

# Kenya's 2013 Elections

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## *Executive Summary*

Kenya's elections this year should turn the page on the bloodshed of five years ago, but the risk of political violence is still unacceptably high. A new constitution, fresh election commission and reformed judiciary should help. But the vote, now set for 4 March 2013, will still be a high-stakes competition for power, both nationally and in 47 new counties. Forthcoming trials before the International Criminal Court (ICC) of four Kenyans for their alleged role in the 2007-2008 post-election violence look set to shape the campaign. The potential for local violence is especially high. Politicians must stop ignoring rules, exploiting grievances and stoking divisions through ethnic campaigning. The country's institutions face fierce pressure but must take bold action to curb them. Business and religious leaders and civil society should demand a free and fair vote. So too should regional and wider international partners, who must also make clear that those who jeopardise the stability of the country and region by using or inciting violence will be held to account.

Many reforms were initiated to address the flawed 2007 polls and subsequent violence. A new constitution, passed in a peaceful referendum in August 2010, aims to fortify democracy and temper zero-sum competition for the presidency by checking executive power. New voting rules require the president to win more than half the votes and enjoy wider geographic support. Power is being devolved to 47 counties, each of which will elect a governor, senator and local assembly. Despite recent mishaps, the new Independent Electoral and Boundaries Commission (IEBC) still enjoys public trust. Judicial reform, including the appointment of a respected new chief justice, also augurs well for a more robust response to electoral fraud and disputes.

The new institutions, however, have their work cut out. The ICC proceedings are influencing political alliances and the campaign. The four individuals facing trial deny the charges and maintain their innocence. While the cases aim to erode impunity long enjoyed by political elites and may deter bloodshed, they raise the stakes enormously. The two most powerful of the accused, Uhuru Kenyatta and William Ruto, look set to contest the elections on a single ticket (Kenyatta for president, Ruto for deputy president). Both have politicised the ICC cases, deepening ethnic polarisation, and have accused Prime Minister Raila Odinga, their strongest opponent, of conspiring with foreigners against them.

The Kenyatta-Ruto alliance would be a strong ticket. Aware that Kenyans want an end to impunity, both have pledged to comply with the ICC, even if they win. Yet, regardless of the outcome of their cases, a president facing lengthy trial before the ICC could potentially have extremely damaging implications for reform and foreign relations, which Kenyatta's backers should ponder carefully. For the moment, their eligibility to run for office remains in doubt; a case challenging their compliance with new constitutional requirements for public officials' integrity is with a high court and may find its way by appeal to the Supreme Court. Were the courts to find Kenyatta and Ruto ineligible after the closing date for submitting nomination papers on 30 January, their supporters would be unable to choose alternative candidates, which might lead to strong protests and even spark conflict. Dealing as it does with a highly charged political issue, whichever way it goes, the final decision is likely to be contentious. If possible, the date of any decision should be announced in advance so the security agencies and others can prepare accordingly.

Other signs are also troubling. Political parties and politicians flout new rules unchecked. The IEBC's bungled procurement of voter registration kits reduced the confidence it previously enjoyed and suggests it may struggle to resist enormous pressure as the vote approaches. The late start to registration has cut all fat from the electoral timeline, and any flaws will heighten tension. The IEBC must work transparently with parties and other stakeholders to clarify and regularly review the timeline, so as to avoid any further – and highly-charged – delays.

Voter education will be crucial. It is the first general election under the 2010 constitution, with new rules that are considerably more complex than previous polls (each voter will cast six ballots). Limiting confusion and misunderstandings could help reduce disputes and election-related conflict. It is also vital that the IEBC provide sufficient access and information to citizen observers and other civil society groups. They must be able to plan their deployment properly and enjoy full access to every part of the election process, especially the tallying of results. Such groups can also be useful allies in bolstering commissioners' ability to resist political interference.

Insecurity too poses a huge challenge. Despite the reforms, many structural conflict drivers – continuing reliance on ethnicity, competition for land and resources, resettlement of internally displaced people (IDPs), and poverty and youth unemployment – underlying the 2007-2008 violence remain unresolved and may be cynically used by politicians to whip up support. Many of those who fled the turmoil remain displaced. Land disputes feed local tension. Youth unemployment is still very high and, together with poverty and inequality, means a steady flow of recruits for criminal groups and militias that can be mobilised to intimidate opponents and their supporters or protest results, as they have in the past. Attacks blamed on the extremist Al-Shabaab movement and clashes over land can cloak political violence. Meanwhile, police reform has lagged and the security forces look ill-prepared to secure the polls. An experienced inspector general of police, David Kimaiyo, has been appointed, but the delay in his selection means little time remains for significant security reform. Multi-agency security planning, which has also lagged, must be completed and implemented.

Ethnic campaigning and horse-trading as alliances formed – by Kenyatta and Ruto but also other leading politicians – have deepened divides. How the supporters of either of the two main tickets, those of Deputy Prime Minister Kenyatta and former cabinet minister Ruto running and of Prime Minister Odinga and Vice President Kalonzo Musyoka respectively, would respond to losing a close vote it perceives as flawed, or even to early signs it is falling behind, is unclear. International partners, including regional neighbours whose economies rely on a peaceful transition, should monitor any signs of interference or violence and weigh in quickly to deter it. Devolution, for all its benefits, introduces new conflict dynamics, as competition between groups for power and resources controlled at county level becomes fiercer.

All these challenges are surmountable, especially given the remarkable determination of most to avoid a repeat of 2007-2008. But they require concerted action by Kenya's institutions and their allies, and – most important – clear signals to leaders who are seen to be prioritising the pursuit of power. The people deserve better. To put the horror of five years ago behind them, they deserve the chance to vote without fear and elect leaders committed to reform and ready to serve society as a whole rather than the narrow interests of its elites.

## *Recommendations*

### **To President Kibaki and the government of Kenya:**

1. Press all candidates to commit publicly to respect election rules, campaign peacefully and contest the results through legal, non-violent means.
2. Continue to urge the national and all provincial security committees to complete security planning, identify vulnerable counties and deploy accordingly.
3. Support the IEBC proposed Joint Risk Assessment and Response Centre for sharing information and coordinating operations among national and local security organisations and committees, as well as civil society groups.

### **To Kenya's political parties and coalitions:**

4. Commit publicly, and together, to respect rules, campaign peacefully, avoid hate speech and divisive mobilisation and pursue any petitions or other election grievances only through legal channels.
5. Recruit party agents early and work with international partners to ensure they understand their role and follow the rules in the polling centres.

### **To Uhuru Kenyatta and William Ruto:**

6. Provide the public with a clear, detailed account of how you would propose to govern while also conducting your defences before the ICC, taking into account the time required and the demands of appearing in person in court on a different continent.

### **To the Independent Electoral and Boundaries Commission (IEBC) and acting registrar of political parties:**

7. Improve outreach and communication with stakeholders, including political parties, candidates, the media and, in particular, civil society, with which a strong alliance is especially important to resist political pressure; and provide citizen observer groups the information they need in a timely manner.
8. Press for all candidates at national and county level and political parties to adhere stringently to the Code of Conduct enacted as part of the 2011 Elections Act.
9. Keep tight focus on operational planning, especially on vote counting and tallying of results, including for the likely presidential run-off; and make results for both rounds publicly available and disaggregated by polling stream to allow for their verification by citizen observers and party agents.
10. Take action, in coordination with the National Cohesion and Integration Commission, against political parties and candidates that violate rules, campaign divisively or use hate speech.

**To Kenya's business and religious leaders and other influential citizens, including the media:**

11. Denounce publicly hate speech and ethnic chauvinism and use actively their resources for civic and voter education.
12. Consider carefully the implications for Kenya of a president facing trial before the ICC.

**To Kenyan civil society groups:**

13. Form ad hoc umbrella committees to capitalise on each organisation's expertise and avoid duplication, in order to find a collective voice and increase their influence; continue preparations to monitor the campaign and vote, use parallel vote tabulation responsibly and work with and support the IEBC if it is performing well.

**To regional leaders, especially the governments of the East African Community:**

14. Send unambiguous public and private messages against political interference with the elections and especially against the use of or incitement to violence.
15. Support the work of the African Union Panel of Eminent African Personalities and the efforts of the joint East African Community election observation team, as well as of other observation missions.

**To Kenya's other regional and wider international partners, especially the African Union, U.S., European Union and its member states, UN and International Financial Institutions:**

16. Send unambiguous public and private messages that politicians must not meddle with the IEBC or the judiciary and that political violence will be sanctioned, including, if appropriate, by adopting travel bans or asset freezes.
17. Ensure all regional and wider international observation missions deploy early, to as many counties as possible, and cooperate to align their statements and avoid duplication.
18. Continue to support the African Union Panel of Eminent African Personalities to avoid separate mediation channels.

**Nairobi/Brussels, 17 January 2013**

# Kenya's 2013 Elections

## I. Introduction

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This year's elections in Kenya will be the first since the 2007-2008 post-election violence that left more than 1,000 dead and over 300,000 displaced and the 2010 adoption of a new constitution.<sup>1</sup> The bloodshed was only ended after intense mediation under African Union (AU) envoy and former UN Secretary-General Kofi Annan that led to a power-sharing deal, the Kenya National Dialogue and Reconciliation Agreements (National Accords), between the two main contenders, President Mwai Kibaki and Prime Minister Raila Odinga.<sup>2</sup>

As part of the deal, the parties agreed to establish two commissions to determine why violence occurred and prevent a similar tragedy. The Independent Review Commission (IREC) investigated all aspects of the 2007 elections, and its final report (the "Kriegler report") made a broad set of recommendations to improve elections and reduce the likelihood of political violence.<sup>3</sup> The Commission of Inquiry into Post-Election Violence (CIPEV), better known as the Waki commission, investigated the fighting that followed the disputed vote.<sup>4</sup> Building on Agenda IV of the National Accords, both reports laid the groundwork for subsequent reforms.<sup>5</sup>

Much has happened since. Most significant is a new constitution that was passed in a largely peaceful and well-run referendum in August 2010. It provides for a radical overhaul of government and a restructuring of the state, and will have enormous bearing on the elections. Stemming from the new constitution, parliament has passed

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<sup>1</sup> Each voter will cast six ballots: president and deputy president; member of the National Assembly (elected from geographical constituency); dedicated women's seat (one elected from each county); senator (one from each county); governor and deputy governor (one in each county); and member of county assemblies elected from wards in counties.

<sup>2</sup> For more about the post-election violence, see Crisis Group Africa Report N°137, *Kenya in Crisis*, 21 February 2008.

<sup>3</sup> The commission, headed by South African Justice Johan Kriegler, was tasked to examine the 2007 elections from several angles, including: "i) the constitutional and legal framework with a view to identifying weaknesses and inconsistencies; ii) the structure and composition of the Electoral Commission of Kenya (ECK) in order to assess its independence, capacity and functions (operations); iii) the electoral environment and the role of the political parties, civil society, the media and observers; iv) organisation and conduct of the 2007 elections, extending from civic and voters education and registration through polling, logistics, security, vote-counting and tabulation to the results-processing and dispute resolutions; v) vote-tallying and counting to assess the integrity of the results of the entire election with special attention to the presidential contest; vi) assessing the functional efficiency of the ECK and its capacity to discharge its mandate; and vii) providing recommendations on electoral and other reforms to improve future electoral processes". "Final Consolidated Report" (hereafter "Kriegler report"), Independent Review Commission, 27 December 2008, p. 3.

<sup>4</sup> "Report of the Commission of Inquiry into Post-Election Violence (CIPEV)", 15 October 2008. The commission was chaired by Kenya Court of Appeal Judge Philip Waki. For more, see Crisis Group Africa Briefing N°84, *Kenya: Impact of the ICC Proceedings*, 9 January 2012.

<sup>5</sup> Agenda IV dealt with long-term issues and solutions, such as constitutional, institutional and legal reforms; land reform; poverty and inequity; unemployment, particularly among the youth; consolidating national cohesion and unity; and transparency, accountability and impunity.

new legislation on elections, political parties and ethics and leadership. The Election Commission of Kenya (ECK), responsible for the 2007 polls that sparked the violence, was replaced with a new Independent Electoral and Boundaries Commission (IEBC). Reform of the judiciary, which also plays an important electoral role, has been wide-reaching, with a new chief justice enjoying – like the IEBC – broad public confidence. After months of uncertainty and disagreements, the election date is now set for 4 March 2013 and, despite a messy procurement process for voter registration kits, electoral preparations are moving fast.

Less than two months ahead of the vote, however, there are troubling signs. Implementation of parts of the constitution has been delayed, with key pieces of legislation still missing, and the risk of political conflict is high. Fear of prosecution by the ICC could deter violence, but the current proceedings appear to have raised the stakes, in particular for two of the four accused, Deputy Prime Minister Uhuru Kenyatta and former cabinet minister William Ruto, who look set to run on a joint ticket for the presidential election. While committing to comply with the court process, they have used the ICC cases to shore up their ethnic bases. Divisive politicking – a regular feature of election campaigns and a major driver of the 2007-2008 clashes – has re-emerged and the ICC cases have been made part of it.<sup>6</sup> There are also reports that youth gangs and other informal armed groups are re-emerging.<sup>7</sup> Reform of the police, primarily responsible for securing the polls, is lagging badly.

This report examines political and electoral preparations of the next elections in Kenya: the new constitution and its implementation, the ICC process, political alliance formation, and how they will impact the polls. It is based on extensive interviews across the country, discussions with politicians and government officials, civil society organisations, and consultation with national and international elections experts.

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<sup>6</sup> The use of violence for political purposes has grown steadily in the last three decades. In 1992 it was centred in the Rift Valley, in 1997 it had two epicentres: the Rift Valley and the coast. Violence decreased in 2002 because of the overwhelming support for the opposition, only to reappear at an unprecedented level in 2007-2008.

<sup>7</sup> The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project (South Consulting), October 2012, pp. 19, 36-37.



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## II. A New Constitution

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The adoption of the new constitution in 2010 marked the culmination of decades of debates over the management and division of power. It was largely a domestic initiative, albeit with some external support. Since the return to multiparty politics in 1991 – a long-held goal of civil society groups, unions, students and reformers – Kenya has held four elections, but the 2013 vote will be the first under a new constitution. The polls will be complicated and tense in part because the constitution has created new centres of power, devolved government and placed checks on the executive.

### A. *Historic Struggles over the Division of Power*

How power is divided and managed has been at the centre of the constitutional debate since independence. During negotiations for the transition to self-rule, and finally independence in 1963, the two main political parties disagreed over how state power was to be organised. The Kenya African National Union (KANU) envisioned a strong central state, while the Kenya African Democratic Union (KADU) favoured a devolved system. The first constitution had devolution, but the country's first prime minister, KANU's Jomo Kenyatta, insisted on a centralised state and, when he became president in 1964, pushed through legislation to that effect.<sup>8</sup> Daniel Arap Moi, who took power after Kenyatta's death in 1978, continued this trend.

