accountability measures may impact the prospects of a meaningful transition in the country.

In Kenya, the process of establishing a political settlement to the disputed 2007 general elections was combined with efforts to create a number of mechanisms aimed at addressing the country's legacy of political violence.⁵ Though these accountability, truth-seeking, and reform measures have generally been conceptualized within a transitional justice paradigm,⁶ arguably there has been no fundamental (political or otherwise) transition in the country, and it is disputed whether such a transition is likely to take place in the near future.⁷ Little is known of how the absence of a fundamental political transition

justice tools used in contexts where there has not been a fundamental political transition should be conceptualized as transitional justice since they have potential to bring about a stable and peaceful democracy).

4. See, e.g., Thomas Obel Hansen, *Transitional Justice: Toward a Differentiated Theory*, 13 OR. REV. INT'L L. 1 (2011) available at <http://www.law.uoregon.edu/org/oril/docs/13-1/Hansen.pdf> (discussing various scenarios in which transitional justice mechanisms may be utilized, and the different interests these mechanisms can serve).

5. Thomas Obel Hansen, *Political Violence in Kenya: A Study of Causes, Responses, and a Framework for Discussing Preventive Action*, INST. FOR SECURITY STUD. PAPER 205 (Nov. 2009) available at <http://www.issafrica.org/uploads/p205.pdf>.

6. Evelyne Asaala, *Exploring Transitional Justice as a Vehicle for Social and Political Transformation in Kenya*, 10 AFR. HUM. RTS. L. J. 377, 382 (2010) available at http://www.chr.up.ac.za/images/files/publications/ahrlj/ahrlj_vol10_no2_2010.pdf. See also Godfrey M. Musila, *Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions*, 3 INT'L J. TRANSITIONAL JUST. 445 (2009).

7. See Osogo Ambani, *Conditions are Hardly Right for Transitional Justice*, DAILY NATION, Aug. 11, 2009, <http://www.nation.co.ke/oped/Opinion//440808/638224/-/4mmd2w/-/index.html> (arguing that "Kenya is not experiencing a transition"). But see Asaala, *supra* note 6, at 385 (concluding that "Kenya remains a state in transition").

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has affected the pursuit of transitional justice in Kenya.⁸ Furthermore, there has only been limited engagement with the question of how the various transitional justice measures in the country impact the political landscape and the possibility of a transition⁹ – here understood to concern political change as well as peaceful transformation.

Focusing on accountability measures, this article sets out to explore these gaps in the literature. First, this article analyzes how the absence of fundamental transition has impacted the pursuit of accountability for the 2008 post-election violence. Second, this article explores how the accountability process impacts domestic politics and security.

I. BACKGROUND TO TRANSITIONAL JUSTICE IN KENYA

Contrary to mainstream perceptions, large-scale political violence in Kenya is not exclusively related to the disputed 2007 elections, but has unfolded on a number of other occasions,¹⁰ particularly in the context of elections. Since the establishment of a multi-party system in 1992, elections in Kenya have tended to be surrounded by clashes between the supporters of different political parties, sometimes at a level comparable to the 2008 violence. In 1992, for example, Human Rights Watch estimates that electoral violence claimed the lives of approximately 1,500 people and displaced approximately 300,000.¹¹ Five years later, the 1997 elections were similarly followed by large-scale violence, especially in the Coast Province and in the Rift

8. *But see* Musila, *supra* note 6 (discussing how various stakeholders approach the transitional justice debate in Kenya).

9. *But see* Christine Alai & Njonjo Mue, Briefing Paper, *Kenya: Impact of the Rome Statute and the International Criminal Court*, INT'L CENTER FOR TRANSITIONAL JUST. (2010) [hereinafter *Impact of the Rome Statute*], available at <http://ictj.org/sites/default/files/ICTJ-Kenya-ICC-Impact-2010-English.pdf>; Thomas Obel Hansen, *How Will International Criminal Court Prosecutions Impact Kenya's Legacy of Political Violence?*, TOWARD FREEDOM, AFRICA (Apr. 12, 2011, 11:23 PM), <http://www.towardfreedom.com/africa/2359-how-will-international-criminal-court-prosecutions-impact-on-kenyas-legacy-of-political-violence>.

10. Madeline Bunting, Comment, *The Violence in Kenya May be Awful, But it is Not Senseless 'Savagery'*, GUARDIAN (Jan. 13, 2008), <http://www.guardian.co.uk/commentisfree/2008/jan/14/kenya.world>.

11. *See, e.g.*, HUMAN RIGHTS WATCH, PLAYING WITH FIRE: WEAPONS PROLIFERATION, POLITICAL VIOLENCE, AND HUMAN RIGHTS IN KENYA 20 (2002), available at <http://www.hrw.org/legacy/reports/2002/kenya/Kenya0502.pdf>.

Valley.¹² Though far more peaceful than the two previous elections, some violent incidents also took place in connection with the 2002 elections.¹³

In 2007, the trend of violence persisted. Following a disputed presidential election in December 2007, where both incumbent president Mwai Kibaki (PNU political party) and his challenger Raila Odinga (ODM political party) claimed victory, large-scale violence erupted in various parts of Kenya, in particular the Rift Valley and Nairobi slums.¹⁴ During the course of a few weeks, more than a thousand Kenyans died in clashes between supporters of Kibaki and Odinga.¹⁵ The violence was driven by armed youth groups and the Mungiki criminal gang, but the police were also involved in the attacks, responsible for perhaps approximately one-third of the total casualties.¹⁶

Under the auspices of the Panel of Eminent African Personalities, headed by former U.N. Secretary-General Kofi Annan, an internationally-sponsored mediation process known as the “Kenyan National Dialogue and Reconciliation” (KNDR) enabled a settlement to the dispute.¹⁷ This entailed the creation of a coalition government in which Kibaki remained president and Odinga became prime

12. *Id.* at 21.

13. *See, e.g.*, HUMAN RIGHTS WATCH, *BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA’S CRISIS OF GOVERNANCE 6* (2008) [hereinafter *BALLOTS TO BULLETS*], *available at* <http://www.hrw.org/sites/default/files/reports/kenya0308web.pdf>.

14. *See generally* COMMISSION OF INQUIRY INTO THE POST ELECTION VIOLENCE, *REPORT OF THE COMMISSION OF INQUIRY INTO POST ELECTION VIOLENCE*, (2008) [hereinafter *CIPEV*], *available at* <http://www.dialoguekenya.org/docs/PEV%20Report.pdf>; *BALLOTS TO BULLETS*, *supra* note 13; Hansen, *Political Violence in Kenya: A Study of Causes, Responses, and a Framework for Discussing Preventive Action*, *supra* note 5.

15. *CIPEV*, *supra* note 14, at 305.

16. *Id.* at 384-85.

17. *See* KENYAN NATIONAL DIALOGUE AND RECONCILIATION, *THE NATIONAL ACCORD AND RECONCILIATION ACT* (2008), *available at* http://www.dialoguekenya.org/docs/Signed_National_Accord_Act_Feb28.pdf; Interview by Martin Griffiths with Kofi A. Annan, 7th Secretary-General of the United Nations, in Geneva, Switz. (May 9, 2008) [hereinafter *Kofi A. Annan Interview*], *available at* [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/JBRN-7QMD4C-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/JBRN-7QMD4C-full_report.pdf/$File/full_report.pdf) (discussing the process of negotiating this settlement).

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minister.¹⁸ Under pressure from the international community and Kenyan civil society, the two parties to the dispute publically stated their commitment to establishing a number of mechanisms aimed at addressing Kenya's legacy of political violence, including criminal prosecutions; a Truth, Justice, and Reconciliation Commission (TJRC); a constitutional review process; and other measures.¹⁹

While debates about transitional justice have taken place on a number of occasions in Kenya's history,²⁰ the current discussions about accountability, truth-seeking, and a number of related issues tend to be specifically linked to the violence in 2008.²¹ Nonetheless, some of the measures established, including the TJRC, are intended to address political violence and other injustices in a comprehensive manner, covering the entire post-colonial period.²² As argued in this

18. Kofi A. Annan Interview, *supra* note 17.

19. See KENYAN NATIONAL DIALOGUE AND RECONCILIATION, ANNOTATED AGENDA AND TIMETABLE (Feb. 1, 2008) [hereinafter KNDR ANNOTATED AGENDA], available at http://www.dialoguekenya.org/docs/Signed_Annotated_Agenda_Feb1st.pdf; KENYAN NATIONAL DIALOGUE AND RECONCILIATION, STATEMENT OF PRINCIPLES ON LONG-TERM ISSUES AND SOLUTIONS (May 23, 2008), available at http://www.dialoguekenya.org/docs/S_of_P_with_Matrix.pdf. Kenyan NATIONAL DIALOGUE AND RECONCILIATION, AGENDA ITEM 3: HOW TO SOLVE THE POLITICAL CRISIS (Feb. 14, 2008) [hereinafter KNDR AGENDA ITEM], available at http://www.dialoguekenya.org/docs/14_Feb_08_TsavoAgreement.pdf. For an analysis of the debate and establishment of these various processes, see Hansen, *Political Violence in Kenya: A Study of Causes, Responses, and a Framework for Discussing Preventive Action*, *supra* note 5.

