

# Policy Briefing

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## Kenya After the Elections

### I. Overview

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Kenyan democracy was severely tested in the lead-up to, during and after the 4 March 2013 elections. On 9 March, following a tense but relatively peaceful election, the Independent Electoral and Boundaries Commission (IEBC) declared Jubilee Coalition's Uhuru Kenyatta president-elect. He garnered 50.07 per cent of the vote – barely passing the threshold for a first round victory. His closest opponent, former Prime Minister Raila Odinga, challenged his victory in court, but despite allegations of irregularities and technical failures, the Supreme Court validated the election. Although Odinga accepted the ruling, his party and several civil society organisations questioned the election's shortcomings and its impact on democracy. President Kenyatta and his deputy, William Ruto, will have to restore confidence in the electoral process and show robust commitment to the implementation of the new constitution, in particular to devolution, land reform, the fight against corruption and national reconciliation. Failure to do so risks further polarising the country and alienating the international community.

Despite some clashes preceding the vote, and following the court's decision, the nation avoided a repeat of the 2007-2008 post-election violence. A number of factors contributed to a predominantly peaceful election, including a general consensus between the political elite and the citizenry *not* to bring Kenya to the brink of civil war again. International pressure, in particular from the current International Criminal Court (ICC) cases, media self-censorship, restrictions on freedom of assembly, and deployment of security forces to potential hotspots also helped avert unrest. In addition, Kenya's citizens took pre-emptive action by returning to ethnic homelands to vote, with vulnerable groups vacating areas of past communal violence.

However, a number of vital, more overarching reforms addressing systemic and structural conflict drivers – a culture of impunity, high unemployment, land reform, resettlement of internally displaced persons (IDPs), ethnic tensions, weak institutions and regional and socio-economic inequality – have yet to be implemented. Accountability for the 2007-2008 post-election violence remains largely unaddressed. It now rests with the ICC with charges against three (of the original six) suspects still pending, including prosecutions of the newly elected president and deputy president. Kenyatta and Ruto deny the allegations against them and have publicly committed to cooperate with the court. Yet in early May, Kenya's permanent representative to the UN submitted a brief to the Security Council seeking to have the case terminat-

ed, a move that was subsequently rejected by Ruto and the attorney general but follows a history of government challenges to the court.

With the first election under the 2010 constitution complete, Kenyans now anticipate the full force of reforms that aim to redress grievances against centralised governance and uneven economic development. Through devolved government, the 47 newly created counties, with their own elected governors and assemblies, will seek to tackle socio-economic inequalities. However, faith in the central government's will and capacity to implement reforms has been further weakened by the failures in the reformed electoral machinery. To restore public confidence in the electoral process, the government should:

- ❑ conduct a comprehensive audit of the electoral process, drawing on all the relevant legislation, institutions and mechanisms;
- ❑ address inadequate training of IEBC field officers, the police and other security sector personnel;
- ❑ enhance communication of the processes in the electoral cycle and address deficiencies in civic and voter education; and
- ❑ investigate and prosecute those suspected of committing electoral offences, including IEBC staff members, and work to rebuild confidence in the IEBC.

County governments will have to work alongside central government to ensure effective management and equitable allocation of national and local resources. The success of devolution will depend on mutual cooperation between the National Assembly, the Senate, county governors and assemblies, and the Transitional Authority (TA) mandated to oversee the devolution process. In the following months the new government should:

- ❑ clarify the distinct and interdependent functions of county and national governments pursuant to the constitution and relevant legislation;
- ❑ encourage transparency with continuous updates on the status of the transition;
- ❑ ensure county governments adhere to constitutional requirements for diversity and representation; and
- ❑ build capacity at the county government level and ensure adequate and timely resource allocation.

As Kenya moves forward under a Jubilee government, focus will be on implementing the constitution, ensuring the smooth transition to devolved government and bringing justice to the victims of the 2007-2008 post-election violence. To ensure political stability, economic growth and mutually beneficial foreign relations, President Kenyatta's government, with the support of regional and international partners, will need to:

- ❑ cement peace and reconciliation initiatives and continue to seek justice for post-election violence victims through continued cooperation with the ICC; and
- ❑ maintain progressive relationships with regional and international partners to ensure the achievements of the Grand Coalition Government, established in 2008, are preserved and built upon, and that Kenya's ambitious socio-economic goals are achieved.

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## II. The 2013 Elections: A Tenuous Peace

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The 2013 elections were the most peaceful since reintroduction of multiparty politics in 1992.<sup>1</sup> Some presidential candidates held multiple prayer rallies, youth groups participated in widespread peace campaigns, and the media collaborated with security agencies and peace committees to resolve simmering tensions. Consistent international pressure, a robust civil society preaching non-violence and a determined citizenry intent on avoiding a repeat of 2007-2008 all promoted a peace-at-all-cost message.<sup>2</sup>

However, this all-pervasive discourse also suppressed frank discussion of critical reform issues that historically contributed to violent elections.<sup>3</sup> Politicians were ordered to refrain from discussing emotive issues of land and inequality on the campaign trail,<sup>4</sup> and the media altered its rhetoric and self-censored its coverage, for instance abstaining from broadcasting pre- and post-election demonstrations and protests.<sup>5</sup>

Even so, reports surfaced of internal displacement, voter bribery and intimidation, hate speech, and instances of people arming themselves in case violence erupted.<sup>6</sup>

### A. Security Sector: A Measured Response

Ahead of the elections, concerns were raised over police reform and, in particular, police preparedness. A few months before the polls, the newly appointed Inspector General of Police (IG), David Kimaiyo, had yet to reveal a clear plan for policing the elections and preventing violence.<sup>7</sup> The police also had repeatedly failed to prevent

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<sup>1</sup> This briefing is based upon rigorous and extensive field research, which was conducted primarily along the coastal region, in Rift Valley, central and western Kenya. In addition to conducting more than 60 interviews with a range of experts (from political scientists, to government officials, to legal experts, etc.), eleven key informants across the country formed an interactive network prior to, during, and following the elections.

<sup>2</sup> Other factors contributing to peace included initial confidence in the IEBC and confidence in the independence of the judiciary, the final arbiter of the election results. The large number of votes separating Kenyatta and Odinga, the success of CORD candidates in the senatorial and gubernatorial races and general fatigue after a long wait for final results contributed to maintaining peace. But perhaps the most visibly effective factor was the large police presence especially in hotspots like the Coast, Kisumu and Nairobi.

<sup>3</sup> See Crisis Group Africa Report N°197, *Kenya's 2013 Elections*, 17 January 2013.

<sup>4</sup> Crisis Group interview, civil society executive director, Mombasa, February 2013.

<sup>5</sup> The media did not report the violence that erupted at the Coast on the eve of the election. Likewise, violent protests in Kondele, Kisumu and Kibera (all CORD strongholds) following the Supreme Court's verdict were not covered by the media until the protests had been contained. But journalists, commentators and private individuals continuously tweeted on local events and ongoing violence. For more information on the role of social media during the elections, see "Umati: Monitoring Online Dangerous Speech", joint report by Umati, iHub and Ushahidi, February and March 2013.

<sup>6</sup> In Nakuru, Eldoret, Mombasa and Nairobi, people said that things were "calm but not peaceful". Crisis Group interviews, Kikuyu resident, long-term election observers, and human rights activist for IDPs, Nakuru, February 2013. Crisis Group interviews, human rights defender, long-term election observers, Eldoret; coordinator for humanitarian organisations, and residents from Kibera and Kawangware, Nairobi; human rights activist in Nakuru; civil society leaders, residents of Bangladesh and Likoni, Mombasa, February 2013.