It was not until July 2005 that a new draft constitution, known as the "Wako draft" named after then-Attorney General Amos Wako, was finalised. However, it included little of the reforms called for by civil society, or promised in a memorandum of understanding (MoU) between Mwai Kibaki's National Alliance of Kenya (NAK) and Raila Odinga's Liberal Democratic Party (LDP), which came to power in 2002 under the National Rainbow Coalition (NARC).<sup>9</sup> It contained a weak prime minister position, subject to presidential appointment, and very limited decentralisation. Kibaki and his allies campaigned for adoption of this draft in the 21 November 2005 constitutional referendum, while Odinga and his supporters formed the Orange Democratic Movement (ODM) to oppose it. Despite Kibaki's political dominance, the proposed constitution was rejected by 58 per cent of voters.

In the 2007 presidential election, Odinga became Kibaki's top challenger. The vote was incredibly close, leading to contested results and a violent aftermath.<sup>10</sup> Intense mediation under the auspices of an African Union Panel of Eminent African Personalities, led by Kofi Annan, produced a power-sharing National Accord, signed by both Kibaki's Party of National Unity (PNU) and Odinga's ODM, which ended the

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<sup>8</sup> KADU contended that centralisation breeds authoritarianism while KANU argued that devolution could lead to balkanisation and undermine national authority. KADU eventually accepted a centralised state and merged with KANU in November 1964. While devolution was underway, Kenyatta drained the local authorities' funding, and in effect repealed the process.

<sup>9</sup> In the 2002 election, the opposition united, for the first time, when the NAK and LDP joined to form NARC. The opposition flag bearer Mwai Kibaki won, garnering 62 per cent of the votes, with the support of Raila Odinga, until then KANU's secretary general. This unity was formalised through an MoU that included constitutional reform. While the specifics of the agreement were never made public, its general thrust was that there would be a new constitution within 100 days after the election that would establish a new prime minister position with a marked decrease in the president's power, checked by other institutions like the parliament.

<sup>10</sup> See Crisis Group Report, *Kenya in Crisis*, op. cit.

violence. It included an amendment to the new constitution to establish a prime minister position, occupied by Odinga.

The Annan-led mediation team emphasised the need for a new constitution to implement reforms to prevent future political violence. A Committee of Experts (six Kenyan and three international) produced two initial drafts, which Kenyans and the relevant institutions used to produce a new document presented to parliament.<sup>11</sup> When parliamentarians met in Naivasha in January 2010 for negotiations with representatives of the president and prime minister, the main sticking points were again the division of power between the president and a newly created premier, as well as devolution. The split during the negotiations also played out in the August 2010 referendum.

Despite heated rhetoric for and against the draft constitution, the draft was ratified by 67 per cent of the votes cast<sup>12</sup> and the referendum was completed peacefully – even in the Rift Valley, where much of the 2007-2008 violence had occurred and opposition to the referendum was concentrated.<sup>13</sup> This was a positive development, but the political alliances and stakes will be very different for the forthcoming elections.

The new constitution was the end product of decades-long reform efforts. It resolved – at least on paper – debates overhanging Kenyan politics since independence over devolution and presidential power. Adopting the constitution was a huge achievement but the principal test lies in its implementation. The schedule for passage of the respective bills to operationalise it has occasionally been delayed by entrenched interests. For example, a new campaign finance law and the law to implement the constitutional provision that not more than two thirds of the members of any county assembly or county executive committee shall be of the same gender have not been passed. Appointments to key offices also have been held up because of political divisions, and some were struck down by the courts because they were inconsistent with the constitution.<sup>14</sup>

The extent to which new rules will impact politicians' behaviour is unclear. As the Krieglger report noted, the problem during previous elections was not only the laws themselves, but also respect for those laws. Again, here signs are less positive and suggest that powerful politicians may still refuse to abide by new rules.

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<sup>11</sup> The experts were required to use as reference the record of Kenyan views gathered by the dissolved Constitution of Kenya Review Commission (CKRC) and any reports it produced, as well as the earlier proposed draft constitutions (the Bomas draft and the Wako draft).

<sup>12</sup> About 70 per cent of registered voters participated.

<sup>13</sup> Significantly, both Odinga and Kibaki, uniting across the political divide, campaigned for the constitution.

<sup>14</sup> The Centre for Rights Education and Awareness (CREAW) contested President Kibaki's controversial appointment of county commissioners in all 47 counties on 11 and 23 May 2012. It contended that these positions do not exist in the constitution and that the appointments violate the one-third women representation rules. Jack Abebe, "CREAW Goes to Court Over the Controversial Appointment of County Commissioners", CREAW Kenya, 17 May 2012. On 29 June, the court held that the president had no power to appoint or deploy county commissioners, and thus the appointments were unconstitutional, null and void. The government filed an appeal but apparently the case was not heard. "Githu disowns Haji lawyer in county jobs suit", *Daily Nation*, 25 October 2012. In November 2012, Internal Security Permanent Secretary Mutea Iringo re-assured county commissioners they would keep their jobs after the March 2013 election and the implementation of devolution. "PS assures chiefs, county commissioners of jobs", *Citizen News*, 27 November 2012. "Court nullifies county bosses' appointment", *The Standard*, 30 June 2012.

## B. *Impact of the New Constitution on the 2013 Elections*

The 2010 constitution radically restructured power and overhauled public institutions, with important consequences for the elections. It strips some power from the presidency,<sup>15</sup> vesting it instead in the judiciary, legislature and local governments, and increases the size of parliament, reserving more seats for women and other traditionally underrepresented constituencies. It also mandates major judicial and police reform, as well as reform of the political party system, campaign finance and the media.<sup>16</sup>

Some of the most significant changes aim to dilute presidential power. On paper, this should not only strengthen democracy, but also reduce the stakes of the presidential polls and the dangers of zero-sum politics, which were identified as among the main drivers of the 2007-2008 violence. Many powers formerly held by the president are now shared with the judiciary and legislature. In particular, the new constitution denies the president the prerogative of unilaterally appointing key public officials, including election commissioners. Most appointments must be vetted and approved by parliament (see below). Whether these changes will make the contest for the presidency any less fierce remains to be seen. Kenya's most powerful politicians still appear to want the top job more than any other, probably because it is likely to exercise considerable informal power.<sup>17</sup> Moreover, the next president could do much to undermine the new constitution's checks and balances.

The constitution also introduces a new level of governance, the impact of which may be even greater than the checks on executive power in Nairobi. There are now 47 counties, each with its own elected governor, assembly and senator to a newly-established upper house, the Senate.<sup>18</sup> This body will be responsible mostly for regional affairs, including allocating the national budget outside Nairobi. The counties

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<sup>15</sup> The prime minister position will be eliminated.

<sup>16</sup> See Section VI.

<sup>17</sup> For example, although it should have been abolished under the new constitution, the provincial administration has survived and continues to control politics for the executive. Crisis Group email correspondence, Kenya expert, 14 January 2013. The government is trying to restructure the provincial administration into a national government service reporting to the president. "Cabinet approves Bill to keep provincial chiefs' jobs", *The Nation*, 23 November 2012. According to *The Nation*, "the sole objective of the Bill is to enable the Office of the President to retain the Provincial Administration under the guise of the national government administration", and fails to clarify how the functions of the national government administration shall coordinate with the county government. "New coordination bill undermines transition authority's own mandate", *The Nation*, 10 December 2012. The National Government Coordination Bill was passed and all 23 clauses of the bill were agreed to, including a new clause with provisions for resolving potential intra-county conflict between county commissioner and governor over mandates. "The National Coordination Bill," 2013 Parliamentary Debates, Plenary Hansard, 9 January 2013, pp. 43-50.

<sup>18</sup> County boundaries were decided by the IEBC and may only be altered by a resolution passed by at least two thirds of the National Assembly and Senate, to take into account population density and demographic trends; physical and human infrastructure; historical and cultural ties; the cost of administration; the views of the communities affected; and geographical features. Counties are divided into constituencies and these are then subdivided into wards. County assembly members are elected on the same day as a general election, with each ward constituting a single-member constituency. They also include a number of special seats for women, persons with disabilities and youth.

together will receive a minimum of 15 per cent of the national budget, on top of local revenues.<sup>19</sup>

Complicating issues is that Kenya in principle devolves power and functions in one shot.<sup>20</sup> County-government bodies are being elected even as their exact mandates, and their control over resources, are contested by local communities. Moreover, although the new level of governance should give communities, including minorities, a greater say in how they are governed, it could also transfer political competition, violence and corruption down and create new minorities and new patterns of marginalisation within counties.<sup>21</sup> County assemblies should provide some check, but governors will enjoy significant control over local resources. They are elected by plurality, according to first-past-the-post (FPTP) system, which leaves nothing for losing candidates.<sup>22</sup>

In some counties competition for governorships will be fierce, and the potential for violence is high, especially since many local conflicts are about access to power and resources. Candidates could exploit and aggravate local grievances and disputes to mobilise support. Any attempt to do so should be monitored carefully and action taken quickly by the relevant authorities, notably the IEBC, judiciary, police and the National Cohesion and Integration Commission, which should identify those counties at risk.<sup>23</sup> Some organisations are already mapping risk areas across the country, and ideally these efforts should inform an official response.<sup>24</sup> Particular attention might be paid to counties in which a majority community splits and allows a minority to win office, or where a minority that has traditionally held power locally faces defeat by a majority group, or where competition for office aligns with older disputes – all of which are potential conflict scenarios.<sup>25</sup>

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<sup>19</sup> According to an official, devolution, especially fiscal devolution, will be critical to improving local living standards. Crisis Group interview, Mutula Kilonzo, former justice, national cohesion and constitutional affairs minister and current education minister, Nairobi, 17 October 2012.

<sup>20</sup> The constitution's Article 6 and the First Schedule establish 47 counties to be the basis of the second level of governance, and the institutions and mechanisms for completing the boundary delimitation process. (Schedules are lists in the constitution that categorise and outline bureaucratic activity and government policy.) "Restructuring the Provincial Administration: An Insider's View", Constitution Working Series Paper no. 3, Society for International Development, p. 1.

<sup>21</sup> For instance, because of demographic patterns in Nakuru county, the Kikuyu may be overrepresented in the national and county assemblies, dominating nine out of eleven constituencies. The two remaining constituencies probably will be dominated by the Kalenjin. As a result, other ethnic groups like the Kisi, Luo and Meru may not win any National Assembly seats, except those nominated on party lists.

<sup>22</sup> FPTP voting takes place in single-member constituencies. Voters choose one candidate and the candidate with the most votes wins. A candidate can only run for one position, unless he or she is also nominated by his or her party for a reserved seat.

<sup>23</sup> See Sections V and VI.

<sup>24</sup> "Building a Culture of Peace in Kenya: Status of violence in the country", The Constitution and Reform Education Consortium, June – August 2012; and Reports of the Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project (South Consulting), at [www.dialoguekenya.org](http://www.dialoguekenya.org).

<sup>25</sup> In Marsabit county, for example, a combination of Rendile, Burji and Gabra minority communities could together easily defeat the Boran, who are the majority. The same could be possible in Isiolo county. In Nakuru the competition between the Kikuyu and the Kalenjin will be very tight. Nakuru is a strategic town in the Rift Valley, the Kalenjin's heartland, but in the forthcoming elections, chances are the more concentrated Kikuyu will capture a few important elective posts. In another case, the Bukusu and Sabaot had separate districts before devolution, but now both live in and could compete for control of Bungoma county. However, ethnic support is fluid; at independence Kikuyus and Luos briefly worked together, and in 2007 Kalenjins and Luos supported ODM.

The new constitution also reforms the electoral system. For presidential elections, a candidate needs to win a majority (50 plus one) – rather than plurality – of votes and must secure more than a quarter of votes in 24 of the 47 counties to avoid a run-off. In principle, this means a winning candidate should enjoy support from different communities. The new provisions also encourage coalition building across ethnicities. Alliances have been a key feature of Kenya's politics since 2002, when a united opposition through NARC defeated the incumbent KANU. The new constitution makes it almost impossible for one party, or ethnic group, to win the presidency single-handedly, thus reinforcing this trend. In the next election, presidential candidates that do not qualify for the run-off, and their supporters, look likely to wait for the run-off to decide behind which candidate to throw their support – as indeed may other politicians.<sup>26</sup>

Given the support bases of the potential candidates and the nature of coalition building, a second round looks likely, and must be held within thirty days of the first round of voting.<sup>27</sup> Other run-offs on the continent have proven more volatile than the first round because it is then that final results are determined.<sup>28</sup> In Kenya, the possibility of new coalitions forming between the first and second round adds a sense of unpredictability to the contest – compounded by tensions in the timeline related to dispute resolution and the ICC cases (see Sections III and IV below). Disputes arising from the first round could significantly raise the temperature of the run-off. Attention from Kenya's regional partners, especially the East African Community (EAC), and international friends needs to remain keen during the run-off and not wane even if the first round is reasonably peaceful. Tension and ethnic campaigning could increase dramatically in between the first and second rounds.

For the National Assembly elections, the new constitution basically retains the FPTP system, albeit creating 80 new constituencies so that 290 parliamentarians – out of 350 – are elected from single-member districts.<sup>29</sup> It also introduces 47 reserved seats for women and twelve seats for special interest groups, although parliamentarians recently agreed that parties could include their presidential candidates on the

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The contest for Nairobi, which accounts for almost half of Kenya's GDP, and Mombasa county, the tourist and regional transportation hub, will also be intense.

<sup>26</sup> Presidential candidates like Musalia Mudavadi, Martha Karua and Peter Kenneth, who are unlikely to stand a chance of winning the presidency, could nonetheless play decisive roles in the likely second round as kingmakers.

<sup>27</sup> The constitutional interpretation, as per the court's last ruling on the election date, states that the vote must be held within sixty days after the expiry of the term of the current parliament on 14 January. The elections will be held on 4 March 2013, and the IEBC must declare the results by 11 March, with the swearing-in happening on 26 March. If no candidate attains more than 50 per cent of votes, the run-off will take place by 4 April 2013. Any challenges must be brought by 24 March. A first-round dispute may delay this vote, which then will occur within 30 days of the Supreme Court ruling on the matter (see below).

<sup>28</sup> This happened, for example, in Côte d'Ivoire, see Crisis Group Africa Report N°171, *Côte d'Ivoire: Is War the Only Option?*, 3 March 2011; Africa Briefing N°77, *Côte d'Ivoire: Finally Escaping the Crisis?*, 25 November 2010; and Africa Report N°158, *Côte d'Ivoire: Securing the Electoral Process*, 5 May 2010.