20. See, e.g., Wanza Kioko, *The Place of Transitional Justice in Kenya's Impending Political Transition*, in BUILDING AN OPEN SOCIETY: THE POLITICS OF TRANSITION IN KENYA 306 (Lawrence M. Mute, Kichamu Akivaga & Wanza Kioko eds., 2002).

21. Musila, *supra* note 6.

22. For an account of the TJRC, see Asaala, *supra* note 6, at 395-404. In addition to electoral violence, the various post-independence governments have, to different extents, been responsible for gross human rights violations. Under Jomo Kenyatta (1963-1978) and Daniel Moi's (1978-2002) regimes, political opponents and other critics of the incumbent frequently suffered arbitrary detention, torture, and in some cases, extrajudicial killings. See Susanne D. Mueller, *The Political Economy of Kenya's Crisis*, 2 J. E. AFR. STUD. 185. Although the human rights record of the current coalition government has significantly improved—especially compared to Moi's dictatorship—extrajudicial killings by police continue to occur, especially in the context of organized crime. HUMAN RIGHTS WATCH, DIVIDE AND RULE STATE-SPONSORED ETHNIC VIOLENCE IN KENYA 6-10 (1993), available at

article, other measures, such as the accountability process, may also address some of the factors that have allowed political violence to unfold in the country on a regular basis.

II. SHAPING TRANSITIONAL JUSTICE SOLUTIONS: POLITICAL OBSTACLES TO ACCOUNTABILITY FOR KENYA'S POST-ELECTION VIOLENCE

A. The Initial Debate Concerning a Local or International Accountability Process

From its inception, the debate about accountability for the 2008 election violence has been framed around a perceived dichotomy between local and international forums for justice. However, as this article suggests, rather than taking the form of a principled discussion about the most appropriate forum for a legitimate accountability process, members of Kenya's political elite have tended to support different forums for an accountability process based on other considerations, including the prospects of compromising justice or gaining personal advantage by seeing political opponents targeted.

The debate over local or international justice was triggered by the publication of a report by the Commission of Inquiry into Post-Election Violence (CIPEV), which the parties to the election dispute created to investigate the violence and make recommendations on how to address it.²³ In the October 2008 publication, CIPEV recommended the establishment of a local accountability process (a so-called Special Tribunal) composed of Kenyans and foreigners to prosecute those responsible for organizing the 2008 post-election violence.²⁴ CIPEV made the proposal under the threat that, if the government failed to immediately comply with the recommendations, it would forward "a list containing names of and relevant information on those suspected

<http://www.hrw.org/legacy/reports/1993/kenya1193.pdf>. See also U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, On His Mission to Kenya*, ¶ 5, 8, U.N. Doc. A/HRC/11/2/Add.6 (May 26, 2009).

23. See CIPEV, *supra* note 14.

24. *Id.* at 472–75.

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to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal” to the International Criminal Court (ICC) prosecutor.²⁵

Before the CIPEV report went public, the parties to the KNDR had already stated their commitment to criminal prosecutions of those responsible for the post-election violence.²⁶ However, it soon became clear that it would be difficult to obtain the necessary political commitment for establishing local accountability measures. On February 12, 2009, for example, the Kenyan parliament voted down a bill concerning the establishment of a special tribunal to deal with the post-election violence.²⁷

Many of the members of parliament who opposed this opportunity to establish a local accountability process cited problems with judicial independence in Kenya and emphasized their preference to conduct the trials in The Hague. For example, following the defeat of the February bill, William Ruto argued, “Kofi Annan should hand over the envelope that contains names of suspects to the International Criminal Court at The Hague so that proper investigations can start.”²⁸ This response might seem ironic because Ruto was later named as one of the ICC suspects, in connection to which he unsurprisingly became

25. CIPEV required the coalition partners to make and sign an agreement to establish a special tribunal within sixty days after presenting the report to the Panel of Eminent African Personalities. *See id.* at 473. As Musila points out, this provision in the report seems to be based on a misunderstanding about the circumstances under which the ICC’s jurisdiction is triggered. Musila, *supra* note 6, at 457.

26. *See* KNDR ANNOTATED AGENDA, *supra* note 19, at 1 (explaining that the parties agreed to conduct further discussions on how to ensure “the impartial, effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty are brought to justice”); KNDR AGENDA ITEM, *supra* note 19, § III (indicating that the parties recognized the need for a political settlement to promote national reconciliation and unity, which in turn requires “identification and prosecution of perpetrators of violence”).

27. Further, on July 14, 2009, the cabinet rejected a bill on special tribunals; on July 30, 2009, parliament rejected a special tribunal bill; and on November 14, 2009, there was no quorum for debating the special tribunal bill. *See* KENYA NATIONAL DIALOGUE AND RECONCILIATION MONITORING PROJECT, DRAFT REVIEW REPORT 23 (Apr. 2011), [hereinafter KNDR DRAFT REVIEW], *available at* <http://www.dialoguekenya.org/docs/April2011KNDRReport.pdf>.

28. *See Ruto: Why I Prefer The Hague Route*, DAILY NATION (Feb. 21, 2009), <http://www.nation.co.ke/News/-/1056/533390/-/u2h24m/-/index.html>.

strongly opposed to The Hague option.²⁹ On the other hand, Odinga, who was initially in favor of the local option, became a strong supporter for ICC trials once the suspects—some of whom are in political opposition to Odinga—were named.³⁰ The fact that Ruto, Odinga, and many others have continuously reversed their stance on *where* to conduct trials illustrates, as Musila notes, how “[p]olitical elites, in particular those reported to be on the list of accused prepared by the Waki Commission, have vacillated between the various options, unsure which would safeguard their own agendas: trials in The Hague or local trials; trials before the Special Tribunal or national courts; and/or the TJRC.”³¹

B. Political Elites’ Reactions to the Naming of ICC Suspects

In July 2009, Kofi Annan, who had been provided with a list of key suspects in the election violence by CIPEV, lost his patience with the Kenyan leadership and forwarded the list to the ICC Prosecutor.³² On March 31, 2010, amidst continued debate in Kenya about establishing a special tribunal, using the ordinary court system to prosecute the masterminds of the post-election violence, or relying on the TJRC,³³ Pre-Trial Chamber II of the ICC authorized the Prosecutor to commence an investigation into the Kenyan case.³⁴

29. See Benjamin Muindi, *ICC: Uhuru, Ruto Lash Out at PM*, DAILY NATION (Mar. 26, 2011), <http://www.nation.co.ke/News/politics/-/1064/1133610/-/7q7klt-/index.html>. At one point (August 2009), Ruto seemed to favour using the TJRC to deal with the organizers and perpetrators of Kenya’s post-election violence. See Maureen Mudi and Karanja Njoroge, *Ruto Urges Clergy to Back Reconciliation*, STANDARD (Aug. 3, 2009), <http://www.standardmedia.co.ke/archives/sports/InsidePage.php?id=1144020630&cid=4>.

30. See *Ruto: Why I Prefer the Hague Route*, *supra* note 28.

31. See Musila, *supra* note 6, at 450. The Waki Commission is the unofficial name for CIPEV.

32. See Hansen, *Political Violence in Kenya: A Study of Causes, Responses, and a Framework for Discussing Preventive Action*, *supra* note 5, at 9.

33. See *Impact of the Rome Statute*, *supra* note 9, at 2-3 (discussing the various attempts of establishing a local accountability mechanism).

34. See *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 83 (Mar. 31, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>.

On December 15, 2010, less than a year after the Pre-Trial Chamber granted the prosecutor permission to open an investigation into Kenya's post-election violence, Ocampo submitted applications requesting the Court to summon the six individuals he deemed to bear the greatest responsibility for the violence. Among the suspects are Francis Muthaura, the top civil servant in the country, as well as Ruto and Uhuru Kenyatta, who have both announced their candidacy for the 2012 presidential elections.³⁵

Though most Kenyan leaders, including President Kibaki, have continuously stated their commitment to cooperate with the ICC,³⁶ the government's actual level of cooperation has often been half-hearted.³⁷ Indeed, after Ocampo named the suspects in December 2010, Kenyan leaders have made a series of moves aimed at halting the ICC process.

i. Motion Requiring Withdrawal from the Rome Statute

On December 22, 2010, almost immediately following Ocampo's request to have the summonses issued, the Kenyan parliament passed a motion requiring the Kenyan government to take "appropriate action

35. See Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Public Redacted Version of Document ICC-01/09-30-Conf-Exp, Dec. 15, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc1050835.pdf> [hereinafter Prosecutor's Application Pursuant to Article 58 as to Ruto, Kosgey and Sang]; Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Public Redacted Version of Document ICC-01/09-31-Conf-Exp, Dec. 15, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc1050845.pdf> [hereinafter Prosecutor's Application Pursuant to Article 58 as to Muthaura, Kenyatta and Ali].

36. See *Impact of the Rome Statute*, *supra* note 9, at 3-4; KNDR DRAFT REVIEW, *supra* note 27, at 23-24. For a recent statement confirming the government's commitment to the ICC process, see OFFICE OF PUBLIC COMMUNICATIONS (OFFICE OF GOVERNMENT SPOKESPERSON), GOVERNMENT RESPONSE TO MEDIA STATEMENT BY ICC PROSECUTOR LUIS MORENO OCAMPO (2011), <http://www.communication.go.ke/media.asp?id=1278> (noting "[t]he government wishes to inform the world that we understand, appreciate and respect the Rome Statute, the Rights enshrined by the United Nations and the ICC process.").