<sup>7</sup> There are concerns that police reform has stagnated since Kimaiyo was sworn in on 24 December 2012. See Crisis Group Report, *Kenya's 2013 Elections*, op. cit.; "Police Reform in Kenya: 'A Drop in the Ocean'", Amnesty International, 30 January 2013.

the escalation of conflict in the Tana River District, prompting doubts about its capacity to prevent violence in the March elections.<sup>8</sup>

Nonetheless, when the time came, police conduct was greatly improved<sup>9</sup> compared to the experience of 2007-2008. Although police were not especially visible in the weeks leading up to the elections, they moved into high gear following the eruption of violence in Kwale, Kilifi and Mombasa on the evening of 3 March. 400 additional officers were immediately deployed, and security was further reinforced in other hotspots.<sup>10</sup>

The strong presence of security forces reasserted the state's authority; ethnic militia groups claiming to protect "their" communities maintained a low profile.<sup>11</sup> The widespread ban on demonstrations and public gatherings also contributed to overall peace.<sup>12</sup> However, there were incidents of excessive use of force and live ammunition without special dispensation.<sup>13</sup>

### B. IEBC Preparedness and Credibility

In the lead-up to the elections, IEBC Chairman Ahmed Issack Hassan repeatedly announced the commission's preparedness, which included a simulation of the entire election exercise in each county that sought to address any lingering weaknesses in the system.<sup>14</sup> The chairman, in a rejoinder to Odinga's petition, declared that "in

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<sup>8</sup> "Tana River residents accuse police of laxity", *The Standard*, 11 January 2013.

<sup>9</sup> There were multiple reports that security personnel conducted their duties in a disciplined manner. Crisis Group telephone interviews, human rights defender in Nakuru, humanitarian aid regional coordinators for Mombasa, and human rights coordinator for northern Rift Valley, March 2013. In Kibera it was reported on 9 and 30 March that officers from the General Security Unit (GSU) were responsive to community leaders' recommendations in dealing with riotous youth, leading to a measured security response. Crisis Group interviews, Kibera residents, March, April 2013.

<sup>10</sup> "400 extra officers flown to Mombasa after terror raid", *Daily Nation*, 5 March 2013. In addition to officers from the National Police Service, Provincial Administration Police, prison wardens, Kenya Wildlife Service, General Service Unit (GSU), and in some cases Kenya Defence Forces (KDF) helped secure the elections. KDF were reportedly seen patrolling in certain parts of the country. Crisis Group telephone interviews, political scientist, Naivasha; resident, Kilifi; community security chair, Mombasa; March 2013.

<sup>11</sup> "The Kenya election and the militarization of 'peace'", *The East African*, 9 March 2013. According to press reports, Kimaiyo had mobilised 99,900 officers. "IEBC, poll ready for Monday polls", *The Standard*, 28 February 2012.

<sup>12</sup> David Kimaiyo issued a ban on political meetings and warned against planned demonstrations, which he described as a threat to peace on 5 March, and ordered it again after petitions were filed on 16 March. "Kimaiyo bans political rallies, prayer gatherings", *The Standard*, 6 March 2013; "Police ban demos ahead of court's ruling", *Daily Nation*, 29 March 2013.

<sup>13</sup> The police used live ammunition several times during banned demonstrations (after the Supreme Court ruling) in informal settlements in Kisumu and Nairobi. "Police defend use of live bullets in riots", *Daily Nation*, 1 April 2013. There were six confirmed deaths due to police shootings (two in Kisumu, one in Mathare, and three in Dandora). In Kawangware, CORD supporters looted and burned Kikuyu shops, and fires spread to nearby homes. In Kisumu, 24 people were treated for injuries, including a number of gunshot wounds. Crisis Group telephone interview, residents, regional director for humanitarian organisation, Kisumu, March 2013. The Independent Policing Oversight Authority (IPOA) is conducting an investigation into the shootings in Kisumu to establish whether or not the use of lethal force was necessary. "Probe launched into killing of two rioters", *Daily Nation*, 2 April 2012.

<sup>14</sup> "Voting simulation now set for February 24", press statement, IEBC, 15 February 2013. "EAC-COMESA-IGAD Election Observer Missions' leaders meet IEBC officials", press statement, East Africa Community, 27 February 2013.

the Commission's 18 month existence it had completed activities that required a five year election cycle", such as recruiting and training electoral staff, acquiring and testing sophisticated technology, registering over 14 million voters and delimiting boundaries.<sup>15</sup>

Yet, there were irrefutable shortfalls in the system, including insufficient voter education, which led to an unprecedentedly large number of rejected votes.<sup>16</sup> The inadequate training of IEBC officials<sup>17</sup> and the lack of cellular network coverage at some polling stations are also believed to have led to breakdowns in the electronic vote transmission (EVT) of results, which challenged the credibility of the provisional results. These early results were to be electronically transmitted from polling stations to the national and county tallying centres to allow easy comparison with final declarations, but the EVT system rapidly deteriorated.<sup>18</sup> The commission was forced to revert back to the manual tallying system that many believe "failed" in 2007.<sup>19</sup> This heightened anxieties significantly, especially over the intent to rig the elections and the impartiality of IEBC officials. There were instances of electoral irregularities involving IEBC staff;<sup>20</sup> other reported electoral malpractices included missing names from the register, as well as voter bribery and intimidation.<sup>21</sup>

These irregularities notwithstanding, international observers – from the African Union, East African Community, European Union and Carter Center, among others – immediately released a joint statement to commend the initial phase of the elec-

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<sup>15</sup> "Response to the Petition by the First and Second Respondent", The Supreme Court of Kenya, 21 March 2013.

<sup>16</sup> The official number of rejected votes after manual tallying was 108,975. "Summary of presidential results declared on 09/03/2013", IEBC official results, 9 March 2013; "Monitors blame inadequate education for rejected votes", *Business Daily*, 6 March 2013.

<sup>17</sup> Crisis Group interview, information technology (IT) expert and local Safina (a registered political party) aspirant, 13 March 2013. Local IEBC officers lacked sufficient training. "Poll officials ill-trained to use devices", *Business Daily*, 7 March 2013.

<sup>18</sup> At around 8.30 pm on election day, around 13,000 polling stations (out of 33,400) had submitted results when the IEBC's servers shutdown. Crisis Group telephone interview, election monitors, Migori, Kilifi, 4 March 2013.

<sup>19</sup> "IEBC now turns to manual vote tallying after glitch", *Business Daily Africa*, 6 March 2013; "Kenyans to wait longer for presidential poll results", *Africa Review*, 6 March 2013. EVT was to provide a check on the vote tabulation. EVT results were always to be validated using the manual system, the legal requirement for verification. A seven-day window to relay results was to allow time for the manual verification of electronically transmitted results. "In order to promote transparency and public participation in elections, the IEBC will provide giant screens at the constituency and county tallying centres for the public to follow the inflow of results for various elective positions". "Voting simulation now set for February 24", *op. cit.*

<sup>20</sup> A polling clerk in Kitui Central constituency was arrested for issuing excess ballot papers to a voter. "Kitui polling clerk in court over election misconduct", *The Star*, 6 March 2013. It remains unclear whether he has been charged. There were similar issues in Kitutu Chache where voters complained of being issued ballot papers not stamped by the IEBC. In Migori, Crisis Group spoke to a voter who claimed a clerk took each of her ballots, opened them and looked at the result before putting them in the ballot box. She feared reporting the matter to authorities. There have been additional reports that some presiding officers prevented certain political party agents from being present during tallying. Crisis Group observation in Migori, 4 March 2013.