<sup>29</sup> Despite years of discussion about proportional representation, the system for all parliamentary, gubernatorial and county assembly elections in the new constitution is still an FPTP system. The speaker for each house of parliament is elected by the respective body, but from non-members, hence a total of 350 members in the National Assembly and 48 in the Senate.

special interest party lists.<sup>30</sup> As things stand, it looks very unlikely that the next national and county legislatures will fulfil the constitution's gender requirement that women occupy at least one third of the positions on all elected bodies, as parliament was unable to agree on rewriting the formula for reserved seats. On 11 December 2012, the Supreme Court ruled that this requirement will be implemented "progressively" and that the bodies elected in the 2013 polls do not need to meet the constitutional gender requirement.<sup>31</sup> The winner-takes-all nature of the vote in single-member parliamentary constituencies, the new powers of legislators and the high salaries they continue to enjoy mean that parliamentary seats will be fiercely fought, although some of the existing lawmakers are running for governor, which will be a more powerful position.<sup>32</sup>

Parliamentarians have blocked or watered down bills that could affect their re-election. They did not approve an important act on campaign finance before the assembly's term expired on 14 January 2013, which means that spending ahead of the elections will again be largely unregulated.<sup>33</sup> They also passed an amended Leadership and Integrity Act on 22 August 2012 lowering the ethical criteria required to run for public office and removing the requirement for candidates to declare their wealth, acknowledge pending criminal cases, and be vetted by the Ethics and Anti-Corruption Commission.<sup>34</sup> Civil society groups objected, claiming it failed to inform the public about their elected leaders,<sup>35</sup> and parliamentarians countered that the pro-

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<sup>30</sup> This would allow losing presidential candidates to still retain political office in the National Assembly. "Presidency: How losers can get back to House", *The Standard*, 16 November 2012.

<sup>31</sup> "Advisory Opinion No. 2 of 2012", Supreme Court of Kenya, 11 December 2012, para. 47. Article 27 (8) requires that the state takes "legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointed bodies shall be of the same gender". However, in the National Assembly, only 47 seats (one per county) of 350 seats are explicitly reserved for women. This means that they must win some 70 FPTP seats (the exact number will depend on how many seats reserved for special interest candidates (twelve) go to women). Parliament was supposed to resolve this dilemma, but the bill regarding reserving parliamentary seats for women was poorly drafted and therefore impossible to pass, opening up a constitutional challenge in court. Crisis Group interview, Peter Okoth, executive director for the Institute for Education in Democracy (IED), Nairobi, February 2012. See also, "Gender rule to take effect in 2015", *The Nation*, 12 December 2012; and "Kenya: Gender rule to be progressive, orders court", Capital FM, 11 December 2012.

<sup>32</sup> Kenyan parliamentarians are some of the highest paid on the continent, with a tax-free salary of approximately \$13,000 per month. They also sparked outrage when they tried to pass a \$110,000 leaving bonus, with money expected from tax increases. "Kenyan MPs' proposed pay rise sparks protest", Al Jazeera, 9 October 2012. Undeterred, parliamentarians tried again on 9 January 2013, passing a \$110,000 leaving bonus and also approved that each gets an armed bodyguard, a diplomatic passport for a retiree and his wife and unlimited access to the executive lounge for Very Important Person in all Kenyan airports. "MPs agree Sh9.3m send off pay", *The Nation*, 10 January 2013. This was again vetoed by President Kibaki. "Kenyan president rejects lawmakers' hefty retirement package", CNN, 12 January 2013.

<sup>33</sup> See Section IV.D below. In newspaper interviews with top presidential contenders and campaign insiders, it is emerging that the price tag for running for president in 2013 could double from what it was in 2007, "with campaigns expected to be bigger, louder and flashier, as each voter now gets to help pick two more electoral positions under the new devolved system". "Campaign finance: Price tag of Kenya 2012 presidential race likely to hit \$130 million", *The East African*, 5 February 2012; "Kenyan candidates raise billions for epic State House race", *The Nation*, 3 February 2012.

<sup>34</sup> "House teams approve diluted Leadership and Integrity Bill", *The Nation*, 22 August 2012.

<sup>35</sup> Civil society groups have challenged the constitutionality of several moves by the government. They petitioned in court President Kibaki's appointment of county commissioners and challenged procedures for nominating Alnashir Visram as chief justice and Githu Muigai as attorney general.

posed bill's threshold was too high. Regardless of the amended act, the national courts have been forceful in upholding integrity requirements in public appointments.<sup>36</sup>

In December 2012, parliamentarians suspended enforcement of academic qualifications<sup>37</sup> and integrity preconditions for candidates wishing to run in the March elections.<sup>38</sup> Concerns were raised over the ambiguity of the law regarding the vetting process. Though the constitution's chapter six requires that public officers be people of high integrity, there is no clear legal framework to vet the candidates after the cabinet and parliament removed such provisions from the Leadership and Integrity Act.<sup>39</sup>

The new constitution also raised expectations that its provisions can reverse inequality, deeply ingrained ethnicity, and other structural drivers of conflict (see Appendix B). But only months before the elections, much still remains to be done. Some of Kenya's most powerful elites still appear determined to protect the privileges they have always enjoyed and resist fully embracing the constitution's provisions and the country's desire for change.<sup>40</sup>

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<sup>36</sup> In an important ruling, the court overturned the appointment of Matemu Mumo as the chairperson of the Ethics and Anti-Corruption Commission. The court criticised the appointing authorities for failing to carry out due diligence and concluded that Matemu did not meet the required constitutional threshold to be appointed. Chief Justice Willy Mutunga indicated the decisions in the Matemu case and another had provided guidance for the courts in integrity cases. Crisis Group interview, Washington DC, 10 September 2012. See also, "CJ says past cases pointer on integrity rulings", *The Nation*, 1 October 2012. Matemu Mumo is appealing the ruling. "Matemu to reclaim his job to fight corruption", *The Star*, 1 October 2012. On 28 November 2012, the Court of Appeal blocked the government from hiring a new Ethics and Anti-corruption Commission (EACC) chairman pending his appeal. The appeal is expected to be heard in January 2013.

<sup>37</sup> Candidates for the presidency, governors and their running mates must have degrees from local universities recognised by the government. Political parties were informed on 7 January that persons seeking positions in the national and county assemblies would not be required to provide any academic papers before being cleared to contest in the elections. Even though Section 2 of the constitution stipulates mandatory post-secondary education requirements, the requirement for the positions has been put on hold until the next elections under the Miscellaneous Amendment Act of 2012. "MPs suspend integrity and academic laws in March poll", *The Standard*, 8 January 2013.

<sup>38</sup> Ibid. Unlike in past elections, the integrity bar for those seeking elective posts in March 2013 has been raised, entrenched by chapter six of the constitution and set as precedent in key cases like the Matemu case ("Trusted Society of Human Rights Alliance v. A.G. & 2 Others"). "Why controversy over integrity under chapter six is phony?", *Kenya Today*, 18 October 2012.

<sup>39</sup> The IEBC asked political parties to ensure that their candidates obtain clearance from relevant bodies, including the police, Kenya Revenue Authority, Credit Reference Bureau, Higher Education Loans Board and the Ethics and Anti-Corruption Commission. An initial provision in the Leadership and Integrity Act gave these bodies the legal backing to clear the aspirants, but was removed by the cabinet. Parliament failed to reinstate the requirement when the law came before it for enactment. However, despite the law's ambiguity, the possibility of being prohibited from running seems to be motivation enough for political parties to ensure that all candidates receive some sort of clearance.

<sup>40</sup> Crisis Group interviews, Nairobi, May-November 2012.

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### III. The ICC and Political Developments

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The ICC process concerning the 2007-2008 post-election violence raises enormously the stakes of the presidential contest.<sup>41</sup> It will potentially be the central plank of the election campaign, with battle lines drawn based on who supports or opposes it. All four of the accused deny the charges against them and have appeared before the court voluntarily. Kenyatta and Ruto in particular have challenged the ICC proceedings as politically motivated, and used them to rally their respective ethnic communities' support.

The ICC may act as a deterrent against electoral violence, especially at the national level. As previous efforts to prosecute political violence were hampered by a partisan judiciary, having a court that is beyond political manipulation may have shifted elites' calculations.<sup>42</sup>

The trials, set to begin on 10 and 11 April 2013, will start about a month after the first round of the election, and likely only a few days after the second round, if one is required and there are no disputes. They could easily be turned into a campaign issue. The prosecution's charges against the accused have been updated and revised. On 9 January 2013, the prosecution submitted to the court its lists of witnesses and evidence to be relied on at trial and disclosed the estimated time it would need to present its case in each trial, confirming that they will be lengthy.<sup>43</sup>

The prosecution has expressed concerns about delays in securing full cooperation from the government.<sup>44</sup> The government has on several occasions either contested or sought to undermine support for the ICC process at several levels.<sup>45</sup> In early October

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<sup>41</sup> The ICC process through early January 2012 is described in Crisis Group Briefing, *Kenya: Impact of the ICC Proceedings*, op. cit. On 23 January 2012, the Pre-Trial Chamber II issued its decision on the confirmation of charges against the original six suspects. It declined to confirm the charges against two, Henry Kiprono Kosgey and Muhammed Hussein Ali, and allowed the cases to go to trial against the four others. "The Prosecutor v. William Samoei Ruto and Joshua Arap Sang", ICC-01/09-01/11, and "The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta", ICC-01/09-02/11. Ruto is accused of being criminally responsible as an indirect co-perpetrator for the crimes against humanity of murder, deportation or forcible transfer of population, and persecution. Sang is accused of having otherwise contributed to commission of the crimes against humanity of murder, deportation or forcible transfer of population, and persecution. Muthaura and Kenyatta are alleged to be criminally responsible as indirect co-perpetrators for the crimes against humanity of murder, deportation or forcible transfer, rape, persecution and other inhumane acts.

<sup>42</sup> A senior official from the Kenya Human Rights Commission said that a few years ago, no-one countenanced the idea that these powerful and wealthy individuals would be tried. Crisis Group interview, Nairobi, March 2012.

<sup>43</sup> "Prosecution's provisions of materials pursuant to Decision ICC-01/09-01/11-440", 9 January 2013; and "Prosecution's provisions of materials pursuant to Decision ICC-01/09-02/11-451", 9 January 2013.

<sup>44</sup> "Statement by the Prosecutor of the International Criminal Court Mrs. Fatou Bensouda", press briefing, Nairobi, 22 October 2012; "Statement by the Prosecutor of the International Criminal Court Mrs. Fatou Bensouda at the press conference at the conclusion of Nairobi segment of ICC Prosecutor's visit to Kenya, Nairobi", 25 October 2012. Article 86 of the Rome Statute requires Kenya to cooperate fully with the court.

<sup>45</sup> Crisis Group Briefing, *Kenya: Impact of the ICC Proceedings*, op. cit. The government sought to rally the support of other African countries, arguing that the ICC was a European court out to impose Western values on Africa. Senior officials who did not toe the line were sidelined. The former justice, national cohesion and constitutional affairs minister, Mutula Kilonzo, who had argued that the four suspects should not hold public office or be permitted to participate in the next election, was moved to the less important education portfolio. He was replaced by Eugene Wamalwa, a vocal



2012, Deputy Prime Minister Mudavadi – and now presidential candidate – again called for local trials, dismissing the need for four individuals to be tried in “foreign jurisdictions”.<sup>46</sup>

During her 22-26 October 2012 visit to Kenya, ICC Prosecutor Fatou Bensouda warned that she could seek the court’s intervention if the government or the accused fail to cooperate.<sup>47</sup> She noted arrest warrants would be requested if Kenyatta and Ruto fail to comply with court directives, even if the former is elected president. Her visit coincided with a highly charged campaign season. Kofi Annan expressed concern in October and again in December about the political impact of the ICC cases and implications for Kenyans having a president facing trial before the ICC.<sup>48</sup>

#### A. *The Eligibility of the Accused*

Those who support Kenyatta and Ruto emphasise that the suspects are innocent until proven guilty, and should therefore be allowed to contest the presidency. Others argue that because of the gravity of the cases, and the demands compliance with the ICC process would place on their time, no one facing trial before the ICC should be permitted to run. Mutula Kilonzo, for example, who is former justice, national cohesion and constitutional affairs minister and current education minister, argues that Chapter 6 of the constitution is very clear: they cannot run. In his view, the presumption of innocence standard is superseded by severity of the alleged crimes.<sup>49</sup>

Yet, a definitive decision on the eligibility of those facing trial to run for public office has not yet been provided.<sup>50</sup> A number of domestic cases were filed contesting

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Kenyatta supporter. Mohammed Yusuf, “Kenya cabinet reshuffle changes presidential race”, *Voice of America*, 27 March 2011; “Kibaki: Kenya working on local trials for Ocampo Four”, *The Nation*, 24 April 2012. See also Crisis Group Briefing, *Kenya: Impact of the ICC Proceedings*, op. cit.

<sup>46</sup> “All Kenyans guilty of PEV – Mudavadi”, *The Star*, 3 October 2012. Prime Minister Odinga has also called for local trials, but Ruto and Kenyatta publicly stated they do not believe his pledge. “Uhuru, Ruto dismiss PM Odinga on ICC trials”, *The Nation*, 6 November 2012.

<sup>47</sup> “Bensouda jets in as Uhuru, Ruto intensify campaigns”, *Sunday Standard*, 21 October 2012; and “Bensouda’s stern warning on Ruto, Uhuru trials”, *The Standard*, 27 October 2012.

<sup>48</sup> During his October visit, Annan said a Kenyatta or Ruto government “would have grand implications, which everyone needs to ponder particularly when you are dealing with leadership of the country, leadership within the country, and leadership that also involves other countries outside and beyond Africa”. Kenyatta replied, “my focus is Kenya, the region, and the continent. No Kenyan or African has said Uhuru should not vie for the presidency, so the rest can stay away if they don’t want to associate with us. We welcome them to continue visiting Kenya because tourists help our economy grow, but I am not looking to be president in the UK, U.S. or Germany”. “Bensouda jets in as Uhuru, Ruto intensify campaigns”, *The Standard*, 21 October 2012. In December Annan urged Kenyans not to vote for politicians facing trial at the ICC. “Kofi Annan urges Kenyans not to vote for indicted politician”, BBC, 4 December 2012. Kenyatta and Ruto and their supporters are increasingly invoking nationalist rhetoric, especially against “foreigners” who challenge their ability to contest the presidency. Pheroze Nowrojee, “Uhuru did wrong to insult Annan, Mkapa”, *The Star*, 17 October 2012.

<sup>49</sup> Crisis Group interview, Mutula Kilonzo, Nairobi, February 2012.