37. See, e.g., KNDR DRAFT REVIEW, *supra* note 27, at 23-24.

to withdraw from the Rome Statute.”³⁸ The motion, which was opposed by only one member of parliament (former Justice Minister and presidential candidate for the 2012 elections, Martha Karua), was passed under threat that any failure to comply with its contents within sixty days would lead to actions against the Kibaki administration, including sabotaging government business in the Parliament.³⁹ Noting that “any criminal investigations or prosecutions arising out of the post election violence of 2007/2008 be undertaken under the framework of the new Constitution,” the motion not only rejected ICC intervention, but once again brought attention back to the possibility of establishing a local accountability process.⁴⁰

Although some cabinet members initially appeared in favor of the motion, the government ultimately chose not to take any action on it.⁴¹ Rather than reflecting the government’s commitment to the ICC process, this neglect of parliament’s decision seems to be based on (the correct) understanding that a possible withdrawal from the Rome Statute would not affect the country’s obligation to cooperate with the ICC concerning the two pending cases.⁴² This interpretation is

38. Motion 144 in KENYA NATIONAL ASSEMBLY, Motions 2010 (Dec. 22, 2010), available at http://www.parliament.go.ke/index.php?option=com_docman&task=doc_download&gid=636&Itemid=.

39. See *id.* (implying that action will be taken against the government if it fails to comply); Amnesty Int’l, *Kenya: Denouncing the Rome Statute Shall Not Have Any Effect on Investigations Currently Under Course*, AI Index AFR 32/019/2010 (Dec. 23, 2010), <http://www.amnesty.org/en/library/asset/AFR32/019/2010/en/bdeb0dac-6e55-4496-b4ad-f67201c5caf8/afr320192010en.pdf>.

40. See Motion 144 in KENYA NATIONAL ASSEMBLY, *supra* note 38.

41. See, e.g., Thomas Obel Hansen, *Why the Ocampo Six Should Not Become Kenya’s Six*, OPEN DEMOCRACY (Feb. 14, 2011), <http://www.opendemocracy.net/thomas-obel-hansen/why-ocampo-six-should-not-become-kenya%E2%80%99s-six> (noting that Energy Minister Kiraitu Murungi, Minister for Public Health and Sanitation Beth Mugo, and Minister for Nairobi Metropolitan Development Njeru Githae called for a withdrawal in early January 2011).

42. According to Article 127(1) of the Rome Statute, a withdrawal takes effect “one year after the date of receipt of the notification, unless the notification specifies a later date.” Article 127(2) further stipulates that,

[a] State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the

supported by the fact that the government instead launched a number of other initiatives to end ICC involvement in Kenya.

ii. Efforts to Obtain a Deferral

One such way of challenging the ICC process concerns the government's efforts to obtain a U.N. Security Council deferral of the Kenyan cases under Article 16 of the Rome Statute, according to which the Council can order a temporary—but possibly renewed—stop to ICC investigations or prosecutions if it deems that such action threatens international peace and security.⁴³

Spearheaded by Vice President Kalonzo Musyoka, in early 2011, the Kenyan government launched diplomatic efforts aimed at convincing other countries that the Security Council should defer the case.⁴⁴ As an initial outcome of this diplomacy, in late January 2011, the African Union decided to support Kenya's quest for putting a temporary stop to the ICC cases.⁴⁵ Though this support from the African Union should be understood in light of how the regional body increasingly views ICC involvement on the continent as a threat to the sovereignty of African states, it also reveals that the Kenyan government used considerable resources to foster and mobilize support from other countries to halt the accountability process.⁴⁶

withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

43. Article 16 of the Rome Statute states: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." *Id.*

44. See, e.g., Njeri Rugene, *Kalonzo Defends Shuttle Over ICC Trials*, DAILY NATION (Feb. 8, 2011), <http://www.nation.co.ke/News/politics/-/1064/1103784/-/70cyvn/-/index.html>.

45. See Assembly of the African Union, Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII), A.U. Doc. Assembly/AU/16 ¶ 6 (Jan. 30-31, 2011).

46. See, e.g., *Kalonzo's Trips Cost Taxpayers Sh4 Million*, KENTV, available at <http://www.kentv.net/home/kentv-news/1-latest-news/3272-kalonzos-trips-cost->

Having obtained this regional support, on February 8, 2011, the Kenyan government made a formal request to the U.N. Security Council for a deferral.⁴⁷ In support of the request, government officials stated that because “some of the individuals mentioned by the ICC prosecutor are among the front runner presidential candidates and the civil servants mentioned are in office and charged with responsibilities for peace and security,” the ICC process poses “a real and present danger to the exercise of government and the management of peace and security in the country.”⁴⁸

As it became increasingly clear that it would prove difficult to convince U.N. Security Council members that the ICC process poses a threat to the country’s security and should therefore be deferred, the government instead deployed another strategy aimed at ending ICC action in the country.⁴⁹

iii. Application Challenging Admissibility

On March 31, 2011, two British lawyers (Sir Geoffrey Nice and Rodney Dixon) hired by the Kenyan government filed an application with the ICC challenging the admissibility of the cases pursuant to Article 19 of the Rome Statute, which states (with reference to Article 17 of the Statute) that the Court cannot exercise jurisdiction if a state

taxpayer-sh4-million (noting that the Vice President spent around 4 million Kenyan shillings visiting heads of states and ministers in Nigeria, Libya, Malawi, Ethiopia, South Africa, and Uganda lobbying for support for the deferral).

47. See, e.g., *Kenya Petitions UN Organ to Delay Trials*, DAILY NATION (Feb. 10, 2011), <http://www.nation.co.ke/News/politics/Kenya%20petitions%20UN%20organ%20to%20delay%20trials%20/-/1064/1105328/-/dt3w0z/-/index.html>.

48. See Letter from Macharia Kamau, Kenya’s Permanent Representative to the U.N. in New York, to the President of the Assembly of State Parties to the Rome Statute (Feb. 28, 2011), [hereinafter Kamau Letter], available at <http://news2.onlinenigeria.com/news/general/81922-Kenyas-letter-ICC-President.html>.

49. See, e.g., Kevin Kelley, *Kenya ICC Deferral Bid Fails*, DAILY NATION (Apr. 9, 2011), <http://www.nation.co.ke/News/politics/UN+Council+rejects+Kenya+ICC+deferral+bid/-/1064/1141408/-/qmart0z/-/index.html> (describing that on April 8, 2011 (after the US, the UK, and other permanent members of the Council had continuously stated their opposition to a deferral), the President of the U.N. Security Council declared that, “after full consideration,” the members of Council could not agree to support Kenya’s request for deferral and no further action would be taken on the matter for the time being).

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with jurisdiction is investigating or prosecuting the case.⁵⁰ The admissibility challenge points to “the fundamental and far-reaching constitutional and judicial reforms very recently enacted in Kenya.”⁵¹ Based on these reforms, it is argued that the “[n]ational courts will now be capable of trying crimes from the post-election violence, including the ICC cases, without the need for legislation to create a special tribunal, thus overcoming a hurdle previously a major stumbling block.”⁵²

Despite the government’s attempts to convince the ICC judges that domestic investigations had commenced or were under way,⁵³ on May 30, 2011, Pre-Trial Chamber II rejected the admissibility challenge, stating that no credible information had been provided to show that Kenya was in fact investigating the Ocampo Six.⁵⁴ Dissatisfied with this ruling, the government filed an appeal, which

50. See *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang and Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-01/11 and ICC-01/09-02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute (Mar. 31, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf>.

51. *Id.* ¶ 2.

52. *Id.*

53. See, e.g., Bernard Namunane, *Wako Orders Police to Probe the Ocampo Six*, DAILY NATION (Apr. 26, 2011), <http://www.nation.co.ke/News/politics/Wako+orders+police+to+probe+the+Ocampo+Six+/-/1064/1151428/-/jkl0ym-/index.html> (discussing that Attorney-General Amos Wako, seemingly in an attempt to promote the admissibility challenge, ordered the police commissioner to include the Ocampo Six in investigations of the post-election violence alleged to take place in Kenya).

54. See *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf>; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1078823.pdf>.

the ICC Appeals Chamber subsequently rejected as it found there were no ongoing investigations in Kenya.⁵⁵

C. Understanding the Government's Accountability Policies

When analyzed in conjunction, it seems clear that the main purpose of government's action has been to avoid criminal prosecutions of the six suspects (and other masterminds of the post-election violence) altogether. On the one hand, the government has sought a deferral of the ICC cases, claiming that prosecuting the Ocampo Six will jeopardize peace and stability in the country. But, on the other hand, the government has attempted to challenge the admissibility of the ICC cases, arguing that a domestic accountability process involving the six ICC suspects has commenced. Various statements made by government officials support this interpretation. For example, Vice President Musyoka has noted, "[y]ou [Ruto and Kenyatta] should not lose hope because of being named in the ICC list. The Government will do its best to assist you, because we want to ensure that every Kenyan feels part and parcel of the next dispensation."⁵⁶

The leadership's reluctance to ensure accountability for the post-election violence, which stands in stark contrast to ordinary Kenyans' support for ICC involvement in Kenya,⁵⁷ may not be surprising given that some of the Ocampo Six are still involved at the highest levels of government business. For example, despite being named as ICC suspects, Kenyatta continues to serve as Deputy Prime Minister and Minister of Finance, and Muthaura continues to serve as the top Civil

55. Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011), *supra* note 54; Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011), *supra* note 54.