<sup>21</sup> Missing names were reported in Embakasi West, Embakasi North, Mandera North, Nambale, Kinangop and Likoni. Multiple, conflicting registers were reported to be in use throughout the country. "Petition Number 4 by Africog – Consolidated by the Supreme Court", Africa Centre for Open Governance, no date.

tion process as transparent and credible, despite initial delays.<sup>22</sup> On 6 March, the European Union Election Observation Mission (EU EOM) said the “integrity of the vote [had been] protected”.<sup>23</sup>

### C. *The Supreme Court – Petitions and Ruling*

Odinga and the Africa Centre for Open Governance (AfriCOG) filed petitions challenging Kenyatta and Ruto’s victory.<sup>24</sup> They requested the Supreme Court to call for a “fresh election”, citing evidence that the polls were neither credible nor free and fair.<sup>25</sup> Jubilee Coalition supporters filed a third petition seeking a re-computation of presidential percentages without rejected votes.<sup>26</sup>

On 30 March, the Supreme Court dismissed Odinga and AfriCOG’s petition, and unanimously ruled the elections were held in compliance with the law and that Kenyatta and Ruto were “validly elected”.<sup>27</sup> The court ruled that the evidence they presented was insufficient to nullify the election results.<sup>28</sup> Despite Odinga’s acceptance of

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<sup>22</sup> The Commonwealth, Common Market for Eastern and Southern Africa, Intergovernmental Authority on Development, International Conference on the Great Lakes Region and Electoral Institute for Sustainable Democracy were also co-contributors. See “Post-election joint statement of observer mission”, Relief International, 5 March 2013.

<sup>23</sup> “Kenyans demonstrate strong commitment to democratic elections”, EU EOM Kenya, Preliminary Statement, 6 March 2013. “The Carter Center finds Kenya election results reflect will of voters”, press release, The Carter Center, 4 April 2013. It is also important to note that the IEBC has not released the total number of votes cast for the five elected posts other than the president (governor, senator, National Assembly member, county assembly member, and women’s county representative.

<sup>24</sup> AfriCOG is a civil society organisation with a mandate to highlight the structural causes of corruption, strengthen the relationship between government and civil society, and restore trust in public institutions. “2009-2013 Strategic Plan”, Africa Centre for Open Governance. Odinga and AfriCOG filed separate petitions on 16 March. Due to time constraints, the Supreme Court consolidated these in a pre-trial meeting on 25 March.

<sup>25</sup> Their evidence revealed discrepancies between presidential vote tallies written on Forms 34 at the constituency level and those later reported by the IEBC at the national tallying polling centre at Bomas, Nairobi. “This is why Africog went to court”, *The Standard*, 30 March 2013. Form 34 represents the aggregate vote tally of each of the 33,400 polling stations. In response to these discrepancies, the Supreme Court ordered a recount of votes in 22 of 291 constituencies and found five to have discrepancies. The court also ordered scrutiny of all the 33,400 Forms 34. The respondents, IEBC Chairman Ahmed Issack Hassan, Kenyatta and Ruto, reassured the court the IEBC had conducted the election transparently and the difference of more than 830,000 votes was “wholly significant” in demonstrating the will of the people.

<sup>26</sup> The Supreme Court held that “the spoiled ballot paper will not find its way into a ballot box – and so, it does not count as a vote”. Supreme Court Judgement, Petition No. 3 of 2013, para. 275, p. 100.

<sup>27</sup> The six-judge bench comprised Chief Justice Dr Willy Mutunga, and Justices Njoki Ndung’u, Smokin Wanjala, Jackton Ojwang, Philip Tunoi and Mohamed Ibrahim. The respondents argued discrepancies were simply a matter of “clerical error” and not evidence of “mischief”. “Kenyans await Supreme Court ruling”, *The Standard*, 30 March 2013.

<sup>28</sup> The court was asked to rule on whether rejected votes should be incorporated in the final calculation of votes cast. Voters could have “spoiled” votes by either wrongly marking the ballot, writing their names on it, or placing it in the wrong ballot box. Following IEBC Chairman Ahmed Issack’s press conference at 8.30pm on 5 March, CORD and Jubilee disagreed on whether the rejected votes should be incorporated into the total percentages. The amount of rejected votes according to the manual tallying decreased substantially from the numbers initially announced during electronic transmission. The IEBC blamed it on a “system bug”, which multiplied the numbers by eight. The Supreme Court ruled that the rejected votes should not be included in the final vote tally of each candidate. Crisis Group interview, IT expert and local Safina (a registered political party) aspirant, Nairobi, March 2013.

the decision and commitment to peace, CORD supporters rioted in Nyanza and Nairobi.<sup>29</sup> Kenyatta's supporters applauded the court's cohesion and independence, while others claim it illustrated the court's overriding concern to maintain the status quo.<sup>30</sup>

Since the decision, 130 additional petitions have been filed by aspirants running for the five other elected positions. The majority of them are challenging the IEBC results due to what they claim were "massive irregularities".<sup>31</sup>

### III. Jubilee Victory and Implications for the ICC

Until the IEBC's announcement on 9 March, most people anticipated a presidential run-off.<sup>32</sup> But, as the votes streamed in, Kenyatta took a clear lead; eventually, more than 830,000 votes separated him from Odinga. With 6,173,433 votes (50.07 per cent), Kenyatta secured his first round victory by approximately 8,400 votes, a very close margin given the number of discrepancies or "human errors" in the voting and tallying process.<sup>33</sup>

Jubilee successfully appealed to voters through a carefully crafted, strategically well-executed and well-funded campaign, aided by the British public relations firm BTP Advisers.<sup>34</sup> For some, the Jubilee victory was inevitable due to what political scientist Mutahi Ngunyi termed the "tyranny of numbers".<sup>35</sup> He predicted the coalition could potentially obtain 6.2 million votes based on support from the Gikuyu, Embu and Meru communities (often known as "GEMA")<sup>36</sup> as well as the Kalenjin

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<sup>29</sup> Crisis Group telephone interview, regional director for humanitarian organisation, Kisumu, March 2013. Odinga's speech accepting the Supreme Court verdict expressed his commitment to the constitution, but also conveyed his disappointment. He said that, "Kenya lost their right to know what indeed happened". "Speech following Supreme Court verdict", Office of the Prime Minister, 30 March 2013. For more information about the ICC cases, see Crisis Group Africa Briefing N°84, *Kenya: Impact of the ICC Proceedings*, 9 January 2012; Report, *Kenya's 2013 Elections*, op. cit.

<sup>30</sup> According to a Kenyan political analyst, having at least one dissenting opinion would have been more indicative of an independent judiciary. Kenyan Television Network, political analyst, 30 March 2013; Crisis Group interview, Kenyan political scientist, Nairobi, April 2013.

<sup>31</sup> "Losers file 130 election cases challenging IEBC results", *Daily Nation*, 11 April 2013.

<sup>32</sup> Under the 2010 constitution a presidential candidate can only win in the first round if he or she a) secured more than 50 per cent plus one of the total votes and b) received more than 25 per cent of the votes in at least 24 counties. Previously Mwai Kibaki was the only president to ever receive more than 50 per cent of the vote (in 2002), making many believe a run-off was highly likely. On 22 February, the Ipsos Synovate poll reported Kenyatta and Ruto had 44.8 per cent support, while Odinga and Kalonzo had 44.4 per cent. "Uhuru now leads Raila", *The Star*, 23 February 2013. Both Kenyatta and Odinga obtained more than 25 per cent of the votes cast in more than half the counties.

<sup>33</sup> CORD's petition lists numerous discrepancies, including the inaccurate transfer and inflating of votes from Form 34 to Form 36 (which aggregates data from the polling stations into constituency-level data); inflating the votes for Kenyatta in the final tally; and reducing Odinga votes (the petition notes in 38 constituencies). In addition, the petition challenges IEBC's explanation for the failure of the electronic system, and the existence of multiple registers with variant numbers. See "Petitioner's Supporting Affidavit", The Supreme Court of Kenya, 16 April 2013, at <http://bit.ly/12arUdh>.