<sup>50</sup> According to Chief Justice Willy Mutunga, recent decisions have provided guidance on how the courts should handle the cases on leadership and integrity. For example, the nomination of attorney Mumo Matemu as the head of the Ethics and Anti-Corruption Commission was nullified by the court on grounds that he was unfit to serve because of questionable integrity. See fn. 36. Deputy Chief Justice Nancy Baraza was suspended following allegations she brandished a gun at a shopping mall security guard. She apologised for the “unfortunate incident”, but denied that a gun was involved. “Police want Bazara tried”, *Daily Nation*, 9 January. She subsequently resigned, writing

Kenyatta's and Ruto's eligibility. In an initial case the petitioners wanted the court to declare that the ICC's confirmation of charges against both "would be a threat to the Constitution".<sup>51</sup> They also asked "whether the presumption of innocence in favour of the two persons committed to trial before the International Criminal Court overrides or outweighs the overwhelming public interest to ensure protection and upholding tenets and principles of the Constitution set out under Article 10 and 73".<sup>52</sup>

This case was withdrawn and a fresh case was filed by the International Centre for Policy and Conflict (ICPC), on 30 November, which argues that "a person committed to trial at the Hague would not be able to properly discharge his/her duties as a public or state officer, since she/he would be required to attend the hearings ... on a full time basis",<sup>53</sup> and adds that the honour and integrity of public officials required by the constitution would be "seriously eroded". The petitioners asked for an advisory opinion or interpretation that the constitution's provisions on leadership and integrity prohibit Kenyatta and Ruto from holding public office.<sup>54</sup>

The case, currently before high court judge David Majanja, was delayed when he instructed the ICPC to personally serve Kenyatta and Ruto with the suit papers.<sup>55</sup> It has subsequently been merged with a second integrity suit, filed on 19 December 2012 by the Kenya Human Rights Commission and the International Commission for Jurists-Kenya.<sup>56</sup> Kenyatta indicated he is ready to fight the case filed by the ICPC challenging his suitability.<sup>57</sup>

If the case is heard and the judge rules against the two men, it would certainly be appealed to a higher court, either the Court of Appeal or directly to the Supreme Court. While it is unclear which way the courts will rule, a decision that Kenyatta and Ruto are ineligible could be very contentious, especially if issued after the 30 January deadline for candidate nominations, since their supporters will be unable to identify and nominate alternative candidates, and could lead to protest and unrest. If possible, the date of any decision should be announced in advance so the security agencies and others can prepare accordingly.

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to the president: "Although I have preferred an appeal in the supreme court challenging the recommendations of the tribunal set up to probe my conduct, I do not see myself getting a fair and impartial hearing before the court as currently constituted". "Baraza drops appeal and quits DCJ job" *The Star*, 19 October 2012; and "Nancy Baraza finally resigns", *The Standard*, 19 October 2012.

<sup>51</sup> Specifically they sought the courts' advisory opinion and the interpretation of "Articles 10 (1) and (2), Articles 73, 75 and 80 of the constitution, and the implication to persons charged with serious crimes taking leadership position". "Patrick Njuguna, Augustino Neto, Charles Omanga, Kenya Youth parliament and Kenya Youth League vs. Attorney General, Commission on implementation of the constitution and IEBC", para. 1, 25 January 2012.

<sup>52</sup> *Ibid*, para. 2.

<sup>53</sup> "The International Centre for Policy and Conflict vs Attorney General, Commission on implementation of the constitution and Independent Electoral and Boundaries Commission", para. 15, 30 November 2012.

<sup>54</sup> *Ibid*, para. 27.

<sup>55</sup> When the group was unable to serve the two men by 5 December, it sought to do so through notices in newspapers. This request was rejected by the judge on 11 December. "Kenya: ICPC fails on bid to serve Ruto, Uhuru by media", *The Star*, 11 December 2012. Eventually court official Michael Munguti managed to serve them with the papers. "Uhuru ready for case over his candidature", *Standard Digital* (online), 3 January 2013.

<sup>56</sup> "Lobbies want court to stop Uhuru and Ruto from vying", *The Nation*, 20 December 2012.

<sup>57</sup> "Uhuru ready for case over his candidature", *op. cit.*

## B. Implications

The ICC process will alter the electoral dynamics, and arguably may be a key factor in determining voting patterns.<sup>58</sup> At the end of November 2012, Uhuru Kenyatta (The National Alliance, TNA), William Ruto (United Republican Party, URP) and Musalia Mudavadi (United Democratic Forum, UDF) formally announced the creation of the Jubilee coalition.<sup>59</sup> They were joined by former ODM stalwarts, including Najib Balala (from the coast and nominally representing the Muslim community) and Charity Ngilu (likely to attract some women's votes and support from lower Eastern Province), both of whom recently defected from the Odinga camp. However, several weeks later, Mudavadi withdrew from the coalition over disputes about the presidential nomination process.<sup>60</sup>

### Ethnic Breakdown – Kenya (2009 census)

Tribe	Per cent of population (approx. 43 million est. in 2012)
Kikuyu	17
Luhya	14
Kalenjin	13
Luo	11
Kamba	10
Kenyan-Somali (disputed)	6
Kisii	6
Mikenda	4
Meru	4
Other	15

The Kenyatta-Ruto alliance seems to be firm – so far. With Kenya's ethnic-based politics, this alliance represents a formidable force if the leaders can attract the full support of their respective communities, particularly Kenyatta's Kikuyu and Ruto's Kalenjin. If it holds,<sup>61</sup> it could potentially lower tension in much of the populous Rift Valley, an epicentre of political violence and ethnic tension between the Kalenjin and Kikuyu since the return to multiparty politics.<sup>62</sup> However, the unity of the two leaders' followers will face a huge test at the local level, especially in some Rift Valley counties.<sup>63</sup> Ruto and Kenyatta must navigate the treacherous and mutually distrustful history between their respective communities.<sup>64</sup>

<sup>58</sup> Crisis Group interview, Issack Hassan, IEBC chairman, Nairobi, February 2012.

<sup>59</sup> "Mudavadi joins Uhuru and Ruto", *The Nation*, 5 December 2012.

<sup>60</sup> "Dissolve Jubilee, says Mudavadi", *The Star*, 3 January 2013; and "Jubilee alliance fate unclear as UDF pulls out", *The Standard*, 3 January 2013.

<sup>61</sup> While Kenyatta and Ruto nationally are seen to be united because of the ICC cases against them, their respective ethnic constituencies seem to be largely undecided on how they will vote, particularly the Kalenjin. Crisis Group interview, Kericho resident, Nairobi, 25 May 2012. Even nationally, the Ruto camp is suspicious of Kenyatta's. "Trouble brews in G7 Alliance", *The Standard*, 6 June 2012. Observers note the logic in Ruto's alliance with Kenyatta: since they are co-accused, their interests overlap. The calculations would be much different were he to join Odinga, who is not subject to an ICC proceeding. Crisis Group interview, human rights activist, Nairobi, 24 October 2012.

<sup>62</sup> However, anti-Luo sentiment may grow and violence occur around tea plantations, which employ many non-Kikuyu, and the border zones of Luo/Kikuyu and Luo/Kalenjin areas. Crisis Group email correspondence, Kenya expert, 12 January 2013.

<sup>63</sup> Kalenjin support for Kenyatta is also contingent in part on whether or not Kikuyus will contest seats in the Rift Valley. "They can come, own property, buy land, but if they run for office, the alli-

Nor are the Kalenjin a monolithic voting bloc. While Ruto holds considerable sway, he is not the only leader with a say in how the community votes.<sup>65</sup> Further, the Kalenjin may be reluctant to play second fiddle – in 2002 Ruto asked them to support Kenyatta; in 2007 he asked them to support Odinga and in 2013 the community may well not be keen to support a presidential candidate from another tribe.<sup>66</sup> On Kenyatta's side, communities like the Meru, who have usually voted with the Kikuyu, are not happy about yet another Kikuyu presidential candidate. They say they will not be used as a rubber stamp by Kenyatta and key leaders have vowed not to work with him.<sup>67</sup>

Prime Minister Raila Odinga, the ODM leader, has countered Kenyatta's and Ruto's move by forming his own alliance, the Coalition for Reform and Democracy (CORD), with Vice President Kalonzo Musyoka from the Wiper Democratic Movement, as well as the Ford Kenya party led by Moses Wetangula.<sup>68</sup> CORD is a coalition of Odinga's Luo, Musyoka's Kamba and Wetangula's Luhya (split by Mudavadi's and Wamalwa's Amani coalition). Odinga is also working with politicians from the Rift Valley and is attempting to reach out to smaller communities.

The other large group is the Amani coalition, featuring Deputy Prime Minister Musalia Mudavadi, Eugene Wamalwa (New Ford Kenya), another president's son, Gideon Moi (KANU), and former cabinet minister and businessman Nicholas Biwot (Vision Party of Kenya).<sup>69</sup> The coalition could claim a sizable proportion of Muda-

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ance will not hold. Why is the Rift Valley in Kenya where everyone can come and live, but Central Province is a Kikuyu-land?" Crisis Group interview, community leader, Eldoret, January 2012.

<sup>64</sup> "In the Rift Valley the conflict always pits the Kikuyu and the Kalenjin against each other. If Kenyatta and Ruto work together there will be tension, but if they do not work together there will be violence". Crisis Group interview, Njoro resident, 23 November 2012. In addition, with the emergence of the Amani coalition, violence also could be recast between Kikuyu/Kalenjin and Luhya in certain counties.

<sup>65</sup> Other Kalenjin leaders include Henry Kosgey, ODM chairman, Sally Kosgei, Aldai constituency parliamentarian, and Professor Margaret Kamar. Crisis Group interview, Vincent Bartoo, Eldoret bureau chief, *The Standard*, Eldoret, 16 November 2012.

<sup>66</sup> Crisis Group interview, political activist, Nakuru, 17 November 2012. In some Rift Valley counties, like Nakuru, the Kikuyu have an unassailable numerical superiority, which makes some Kalenjin wary about a Kenyatta-Ruto alliance – they argue that if they support Kenyatta, it is only fair for local seats to be allocated to them.

<sup>67</sup> The most senior Meru leader, Energy Minister Kiraitu Murungi, has broken ranks with Kenyatta claiming he showed a lack of respect. Another leader, Gitobu Imanyara, formally joined ODM. Kenya's history of pre-election coalition fluctuations is making most politicians wary of committing to any alliance without extensive negotiations and consultations. Former parliamentarian Richard Maoka Maore noted, "when you talk of political rewards, these people feel marginalised ... this marginalisation has been most explicit during the Kibaki administration, during which the Meru people were divided in the middle when the president put Kiraitu Murungi and Francis Muthaura in the front line. These two apparently did not know the size of Meru; we have over 300 senior government officials from Meru and over 99 per cent of them come from two constituencies namely Central Imenti and South Imenti, where Muthaura and Kiraitu respectively hail from. So there have been resentment and disgust among the other residents of the greater Meru". "Why the Meru will support Riala-Maoka Maore", *The Star*, 7 January 2013.

<sup>68</sup> "Cord hints at endorsing PM Odinga for race", *The Nation*, 9 December 2012. Moses Wetangula was foreign minister from January 2008 to March 2012.

<sup>69</sup> It is not an officially constituted coalition, since it formed after the 4 December 2012 deadline. This may make it less stable in the run-up to the elections.

vadi's and Wamalwa's Luhya in Western Province, and Gideon Moi's Kalenjin. This may eat into the Jubilee coalition's vote in the Rift Valley.<sup>70</sup>

Additionally, Peter Kenneth (Kenyan National Congress, KNC) has joined hands with Raphael Tuju (Party of Action, POA) in the Eagle alliance. The two younger politicians are in the race for the crucial youth vote.<sup>71</sup> To their supporters, the Kenneth-Tuju pair is a fresh alternative, with a non-tribal and policy-oriented platform.<sup>72</sup>

According to the December 2012 opinion poll by Ipsos-Synovate, whose polling tends to be fairly accurate, 34 per cent would vote for Raila Odinga if the election had taken place then; 27 per cent for Uhuru Kenyatta; 5 per cent for Musalia Mudavadi (before he announced his own Amani coalition); and 4 per cent for Peter Kenneth.<sup>73</sup> Unsurprisingly, support for particular candidates varies widely by region and its dominant ethnic group.<sup>74</sup> In the case of a two-way contest, 47 per cent would vote for an Odinga-Musyoka and 41 per cent for a Kenyatta-Ruto ticket.<sup>75</sup> Unfortunately, the rapid cobbling together of large multi-party coalitions has also undermined the possibility of coherent political platforms.<sup>76</sup> This limits idea-based elections and focuses voters' choices on particular leaders and tribal affiliations.

It will be essential to monitor historically volatile relations and regions such as the Rift Valley, while keeping a close eye on emerging fault lines and new theatres of violence in the election.<sup>77</sup> The first test will be the party nomination process that selects candidates before the nominations deadline on 18 January 2013. There are 1,882 positions to be contested countrywide for which parties will be picking candidates, including 290 for the National Assembly, 1,450 for county assembly, 47 for governor and senator and reserved seats (one in each county); and one for the president and deputy president.<sup>78</sup>

For parliamentary, gubernatorial and county assembly aspirants in some "safe" counties, where one party or coalition dominates, this will be tantamount to winning the election. The three biggest coalitions all chose 17 January to hold nominations (this would prevent those who lose from defecting to rival parties).<sup>79</sup> This has led to a

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<sup>70</sup> Mudavadi's ability to attract significant Rift Valley votes depends on his Kalenjin coalition allies, principally Gideon Moi, KANU chairman, whose father, former President Moi, still has some residual power, especially with older voters. Crisis Group email correspondence, Kenya expert, 12 January 2013.

<sup>71</sup> The 2010 census showed that 75 per cent of the Kenyan population is less than 30 years old, although the percentage of registered voters of that age is considerably lower.

<sup>72</sup> "Kenneth, Tuju beat coalitions deadline with pact", Capital FM (online), 4 December 2012. Kenneth is known for good management of the constituency development fund in Gatanga.

<sup>73</sup> The popularity of front runners Odinga and Kenyatta each gained one percentage point compared to the November poll. Ruto lost 7 points and Musyoka shed 5 points. "Political Barometer Survey", Ipsos Public Affairs, 14 December 2012.

<sup>74</sup> For example, in Nyanza (a Luo-dominated province) 70 per cent support Odinga. In Central (Kikuyu-dominated) 56 per cent would vote for Kenyatta. Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> N. Cheeseman, G. Lynch and J. Willis (eds), "Early Warning and Long Term Monitoring Project: Kenya Elections 2013 Baseline Report", Nairobi, December 2012.

<sup>77</sup> For example, tensions are very high along the coast because of the Mombasa Republican Council's secession demands.

<sup>78</sup> James Oswago, "Kenya 2013 Election Watch Forum", lecture, Sarova Stanley, Friedrich Ebert Stiftung and Africa Policy Institute, Nairobi, 16 January 2013.