56. *Raila Rivals Toy with Single Candidate Plan*, DAILY NATION (Jan. 16, 2011), <http://www.nation.co.ke/News/politics/Raila+rivals+toy+with+single+candidate+plan+/-/1064/1090904/-/13rakrr/-/index.html>.

57. See KNDR DRAFT REVIEW, *supra* note 27, at 9 (finding that 78% of Kenyans are "very/somewhat happy" about ICC involvement in Kenya).

Servant and Secretary to the Cabinet. Consequently, as noted by the ICC prosecutor, “currently the suspects or their allies are able to influence the Kenyan government’s position.”⁵⁸

Thus, while Kenyan leaders initiated discussions about accountability, the absence of a political transition in Kenya has proved an obstacle to obtaining sufficient support for establishing accountability measures at the domestic level. This political context has also caused crucial elements in the leadership to fiercely resist the ICC process, which is nonetheless still ongoing. Yet, as discussed in the following section, government action to combat the ICC is not based on consensus in the Kenyan leadership. This lack of consensus has to do with a complex relationship between the accountability process and domestic politics.

III. THE ACCOUNTABILITY PROCESS’S IMPACT ON DOMESTIC POLITICS AND SECURITY

Perhaps more than any other country where the ICC is involved, Kenya’s political landscape has been deeply influenced by the Court’s action. Especially following Ocampo’s naming of the six suspects in December 2010, the ICC process has contributed to a number of significant developments in the political landscape, some of which have implications for peace and security in the country.

A. Split in the Coalition Government and ODM Political Party

Since early 2011, tensions between the two coalition partners have escalated, something which on the surface seems a consequence of conflicting perceptions concerning whether the ICC process should be supported. Whereas Kibaki’s PNU party, which has dominated the official government responses, is opposed to the proceedings, decisive

58. Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Prosecution’s Response to “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194” ¶ 8 (May 10, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1070344.pdf>.

parts of the ODM political party, including Prime Minister Odinga, support ICC trials.⁵⁹

The lack of a coherent government policy is evident from a number of incidents. On March 13, 2011, for example, ODM Secretary General Anyang' Nyong'o wrote a letter on behalf of the ODM political party, urging the U.N. Security Council not to order a deferral of the ICC cases, thereby distancing himself from the diplomacy launched by Vice President Musyoka.⁶⁰ Further, in sharp contrast to the efforts made by the government to end ICC involvement, Odinga has expressed his support for trying the Ocampo Six in The Hague on a number of occasions.⁶¹

However, though it is fair to conclude that the ICC issue has been *the* dominating controversy between the coalition partners since Ocampo named the six suspects in December 2010, it is important to note that the coalition government has a track record of failing to agree on other major national issues.⁶² Even if the ICC controversy has intensified tensions between the two coalition partners, it should therefore not be viewed as something which has caused a breakdown of an otherwise harmonious government.⁶³

59. See, e.g., Dave Opiyo, *Kenya Coalition Partners Lock Horns Over Cases*, DAILY NATION (Mar. 10, 2011), <http://www.nation.co.ke/News/politics/Coalition+partners+lock+horns+over+cases+/-/1064/1122832/-/970bg9/-/index.html>.

60. See Peter Leftie, *Reject Kenya Plea, Orange Asks UN*, DAILY NATION (Mar. 13, 2011), <http://www.nation.co.ke/News/politics/Orange+asks+UN+to+reject+Kenya+plea+/-/1064/1124530/-/v7vevwrz/-/index.html>.

61. See, e.g., Njeri Rugene, *Prove your Innocence at Hague, Ocampo Six Told*, DAILY NATION (Mar. 23, 2011), <http://www.nation.co.ke/News/politics/PM+says+local+trials+require+independent+bodies/-/1064/1131542/-/aryd4lz/-/index.html> (quoting Prime Minister Odinga as saying, “[t]hat innocence of the six must be proved through a fair judicial process. If you are mentioned, go through the process,” and “[i]f you are a suspect do not tell us you are innocent. Go and clear your name there (at the Hague)”).

62. *Kenya: Who is in Charge Here*, AFR. CONFIDENTIAL, May 1, 2009, at 10.

63. This conclusion is also supported by ordinary Kenyans. A recent survey finds that only nine percent of Kenyans who believe it is hard for the coalition partners to work together view the ICC process as *the* major reason for this (while 48% mention “lack of cohesion in the government,” 32% mention “political party divisions,” and 11% mention “2012 elections competition”). See KNDR DRAFT REVIEW, *supra* note 27, at 45.

While there is a split between the coalition partners, there are also internal tensions within the ODM political party. Such internal tensions were demonstrated in mid-March 2011, when a number of ODM leaders—including Vice Chair Aden Bare Duale, Deputy Organizing Secretary Benjamin Langat, and Deputy Secretary General Mohamed Mohamud—sent a letter to the U.N. Security Council, explaining that the letter sent by ODM Secretary General Nyong’o did not reflect the ODM party’s position on the deferral issue.⁶⁴ Adding further confusion to the ODM policy, in late March 2011, both Nyong’o and Odinga seemed to temporarily change their position when they stated their support for the establishment of a credible local accountability process.⁶⁵ Odinga, however, soon reaffirmed his support for trials in The Hague.⁶⁶

Furthermore, there was clear disagreement in the party when it discussed whether the party should provide the ODM suspects with legal assistance. On March 24, 2011, Parliamentary Secretary Ababu Namwamba and other ODM leaders stated that all three suspects in the ODM case would be accompanied by lawyers paid by the party during their initial appearances in The Hague.⁶⁷ However, Nyong’o later contradicted this statement when he denied claims that the party would provide legal aid to any of the ODM suspects.⁶⁸ The confusion was complete when Ruto subsequently made clear that he was not even interested in obtaining such assistance, noting that it would resemble “a hyena promising defence to goats.”⁶⁹ These tensions

64. See *Ruto Allies Write to UN Council on Hague Trials*, DAILY NATION (Mar. 16, 2011), <http://www.nation.co.ke/News/politics/Ruto+allies+write+to+UN+council+on+Hague+trials+/-/1064/1127568/-/9yraqz/-/index.html>.

65. See Patrick Mayoyo, *ODM Pushes for ICC-Led Local Trials*, DAILY NATION (Mar. 23, 2011), <http://www.nation.co.ke/News/politics/ODM+pushes+for+ICC+led+local+trials+/-/1064/1131848/-/1282c0j/-/index.html>.

66. See Dave Opiyo, *Clear the Air on Trials, ODM Told*, DAILY NATION (Mar. 25, 2011), <http://www.nation.co.ke/News/politics/-/1064/1132864/-/7q6x04/-/index.html>.

67. See John Ngirachu & Njeri Rugene, *ODM to Hire Lawyers for Ruto, Kosgey Over ICC Cases*, DAILY NATION (Mar. 24, 2011), <http://www.nation.co.ke/News/politics/-/1064/1132406/-/7q6tp1/-/index.html>.

68. See Njeri Rugene, *ODM Confusion Over Legal Aid for ICC Suspects*, DAILY NATION (Mar. 24, 2011), <http://www.nation.co.ke/News/politics/Confusion+over+lawyers+hiring//1064/1132746/-/rn3ksuz/-/index.html>.

69. See Muindi, *supra* note 29.

between the coalition partners and within the ODM party are closely related to succession politics.

The two front figures of the ODM party, Odinga and Ruto, as well as Kenyatta, have all announced their candidacy for the 2012 presidential election. Ruto, Kenyatta, and their supporters claim that Prime Minister Odinga is using the ICC process to get rid of his competitors for the 2012 presidential elections, suggesting that the prime minister had influenced the ICC prosecutor's decision to target Ruto and Kenyatta.⁷⁰ Though Odinga has firmly dismissed such allegations,⁷¹ it seems true that the ICC process comes convenient for the Prime Minister, who has never agreed on much with Ruto and started to see Ruto and Kenyatta threaten his path to the State House in 2012.⁷² Moreover, Odinga's media appearances arguably indicate that he is using the ICC process to promote his own presidential aspirations. For example, a few hours before the suspects took off to The Hague in connection with the April 2011 hearings, the Prime Minister went on national television to express his sympathy with the victims of the post-election violence.⁷³

In sum, ICC intervention has escalated the divides in political leadership. Yet, rather than viewing the ICC process as the *cause* of tensions in Kenyan politics, it is more correct to view it as something which has added fuel to existing tensions and is being used as a *tool* to fight competitors for the 2012 presidential elections.