<sup>34</sup> Crisis Group interviews, political analysts, Nairobi, March 2013.

<sup>35</sup> His predictions were based on the fact that Kenyans have historically voted along tribal lines. Not a Kenyatta supporter, Ngunyi nevertheless calculated that the number of votes Kenyatta and Ruto could potentially garner would give them a first round win (based on the IEBC registration numbers).

<sup>36</sup> Gikuyu, Embu, and Meru Association (GEMA) was created in 1971 to advance the social and political needs of these communities.

community, against CORD's 2.74 million votes based on Luo and Kamba support.<sup>37</sup> The calculation did not include Luhya and Kisii votes but even with these additional numbers, Odinga would not have reached 6 million, the half-way mark.

#### A. *A Tale of Two Campaigns*

CORD's campaign seemed disaster-prone from the start. Odinga had to contend with his increasingly fractious Orange Democratic Movement (ODM) party, within the CORD coalition, including numerous defections. While all major political parties held disorderly nomination processes,<sup>38</sup> Odinga's initial demand for an exclusive "six-piece" party-line vote for ODM,<sup>39</sup> and his clear manipulation (including promoting his siblings) angered CORD members and supporters alike.<sup>40</sup> ODM primaries suffered from multiple instances of rigging and vote tampering and, according to a party official in Kisumu, the whole process undermined the party's campaign and tainted Odinga and the party.<sup>41</sup>

By contrast, Kenyatta's The National Alliance (TNA) and Ruto's United Republican Party (URP) managed their campaigns with relative transparency and with strong joint leadership. Both were able to distance themselves from local disputes, with the exception of Nairobi county, where Kenyatta stepped in to unify warring factions of his TNA aspirants.

#### B. *ICC: Jubilee's Secret Weapon?*

Much to the dismay of the international observers – but not to the surprise of many Kenyans – Kenyatta and Ruto used nationalist rhetoric grounded in the perception that the ICC discriminates against Africa and unfairly targeted the Kalenjin and Kikuyu communities.<sup>42</sup> The ICC cases provided a convincing narrative that forged soli-

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<sup>37</sup> Ngunyi predicted Jubilee had secured a win as of 18 December because of the coalition's success in mobilising and registering voters. Mutahi Ngunyi, "Kenya 2013 general election: 7 point minimum scenarios", YouTube, 4 February 2013. A first round win was not expected because pre-election polls suggested a close race between Kenyatta and Odinga. See footnote 32 for a thorough account of pre-election polls. Although the election results confirmed Ngunyi's assertion, it is important to note that his prediction failed to incorporate the effect of incumbency on elections in 1992, 1997 and 2007. "Investigating Ngunyi's tyranny of numbers", *The Star*, 26 February 2013. As of December 2012, Tom Wolf, from Ipsos Synovate, contended that 22 per cent of voters were still undecided. Crisis Group interview, Nairobi, January 2013.

<sup>38</sup> The nominations, organised by the parties and coalitions and *not* the IEBC, were marred by late arrival of materials, insufficient ballot papers, and even missing ballot boxes.

<sup>39</sup> A voter would choose candidates for all six positions from the same party. "Voters reject six-piece option in defiance of Raila", *Daily Nation*, 10 March 2013.

<sup>40</sup> Crisis Group interviews, residents, ODM party official, Kisumu, February 2013. Odinga and his party advocates attempted to secure a gubernatorial nomination for his sister Ruth Odinga in Kisumu county and a senate nomination for his brother Oburu Odinga in Siaya county. This resulted in violent protests, which led both individuals to withdraw. Reports of rigging in other areas of Nyanza also resulted in protests. For example, homes were razed in Homa Bay, and riot police were forced to intervene in Migori. Crisis Group interview, ODM party official, Kisumu, February 2013.

<sup>41</sup> Crisis Group interviews, ODM party official, former ODM aspirant, residents, Kisumu; ODM party aspirant, residents, Nairobi; political aspirants, residents, Mombasa, February 2013. Recently elected leaders in former Nyanza Province, including the Siaya county governor and local parliamentarians, commented that voter apathy gave their opponents an advantage. "Nyanza leaders blame voters for Raila's election loss and trouble", *Daily Nation*, 25 March 2013.

<sup>42</sup> A week before the elections, a human rights defender in Eldoret commented that if Jubilee wins, "they will owe it to the ICC". Crisis Group interview, human rights defender, Eldoret, 26 February



darity between hitherto antagonistic communities. GEMA and Kalenjin communities recognised that the alliance between Kenyatta and Ruto was necessary to ensure a win, and they sympathised with the plight of their “heroes” facing trial at the ICC.<sup>43</sup> Kenyatta stated that a vote for him was a no-confidence vote for the ICC.<sup>44</sup>

Odinga’s broad national appeal may have suffered from his close relationship with the West, which enhanced the perception that he was responsible for the ICC prosecutions.<sup>45</sup> Furthermore, conspiracy theories abound that Western governments had a strategic plan to have the ICC detain Kenyatta and Ruto, paving the way for Odinga to win the elections.<sup>46</sup>

### C. *The Future of the ICC Cases*

Kenyatta is the first president elected while facing trial at The Hague, and the second sitting head of state to face ICC charges. Unlike Sudan’s president, Omar al-Bashir, however, he has been cooperative so far. His trial is currently scheduled to start on 9 July 2013.<sup>47</sup> But on 11 March, the ICC dropped its case against Francis Muthaura, the former public service head, who was jointly charged with Kenyatta as an indirect co-perpetrator of the 2007-2008 post-election violence.<sup>48</sup>

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2013. For more information on the ICC cases in Kenya, see Gabrielle Lynch and Miša Zgonec-Rozej, “The ICC Intervention in Kenya”, Chatham House, February 2013; Crisis Group Briefing, *Kenya: Impact of the ICC Proceedings*, op. cit.

<sup>43</sup> Crisis Group interviews, Kikuyu elder, human rights activist, Nakuru; political aspirant, human rights defender, religious elder, Eldoret, February 2013. In Eldoret, an individual speaking of Ruto commented, “despite what happened, we [the Kalenjin] cannot let our son go to The Hague”. In Nakuru, a Kikuyu elder said, “Kenyatta is a local hero .... He protected his people last time [2007-2008]”. See Crisis Group Briefing, *Kenya: Impact of the ICC Proceedings*, op. cit.

<sup>44</sup> Kenyatta commented, “we are not guilty of the ICC charges. What I seek is an elective position and not an appointive one. If Kenyans vote for me that is a show of their confidence in my ability and I will clear my name and run the country”. First Presidential Debate, aired on NTV, 9 February 2013.

<sup>45</sup> “Public opinion in Kenya: Politics and Justice”, *The Economist*, 10 October 2012.

<sup>46</sup> “Arrest, detain Kenyatta and Ruto to pave way for Raila presidency! – British government”, Hard Talk Kenya, 9 March 2012. Concerning “leaked” documents detailing plans to bar Kenyatta from contesting the presidency, see “They aren’t genuine, UK says of documents”, *The Standard*, 10 March 2012.

<sup>47</sup> On 7 March, the ICC judges granted requests of the defence teams for both Kenyatta and Muthaura to postpone the start of the trial. “Muthaura and Kenyatta case: The trial opening is postponed to 9 July 2013”, ICC-CPI-20130307-PR878, 7 March 2013. In his 9 March victory speech, Kenyatta stated, “to the nations of the world I give you my assurances that I and my team understand that Kenya is part of the community of nations and while as leaders we are, first and foremost, servants of the Kenyan people, we recognise and accept our international obligations and we will continue to co-operate with all nations and international institutions – in line with those obligations. However we also expect that the international community will respect our sovereignty and the democratic will of the people of Kenya”. “Victory speech by President-Elect of the Republic of Kenya Uhuru Kenyatta”, *The Standard*, 9 March 2013.