<sup>79</sup> However, the major alliances all abandoned joint nominations. "Cord changes tack in poll strategy", *The Nation*, 9 January 2013; "Amani parties to hold separate primaries", 8 January 2012.

great deal of confusion and fear of possibilities of rigging.<sup>80</sup> Many aspirants, mainly from Cord and Jubilee coalitions, have expressed fears that top party officials are going to favour certain candidates through direct nomination.<sup>81</sup> They are also concerned with the possible tampering of the nomination process to tilt the outcome in favour of their preferred candidates.<sup>82</sup> The lack of transparency is also creating tensions.<sup>83</sup> The high number of disputes that may arise could overwhelm the Political Parties Disputes Tribunal and IEBC.<sup>84</sup> This is also seen as a test of security arrangements.<sup>85</sup>

### C. Possible Scenarios

Given Kenya's tumultuous politics and the ongoing implementation of the new constitution, it is difficult to predict what will happen, which will depend on many factors. How either of the two main camps would respond to losing a close vote it perceives as flawed, or even to early signs it is falling behind, is unclear. All of the main contenders have spoken out against political violence and should be encouraged to continue doing so. Still, it is important to ponder the possible consequences of the presidential race and the risks to the country's stability.

#### 1. What if the election is very close and disputed?

In Kenya the incentive to use political violence in national- or county-level races will increase if the vote is close or expected to be close (when it can be used to suppress opponents' voters) or during election disputes. In the presidential race, counties in which a candidate is just above or below the 25 per cent of the votes necessary to win (in 24 of the 47 counties) are particularly vulnerable. County-level contests, for governor, National Assembly and county assembly, could also become violent, especially in locations where communities are split by new electoral boundaries or areas where "indigenous" communities are outnumbered by new arrivals.<sup>86</sup> Lastly, in some "safe" counties, where one party (or ethnic group) dominates, violence could occur before the polls as politicians vie for the party's nomination. The lack of transparency in party nominations is also raising tensions among communities.

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<sup>80</sup> "Confusion ahead of Jan 17 party nominations deadline", *The Star*, 14 January 2013.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Crisis Group email correspondence, Kenya expert, 13 January 2013. Many politicians have also quietly secured the nomination of smaller parties in case they lose in the 17 January primaries. "The countdown, elections 2013", *The Standard*, 16 January 2013; Crisis Group interview, Kenya expert, 10 January 2013.

<sup>84</sup> The tribunal, a quasi-judicial body, was created by the 2007 Political Parties Act to rule on disputes between members of a party, a coalition or between two camps. See also "Confusion ahead of Jan 17 party nominations deadline", op. cit. The IEBC has said it will not consider party nominations petitions after 17 January. "No petitions after Thursday, IEBC warns political parties", *The Standard*, 16 January 2013; James Oswago, "Kenya 2013 Election Watch Forum", op. cit.

<sup>85</sup> Inspector General of Police Kimaiyo has assured Kenyans of security during the exercise, which "resembles a mini-election". Ibid.

<sup>86</sup> "Early Warning and Long-Term Monitoring Project", op. cit. Areas this study highlights as of particular concern for electoral fraud and violence are: Mombasa and Tana River (Coast); Rift Valley; Isiolo (Eastern); Kisumu (Nyanza); Kibera and Mathare slums (Nairobi); as well as Garissa and Marsabit (North Eastern). See also, David Throup, "Reading the Tea Leaves on the Kenyan Elections: Patterns of Violence and Political Alliances", Center for Strategic and International Studies, 16 November 2012.

The stakes for Kenyatta and Ruto, in particular, are high. If Kenyatta fails to win the presidency they may be facing trial in The Hague, with little, if any, support from a new government that might be eager to sideline former rivals by supporting the ICC process.<sup>87</sup> If the vote is very close or disputed, as it was in 2007, there is a risk of violent contest over the result, which would spoil the election. Kenyatta, notably, has specifically warned against this, stating that “politicians must never again be allowed to cause violence and then go to Nairobi to make deals over power”.<sup>88</sup> Others may also respond badly to a close or uncertain result. Raila Odinga’s supporters engaged in political violence after the disputed 2007 polls,<sup>89</sup> and Kenya has a history of violent political conflict.<sup>90</sup>

## 2. What if Kenya has a president facing trial before the ICC?

### Domestic implications

The first domestic challenge such a president would likely face would be Article 145 (1) (b) of the constitution, which allows a member of the National Assembly, supported by at least a third of all the members, to move a motion for the president’s impeachment on the ground that there are serious reasons for believing he has committed a crime under national or international law. While he would continue in office during subsequent proceedings, the president might find it difficult to continue to carry out his duties fully.

At the same time the president would need to decide whether to cooperate with the ICC. Kenyatta and Ruto have consistently pledged to do so, and their hope is that they stand trial and are acquitted. The incentive to cooperate is stronger if they sense the trials are fair and going in their favour. Kenyatta’s trial is due to commence on 11 April 2013. This would mean he would be often absent from office, spending much of his time at The Hague over many months.<sup>91</sup> Day-to-day government would be managed by a leaderless cabinet for the course of the proceedings and little of the reform process would be expected to move ahead.<sup>92</sup>

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<sup>87</sup> It appears that Kenyatta and Ruto also plan to win a majority in parliament, which may influence how the country responds to the ICC, whether or not they win the presidential vote. Crisis Group interview, Nairobi, 13 January 2013.

<sup>88</sup> “Kenya: Jubilee plans major Uhuru Park rally”, Capital FM, 7 January 2013.

<sup>89</sup> William Ruto was an ODM leader at the time of the 2007-2008 violence.

<sup>90</sup> As the Commission of Inquiry into Post-Election Violence report noted, “sadly, violence has been a part of Kenya’s electoral processes since the restoration of multi-party politics in 1991”. “Report of the Commission of Inquiry into Post-Election Violence (CIPEV)”, *op. cit.*, p. 3. See also “Divide and Rule: State-Sponsored Ethnic Violence in Kenya”, Human Rights Watch, 1993; “Kayas of Deprivation, Kayas of Blood: Violence, ethnicity and the state in coastal Kenya”, Kenya Human Rights Commission (KHRC), 1997; and “Playing with Fire: Weapons Proliferation, Political Violence and Human Rights in Kenya”, Human Rights Watch, 2002.

<sup>91</sup> In a pre-trial brief, ICC Prosecutor Bensouda told trial judges she will need an estimated 826 hours to present her case against Ruto and Sang and 572 hours to present evidence against Kenyatta and Muthaura. “Prosecution’s provisions of materials pursuant to Decision ICC-01/09-01/11-440”, 9 January 2013; and “Prosecution’s provisions of materials pursuant to Decision ICC-01/09-02/11-451”, 9 January 2013. This does not include time required by the defence and others.

<sup>92</sup> Crisis Group interview, civil society activist, Nairobi, November 2012. See also, “If Uhuru Kenyatta or William Ruto is Elected President: Implications of a Kenyatta/Ruto Presidency for Kenya”, Kenya Section of the International Commission of Jurists (ICJ-Kenya), Katiba Institute and Kenya Human Rights Commission (KHRC), no date.

If the trial goes against them, they could use their powerful positions to attempt to derail their prosecution, possibly try to have Kenya withdraw from the Rome Statute, and undermine the ICC by turning the region against it.<sup>93</sup> Withdrawal, however, would not suspend ICC proceedings or relieve the accused or their government of their obligations before the court. The president could also push for local jurisdiction to try his case. This would be huge challenge for a judiciary that is trying to rebuild and end impunity.

The most extreme case scenario would be complete non-cooperation, comparable to neighbouring Sudan's President Omar al-Bashir, where the president would need to remain in power indefinitely for fear that he would otherwise ultimately end up in The Hague. Such an outcome would be disastrous for Kenya and its business community and the reform process would be irretrievably undermined.

#### International implications

While most countries say they are not backing any candidate, the potential international implications if Kenyatta wins the presidency are serious, if uncertain. If he were to resist The Hague process, Kenya would be isolated, with major implications for the entire population and socio-economic development. Even if the president cooperates with the court, it would be difficult for many countries to have normal diplomatic relations during the long trial and many donor governments might need to scale back their bilateral assistance.<sup>94</sup> Regardless of the outcome of the trial, the country's diplomatic capital would also erode, and some trading partners would likely find it difficult to conduct business with Kenya, which relies heavily on foreign direct investment, trade and tourism.

In case of non-cooperation, it is likely that the UN may curtail its operations in Kenya, and Nairobi in particular.<sup>95</sup> Not only would this mean a loss of business for Kenyan companies, but the numerous UN staff based in Nairobi might also move, with the attendant loss in rental income and spending, which, combined, would have a disastrous impact on the economy.<sup>96</sup>

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<sup>93</sup> A week after then-ICC Prosecutor Luis Moreno-Ocampo named six Kenyans suspected of being behind post-election violence, Kenyan parliamentarians voted overwhelmingly for the country to pull out of the Rome Statute. The move had no legal force but was intended to send a signal to the government. "Kenya MPs vote to leave ICC over poll violence claims", BBC, 21 December 2010.

<sup>94</sup> Crisis Group interview, EU diplomat, Nairobi, 30 November 2012. Speaking in Eldoret on 15 January 2013, the UK envoy to Kenya reiterated that his government does not support any candidate but stated "the position of my government and others is that we don't get in contact with the ICC indictees unless it is essential". "UK to avoid contact with ICC suspects", *The Standard*, 16 January 2013. See also "Election threatens to destabilise Kenya", *Financial Times*, 14 January 2013.

<sup>95</sup> A note issued in 2006 by the UN legal adviser states, "Contacts between UN representatives and persons indicted by international criminal jurisdictions holding positions of authority in their respective countries should be limited to what is strictly required for carrying out UN mandated activities. The presence of any UN representative in any ceremonial or similar occasion with such individuals should be avoided. When contacts are absolutely necessary, an attempt should be made to interact with non-indicted individuals of the same group or party". Nicholas Michel, Under-Secretary-General for Legal Affairs, The Legal Counsel, "The UN position on peace and justice in post-conflict societies", UN Interoffice Memorandum, 27 September 2006.

<sup>96</sup> "Is Kenya ready to face the consequences of Uhuru Presidency?", *The Star*, 8 December 2012.



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## IV. Electoral Preparations

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Preparations for the elections are now moving forward fast. A new election commission, the IEBC, despite controversy over the timeline and the procurement of voter registration kits, still enjoys a reasonable degree of public trust. New constituency boundaries have been drawn and all related disputes resolved by the courts. The IEBC is planning an array of fraud prevention measures and expedited provisional results communicated directly from polling stations to allay worries of manipulation.

But considerable challenges remain. Parliamentarians watered down some necessary laws, and have failed to pass others, such as the campaign finance bill. The acting registrar of political parties appeared unable to enforce new rules during political party registration. The bungled voter registration procurement meant a delayed start to voter registration, which in turn impacts other preparations – a particularly troubling development given that the ICC cases make the electoral timeline extremely sensitive for the current contenders. Any non-transparent changes to the timeline now, even on technical grounds, would undermine confidence in the IEBC and, worse still, be perceived as politically motivated. The election commission urgently needs to work with other stakeholders, particularly political parties, the judiciary and civil society, to address potential problems with the electoral timeline and keep the electorate informed about what it is doing.

### A. *The Independent Electoral and Boundaries Commission (IEBC)*

The Kriegler report identified weaknesses in the previous election commission, the Electoral Commission of Kenya (ECK), as having contributed to the 2007-2008 violence. Its weak management of a flawed results process, particularly for the presidential polls, sparked the initial protests. Deep distrust in the ECK meant that opposition politicians suspected it of election rigging and had little reason to believe commissioners would address their complaints fairly. The commission's weakness and lack of credibility could be traced in part to the president's ability at the time to unilaterally appoint its members.<sup>97</sup>

To address these problems, the Kriegler report recommended, and the new constitution required (Article 88), that commissioners to the IEBC be appointed through a consultative process. A selection panel, set up in August 2011 through consultations between the president and prime minister, identified commissioners who were formally nominated by the president. The list was vetted and approved by parliament in transparent hearings, some of which were even streamed online.<sup>98</sup>

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<sup>97</sup> Ahead of the 2007 election, Kibaki ignored the Inter-Parties Parliamentary Group (IPPG) agreement according to which a president would appoint commissioners nominated by the opposition. President Moi in 2002 had appointed commissioners according to this agreement, but it was never codified in law. Kibaki instead appointed a number of ECK members unilaterally only months before the elections, despite protests from a cross-section of society, including party leaders and other presidential candidates. Nothing in the legal framework at the time prevented him doing so. "Kriegler report", op. cit., pp. 30-32. Samuel Kivuitu, the election commission chairman, was also trusted (due to his successful management of the 2002 polls) just before the 2007 election results were announced.

<sup>98</sup> "IEBC nominees face Parliament", *The Nation*, 29 October 2011.

Despite complaints from some politicians that the process was insufficiently transparent, a promising constellation of commissioners was appointed.<sup>99</sup> The majority are a change from previous appointments of semi-retired civil servants and diplomats.<sup>100</sup> They now serve for only a single, non-renewable six-year term. They are also more difficult to dismiss, and thus appear to have less incentive to curry favour with politicians to seek renewal or stay in post. Together these measures provide the security of tenure that the Kriegler report recognised was important to ensure commissioners' independence.<sup>101</sup>

The IEBC until recently enjoyed broad political and public support, in part because of its successful management of the 2010 constitutional referendum and various by-elections.<sup>102</sup> The IEBC also performed delimitation of county boundaries – one of its first tasks related to the 2013 polls – reasonably adeptly.<sup>103</sup>

The commission's recent handling of the procurement of expensive biometric voter registration kits, however, as well as its inability to enforce new rules on political parties during their registration (see Section IV.E below) and the controversy over the elections date, appear to have somewhat eroded its solid reputation.<sup>104</sup> The bungled procurement process in particular, although the IEBC was not solely responsible, exposed its inexperience and weakness.<sup>105</sup>

Despite these problems, the IEBC remains one of Kenya's more trusted institutions, but the intense political pressure as March approaches will provide a stiff test.<sup>106</sup>

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<sup>99</sup> Several parliamentarians argued that some candidates were unfairly overlooked. "MPs fault list of applicants for IEBC commissioners", *The Standard*, 16 September 2011. However, according to an interlocutor, the nine-person commission is leaner than the previous one, and enjoys public support because of the manner in which its members were appointed. Crisis Group interview, Peter Okoth, executive director for the Institute for Education in Democracy (IED), Nairobi, February 2012.

<sup>100</sup> Much of the interim commission's experience was lost.

<sup>101</sup> "Kriegler report", *op. cit.* According to Article 251 of the constitution, commissioners can only be removed by a special tribunal.

<sup>102</sup> The referendum was organised by a transitional election commission, the Interim Independent Election Commission (IIEC), but a number of IEBC commissioners, including the chairman, were on the IIEC board. A survey showed that 70 per cent of Kenyans believe the IEBC has so far conducted its work in an impartial manner. "Kenya's 2013 General Election: A Review of the Environment and Electoral Preparedness", The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project (South Consulting), October 2012, p. 45.

<sup>103</sup> After acrimonious parliamentary and grassroots debates, the IEBC report defining new constituencies on delimitation was passed by the parliament with only limited amendments. The judges also dismissed nearly 70 of the 136 petitions lodged against the boundaries, saying they lacked sufficient grounds and that some were filed after the deadline to submit complaints. The delimitation process is an important success of the reformed electoral institutions and the courts.