70. *See id.*

71. *See, e.g.,* Anthony Kariuki, *Raila Insists on ICC Trial for Ocampo Six*, DAILY NATION (Mar. 26, 2011), <http://www.nation.co.ke/News/politics/Raila+insists+on+ICC+trial+for+Ocampo+Six+/-/1064/1133462/-/yduvkoz/-/index.html>.

72. *See, e.g.,* *Raila, Ruto Clash Not Surprising at All*, NAIROBI CHRONICLE (Aug. 17, 2009), <http://nairobichronicle.wordpress.com/2009/08/17/%EF%BB%BFraila-ruto-clash-not-surprising-at-all/> (discussing a clash between Ruto and Odinga in 2009, which it is argued, follows a pattern that results from the two politicians' opposed views on major issues).

73. *See Kenyatta-Odinga Rivalry Replayed*, DAILY NATION (Apr. 9, 2011), <http://www.nation.co.ke/News/politics/Kenyatta+Odinga+rivalry+replayed+/-/1064/1141866/-/irxpwsz/-/index.html>.

*B. New Coalitions and Various Scenarios for the 2012 Elections**i. New Coalitions*

Following Ocampo's naming of the ICC suspects, Ruto and Kenyatta formed an alliance, which also includes Vice President Musyoka and a number of other prominent politicians.⁷⁴ The formation of such a coalition, which has the stated purpose of obtaining power in the 2012 elections,⁷⁵ might seem ironic given that Ruto and Kenyatta are alleged to have incited violent attacks on each other's supporters in connection to the 2008 elections.⁷⁶ An obvious interpretation, therefore, is that the coalition is a "marriage of convenience" formed by the two suspects in order to influence government policies on the ICC issue, and to challenge Odinga's way to State House next year by creating an opposition which may draw on the support of the members of some of the major tribes in Kenya (the Kikuyu, the Kalenjin, and the Kamba).⁷⁷ However, whereas the ICC process has clearly influenced *when* this coalition was formed and seems to have strengthened the ties between Ruto and Kenyatta, it is not impossible that even in the absence of The Hague Court's involvement in Kenya, Kenyatta and Ruto would have joined forces at some point prior to the 2012 elections, as forming such an alliance

74. Besides Vice President Musyoka, the alliance appears to include George Saitoti (Rift Valley), Abdikadir Mohamed (North Eastern), Najib Balala (Coast), and Eugene Wamalwa (Western). See Murithi Mutiga, *Hague Cases Set to Change the 2012 Election Game Plan*, DAILY NATION (Apr. 9, 2011), <http://www.nation.co.ke/News/politics/A+race+against+time+/-/1064/1141852/-/2ifwihz/-/index.html>.

75. See John Ngirachu, *Uhuru and Ruto Strengthen Ties*, DAILY NATION (Apr. 1, 2011), <http://www.nation.co.ke/News/politics/Uhuru+and+Ruto+strengthen+ties+/-/1064/1137354/-/xr4ekyz/-/index.html>; Benson Amadala, *Alliance Mulls Holding Presidential Nomination*, DAILY NATION (June 18, 2011), <http://www.nation.co.ke/News/politics/Alliance+mulls+holding+presidential+nomination/-/1064/1184748/-/12nquuc/-/index.html>.

76. See Prosecutor's Application Pursuant to Article 58 as to Ruto, Kosgey and Sang, *supra* note 35; Prosecutor's Application Pursuant to Article 58 as to Muthaura, Kenyatta and Ali, *supra* note 35.

77. See KNDR DRAFT REVIEW, *supra* note 27, at 47; Makau Mutua, *The Group of Seven is a Tribal Alliance In All But Name*, DAILY NATION (June 4, 2011), <http://www.nation.co.ke/oped/Opinion/The+Group+of+Seven+is+a+tribal+alliance+in+all+but+name/-/440808/1174840/-/13qaf1h/-/index.html>.

seemed the only way to offer a credible alternative to Odinga's way to State House.⁷⁸

ii. Various Scenarios for the 2012 Elections

Though there have been a number of indications that the coalition enjoys strong support,⁷⁹ only six percent of the voters indicated their support for the Kenyatta/Ruto combination in an April poll.⁸⁰ Furthermore, by June 2011, there were indications that the internal cohesion in the alliance might not be as strong as it had initially appeared.⁸¹ In the end, however, the success of the Ruto/Kenyatta alliance—and any other presidential candidate for the 2012 elections—will to a large extent depend on the outcome of the ICC process.

78. See Julius Sigei et al., *Ruto, Uhuru Allies Train Their Guns on Raila*, DAILY NATION (Apr. 2, 2011), <http://www.nation.co.ke/News/politics/Ruto+Uhuru+allies+train+their+guns+on+Raila+/-/1064/1137712/-/xtcsasz/-/index.html> (quoting Kenyatta as saying, “[t]hey were thinking that Mr Ruto [sic] and I will begin fighting each other over the evidence, but they are wrong. We shall go to The Hague and come back as solid as before”); *Raila, Ruto Clash Not Surprising at All*, *supra* note 72.

79. See John Ngirachu & Oliver Musembi, *Uhuru, Ruto Hold Last Rally Ahead of Hague Visit*, DAILY NATION (Apr. 4, 2011), <http://www.nation.co.ke/News/politics/Uhuru+Ruto+hold+last+rally+ahead+of+Hague+visit//1064/1138654/-/4you41/-/index.html> (noting that fifty MPs attended the last Ruto/Kenyatta rally before they headed for The Hague); Jacob Ng'etich, *Field Day for Ruto, Uhuru Loyalists*, DAILY NATION (Apr. 8, 2011), <http://www.nation.co.ke/News/politics/Field+day+for+Ruto+Uhuru+loyalists+/-/1064/1141382/-/tnsqp5z/-/index.html> (noting that more than forty MPs joined the suspects to The Hague to show support).

80. See Oliver Mathenge, *Raila-Mudavadi Tipped to Win in 2012*, DAILY NATION (Apr. 30, 2011), <http://www.nation.co.ke/News/politics/Raila+Mudavadi+tipped+to+win+in+2012+/-/1064/1153932/-/vsvwasz/-/index.html>. The most popular combination for the 2012 election involves Odinga and Mudavadi, who enjoy support by 20% of the voters, followed by a Kenyatta/Musyoka combination, which is supported by 8% of the voters. *Id.* On their own, the April poll shows that the most popular candidates for the 2012 presidential elections are: (1) Odinga (38%); (2) Kenyatta (18%); (3) Musyoka (13%); (4) Ruto (8%); and (5) Karua (6%). *Id.*

81. See, e.g., Julius Sigei, *What Ails Uhuru-Ruto Union?*, DAILY NATION (June 4, 2011), <http://www.nation.co.ke/News/politics/What+ails+Uhuru+Ruto+union//1064/1175062/-/item/0/-/wdjwhb/-/index.html> (noting that land issues seem to cause tensions in the alliance).

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There are three potential outcomes of the ICC process: (1) Kenyatta and Ruto will not stand trial; (2) Kenyatta and Ruto are both charged; or (3) charges are confirmed against either Kenyatta or Ruto, but not the other. Should Pre-Trial Chamber II decide that Kenyatta and Ruto will not stand trial, the two politicians would seem to stand with strong cards against the other main competitors for the 2012 presidential elections, including Odinga.⁸² Not only will they be able to claim that their names have been cleared, but they will almost certainly attempt to discredit Odinga for having pushed for ICC trials.⁸³

On the contrary, should the Court decide to charge Ruto and Kenyatta, both will face an uphill battle in gaining the presidency. First, many commentators argue the new Constitution should be understood to prohibit anyone charged with a serious crime from running for president.⁸⁴ Second, should Ruto and Kenyatta nonetheless run for president, Odinga and the other presidential candidates are likely to benefit, both because charges of crimes against humanity can hardly be seen as an asset in an election campaign and because the two suspects will be busy preparing their defenses for trials in The Hague.⁸⁵ Furthermore, if Ruto (Kalenjin) and Kenyatta (Kikuyu) are out of the game, some speculate that the Kalenjin and Kikuyu ethnic groups might not follow past voting patterns, where members of each tribe have tended to vote almost unanimously for a candidate from their own or affiliated tribe, something which will likely benefit the other candidates, including Odinga.⁸⁶

82. See Samwel Kumba, *September Set to Shape Future of Kenyan Politics*, DAILY NATION (Apr. 15, 2011), <http://www.nation.co.ke/News/politics/September+set+to+shape+future+of+Kenyan+politics+/-/1064/1145550/-/yplfjr/-/index.html>.

83. See Mutiga, *supra* note 74.

84. See, e.g., *id.* (citing Betty Murungi, an international law expert) (noting that the new constitution and the Public Officer Ethics Act would not allow the two to run for president if they are charged).

85. See Kumba, *supra* note 82.

86. See Kipchumba Some, *Uhuru, Ruto Could Miss 2012 Polls*, DAILY NATION (Mar. 12, 2011), <http://www.nation.co.ke/News/politics/Uhuru+Ruto+could+miss+2012+polls+/-/1064/1123978/-/item/1/-/14qvf8hz/-/index.html>. For further discussion on the ethnic dimensions of Kenyan politics, see Fred Jonyo, *Ethnicity in Multi Party Politics*, in ELECTORAL POLITICS IN KENYA 86-107 (Ludeki Cheya ed., 2002).