<sup>48</sup> This is the first case that ICC prosecutors have dropped since the court was created in 2002. “ICC prosecutors drop case against Kenyan politician Francis Muthaura”, *The Guardian*, 11 March 2013. “Bensouda under fire for dropping Muthaura”, *The Star*, 25 March 2013. See Crisis Group Briefing, *Kenya: Impact of the ICC Proceedings*, op. cit.; Crisis Group Report, *Kenya’s 2013 Elections*, op. cit.; “The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta”, ICC-01/-09-02/11 (online). They were accused of orchestrating deadly violence against opposition supporters, and charged with five counts of crimes against humanity, including murder, rape, deportation and persecution.

The joint charges were initially confirmed in January 2012 based in part on the testimony of “witness four”. In early 2013, the prosecution disclosed that it would not call the witness at trial because he had recanted his testimony.<sup>49</sup> On 18 March, Kenyatta’s lawyers argued that without the witness’s testimony the case is compromised and should be reconsidered by the pre-trial chamber.<sup>50</sup> ICC prosecutor Fatou Bensouda has insisted that the dismissal of Muthaura’s case will have no bearing on Kenyatta’s.<sup>51</sup>

Many witnesses who were expected to testify against Kenyatta and Ruto have either died or are not willing to testify.<sup>52</sup> Nevertheless, the ICC prosecutor has affirmed she has enough evidence to move forward to trial.<sup>53</sup>

Both Kenyatta and Ruto have consistently pledged to cooperate with the ICC. But with its past challenges to the court’s jurisdiction in addition to Kenya’s inadequate and underfunded witness protection program, serious concerns have been raised over the government’s commitment to see the process through. Most recently, Kenya’s permanent representative to the UN presented a brief to the Security Council calling for “the immediate termination of the case at The Hague”.<sup>54</sup> Ruto and the attorney general quickly criticised the move as not reflecting government policy, though the government has yet to formally withdraw the brief.<sup>55</sup>

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<sup>49</sup> The witness stated he lied about being present at meetings where the two accused had allegedly agreed on a common plan to commit crimes. “Tough battle shapes up at ICC over Witness 4”, *Daily Nation*, 10 February 2013.

<sup>50</sup> Special Hearing of the ICC, 18 March 2013. “Kenya: Uhuru Kenyatta challenges ICC case”, BBC, 18 March 2013.

<sup>51</sup> “ICC ‘will not drop charges’ against Uhuru: Bensouda”, *Daily Nation*, 21 March 2013. Bensouda was recently allowed to amend charges facing Kenyatta. Pre-trial judge Ekaterina Trendafilova said that allegations concerning the use of weapons in Naivasha were initially dismissed due to a lack of evidence. However, the prosecution was able to present enough evidence in mid-March for these allegations to be re-inserted. Felix Olick, “ICC judges allow prosecutor to amend Uhuru charges”, *The Standard*, 22 March 2013.

<sup>52</sup> “Claims of witnesses in Kenya ICC trial ‘disappearing’”, BBC, 8 February 2013. Since the confirmation of charges against Muthaura and Kenyatta, a total of seven witnesses have been dropped. For more information about the ICC witness protection, see Crisis Group Briefing, *Kenya: Impact of the ICC Proceedings*, op. cit.; “Three more ICC witnesses refuse to testify against Uhuru”, *The Standard*, 5 April 2013; “Ruto ICC witness withdraws evidence”, *The Star*, 19 March 2013. “Bensouda: someone keen to out ICC Kenya witnesses”, *Daily Nation*, 8 February 2013. There have been reports of men, who allegedly took part in organising violence in Naivasha and Nakuru in 2007-2008, disappearing. While it is difficult to verify such claims, Bensouda is nonetheless alarmed by “attempts to interfere with the witnesses”. She also commented that the Kenya case was turning out to be one of the most challenging in the ICC’s history, due in large part to the lack of government cooperation and witness intimidation. See “Statement by ICC Prosecutor on the notice to withdraw charges against Mr. Muthaura”, press statement, International Criminal Court, 11 March 2013. “Bensouda: someone keen to out ICC Kenya witnesses”, *Daily Nation*, 8 February 2013.

<sup>53</sup> “Case of the Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta – ICC-01/09-02/11”, Status Conference, 18 March 2013, <http://bit.ly/1otY4fR>.

<sup>54</sup> See “Brief on the situation in Kenya and the International Criminal Court”, Permanent Mission of the Republic of Kenya to the United Nations, No. 167/13, 3 May 2013.

<sup>55</sup> “Ruto denies bid to halt ICC trial”, *Sunday Nation*, 9 May 2013; and “Attorney general disowns attempt to drop Kenyatta trial”, Agence France-Presse, 11 May 2013. The attorney general stated: “The official position of the Kenyan government is that it has cooperated fully with the ICC and intends to continue cooperating within the framework of the Rome Statute and international law”. Kenyatta has not issued any public statement about the UN brief, but he recently confirmed Kenya’s responsibilities to meet its international obligation under the Rome Statute and his own commitment to clear his name before the court. “Kenyatta denies ICC crimes against humanity charges”, BBC, 13 May 2013.

A key concern is whether Kenyatta and Ruto will be able to govern effectively while attending trial at The Hague.<sup>56</sup> If they do cooperate, it may entail spending much time at the ICC and being unable to carry out many of their responsibilities as president and deputy president. They may have a strong cabinet,<sup>57</sup> able to carry out most of their mandate independently, but with a larger parliament and untested county governance structures, the country will need present and active leadership from both. Furthermore, Kenyatta and Ruto have reduced the number of ministries, implying greater executive supervision for the implementation of reforms.<sup>58</sup>

#### D. Foreign Relations

Western governments had, and continue to have, a difficult task in balancing their policy of “essential contact” only, when dealing with individuals facing trial at the ICC, with managing their bilateral interests in Kenya. Their dilemma unwittingly reinforced anti-Western rhetoric that advanced Jubilee’s campaign.<sup>59</sup> Moreover, civil society organisations receiving Western funding and which assisted the ICC’s collection of evidence have been intimidated and verbally attacked.<sup>60</sup>

As long as Kenyatta and Ruto are seen to cooperate fully with the ICC, Kenyan foreign affairs are likely to proceed unaffected;<sup>61</sup> however, were they to stop, the ICC would be forced to submit arrest warrants requiring many Western countries and international organisations to limit their engagement with Kenya.<sup>62</sup> The current move by Kenya’s UN delegation to terminate the cases will likely strain international

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<sup>56</sup> See Crisis Group Report, *Kenya’s 2013 Elections*, op. cit. In the nation’s first-ever presidential debate on 11 February, Kenyatta asserted that if elected he would “discharge [his] duties while still proceeding to clear [his] name”. Raila Odinga bitingly responded, “I know it’s going to cause serious challenges to run the government by Skype from The Hague”.

<sup>57</sup> Kenyatta and Ruto have nominated sixteen cabinet secretaries, out of a proposed eighteen, who will be vetted by a parliamentary committee. “Politics, intrigues in cabinet vetting”, *The Standard*, 28 April 2013.

<sup>58</sup> The number of ministries has decreased from 44 to eighteen; four less than the constitutional maximum of 22.

<sup>59</sup> See “The Big Story: Kenya rebukes US, EU countries over poll comments”, *The Star*, 11 February 2013; “Ongeri criticises EU diplomats over sanction talks”, *Daily Nation*, 11 February 2013. Former U.S. Assistant Secretary of State for African Affairs Johnnie Carson stated that Kenyans’ choice of leader would “have consequences” and that Kenya is the most important partner in East Africa. The U.S. is unlikely to alienate it considering its strategic position in the region regarding Somalia and South Sudan. “President Obama’s message to the people of Kenya”, video message, 5 February 2013.