<sup>104</sup> "Kenya's 2013 General Election", *op. cit.*, p. 49.

<sup>105</sup> "Kenyans' faith in the Independent Electoral and Boundaries Commission's (IEBC) ability to conduct free and fair elections has dropped from 83 per cent in March this year to 76 per cent by last month, according to the latest opinion poll survey". Peter Obuya, "Public trust in IEBC plummets over BVR saga – poll", *The Nation*, 11 November 2012. The IEBC's earlier decision to abandon electronic voter registration was overruled by the government.

<sup>106</sup> According to the respected South Consulting group that is monitoring compliance with the National Accords that ended the 2007-2008 violence, 72 per cent of those surveyed believe the IEBC is independent enough to conduct the next general election in a free and fair manner. It noted, however, that most people rated the commission poorly for enforcing electoral laws. It also found that the most trusted institution was the judiciary, with 78 per cent saying they had confidence in the institution as the election approaches. "Kenya's 2013 General Election", *op. cit.*, p. viii, x and 33.

Since many of its decisions between now and March are likely to be contentious, it should exploit opportunities – including through the Political Parties Liaison Committee – to discuss them fully with all political factions, ideally involving them in key decisions. Local IEBC regional offices should do the same with candidates for local office, especially for the gubernatorial election.

Drawing in and building a strong alliance with civil society groups would also strengthen confidence in the IEBC.<sup>107</sup> Transparency and effective outreach and communication will be key to maintaining public support. The commission should also consider taking strong early action against violators of campaign rules, particularly those who use inflammatory language, to send warning signal that, like the judiciary, it is unafraid to take on powerful politicians. Making an early example would help set the tone for the campaign.

### B. *Electoral Dispute Resolution*

The absence of trusted and credible ways of resolving electoral disputes was, according to the Kriegler report, another key factor contributing to the 2007-2008 violence. In particular the report highlighted that parties had no means to address perceived flaws in results – such as those from Kibaki strongholds for example – before they were formally announced. Petitions could only be lodged afterwards, and only to the courts, which often took “months or even years” to resolve them.<sup>108</sup> In any case, given that five new justices were appointed a few days before the polls by President Kibaki, the Odinga team doubted the judiciary’s capacity to resolve disputes fairly.<sup>109</sup> A crucial recommendation, drawing on Judge Kriegler’s own experience, was to establish a body dedicated to resolving electoral disputes “quickly, fairly and practically”.<sup>110</sup> This would avoid cases, especially those pertaining to results, getting stuck in the regular judiciary.

The new constitution and laws do not establish such a body, although they do address many of the weaknesses in dispute resolution identified by the Kriegler report. The Elections Act, 2011 provides a comprehensive list of electoral offences and sanctions for their violation. The IEBC has authority to pursue those who commit offences, and the chairman has indicated it will use this prerogative robustly, though its will to do so remains to be seen.<sup>111</sup> Disputes are still resolved by either the IEBC or the judiciary, but both have been reformed and enjoy considerably more independence and political and public confidence. The commission resolves disputes that arise before the announcement of results, including those related to candidate nomination – which could require it to rule on the eligibility of those accused by the ICC.<sup>112</sup> Disputes sub-

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<sup>107</sup> Some have suggested that the IEBC is not communicating openly with civil society groups, which if true would be a grave mistake.

<sup>108</sup> “Kriegler report”, op. cit., p. 141.

<sup>109</sup> Ibid.

<sup>110</sup> His reasons for the establishment of such a body are developed in a section on “a special electoral dispute resolution court”. Ibid, pp. 142-143.

<sup>111</sup> According to Chairman Hassan, “it’s every politician’s nightmare to be disqualified from participating in the polls, and this will hopefully discourage them from participating in electoral malpractice”. Crisis Group interview, Ahmed Isaack Hassan, IEBC chairman, Nairobi, February 2012.

<sup>112</sup> Constitution of Kenya, Article 88 (4) and Elections Act, Article 74. The IEBC must resolve disputes within seven days, or before the nomination or the results challenged are confirmed, which in principle addresses the problem of timeliness identified by the Kriegler commission. On 21 November, the IEBC chairman, Isaack Hassan, said the commission would make a decision on Kenyatta

sequent to the announcement of results go either to the high courts (for county and parliamentary polls) or to the Supreme Court (for the presidential contest). But given the shortage of judges – there are only about 70 – the judiciary is still likely to struggle to resolve all disputes in a timely manner.<sup>113</sup>

A troubling gap in the legal framework for disputes concerned the adjudication of disputes between the first round of voting and a potential presidential run-off. According to the new constitution, anyone can challenge the election of a president-elect.<sup>114</sup> A petition against the candidate with the second highest number of votes or another dispute related to the first round could shape which candidates qualify to contest the run-off.<sup>115</sup> On 11 December 2012, the Supreme Court asserted its jurisdiction in all aspects of potential presidential election disputes, and clarified that if a second vote were necessary it should occur within 30 days “from the date on which disputes in respect of the first round have been resolved”.<sup>116</sup> Aware that delays could undermine free, fair and peaceful elections, it also indicated it would establish specific and efficient guidelines for the hearing of first-round election disputes.<sup>117</sup>

### C. *Political Parties Act*

Another major change in the legal framework for elections is the November 2011 Political Parties Act. Political parties in Kenya have long been problematic. Formed for the most part along ethnic lines, they tend to be ideology-free electoral vehicles for their leaders and central to the ethnic number-crunching and coalition building that take place ahead of each poll. Few have internal party democracy that is sufficiently robust to allow for the transparent selection of leaders, or to replenish leadership and offer young members a chance to progress through the ranks. Leaders or their financiers often meddle in primaries or candidate selection processes. Politicians traditionally jump from one party to another readily, or start new parties when they believe existing ones do not serve their interests. The last few months have seen a major migration of politicians, as incumbents and aspirants for elective office rush to join parties that are perceived as popular in their locales.<sup>118</sup>

The new act aimed to address at least some of these problems, and – were it enforced – could represent a genuine opportunity to change Kenya's political culture. It

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and Ruto once the court rules on a case questioning their integrity. “Court has final say on Uhuru and Ruto, says IEBC boss”, *The Nation*, 21 November 2012. When it appeared likely the court would not rule before the candidate nomination deadline, he told the press the commission would not deny nominations to candidates facing criminal charges, as long as they conform to the rules required of the elective posts. However, when asked whether Kenyatta and Ruto would be allowed to contest, he stated, “no comment on these two since their matter is in court”. “Uhuru, Ruto: IEBC states its position”, *The Nation*, 3 January 2013.

<sup>113</sup> See, for example, “Kenya's 2013 General Election”, op. cit.

<sup>114</sup> The petition must be lodged within seven days of the announcement of results. The Supreme Court must then determine the petition within two weeks and its decision is final.

<sup>115</sup> The KNDR Monitoring Report lays out potential scenarios for disputes related to the first round of elections. “Kenya's 2013 General Election”, op. cit., p. 30.

<sup>116</sup> “Advisory Opinion No. 2 of 2012”, op. cit., para. 106.

<sup>117</sup> Ibid. Many are not convinced the Supreme Court's assertion of jurisdiction through an advisory ruling is constitutional. If the court makes a controversial decision, its legal basis may be appealed and cause further delays and controversies. Crisis Group email correspondence, Kenya expert, 12 January 2013.

<sup>118</sup> “Politicians to ditch parties in defections”, *The Nation*, 24 September 2012; and “Stage set for mother of all defections”, *The Standard*, 28 September 2012.

restricts party hopping, attempts to engender party discipline and promotes transparent, accountable and democratic national political parties. It prohibits engagement in or encouragement of political violence as well as organising parties along ethnic or regional lines.<sup>119</sup> It imposes strict regulations regarding membership, intra-party mechanisms and finance, and also provides for some public funding for political parties, nominally to check the influence of powerful benefactors. As this money can only be used for promoting parties' internal democracy, rather than campaigning, and as the campaign finance legislation has yet to pass, it looks unlikely that this measure will have much effect for the 2013 polls.<sup>120</sup>

The act also seeks to discourage party hopping by allowing switching of parties only up to two months before the election, though this deadline was recently relaxed to 19 January by parliament and President Kibaki.<sup>121</sup> In addition, parliamentarians cannot "publicly advocate" for parties of which they are not members, a rule that has in the past been continually broken.<sup>122</sup>

The act is enforced by the registrar of political parties,<sup>123</sup> but this appointment has been on hold since September 2011 and is currently being filled by an acting registrar, Lucy Ndung'u.<sup>124</sup> The law also created the Political Parties Tribunal to settle internal party disputes.<sup>125</sup> Until November 2012, the tribunal had heard only one case.

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<sup>119</sup> However, personality-driven ethnic politics still remains. Most of the politicians from central Kenya declared their support for Kenyatta's TNA, while a majority of politicians from the Rift Valley extended support to Ruto's URP.

<sup>120</sup> It will cover political party costs for communicating party policies; maintaining links between party and state organs; organising civic education in democracy and electoral processes; bringing the party's influence to bear on shaping of public opinion; and not more than 25 per cent for administrative expenses of each party. Political Parties Act, Part 5, 28-30. But the money allocated in the budget is not sufficient. The finance minister allocated a paltry KSh200 million (\$2,349,000) to political parties in the 2009-2010 budget. Kennedy Masime and Dr Peter Oesterdiekhoff, *Institutionalising Political Parties in Kenya* (Nairobi, 2010), p. 34. The authors argue that the Political Parties Act should be amended to require the minister to allocate a specific proportion of the national budget to the fund (maybe 1 or 2 per cent). *Ibid*, p. 42.

<sup>121</sup> This was done to allow parliament to sit beyond 4 January, the initial deadline, because parliamentarians who switched parties for the upcoming elections would legally relinquish their seats. Parliament still must pass several important bills, including laws on devolution. "Kibaki allows MPs more time to party-hop", Capital FM, 1 January 2013.

<sup>122</sup> Article 103 of the constitution states, "(1) the office of a Member of Parliament becomes vacant ... (e) if, having been elected to Parliament (I) as a member of a political party, the member resigns from that party or is deemed to have resigned from the party as determined in accordance with the legislation contemplated in clause (2); or (ii) as an independent candidate, the member joins a political party...". The Political Parties Act stipulates that should a party member join or form another party, or publicly advocate for another party, he or she will be deemed to have resigned from his or her original party. Political Parties Act 2011, Part 2, Clause 14 (5).

<sup>123</sup> Its role is to register, regulate, monitor, investigate and supervise political parties to ensure compliance with the act; administer the political parties fund; ensure publication of audited annual accounts of political parties; verify and make publicly available the list of all members of political parties; and maintain a register of political parties and the symbols of the political parties.

<sup>124</sup> Ms Ndung'u is director of the Office of the Registrar of Political Parties. "Office of the Registrar of Political Parties", at [www.iebc.or.ke/index.php/component/content/article/268-secretariate/137-office-of-the-registrar-of-political-parties](http://www.iebc.or.ke/index.php/component/content/article/268-secretariate/137-office-of-the-registrar-of-political-parties).

<sup>125</sup> This quasi-judicial body was created by the 2007 Political Parties Act to hear appeals against decisions made by the registrar of political parties and to rule on disputes between members of a party or a coalition or between two camps. The tribunal is constituted by the chief justice, who determines its procedural rules, and its members must be ratified by parliament. See Kennedy Masime and Dr Peter Oesterdiekhoff, "Institutionalising political parties in Kenya", Electoral Insti-

Two additional cases have since then been submitted before the tribunal as parties begin to make use of this body, with the elections approaching fast. However, its decisions are not final and can be appealed.<sup>126</sup>

Through a code of conduct the act attempts to ensure that internal party nominations are credible to guarantee democratic party functioning and elections.<sup>127</sup> So far the code has not been fully enforced by the acting registrar of political parties. Some internal party elections even saw violence. In several Homa Bay county constituencies, ODM primaries turned violent in late 2011, which cast doubt over their fairness,<sup>128</sup> and Rongo, Nyatike, Kasipul, and Kabondo constituencies also experienced considerable violence, resulting in ten party members' deaths. In Migori county (Rongo constituency), police later investigated the clashes, but produced no findings.<sup>129</sup> Fighting also broke out in the Likoni election, after parliamentarian Suleiman Shahbal submitted a petition, which he later dropped, to halt recognition of the results, claiming there were irregularities in the polling.<sup>130</sup> Similar reports of irregularities occurred in Kisumu Town, Bomachoge, and Othaya.<sup>131</sup> The nominations for other recent by-elections also resulted in bitter legal wrangles.<sup>132</sup>

In the mad dash to meet the 30 April 2012 deadline for the registration of parties set by the act, some parties were alleged to have resorted to desperate measures to meet registration requirements.<sup>133</sup> Parties have been accused of registering citizens as their members without their knowledge.<sup>134</sup> In the wake of these accusations, officials called on the acting registrar of political parties to investigate.<sup>135</sup> Although there

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tute for the Sustainability of Democracy in Africa ([www.eisa.org.za/WEP/kentribunal.htm](http://www.eisa.org.za/WEP/kentribunal.htm)) Nairobi, 2010; and "Analysts see party disputes tribunal's plate overflow", *The Standard*, 1 January 2012. The overlap involving the IEBC, which settles disputes related to nominations, the tribunal and the registrar should have been harmonised and brought under one piece of legislation or authority.

<sup>126</sup> "This defeats the purpose of political parties' dispute resolution, which should be expeditious. The tribunal structure is equivalent to a magistrate's court, yet qualification of the chairman is a high court judge". "Stringent timelines for resolving electoral disputes may be untenable", *Sunday Standard*, 30 September 2012.

<sup>127</sup> Political Parties Act, 2011, Code of Conduct 6 (k).

<sup>128</sup> "ODM party polls breached the new constitution", *The Star*, 16 January 2012.

<sup>129</sup> "Police probe politicians in killings of Migori youth", *The Standard*, 13 December 2011; and "Four youth killed, scores injured after rival ODM supporters clash", *The Standard*, 12 December 2011.

<sup>130</sup> "Likoni election results still stand, ODM leaders insist", *The Star*, 31 December 2011.

<sup>131</sup> "Minister skips ODM elections", *Daily Nation*, 25 November 2011.

<sup>132</sup> According to the KNDR, by-elections in Ndhiwa, Kangema and Kajiado North were all problematic. "Kenya's 2013 General Election", op. cit., pp. 33, 50. See also "Pre-Election Environment in Kajiado North, Ndhiwa and Kangema", Elections Observation Group (ELOG), 14 September 2012; "ODM, TNA nominees cleared", *The Nation*, 22 August 2012.

<sup>133</sup> "M-Pesa details used 'to register' party members", *The Standard*, 16 January 2012.