Should the court confirm charges against only one of the two individuals, the person who is not charged would seem to pose a serious challenge to Odinga and the other presidential candidates, as he is likely to draw support from those who had intended to support the person charged.⁸⁷

Yet, there are a number of uncertain factors, which might prove determinative for the 2012 elections. For example, it is difficult to predict how Vice President Musyoka will respond to the various scenarios, and a leadership dispute between Ruto and Kenyatta certainly cannot be excluded.⁸⁸ Further, Kenyan politics are unpredictable in that new alliances can be formed quickly, and new, lesser-known politicians, may be “boosted” for the presidential post. In March 2011, for example, Roads Minister, Franklin Bett, a Kalenjin who has generally been seen as aligned with Odinga, indicated that he will run for president.⁸⁹ Some consider Bett’s move as an attempt to position himself as an alternative for the Kalenjins, should Ruto be charged.⁹⁰

C. How the ICC Process Impacts Peace and Security

Because tensions in the political leadership can spread to communities, the impact of the ICC process on Kenyan politics is closely related to the highly-contested question of how ICC intervention affects peace and security in the country. Some—including a number of government officials—argue that the pursuit of accountability in the run-up to the 2012 election might trigger new political violence. For example, a Kenyan ambassador rhetorically asks: “[i]s a rush to undertake the pre-trial process in the political climate of a presidential campaign worth the risk of destabilising the country and a return to violence and loss of life in Kenya?”⁹¹ In contrast, many nongovernmental organizations (NGOs) and

87. See Mutiga, *supra* note 74.

88. Makau Mutua, *Why a Fallout Between Ruto and Uhuru is Inevitable*, DAILY NATION (June 18, 2011), <http://www.nation.co.ke/oped/Opinion/Why+a+fallout+between+Ruto+and+Uhuru+is+inevitable+/-/440808/1184970/-/11ojv6hz/-/index.html>.

89. See, e.g., Some, *supra* note 86.

90. *Id.*

91. Kamau Letter, *supra* note 48.

academics involved with the issue argue that ICC trials will promote peace and security in the country, not least since they will counter a culture of impunity.⁹² Though somewhat tenuous, a number of linkages between the ICC process and security in the country can be identified.

i. Triggering or Limiting the Use of Hate Speech?

A first concern is that the political tensions described above have been accompanied by “[a] tone for divisive ethno-political mobilisation,” resembling what has surrounded other instances of political violence in the country.⁹³ There are plenty of examples of such rhetoric. For example, Public Works Assistant Minister Mwangi Kiunjuri, a vocal supporter of Kenyatta, has stated:

If we don't talk about Raila [Odinga] now, we shall be caught unawares as a community Raila is not a good person. He is like the animal that eats the chicken and its eggs A hyena is hunted by a man and his in-law and a house that is divided is destroyed by one stone A hyena hunts by following you in the hope that your swinging hand will fall off. But we must get rid of this hyena now Let me tell you, uncircumcised boys [making reference to the Luo ethnic group to which Odinga belongs] are not invited to dowry negotiations because, as you know, boys will always take time to sing their play songs. An uncircumcised boy's goings are only ended when he faces the knife.⁹⁴

PNU Chief Whip Johnstone Muthama made statements of similar gravity.⁹⁵ Kenyatta and Ruto have also engaged in hard attacks on

92. See, e.g., Letter from Non-Governmental Organizations in Kenya to the Ministries of Foreign Affairs of African ICC States Parties on the UN Security Council (Mar. 1, 2011) [hereinafter NGO Letter to African ICC States], available at <http://www.hrw.org/en/news/2011/03/02/gabonnigeriasouth-africa-reconsider-support-deferral-icc-kenya-investigation>.

93. See KNDR DRAFT REVIEW, *supra* note 27, at vi.

94. John Ngirachu, *Uhuru and Ruto Warned Over Hate Speech at Rallies*, DAILY NATION (Apr. 2, 2011), <http://www.nation.co.ke/News/politics/-/1064/1137688/-/item/1/-/1e2x0t/-/index.html>.

95. *Id.*

Odinga, though generally abstaining from the same level of ethnically-divisive propaganda.⁹⁶

The use of statements like those cited here poses a serious risk for the recurrence of political violence. Political commentator Onesmus Murkommen explains: “[i]n Kenya certain leaders embody the ideals of their respective communities and that is why they are kingpins where they come from. Therefore, an attack on these individuals is construed to be an attack on the larger community.”⁹⁷ Some argue that tensions in the political elite—and the potential for the elites to mobilize masses through “hate speech”—present *the* biggest challenge for peace and security in the country.⁹⁸

While the political climate has changed dramatically due to ICC involvement, and ICC involvement seems to have triggered the use of “hate speech,” the ICC may at the same time remedy some of these problems. First, though some politicians attempt to make the ICC process look like an attack on whole communities, the hearings may ultimately contribute to an understanding that it was *individuals* who organized the violence to maintain or obtain power. It is interesting in this regard that a recent survey reveals that more than fifty percent of Kenyans expect community members to support ICC trials even if they target leaders of their own ethnic group, while only four percent predict such targeting could lead to a violent response.⁹⁹

Second, the Court has taken certain steps to limit the use of divisive ethno-political rhetoric. During the April hearings, the presiding judge of Pre-Trial Chamber II warned the suspects in

96. *E.g., id.* (quoting Kenyatta as calling Odinga a “kimundu” (a nuisance bully) and stating, “[n]ow that Raila keeps describing some of us as drunkards, do we go drinking with his wife? And now that he keeps telling us to go to The Hague, is that Hague his mother’s place? Is The Hague your mother’s place for you to keep singing about it?”).

97. Kipchumba Some, *Will this be Raila’s Waterloo?*, DAILY NATION (Apr. 16, 2011).

98. *See* KNDR DRAFT REVIEW, *supra* note 27, at v (“Sustaining the peace and calm that was secured [in 2008] depends on only one major factor: how political leaders reconcile their differences as the country moves towards the next General Election, and specifically how they organise their politics for presidential contests. National level political dynamics will influence local level issues; conflicts will trickle to the local level and disrupt inter-ethnic relations. There is thus need to manage national level political divisions to prevent a recurrence of violence.”)

99. *Id.* at 17.

general tones that any use of “dangerous speeches” could lead the Chamber to issue arrest warrants on the suspects.¹⁰⁰ The warnings issued seem to have had some impact on the nature of statements subsequently made. For example, there was a notable change in the language used during the “home-coming” rally, with Ruto stating, “[w]e are prepared to carry this cross but our consolation is that never again shall a Kenyan lose his life or property because of political competition.”¹⁰¹

ii. Promoting or Hampering Kenya’s Reform Agenda?

Another issue where the ICC process has a complex relationship to peace and security concerns its impact on the reform agenda in Kenya, which is recognized by many as crucial for preventing political violence in the country.¹⁰² On the one hand, it seems as if the recent, overwhelming focus on the ICC process has to some extent led to neglect of the reform agenda. As the Panel of Eminent African Personalities explains, “the personalisation and politicisation of the ICC process had obscured dialogue on reforms that would prevent future violence and the need to find justice for the victims, including IDPs.”¹⁰³

On the other hand, there are also indications that ICC involvement has caused politicians to pay increased attention to certain aspects of the reform agenda. For example, Kenyan politicians have understood that their prospects of succeeding with the admissibility challenge are closely related to the reform agenda. This is well illustrated by a statement made by Central Kenya MPs Association’s Chairman, Ephraim Maina:

100. See International Criminal Court, *Ruto, Kosgey & Sang Case: Initial Appearance*, 7 April 2011, YOUTUBE (Apr. 7, 2011), <http://www.youtube.com/IntlCriminalCourt#p/search/1/CQ09M8LeVJA>.

101. See Peter Leftie, *Uhuru and Ruto Vow to Preach Peace*, DAILY NATION (Apr. 11, 2011), <http://www.nation.co.ke/News/politics/Uhuru+and+Ruto+vow+to+preach+peace+/-/1064/1142960/-/9tmj05z/-/index.html>.

102. See, e.g., Thomas Obel Hansen, *Will the New Constitution Lead to a More Peaceful Kenya?*, AFR. ARGUMENTS ONLINE (Aug. 4, 2010), <http://africanarguments.org/2010/08/will-the-new-constitution-lead-to-a-more-peaceful-kenya/>.

103. *ICC Politics Hindrance to Reform, Says Annan*, DAILY NATION (May 25, 2011), <http://www.nation.co.ke/News/politics/-/1064/1169078/-/7s68nl/-/index.html>.

We must now concentrate on enacting laws that will lead to creation of a tenable judicial mechanism and ensure it is in place by September when the Six return to The Hague. With this, the country will be able to argue for a deferral and transfer of the case home.¹⁰⁴

Notable progress, seemingly related to this perceived linkage, includes the recent approval of a new Chief Justice who is generally believed to be a “pro-reformer.”¹⁰⁵ Furthermore, after significant controversy, Parliament has passed some crucial bills throughout 2011 to reform the judiciary—actions which seem to have been promoted by a perceived relationship between judicial reforms and the prospects of succeeding with the admissibility challenge.¹⁰⁶

iii. Will the ICC Process Deter Political Leaders from Utilizing Violence as a Political Tool?