<sup>60</sup> Individuals affiliated with the Kenya Human Rights Commission (KHRC), AfriCOG, Open Society Institute (OSI) and the International Commission of Jurists (ICJ) have been the targets of a smear campaign that has labelled them as part of Kenya’s “evil society”. Crisis Group email correspondence, Nairobi, March-April 2013; “Kenya: Wither civil society”, *The Standard*, 6 April 2013; “Foreign interests funding civil society to compromise Kenya’s sovereignty”, *Daily Nation*, 18 March 2013; “34 lobby groups to Kenya: Stop intimidation”, *Africa Review*, 3 April 2013. Also, reportedly a new law will be submitted to parliament as soon as the new Jubilee administration forms its cabinet that will order NGOs to re-register. “8500 NGOs to register a new under new law”, *Daily Nation*, 2 April 2013.

<sup>61</sup> For example, Kenyatta attended the London Somali conference.

<sup>62</sup> “If Uhuru Kenyatta or William Ruto is Elected President and Deputy President: Implications of a Kenyatta/Ruto Presidency in Kenya”, Joint Report by the Kenyan Section of the International Commission of Jurists (ICJ Kenya), Katiba Institute, the Kenya Human Rights Commission (KHRC) and Africa Centre for Open Governance, February 2013.

relations further.<sup>63</sup> Yet, regional (political and economic) relationships remain strong.<sup>64</sup> Kenyatta and Ruto are also likely to follow Kibaki's "look east" policy, pursuing non-Western sources of foreign direct investment and development assistance.<sup>65</sup>

#### IV. National and County Governance

Kenya faces numerous challenges in coordinating roles between the new Senate, National Assembly, and county assemblies. The Senate's main responsibility is to represent and protect the interests of the counties – especially to oversee and determine the allocation of national revenue to the county governments.<sup>66</sup> However, its role was watered down by changes to its proposed constitutional powers in informal pre-referendum discussions in 2010. This leaves most legislative responsibility with the National Assembly.<sup>67</sup>

With a strong majority in the National Assembly, the Jubilee government can implement its manifesto for political, social and economic reform. First on the agenda was appointing a new cabinet. Although traditionally a reserve of the president, confirmation by a parliamentary vetting committee is now required. With the exception of two career politicians, ex-Kibaki ministers, Charity Ngilu and Najib Balala, the other fourteen nominees have professional backgrounds, possibly ushering in a new era of technocratic government.<sup>68</sup> Jubilee's majority in the parliamentary vetting committee should ensure the quick approval of the nominees.

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<sup>63</sup> The precise request in the Brief to the Security Council (see footnote 54) is ambiguous as to the action sought by the Council, which has no clear authority itself to give effect to the demand that "what this delegation [Kenyan Permanent Mission] is asking for is not deferral. What this delegation is asking for is for the immediate termination of the case at the Hague without much further ado".

<sup>64</sup> "Museveni salutes Kenyans for 'rejecting ICC'", *The Standard*, 9 April 2013. For the full speech, see "Museveni's speech at Uhuru's inauguration", *New Vision*, 10 April 2013.

<sup>65</sup> China has remained silent on the issue of the ICC in the lead-up to the elections and was one of the few countries to directly congratulate Kenyatta and Ruto prior to the Supreme Court decision. "Peaceful polls soften positions, but ICC still lurks over Kenya", *Daily Nation*, 6 April 2013. The UK moved quickly to reestablish its ties with Kenya by being the first country to invite Kenyatta for an official meeting. "President to meet British PM today", *Daily Nation*, 7 May 2013.

<sup>66</sup> The Senate consists of 47 elected members, sixteen nominated women, two nominated youth (one male, one female), and two nominated representatives of persons with disabilities (one male and one female). The Senate elected Ekwe Ethuro, a supporter of the Jubilee Coalition and a former parliamentarian for Turkana Central, as the house speaker. The Senate also has powers to consider and approve county-related bills and to vote on the impeachment of the president.

<sup>67</sup> Isaac Ongiri, "Power struggles between MPs and Senators likely to take centre stage", *Daily Nation*, 10 December 2012. The National Assembly consists of 290 elected members, one for each of the nation's constituencies, 47 elected women representatives from each county, and twelve nominees who are supposed to represent special interests in proportion to their party numbers in parliament. The assembly elected Justin Muturi, a Jubilee supporter and former parliamentarian for Siakago, as the speaker. The assembly allocates funds for the national government and other state bodies, it exercises oversight over national revenue and its expenditure, has powers to impeach the president, and can approve declarations of war and states of emergency.

<sup>68</sup> The inclusion of the former ministers was surprising given indications by Kenyatta that there would be no politicians in the new team. "Kenyatta, Ruto to form a politicians-free cabinet", *Citizen News*, 25 April 2013. Many health-care providers protested that James Macharia, a career banker with no medical experience, was nominated to head the health ministry. "Why doctors got it wrong on choice of Health Secretary", *Business Daily*, 28 April 2013. Some MPs, particularly Masai, have also complained their communities were not represented, and special interest groups have ap-

The next challenge will be establishing a working relationship between the national and new county governments. Devolution of power and resources to local representatives, including governors, senators and county assembly members promises a significant shift in the political landscape. Their roles and mandates will need to be clearly defined and communicated to ensure effective decentralisation of power in line with the spirit and letter of the 2010 constitution.

#### A. *An Uneasy Partnership: The Politics of Transition*

Efforts at independence to devolve power were gradually reversed by Mzee Jomo Kenyatta (Uhuru's father).<sup>69</sup> Over the following decades, authority was further centralised, leaving certain regions economically and politically marginalised.<sup>70</sup> Many perceive devolution (in its different shapes) to be a "magic bullet" that will allow the country to correct historical patterns of neglect, and redress regional marginalisation and inequitable development.<sup>71</sup>

However, Mwai Kibaki's government (2002-2013) was reluctant to cede control, to the extent that the president created the county commissioner position without consultation with the prime minister. This creates a parallel authority to governors and county assemblies that is directly accountable to the executive.<sup>72</sup>

The Jubilee government has not addressed this dual authority.<sup>73</sup> But tensions between national and county governments are emerging: newly elected Governors Wycliffe Oparanya (ODM) and Okoth Obado (United Democratic Forum, UDF) argued that the constitution endorsed a clear separation of powers, with the counties as "independent units", and that central government has no mandate to interfere

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plauded the inclusion of competent women nominees but decried the lack of minorities or people with disabilities.

<sup>69</sup> David Anderson, "Yours in struggle from majimbo'. Nationalism and the party politics of decolonization in Kenya, 1955-64", *Journal of Contemporary History*, vol. 40, no. 3 (2005), pp. 547-564.

<sup>70</sup> Daniel Branch and Nic Cheeseman, "The politics of control in Kenya: Understanding the bureaucratic-executive state, 1952-1978", *Review of African Political Economy*, vol. 33, no. 107 (2006), pp. 11-31.

<sup>71</sup> For additional information on Kenya's devolution process, see "Devolution without disruption: Pathways to a successful new Kenya", World Bank, November 2012.

<sup>72</sup> Crisis Group interview, human rights lawyer, Nairobi, March 2013. Vague wording in the constitution has led to much debate around the future of the provincial administration, which was to be "restructured" by 2015 in accordance with devolution. Many argued that this meant it would be scrapped altogether or phased out within five years, while others have suggested that local levels of provincial administration would be folded into county governance structures. Kibaki created county commissioners in May 2012 to be part of the provincial administration, independent of the county government. "President names 47 County bosses", *Daily Nation*, 11 May 2012. The High Court determined the appointment of county commissioners was unconstitutional in late June 2012, yet parliament later approved it with the National Government Co-Ordination Act. "Court nullifies Kibaki's list of County bosses", *Daily Nation*, 29 June 2012.