<sup>134</sup> *The Nation* reported the results of a check it conducted finding that a woman who had died on 19 January 2012 was among those improperly registered as party members. Others registered without their consent included several *Nation* staffers and other journalists. This raised significant concerns regarding the authenticity of the lists submitted to the registrar. She has responded to complaints indicating she has consistently asked parties to correct anomalies. The Political Parties Act, however, gives her power to deregister parties that obtain registration fraudulently. "Dead woman included in party members' list", *The Nation*, 9 January 2013. See also, "Political parties in members registration fraud saga", *The Star*, 3 January, 2012; "Kenyans cry foul over fake party membership", Citizens TV, 3 January 2013; and "Voter beware, you might 'belong' to a political party", Capital FM, 3 January 2013.

<sup>135</sup> TNA writes to registrar of political parties regarding fake registrations", *The Star*, 4 January 2013.

have been some investigations, to date neither the registrar nor the IEBC has delisted any parties. Not only has this raised concerns about their ability and willingness to enforce legislation governing the behaviour of parties, but it reinforces a sense of impunity.<sup>136</sup> The registrar and the rest of the IEBC must be forceful against violations of the act, in particular related to the behaviour of politicians during the campaign.

#### D. Campaign Finance

Campaign financing previously was shrouded in secrecy, and political parties generally did little to disclose their sources of funding.<sup>137</sup> Campaigns are very expensive.<sup>138</sup> In the past major corruption scandals were often linked to campaign and political financing.<sup>139</sup> A 2012 draft Election Campaign Financing Bill would have forced parties to make public their finances and place a ceiling on the amount spent on campaigns. However, parliament did not reach agreement on the draft bill before its last session. The failure to pass the bill is seen as another sign that Kenya's politicians are stalling implementation of the new constitution and failing to meet citizens' expectations for reform.

#### E. Voter Registration and the Electoral Timeline

Kenya has used a biometric system for voter registration to try to address the flaws and manipulation that had plagued previous registration exercises.<sup>140</sup> However, a controversial procurement of expensive voter registration kits in the fall of 2012 undermined confidence in the IEBC. The bidding process was scrapped and the commission pledged to run voter registration without biometrics, until the government stepped in and purchased kits.<sup>141</sup> The procurement saga played out blow-by-blow in the Kenyan media.<sup>142</sup> It exposed the IEBC's inability to communicate effectively and its struggle to contain negative press. As election day approaches, commissioners must develop a media outreach strategy to explain better the electoral process and they and their staff must speak with one voice to inspire confidence.

The IEBC registered 14.4 million Kenyans: fewer than the 18 million citizens it had aimed for but more than the 12.4 that registered ahead of the 2010 constitutional

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<sup>136</sup> According to a minister, little has changed regarding the culture of political parties. "The politicians as well as the citizens have not reoriented their activities in line with the new constitution". Crisis Group interview, Mutula Kilonzo, Nairobi, 17 October 2012.

<sup>137</sup> "Response to Campaign Finance Bill 2011", Centre for Multiparty Democracy-Kenya, no date, at [www.cmd-kenya.org](http://www.cmd-kenya.org).

<sup>138</sup> "Campaign Finance and Corruption, a monitoring report on campaign finance in the 2007 general election", Coalition for Accountable Political Financing, 2008. This organisation estimates that President Mwai Kibaki and Prime Minister Raila Odinga campaigns spent \$75 million in 2007 and parliamentary candidates spent an average of \$100,000.

<sup>139</sup> Oscar Gakuo Mwangi, "Political corruption, party financing and democracy in Kenya", *Journal of Modern African Studies*, vol. 46, no. 2, June 2008, pp. 267-285; and "Transparency in campaign and political financing", CAPF bill digest, Coalition for Accountable Political Financing (CAPF), August 2012.

<sup>140</sup> "Kriegler report", op. cit. Most analysts, however, agree that the registration ahead of the constitutional referendum marked an enormous improvement on previous exercises.

<sup>141</sup> Crisis Group interview, Nairobi, November 2012.

<sup>142</sup> Crisis Group telephone interviews, November 2012. See Mashaka Lewela and Emmanuel Kisiangani, "Kenya's Biometric Voter Registration: New Solution, New Problems", Institute for Security Studies, 29 October 2012.

referendum.<sup>143</sup> The delayed start of voter registration (originally scheduled for 1-30 November 2012) places enormous pressure on the electoral timeline, as other aspects of electoral preparations – particularly party and candidate registration – rely on voters being registered. This has already prompted some adjustments and tweaks to the timeline, such as the decision not to register Kenyans in the diaspora (except for the EAC) and time for checking the ballot papers and the electoral registry. To prevent confusion, the IEBC should publish clear guidelines on the timetable of the elections. Any further changes to the date of the vote, even on technical grounds, would likely meet fierce political resistance from Kenyatta and Ruto (if they are permitted to run). Delays would push the electoral date back against the ICC trials, requiring the defendants to be in The Hague and making it more difficult for them to campaign.

#### F. *Operational and Anti-Fraud Preparations*

The IEBC plans extra measures to prevent fraud, ballot stuffing, bribery and manipulation of results that have been features of recent Kenyan elections, often with the complicity of electoral officials.<sup>144</sup> It has tightened its recruitment practices. Many officials will not be allowed to perform their duties in their home areas and will be informed where they will work only at the last minute in an attempt to reduce their susceptibility to community pressure, bribery or intimidation.<sup>145</sup> In addition to the new registration methodology, the IEBC plans to use electronic poll books – the procurement of which is now underway – in each polling stream on election day, which if they work should allow staff to identify voters through their finger prints. The electronic books should also make it easier for citizen observers and party agents to track how many ballots have been cast at each point during the day. In principle this should make it more difficult for ballot boxes to be “topped up” with any unused ballots by unscrupulous polling staff at the end of the day.<sup>146</sup>

Results from each polling stream will be relayed directly, usually via mobile phone, to a data centre in Nairobi, which should allow for the quick tallying of provisional results.<sup>147</sup> A similar method used during the constitutional referendum avoided the uncertainty and tension surrounding delayed results; although with multiple elections taking place simultaneously, the amount of information relayed is unprecedented. Final results are announced only once paper results forms make their way back and are checked against the data initially reported electronically from polling locations. It will be vital for all citizen observers and party agents in each polling stream to receive copies of that stream's forms. The IEBC must also publish results online as

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<sup>143</sup> According to the IEBC, those registered represent almost 80 per cent of the estimated eligible voting population. “Registered voters by 18th December, 2012”, Independent Electoral and Boundaries Commission, 18 December 2012.

<sup>144</sup> The Kriegler report said that errors were so egregious at every level of vote collection and tallying that any statistical analysis of the 2007 results was pointless. “Kriegler report”, op. cit.

<sup>145</sup> Crisis Group interview, Ahmed Isaack Hassan, IEBC chairman, Washington DC, April 2012.

<sup>146</sup> It is hoped this process will also eliminate ghost voters. In the 2007 election, 1.2 million dead people reportedly voted. Crisis Group interview, Ahmed Isaack Hassan, IEBC chairman, Nairobi, February 2012.

<sup>147</sup> Technical experts with the IEBC currently estimate that some 70 per cent of polling stations have sufficient mobile coverage. For the others different measures will be used, they say, including in places satellite phones. Crisis Group telephone interviews, November 2012.



soon as they are available, and disaggregated by polling stream, to allow observers and parties to verify their accuracy and challenge any with which they disagree.

The complexity of the next polls, with each voter casting six ballots – for the president/deputy, member of the National Assembly (from their constituency), a reserved women's seat in the National Assembly (from each county), a senator (from each county), as well as a county governor and county assembly member (from county wards) – will present enormous operational challenges, for the IEBC but also for citizen observers and political parties.<sup>148</sup> Electoral officials will need to plan meticulously, emphasising in particular ballot production, the recruitment and training of staff, polling procedures and, especially, counting procedures, given that the team of officials in each location will have to tally the results of all six elections. The tabulation of results will also need particular attention.

### G. *Scrutiny and Voter Education*

Scrutiny in each polling location by citizen observers and by representatives of the political parties is an important part of civic participation in the elections, and should provide another check against fraud and increase confidence in results. Civil society groups will observe under the umbrella of the Elections Observation Group (ELOG), which will deploy citizen observers to a representative sample of polling streams across the country. ELOG will also perform parallel vote tabulation (PVT), which should help the IEBC increase confidence in the vote, provided it performs its role impartially and independently.<sup>149</sup> It is vital that the commission provide sufficient access and information to citizen observers and other civil society groups. They must be able to plan their deployment properly and enjoy full access to every part of the election process, especially results tallying. Such groups can also be useful allies in bolstering commissioners' ability to resist political interference. A strong alliance with civil society makes sense for the IEBC.

Political parties are also expected to have agents in polling locations, although the extent to which each party or coalition will be able to deploy their representatives across the country is unclear. It is imperative, given their poor performance in 2007, that all agents be well trained and understand their role in and around the polling stations, including how to collect information and pursue grievances legally.<sup>150</sup>

International observers will complement the work of ELOG. The European Union (EU) will, sensibly, deploy its team of observers for a longer period than usual, probably as early as January.<sup>151</sup> It has also sent two experts to follow voter registration. The EAC deployed long-term in November 2012, and plans to send additional short-term, election observers.<sup>152</sup> The U.S. also is supporting a Carter Center observation

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<sup>148</sup> During previous elections voters cast only three ballots, for president, legislator and local officials.

<sup>149</sup> The ELOG's PVT receives technical support from the National Democratic Institute (NDI). Elsewhere on the continent, PVTs, when well conducted, have supported the work of credible election commissions, by reinforcing official results. This method can also deter the manipulation of results by electoral officials at all levels, by providing an alternative source of results. ELOG reportedly suffers from low levels of organisational and financial capacity. "Early Warning and Long-Term Monitoring Project", *op. cit.*

<sup>150</sup> "Kriegler report", *op. cit.*, pp. 112-113.

<sup>151</sup> Crisis Group interview, EU official, Brussels, November 2012.

<sup>152</sup> The EAC sent a mission drawn from National Electoral Commissions, the East African Legislative Assembly and the EAC Secretariat to Kenya on 15-16 November. Long-term observers arrived

mission.<sup>153</sup> The African Union is also likely to deploy observers. The missions should ensure that their statements align to the extent possible and that observers speak with one voice; regular coordination meetings between the different teams may go some way towards that.

Voter education is particularly important for explaining the new, complex ballot and educating Kenyans about the post-election phase of devolution. The IEBC officially launched the Voter Registration Curriculum, Handbook on Elective Positions and Voter Education Training Manual, on 1 October 2012, projects which were intended for distribution back in April 2011. According to the IEBC CEO, James Oswago, voter education is well underway, and is a segmented process that will speak to issues at different stages throughout the electoral process – including voter registration, voter inspection, and post-election devolution. Yet, he was vague as to the specific details regarding such initiatives (i.e. how many individuals have been trained?).<sup>154</sup> Others are less optimistic about voter education initiatives, claiming that the IEBC and the Voter Education Department have been negligently or even deliberately denied funds.<sup>155</sup> Parliament recently passed the Supplementary Budget Act that awards the IEBC additional funds, but it has yet to be determined whether those funds will be allocated to the Voter Education Department to strengthen voter education initiatives.<sup>156</sup>

A number of organisations also are providing civic education, although coordination still remains a concern. These include Uraia Trust, established in 2011 as a successor to Kenya's National Civic Education Programme, and the Kenya National Integrated Civic Education Programme (K-NICE), which is a partnership between non-state actors and the government intended to provide a long-term strategy for increasing citizen participation in the implementation of the constitution. In addition, a number of television programs, including IEBC Countdown and Cheche, have been designed by the commission and civil society to improve interaction with the public through the mass media. The IEBC has also developed a voter education program launched on 1 October 2012.

The most recent private election awareness drive launched on 22 September 2012 is Uongozi, an initiative of Inuka and the Nation Media Group in partnership with the U.S. Agency for International Development (USAID), UK Department for International Development (DFID) and a number of other donors. It aims at encouraging Kenyans to engage in the democratic process positively by selecting 48 outstanding leaders for a reality show where their leadership skills will be tested. In addition, the Media Owners Association will sponsor live presidential debates covered by all the major media houses and outlets.

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in early December 2012 and short-term observers are expected in February 2013. "EAC election observers expected in Kenya from December", IEBC press release, 16 November 2012; "EAC to send Kenya general election observers", *The Nation*, 21 November 2012.

<sup>153</sup> Crisis Group interviews, Washington DC, December 2012.

<sup>154</sup> James Oswago, "Kenya 2013 Election Watch Forum", op. cit.

<sup>155</sup> Crisis Group interview, Kenya expert, 16 January 2013.

<sup>156</sup> Ibid.

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## V. Police and Judicial Reform

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The IEBC is not the only institution whose performance will impact the elections. The Kriegler report also identified major failings within the police and judiciary as contributing to the 2007-2008 bloodshed. The Waki commission found that a heavy-handed police response to the protests caused hundreds of deaths.<sup>157</sup> Lack of judicial independence was a major trigger of violence, as the losing presidential candidate Raila Odinga and his allies did not trust courts to resolve disputes fairly or in a timely manner. The constitution does much to address these issues. The judiciary in particular has come a long way from public perceptions that it was an extension of the executive branch. The appointment of a respected chief justice has strengthened public confidence. However, reform of the police and the director of public prosecution's (DPP) office have not gone in tandem with the judicial reform. Since the police investigate and the DPP leads prosecution, their lack of progress in reform risks harming advances in the judiciary.

### A. Police

Credible policing with competent and independent leadership is a key ingredient to a peaceful election. But police reform has been slow.<sup>158</sup> The president and the prime minister finally have appointed the inspector general of police, an important step that could help avert violence at potential hotspots, even if necessary police reform will not take place before the election.

The police have been the face of an entrenched culture of impunity and are frequently accused of excessive force, corruption and lack of professionalism.<sup>159</sup> Combined, these practices have undermined the rule of law and democracy. In the past the police reported to the president, making the force susceptible to political misuse, including settling of scores against political foes. Under the new constitution, national security falls within the purview of the central government, but provision of security at the county level is the prerogative of the local government. Following the 2007-2008 violence, the police came under the spotlight for their dereliction of duty,<sup>160</sup>

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<sup>157</sup> "Commission of Inquiry into Post-Election Violence", op. cit., p. 417.

<sup>158</sup> Police reform means different things to different people at different times. To the police leadership it means losing jobs; to the ranks and file improvement of terms of service and better pay and facilities; to human rights groups it means an accountable force; and to the president's office and internal security minister a threat to the status quo. Crisis Group interview, Kenya Human Rights Commission senior official, Nairobi, June 2012.

<sup>159</sup> "Kenya: End Police Use of Excessive Force", Human Rights Watch, 13 January 2008. According to Transparency International, the Kenyan police force is the most corrupt institution in Kenya. "The East African Bribery Index", 31 August 2012.