Finally, the ICC process might deter political leaders in the country from using violence as a tool to maintain or obtain power. Some argue that pursuing accountability runs counter to peace and security because by targeting presidential candidates, the ICC process will push powerful individuals into a corner where, out of desperation, they will be more disposed to incite and organize violence.¹⁰⁷ Though such a scenario certainly cannot be excluded, it nonetheless seems more likely that the accountability process will contribute to peace and security in the country, at least in the long run. The ICC process

104. Njeri Rugene, *MPs: ICC's Handling of Suspects Okay*, DAILY NATION (Apr. 8, 2011), <http://www.nation.co.ke/News/politics/-/1064/1140986/-/7qr43d/-/index.html>.

105. *See Mutunga, Baraza and Tobiko Get House Nod*, DAILY NATION (June 15, 2011), <http://www.nation.co.ke/News/politics/Mutunga+Baraza+and+Tobiko+get+House+nod+/-/1064/1181740/-/15qvdh5/-/index.html>.

106. For an overview of the bills passed, see Alphonse Shiundu, *MPs Work Overtime to Pass Crucial Bills*, DAILY NATION (June 1, 2011), <http://www.nation.co.ke/News/politics/-/1064/1172996/-/7sn4fj/-/index.html>.

107. *See, e.g., Kamau Letter, supra* note 48 (“Some of the individuals mentioned by the ICC prosecutor are among the front runner presidential candidates and the civil servants mentioned are in office and charged with responsibilities for peace and security. Needless to say, therefore, the pending ICC indictments pose a real and present danger to the exercise of government and the management of peace and security in the country.”).

presents an important step forward in ending Kenya's legacy of impunity, which has been a prerequisite for political violence. The potential trial of six powerful Kenyans is likely to make political leaders think twice before ordering violent attacks on their opponents in the future.¹⁰⁸ While the deterrent effect of the ICC as such is disputed,¹⁰⁹ in the specific case of Kenya, where members of the political elites have for decades incited large-scale violence with impunity, there seems thus to be some merit in claiming that the Court's actions might deter other political leaders from using violence as a political tool in the future.¹¹⁰ Interestingly, a recently published study reveals that ordinary Kenyans view prosecuting the people responsible for political violence as the single-most important way of preventing new violence.¹¹¹

The court hearings might also indirectly contribute to ending a practice of using violence for political purposes, as they seem to limit

108. See, e.g., NGO Letter to African ICC States, *supra* note 92.

109. For a discussion of the role international tribunals can play for deterring large-scale violence, see MARK A. DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* 169-73 (2007) (arguing that international courts face a number of serious obstacles deterring potential war criminals and perpetrators of other international crimes). See also Miriam Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 63-71 (2002) (expressing doubts as to the effectiveness of criminal justice as a deterrent); Margaret M. DeGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, MICH. J. INT'L L. (forthcoming 2012), available at <http://ssrn.com/abstract=1780446> (assuming that deterrence "provides a partial justification for the ICC's work," but emphasizing that deterrence theory also fails to provide an "adequate basis for making selection decisions at the Court"); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473 (1999) (arguing that international courts have a limited deterrent effect); Jonathan I. Charney, *Editorial Comment: Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 462 (1999) (arguing that consistent prosecution of state leaders may have some deterrent effect).

110. CIPEV, *supra* note 14, at 22 ("Over time, this deliberate use of violence by politicians to obtain power since the early 1990s, plus the decision not to punish perpetrators has led to a culture of impunity and a constant escalation of violence."). See also *Impact of the Rome Statute*, *supra* note 9; Asaala, *supra* note 6, at 390-95.

111. KNDR DRAFT REVIEW, *supra* note 27, at 25 (finding that the five most important measures for preventing new violence are seen by Kenyans as: (1) "[p]rosecute those responsible for violence" (21%); (2) "promote peace and reconciliation" (18%); (3) "fight tribalism" (17%); (4) "free and fair elections" (12 %); and (5) "politicians stop incitement" (8 %)).

the perception that Kenya's political elite are untouchable. For example, during the April hearings in The Hague, Presiding Judge Ekaterina Trendafilova ordered Ruto to sit down and be quiet when he claimed the charges brought against him "can only be possible in a movie."¹¹² This clear signal sent by the judge that the Court will not allow any manipulation of the hearings seemed to surprise Ruto, a politician who is generally viewed by Kenyans as beyond the reach of the law.¹¹³ Importantly, the incident received significant attention in Kenyan media, with one commentator sarcastically noting that "[i]t took the eloquence of Eldoret North MP William Ruto to make the point that everybody has been getting unnecessarily excited over a movie—a work of art, the fictive imaginings of a fertile mind."¹¹⁴

D. *Toward Transition with the ICC?*

The ICC process has had—and will in all probability continue to have in the near future—a significant impact on politics and security in Kenya. Yet, while ICC intervention has clearly impacted Kenyan politics in fundamental ways, the developments taking place should often be seen as *triggered*, rather than *caused* by the ICC. As noted by Chairman of the Parliamentary Committee on Justice and Legal Affairs, Mr. Ababu Namwamba, "[the ICC dispute] is a tiny piece of the iceberg. The real prize is succession and control over the shaping of the Second Republic."¹¹⁵ While it remains uncertain *who* will

112. See International Criminal Court, *Ruto, Kosgey & Sang Case: Initial Appearance*, 7 April 2011, *supra* note 100.

113. In April 2011, for example, Ruto was acquitted in a grant corruption case due to the absence of witnesses who could testify against him. The witnesses had either died or were unwilling to testify, often because they had subsequently been employed by Ruto. See *Fraud Case: Ruto Gave Job to Key Potential Witnesses*, DAILY NATION (Apr. 16, 2011), <http://www.nation.co.ke/News/politics/Fraud+case+Ruto+gave+job+to+key+potential+witness+/-/1064/1145926/-/t8qmt6z/-/index.html>.

114. See Kwamchetsi Makokha, Op-Ed., *Yes, Kenya's Post-Election Violence Was Just a Harmless Horror Movie*, DAILY NATION (Apr. 8, 2011), <http://www.nation.co.ke/oped/Opinion/Yes+post+poll+chaos+was+just+movie+/-/440808/1141222/-/2uheoh/-/index.html>.

115. Mugumo Munene, *Power Politics Behind Kibaki-Raila Standoff*, DAILY NATION (Feb. 19, 2011), <http://www.nation.co.ke/News/politics/Power+politics+behind+Kibaki+Raila+standoff+/-/1064/1111064/-/119sqsmz/-/index.html>.

eventually benefit politically from the accountability process, it also remains uncertain whether the ICC process will promote profound political transition. However, profiling the main candidates may cast some light on the prospects for fundamental political change.

Kenyatta and Ruto, who were associated with the Moi regime (the authoritarian leader that ruled Kenya from 1978-2002), are generally seen as conservative powers who work on the premises of tribal politics and are unlikely to promote fundamental reforms of the system of governance.¹¹⁶

Musyoka, an experienced politician with roots in Moi's dictatorship, is also seen by most as a pragmatic politician who is opposed to fundamental changes.¹¹⁷

Odinga, who was detained as a political prisoner during Moi's dictatorship, is generally understood to be relatively supportive of the reform agenda. But Odinga is also seen as pragmatic, and the extent to which he will be able to reform the system of governance is likely to depend on a number of other factors, including who he allies with for the 2012 elections.¹¹⁸

Karua, a dedicated women's rights activist, is generally accepted to be an outspoken pro-reformer. While she is arguably the only major presidential candidate who shows some reluctance toward working on the premises of tribal politics, she might be forced to enter an alliance which would make it harder, but not impossible, to promote profound transition.¹¹⁹ Put simply, should the ICC choose to

116. See *Raila, Ruto Clash Not Surprising at All*, *supra* note 72; Willy Mutunga, *The Unfolding Political Alliances and their Implications for Kenya's Transition*, in BUILDING AN OPEN SOCIETY: THE POLITICS OF TRANSITION IN KENYA, *supra* note 20, at 60; David Kariuki, *Guest Column: Casting Uhuru Kenyatta's Profile into Perspective*, KENYA STOCKHOLM BLOG (June 2, 2011), <http://kenyastockholm.com/2011/06/02/guest-column-casting-uhuru-kenyattas-profile-into-perspective/>.

117. See Joe Khamisi, *How Kalonzo and Uhuru Plotted to Stop Raila*, DAILY NATION (Apr. 23, 2011), <http://www.nation.co.ke/News/politics/How+Kalonzo+and+Uhuru+plotted+to+stop+Raila+/-/1064/1149826/-/ie2eu3z/-/index.html>; Mutunga, *supra* note 116.

118. See *Raila, Ruto Clash Not Surprising at All*, *supra* note 72; Mutunga, *supra* note 116; Noel Mwakugu, *Odinga: Kenya's King-Maker*, BBC NEWS (Apr. 17, 2008), <http://news.bbc.co.uk/2/hi/africa/7068055.stm>.

119. See, e.g., Makau Mutua, Op-Ed., *Five Reasons Martha Karua Could Win the Presidency*, DAILY NATION (May 7, 2011), <http://www.nation.co.ke/oped/>

charge Ruto and Kenyatta, presidential candidates who are more disposed to transforming the system of governance would likely benefit.