<sup>73</sup> National government administration officers will now include county commissioners (as opposed to provincial commissioners), deputy county commissioners (instead of district commissioners), assistant county commissioners (formerly known as district officers), chiefs, and assistant chiefs. Like the provincial administration, county commissioners are important to the national government, as they act as an extension of government on the ground. They were historically used as an instrument of coercive control, restricting local political activity. Odinga said that "a situation is developing, one that we saw coming, where some forces in government want to have county commissioners and other members of the provincial administration act as the legitimate authorities in the counties". "Raila: State officials out to kill devolution", *The Standard*, 4 April 2013.

with or control the county governments.<sup>74</sup> Furthermore, Governor Alfred Mutua (Wiper Democratic Movement, WDM) complained that the treasury was frustrating the disbursement of funds to the counties.<sup>75</sup>

The Transitional Authority (TA)<sup>76</sup> has faced numerous logistical problems since the March elections, including the initial dispersal of county funds,<sup>77</sup> as well as the designation of governors' offices, official residences,<sup>78</sup> and demands for costly perks.<sup>79</sup> The devolved system is likely to place an even greater strain on the country's fiscal deficit, especially as revenue collection is not expected to fully cover expenditures in the first few years.<sup>80</sup>

There are concerns devolution could ultimately balkanise counties, creating "ethnic fiefdoms".<sup>81</sup> At the moment, many county assemblies are dominated by a single political party, often the same as the governor's.<sup>82</sup> It is vital that county governments are inclusive of minority interests so as not to perpetuate existing inequality under the new devolved system.

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<sup>74</sup> Jaindi Kisero, "Clash between national and county govts with onset of devolution", *The East African*, 30 March 2013; "Is ours a devolved or confused government?", *The Star*, 28 March 2013.

<sup>75</sup> He was previously Kibaki's spokesman. He said that "devolution without money is a joke" and that it was "impossible to operationalise county initiatives without funds". "Talk of devolution without money to counties is a joke", *The Daily Nation*, 6 April 2013.

<sup>76</sup> The TA is headed by Chairperson Kinuthia Wamwangi, and includes Vice Chairperson Angeline Hongo, Mary Mwongeli Ndeto, Jacqueline Akhalemesi Mogeni, Erastus B.I. Nyaga Rweria, Simeon Pkatey Pkiyach, Bakari Garise Omar and Dabar Abdi Maalim. The chair stipulated that devolution will take ten years to institutionalise; it will be a gradual process, and will likely exceed TA's mandated period. "Devolution will need 10 years – Wamwangi", *The Star*, 25 March 2013.

<sup>77</sup> In a workshop for governors on 2 April, attendees walked out. The treasury in conjunction with the TA created an itemised budget of 9.8 billion Kenyan shillings (\$117 million), which was to be distributed to the counties. Several governors argued that the government did not have the authority to dictate the way counties spent their funds. Eventually the TA and treasury scrapped the itemised budgets and agreed governors could distribute funds according to the needs of the counties. "Why many counties may miss out on cash", *The Star*, 6 April 2013.

<sup>78</sup> According to some reports, the TA denies it has the mandate to decide on the premises for offices and residences. Several governors from north Rift Valley, especially in Elgeyo/Marakwet, Trans Nzoia, Nandi and Turkana, are still waiting for offices. Machakos County Governor Alfred Mutua has rejected offices allocated to him by the TA, citing inadequate space for his staff. The situation is further confused by the absence of government and local authorities' asset registers.

<sup>79</sup> For example, governors are demanding eight body guards, diplomatic passports, and three vehicles with special number plates, which some claim illustrates governors are power hungry, focusing on symbolic power instead of being concerned with the key issues facing their counties. "Governors memo that made Kibaki hit the roof", *The Standard*, 7 April 2013. Other governors, especially in Turkana and Kitui, want control over the natural resources in their counties. The National Land Commission is to review national policies and determine how revenues will be allocated. The executive director for the Ujamaa Centre in Mombasa argues that this will be a very contentious issue, as the government's previous policy has been that "anything below six feet is not yours". Crisis Group interview, executive director of Ujamaa, Mombasa, February 2013.

<sup>80</sup> "Devolution without disruption", op. cit.; "The new Kenya: How a complex devolved system will change the country", *The East African*, 16 March 2013.

<sup>81</sup> Ken Opalo, "Devolved system will work if we don't balkanise counties", *The Standard*, 16 March 2013. The government has attempted to put into place laws, which will try and keep balkanisation from occurring.

<sup>82</sup> "Party dominance to alter spending in counties", *Daily Nation*, 1 April 2013.

### B. *The Relative Strength of the Coalitions*

CORD becomes the official opposition party against a formidable Jubilee majority.<sup>83</sup> Odinga has stated he will ensure the opposition remains strong and committed to enforcing checks and balances on the government. However, his future political role is uncertain; if his political commitment and authority decline, CORD's cohesion is likely to deteriorate. A true democracy requires a robust opposition, one that represents the more than 5 million votes that CORD received.

Musalia Mudavadi's Amani Coalition could have helped solidify the opposition.<sup>84</sup> However, it has since disintegrated with no clear leader;<sup>85</sup> its component parties have joined either Jubilee or CORD. This provides an opportunity for CORD to further increase its support from the Luhya community (the second largest ethnic bloc according to the 2009 census).

Even though the Jubilee Coalition has the majority in both houses of parliament,<sup>86</sup> its dominance is dependent on Kenyatta's TNA and Ruto's URP remaining unified.<sup>87</sup> Neither can afford to sideline the other and risk divisions in parliament or national support.<sup>88</sup> But with Kenyatta and Ruto facing separate ICC trials, the cases still have the potential to fracture the Jubilee alliance.

## V. Conclusion

Though the 2013 general elections were relatively peaceful, the country is still deeply divided and ethnically polarised. Complacency or maintaining the status quo is simply not an option for a still divided Kenya. Many of the conflict drivers that fuelled violence in 2007 are yet to be adequately addressed – high unemployment, incomplete resettling of IDPs, land grievances, corruption, impunity and ethnic tensions still abound. The ICC cases, a disappointed and bitter opposition and the implementation of a new and untested system of governance remain significant challenges for the Jubilee alliance.

Kenya has changed significantly since independence in 1963, but the attempt to recast the political system in response to the 2007-2008 trauma is unparalleled. The new government has the opportunity to usher in a new era of peace and socio-economic development that would benefit all communities and unite the country. The foundation has been laid with the overwhelming support the constitution re-

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<sup>83</sup> Odinga has not yet decided whether he will return to parliament. His running mate, Kalonzo Musyoka, is being fronted for the role of minority leader, pending his return to parliament. The other key coalition in CORD is the Forum for the Restoration of Democracy (FORD)-Kenya headed by Moses Wetangula (the most senior Luhya in politics currently).

<sup>84</sup> Mudavadi, a Luhya presidential candidate, finished a distant third, with 483,981 votes.

<sup>85</sup> See Appendix A.

<sup>86</sup> Ibid.

<sup>87</sup> Beyond the URP, the Jubilee Coalition was supported by the NARC (National Rainbow Coalition) and the Republican Congress (RC). The RC failed to secure any seats and the NARC has one senator and three National Assembly members. This does not give Jubilee the two-thirds majority it would need to either protect the president from impeachment or to assist him in getting special legislation passed.

<sup>88</sup> While Kenyatta and Ruto have received a boost with smaller parties joining Jubilee, a major division between the Kikuyu and Kalenjin could cost the coalition its majority. Their response to their ICC trial, and whether they continue to support each other, will put their unity to the test.