Beyond the impact on succession politics, the ICC process may also promote transition in Kenya in other ways. In particular, the accountability process offers hope that political leaders will be more reluctant to use violence as a political tool in the future, thus potentially leading the way to peaceful transformation. Yet, other measures such as implementing the new constitution and combating so-called political tribalism are also needed to bring about a profound transition.¹²⁰ While ICC involvement in the short-term might prove an obstacle for ensuring that sufficient attention is paid to such measures, the reform process ultimately has little value if not followed by a “culture of accountability.” Overall, the ICC process should thus be viewed as something positive for promoting peaceful transition in Kenya.

CONCLUSION

This article has examined the complicated process of pursuing accountability for the 2008 post-election violence in Kenya, and how the accountability process impacts domestic politics and security. While significant obstacles to a meaningful transition lie ahead, the absence of a regime change should not be viewed as a factor that *per se* renders it impossible to commence an accountability process that might ultimately promote political and peaceful transition. The Kenyan case sets itself apart from most other cases of transitional justice in that there has been a partial, though extremely shifting, commitment to pursuing accountability in a scenario where those who allegedly sponsored large-scale violence still form part of the country’s leadership. Although this commitment has not materialized into the establishment of a local accountability process—and crucial parts of the leadership strongly oppose ICC involvement in the country—the accountability process is nonetheless ongoing, and there are signs that

Opinion/Five+reasons+Martha+Karu+could+win+the+presidency+/440808/1158038/-/gx3dl1/-/index.html.

120. Thomas Obel Hansen, *The Kenya Transitional Justice Brief*, vol. 1, no. 2, August 2011, INT’L CENTER FOR TRANSITIONAL JUST., (Sept. 2011), <http://ictj.org/sites/default/files/ICTJ-KEN-Transitional-Justice-Brief-2-2011.pdf>.

it is more likely to promote progressive transformation than not. It therefore also makes some sense to speak of “transitional justice” in Kenya—if understood as a potential *driver* of transition, rather than something that is preconditioned on an already existing transition.

AFTERWORD

On January 23, 2012—after this article had been completed and prepared for publication—Pre-Trial Chamber II of the ICC made the much-awaited decision on the charges brought by the Prosecutor with regard to Kenya’s post-election violence. The majority of judges found substantial grounds to believe that four of the six suspects committed the crimes alleged by the Prosecutor.¹²¹ In the PNU case, the Chamber concluded that “there is sufficient evidence to establish substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta are individually criminally responsible as indirect co-perpetrators” for murder, deportation or forcible transfer of population, rape, persecution, and other inhumane acts, all constituting crimes against humanity under the Rome Statute.¹²² The evidence presented, the Chamber noted, supports the Prosecutor’s allegations of close links between Kenyatta and Muthaura and the Mungiki gang.¹²³ In the ODM case, the Chamber found sufficient evidence to establish substantial grounds to believe that Ruto is criminally responsible as an indirect co-perpetrator and Sang for contributing to the crimes of murder, deportation or forcible transfer of population, and persecution, amounting to crimes against humanity.¹²⁴ Assessing the

121. Judge Hans-Peter Kaul dissented for the same reason that he dissented to the prior decisions, namely on the ground that the policy requirement in crimes against humanity is seen not to be satisfied.

122. Situation in the Republic of Kenya in the Case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Public Redacted Version, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 428 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf> [hereinafter Decision on the Confirmation of Charges – Muthaura, Kenyatta & Ali].

123. *See id.* ¶¶ 301-308.

124. Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 299 (Jan. 23, 2012), <http://www.icc->

evidence presented, the Chamber found reasons to believe that Ruto played a crucial role organizing the attacks on PNU supporters, including adopting a “stipendiary scheme and a rewarding mechanism to motivate the perpetrators to kill and displace the largest number of persons belonging to the targeted communities as well as to destroy their properties.”¹²⁵ The Chamber dismissed the defense team’s claim that any alleged misconduct of the Prosecutor has a bearing on the confirmation of charges.¹²⁶

Unless the Appeals Chamber reverses the decisions, Kenyatta, Muthaura, Ruto, and Sang will thus stand trial in the near future, while Kosgey and Ali are no longer suspected by the Court. The suspects committed for trial all immediately indicated their intent to appeal the Chamber’s ruling, with Ruto and Kenyatta further emphasizing that their run for the presidency remains unaffected by the prospects of international trials.¹²⁷ While the Prosecutor has publically stated that he will not appeal the Court’s decision concerning Kosgey and Ali, at the same time he noted that he will “keep investigating Kosgey and the activities of the police as well as crimes allegedly committed in Kibera and Kisumu.”¹²⁸

It remains unclear at present exactly how the government will react to the Court’s ruling. However, in a speech delivered on the day of the ruling, President Kibaki implied that the government views its own (partly reformed) judiciary as capable of dealing with the post-election violence cases.¹²⁹ Subsequently, the Attorney-General stated he will consult the newly appointed Chief Justice, noting that “[w]e in

[cpi.int/iccdocs/doc/doc1314535.pdf](http://www.cpi.int/iccdocs/doc/doc1314535.pdf) [hereinafter Decision on the Confirmation of Charges – Ruto, Kosgey & Sang].

125. *Id.* ¶ 303.

126. See Decision on the Confirmation of Charges – Muthaura, Kenyatta & Ali, *supra* note 122, ¶¶ 63-65; Decision on the Confirmation of Charges – Ruto, Kosgey & Sang, *supra* note 124, ¶¶ 49-53.

127. See Xinhua, *Kenyan Suspects to Appeal Against ICC Ruling*, DAILY NATION (Jan. 23, 2012), <http://www.nation.co.ke/News/politics/Kenyan+suspects+to+appeal+against+ICC+ruling/-/1064/1312660/-/mth9mlz/-/index.html>.

128. Statement by the Prosecutor of the International Criminal Court on Kenya Ruling (Jan. 24, 2012), <http://www.icc-cpi.int/NR/exeres/54E6388D-4DD0-4E85-8FA9-90DA95A2AFB3.htm>.

129. See *Kibaki Orders Githu to Set Up Legal Team on Ruling*, DAILY NATION (Jan. 23, 2012), <http://www.nation.co.ke/News/politics/Kibaki+orders+Githu+to+set+up+legal+team+on+ruling+/-/1064/1312780/-/13okgghz/-/index.html>.

government are confident that under the stewardship of Chief Justice Willy Mutunga, the Judiciary is robust and capable of undertaking this challenge.”¹³⁰ The Attorney-General further stated that the two members of the government—Finance Minister Kenyatta and Head of Public Service Muthaura—will remain in office.¹³¹ As the Court has already dismissed Kenya’s admissibility challenge, this could be seen as a policy statement indicating potential non-cooperation with the ICC. It is thus unclear whether the government ultimately intends to respect the Court’s claim of jurisdiction, including potentially handing over the suspects to the ICC should they fail to appear voluntarily. Understanding the motives for such opposition, it is necessary to take into account that the trial of Muthaura and Kenyatta may implicate the President directly in the violence. Notably, the Pre-Trial Chamber’s finding that there are substantial grounds to believe that several meetings were held at Nairobi State House between “Mr. Muthaura, Mr. Kenyatta, Mungiki representatives, President Mwai Kibaki, and others” raises the question of how the President could attend such meetings without having endorsed, or at least been familiar with, the plans of attacking ODM supporters.¹³²

Keeping in mind that Odinga and other prominent ODM party members will likely push hard for the commencement of the ICC trials, tensions between the coalition partners may escalate in the coming months, possibly leading to the complete breakdown of the coalition government. In this event, the election date could be pushed forward from the March 2013 date recently ruled the deadline by a Kenyan court.¹³³ In sum, the political landscape in Kenya will continue to be dramatically affected by the ICC cases, likely increasing already existing tensions. While there is a danger that some politicians may attempt to mobilize masses in an effort to avoid ICC prosecutions and gain power, it is also worth noting that there

130. John Ngirachu, *Uhuru, Muthaura Can Remain in Office*, AG, DAILY NATION (Jan. 24, 2012), <http://www.nation.co.ke/News/politics/Uhuru+Muthaura+can+remain+in+office+AG+/-/1064/1313300/-/11gcupgz/-/index.html>.

131. *Id.*

132. *See, e.g.*, Decision on the Confirmation of Charges – Muthaura, Kenyatta & Ali, *supra* note 122, ¶¶ 310-332 (regarding meeting on Nov. 26, 2007).

133. *Court: Kenya Set for 2013 Poll Unless Coalition Dissolved*, DAILY NATION (Jan. 13, 2012), <http://www.nation.co.ke/News/politics/Kenya+set+for+2013+poll+unless+coalition+dissolved/-/1064/1304976/-/12wipq/-/index.html>.

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were no immediate violent responses to the ICC ruling and that most ordinary Kenyans continue to support the Court's intervention.¹³⁴

134. See Tom Maliti, *Polls: Support for ICC Remains High, But Fear of Violence Has Increased*, KENYA MONITOR (Jan. 19, 2012), <http://www.icckenya.org/2012/01/polls-support-for-icc-remains-high-but-fear-of-violence-has-increased/>.