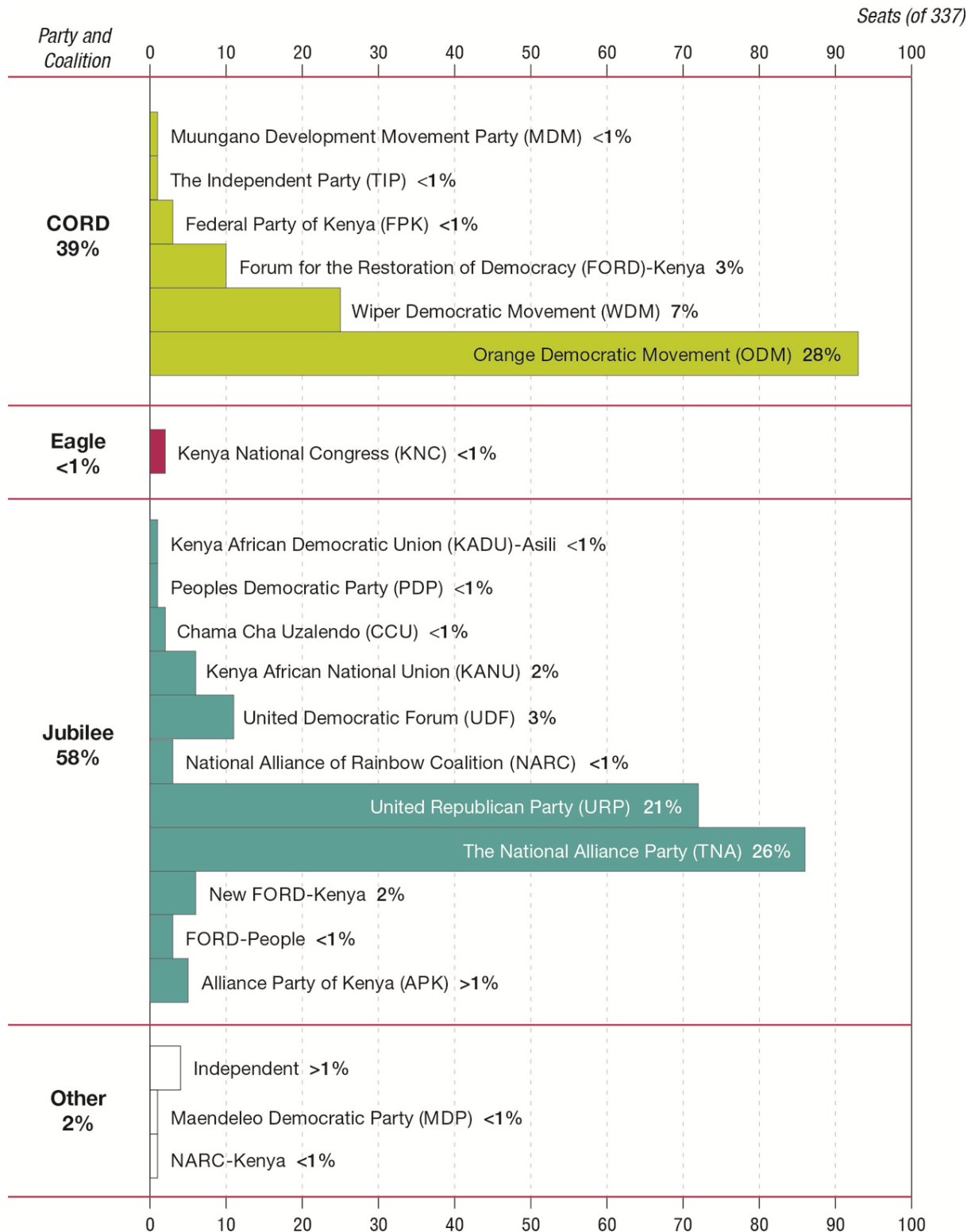
ceived in 2010, a base that should be maintained and built upon for a peaceful and prosperous future.

**Nairobi/Brussels, 15 May 2013**



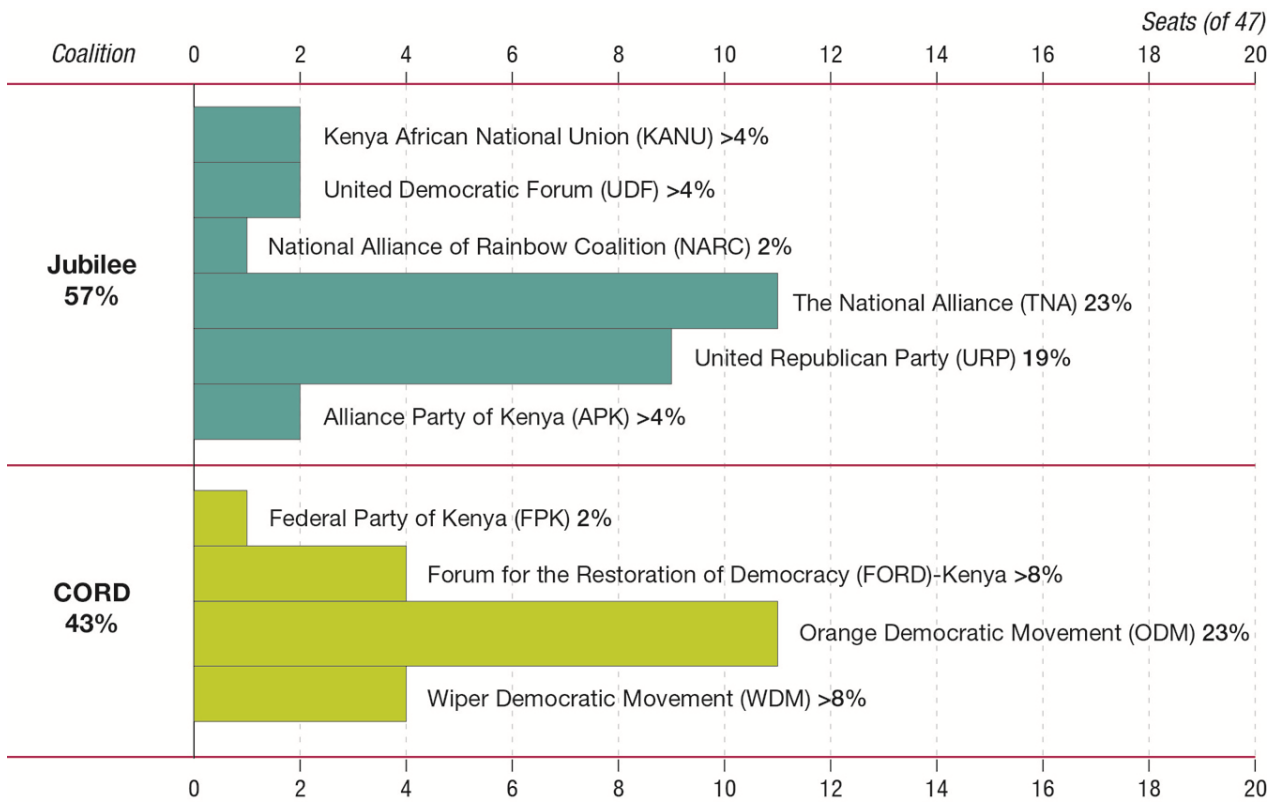
Appendix A: Charts of the Bicameral House

National Assembly of Kenya



This chart includes the women's county representatives and the 290 elected members of the National Assembly. This graph does not include those twelve nominated representatives for special interest.  
 Source: "The Kenya Gazette: Special Issue", vol. CXV, no. 45 (Notice No. 3157 and 3159), 13 March 2013.

Senate of Kenya



This chart only includes the 47 elected members of the Senate, and does not include the sixteen women members nominated by political parties, the two members representing youth, the two members representing persons with disabilities, and the speaker.