<sup>160</sup> Investigations exposed severe defects in Kenya's security sector, and specifically the police. The Waki commission highlighted widespread allegations of police involvement in attacks, rapes and deliberate negligence and made recommendations regarding security sector reform. The report documented 405 deaths by gunshot during the post-election violence, the majority of which could be attributed to the police because very few civilians possess guns. With the death toll placed at 1,133, the police were responsible for roughly 36 per cent. "Commission of Inquiry into Post-Election Violence", op. cit., p. 418.

and, according to the Waki commission, they were completely overwhelmed by the scale and volume of mayhem.<sup>161</sup>

#### 1. Police restructuring, capacity and accountability

In response, in May 2009 the government established the National Task Force on Police Reforms.<sup>162</sup> The recommended “visible” change to police leadership took place in September 2009.<sup>163</sup> A Police Reform Implementation Committee (PRIC) was established in 2010 to draft five critical pieces of legislation.<sup>164</sup> In June 2011, another attempt to vet the police force quickly stalled after civil society protested the lack of civilian involvement.<sup>165</sup> Three acts were passed in August 2011,<sup>166</sup> but reform has largely stagnated. An Independent Police Oversight Authority was established in July 2012 but did not formally start until November.<sup>167</sup>

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<sup>161</sup> The report also found that while the National Security Intelligence Service (NSIS) gathered good intelligence predicting the violence, this was not effectively communicated to provincial and district security and intelligence committees. Moreover, the report notes that when local agencies had their own intelligence warning, appropriate preparations were not made. Ibid, pp. 361-367. According to a Nakuru resident, this time round the police may be restrained because of the ICC prosecution and the recent killing of over 40 police officers in Baragoi, Samburu, which will make them realise that citizens are as armed as they are. Crisis Group interview, resident, Nakuru, 24 November 2012. In Samburu in North Rift Valley, over 40 police officers were killed by the Turkana herders in the Suguta Valley on 12 November 2012. Cattle rustling among the Turkana and Samburu community is not new, but the scale and level of sophisticated weapons have evolved. The government decision to use military force to address a law and order issue is disconcerting. This conflict is significant because of a recent oil discovery in the area. While these incidents are not directly related to the election, they could easily aggravate electoral violence in the coming months.

<sup>162</sup> The task force, led by Judge Philip Ransley, travelled to all eight provinces collecting testimony from civilians and police. Many of those interviewed reported police corruption; others expressed reluctance to report crimes for fear of reprisal and lack of trust. Peter Gastrow, “The Complexity of Kenya and Its Police Reforms”, International Peace Institute, 4 January 2010.

<sup>163</sup> National Commissioner of the Kenya Police Force Mathew Iteere was appointed to replace Major General Mohammed Hussein Ali.

<sup>164</sup> The National Police Service Bill, National Police Service Commission Bill, Independent Policing Oversight Authority Bill (IPOA Bill), National Coroners Bill and Private Security Industry Regulation Bill.

<sup>165</sup> “World Report 2012: Kenya”, Human Rights Watch, January 2012; and “Vetting of top police officers kicks off”, *The Standard*, 4 June 2011.

<sup>166</sup> The 2011 National Police Service Act establishes an independent inspector general of police to be appointed by the National Police Service Commission. A separate law, the 2011 National Police Service Commission Act addresses the Waki commission’s recommendation that the Administration Police and the Kenya Police Service be integrated, but this is still pending because the inspector general of police has only just been appointed. The commission so far has adhered to its timetable. Another, the 2011 Independent Policing Oversight Authority Act established the IPOA, an independent body to receive and address public complaints regarding the police, and more generally, to provide civilian police oversight. It also addresses the Waki commission’s recommendations to ensure past and future complaints regarding police conduct are heard and addressed, as well as the task force’s recommendation that an independent policing oversight authority be established. “Kenya: House passes three police reform bills”, *Nairobi Star*, 25 August 2011.

<sup>167</sup> The functions of the oversight authority include investigating any complaints by or against a police officer; monitoring and investigating policing operations affecting members of the public; monitoring and auditing investigations and actions taken by the internal affairs unit, which was established to handle internal complaints, especially related to living conditions and pay; conducting inspections of police premises; cooperating with other institutions on issues of police oversight; and reviewing patterns of police misconduct. Its members include Chairman Macharia Njeru, Tom Kagwe (Kenya Human Rights Commission), Fatuma Ali Saman, Jane Njeri Njoki Onyango, Grace Madoka,

The appointment of the National Police Service Commission and inspector general of police was also delayed by incessant partisan wrangles and apparent lack of political will for reform by the president and the prime minister. The selection process for the National Police Service Commission, which vets police officers, was plagued by controversy. Although the president was supposed to decide on the selection with the prime minister, the latter claims he was not consulted. The commission was finally sworn in on 9 October.<sup>168</sup> Likewise, the inspector general of police, David Mwole Kimaiyo, only took his oath of office on 24 December 2012. He pledged to restore security and do everything possible to forestall a recurrence of post-election violence. He was supported by parliamentarians, but faces substantial challenges in reinstating confidence in the police.<sup>169</sup>

Although the new police leadership is now in place, more reform is needed. Endemic indiscipline and excessive use of force criticised in the last elections have yet to be addressed.<sup>170</sup> As a resident of Nakuru put it, “despite the reforms it’s hard to envisage a well-functioning police”.<sup>171</sup> The new leadership should help continue reform. A promising new police training method has been developed by the Kenya Institute of Education (KIE), which requires fifteen instead of six months of training as well as specific training in human rights, gender, public relations and communications, ethics, and service and customer focus. In addition, the force also has been renamed the “Kenya Police Service” to capture its motto, “*Utumishi kwa Wote*” (Service to All).<sup>172</sup> According to observers, the new training should help to make the shift from a

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Vincent Kiptoo and Rose Awuor. “Other progress is the ... development of Community Policing Policy guidelines and completion of a pilot project in Kikuyu Police Station to demonstrate best practice in Community Policing, development of a new Police Training Curriculum that extends the period of training from 9 to 15 months of basic training and additional 6 months cadet training for University graduate recruits”. “Preparedness of the Police to Combat Insecurity and Crime”, Police Reform Monitoring Project, June 2012, p. 1.

<sup>168</sup> Lydia Gachoya, a member of the panel that interviewed candidates, claimed the selection process was driven by politics rather than merit. She accused the panel of excluding Jean Kamau from the list although she ranked third based on merit assessments. “Kibaki, Raila pick Amina Masoud to head police commission”, *The Nation*, 8 March 2012; “Police team appointees rejected”, *The Star*, 16 May 2012. The controversial Amina Masoud was ultimately replaced by Johnstone Kavuludi as chairman. “Swearing in of Commissioners of the National Police Service Commission”, press release, Kenya Judiciary, 9 October 2012.

<sup>169</sup> “David Kimaiyo sworn in as first Inspector General of Police”, *The Standard*, 25 December 2012.

<sup>170</sup> As Crisis Group was informed, “the much-needed police reform has not happened in practice”. Crisis Group email correspondence, Eldoret resident, June 2012. During the last election, the police was perceived by some as divided between ODM and Kibaki’s Party of National Unity, and those divisions are still seen to exist. The lack of reform is particularly stark in the North East Province, where both military and police forces are regularly accused of excessive use of force and ethnic profiling, particularly against Kenyan Somalis and increasingly since Kenya’s intervention in Somalia in mid-October 2011. Security agencies used insecurity often linked inconclusively to Al-Shabaab or their proxies as a justification to target Somalis and other Muslims. See “Criminal Reprisals: Kenyan Police and Military Abuses against Ethnic Somalis”, Human Rights Watch, 4 May 2012.

<sup>171</sup> Crisis Group interview, resident, Nakuru, 26 November 2012.

<sup>172</sup> However, as Crisis Group was informed: “I think there is need for civic education. ‘*Utumishi kwa Wote*’ service for all, is not how the public views the police. There is need to work on the public perception of the police in order to restore public confidence in policing. There are those who have received the brunt of police brutality. I have a few friends who tremble literally at the sight of the police”. Crisis Group email correspondence, Eldoret resident, 5 October 2012.

“police force” to a “police service” and attempts to send the signal that the police work for the public rather than the government.<sup>173</sup>

The police operate in difficult circumstances. Low wages, lack of adequate resources and deficient equipment result in poor working and living conditions, which fuel corruption and nepotism. This also directly affects morale and service delivery capacity. Discontent is widespread among the force, affecting lower and senior officers alike, and forcing many to find their own accommodation because what they are offered is simply unacceptable.<sup>174</sup>

## 2. Policing and security for the elections

Fundamental change in the police force in the current pre-election environment is unattainable.<sup>175</sup> Only limited reform can be accomplished in the remaining months before the polls. More could be done to develop and implement national, provincial and district security plans to prevent pre- and post-election violence, and allocate state resources to the police during the election period.<sup>176</sup> Currently much of the planning has been devolved to the provincial level (the establishment of county-level institutions is still a work in progress) and its extent and scope dependent on individual officers.<sup>177</sup>

According to the IEBC, at least two officers are necessary for each of the 45,000 polling stations, which means at least 90,000 are needed.<sup>178</sup> However, as of 1 January 2013, only 70,000 were in service.<sup>179</sup> The intention is to hire more officers in the

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<sup>173</sup> As of June 2012, only a total of 446 police officers from the rank of inspector and above were trained. “Police Reform Monitoring Project”, op. cit., p. 1; “Progress on Implementation of the Constitution and Preparedness for 2012”, Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project (South Consulting), January 2012. Police reform is a process that involves a cultural shift, not just of the police but also the public. Crisis Group interview, Kenya Human Rights Commission senior official, Nairobi, June 2012. “In my view brutality, corruption and denial of the force is still deeply entrenched in the public’s mind and the slow pace of reforms has not made the perception any better”. Crisis Group email correspondence. Nairobi resident, 5 October 2012.

<sup>174</sup> As a provincial commissioner in the Rift Valley Province, Osman Warfa, noted, “we send young, unprepared, and ill-equipped officers in harm’s way and expect much from them, for instance, my officer commanding police division in Turkana where there were clashes between Turkana and Samburu does not have a car, and the car sent from Nairobi is sitting in the provincial commissioner’s office parking lot in Nakuru because it has no wheels”. Crisis Group interview, Nakuru, 26 November 2012. Low salaries (around KSh16,000 (\$188) per month) and housing allowances (between KSh6,000 (\$70) and KSh10,000 (\$117), often below the price of accommodation) sometimes force two families to share a two-bedroom apartment. “A neglected police force”, *The Standard*, 8 February 2012. Police spokesmen have also called for improvements in medical packages, including making them comparable to those of other countries’ law enforcement services. “Kenya: Police demand customised NHIF medical policy”, *Business Daily*, 19 February 2012.

<sup>175</sup> “We should be careful in pushing for a wholesale police reform with only few months left to the election, it’s better we head into the election with minimum reform, and systemic reforms start after the election depending on who comes to power. The delay in reform is not an accident but a deliberate design by the forces of status quo to undermine the election”. Crisis Group interview, human rights activist, Nairobi, 24 October 2012.

<sup>176</sup> Much of the focus has been on the safety of polling stations and officers and securing election materials, rather than preventing political violence.

<sup>177</sup> Crisis Group interviews and telephone interviews, police officers, diplomats and civil society, Nairobi and Washington DC, October-December 2012.

<sup>178</sup> “7,000 police officers to be hired in time for elections, says PS”, *Daily Nation*, 2 April 2012.

<sup>179</sup> “Police boss unveils plan of action for elections”, *Daily Nation*, 1 January 2012; Crisis Group email correspondence, Kenya expert, 12 January 2013.

next two months, but whether that will occur, and whether they will be sufficiently trained, is to be determined.<sup>180</sup> A number of officers legitimately complain they lack the equipment, especially vehicles and communications gear, to respond adequately to incidents,<sup>181</sup> and thought should be given to temporarily transferring equipment from other departments and agencies to the police during the election period.

Coordination among the different services, commissions, agencies and organisation managing and monitoring the elections will be crucial. In addition to careful planning and coordination by the national, provincial and district security and intelligence committees, the IEBC proposed Joint Risk Assessment and Response Centre could be an important mechanism for sharing information and coordinating operations.<sup>182</sup>

A number of early warning systems have been developed, but efforts remain fragmented. Furthermore, when early warning was provided, as in the case of Tana River Delta and Baragoi, the government failed to respond pre-emptively.<sup>183</sup> Most important, local people do not know where to go with information or who their district security committees are.<sup>184</sup>

At present, police public order management focuses more on suppression of public unrest. The police should produce a new set of regulations that take into account the provisions of the Public Order Act, the Bill of Rights and also the limitations on the use of force in the new National Police Service, and emphasise that the police should promote cooperation with the public, political parties and candidates, as well as independent commission to ensure security during the elections period. Another immediate focus should be that reasons of “national security” should not unduly curtail rights; a reported spike in police abuses since the passage of the 2012 Prevention of Terrorism Act lends some validity to this concern.<sup>185</sup>

## B. *Justice Sector*

The judiciary will play an important role in resolving electoral disputes. Corruption and lack of impartiality and independence before the 2007 election created a deep distrust of the institution. This discouraged ODM from taking their disputes over the election to the courts.<sup>186</sup> The new constitution contains important measures for judicial reform.<sup>187</sup> Public vetting of senior judicial officers has restored trust. Perhaps

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<sup>180</sup> The Kenya Police will get 4,000 new members and the Administration Police 3,000. “State to hire 7,000 police, deploy spies for election”, *The Standard*, 18 February 2012.

<sup>181</sup> Crisis Group interviews and telephone interviews, police officers, diplomats and civil society, Nairobi and Washington DC, October-December 2012.

<sup>182</sup> “Kenya Election Security Arrangements Project”, IEBC and Kenya Police Service, no date.

<sup>183</sup> “Early Warning and Long-Term Monitoring Project”, *op. cit.*

<sup>184</sup> *Ibid.*

<sup>185</sup> Jonathan Horowitz, “Counterterrorism and Human Rights Abuses in Kenya and Uganda”, Open Society Justice Initiative, 2012.

<sup>186</sup> Both politicians and the public had low trust in the judiciary. Despite suffering human rights abuses and property theft during the post-election violence, many citizens were reluctant to go to the courts. The Waki commission revealed that a severely dysfunctional judiciary had largely contributed to the chaotic aftermath of the 2007 elections and the general climate of impunity. It recommended deep and fundamental reforms to the entire judiciary system. “Commission of Inquiry into Post-Election Violence”, *op. cit.*, pp. 460-462.

<sup>187</sup> A Task Force on Judicial Reforms was assembled to address this crisis of confidence. In its investigations it found that there was widespread resistance to reform within the judiciary, as well as crippling financial and human obstacles. Its recommendations largely informed the 2010 constitution’s provisions for the judiciary. A survey performed in early January 2009 revealed that only 28

most important, the appointment of the new chief justice, Willy Mutunga, was broadly welcomed by the general public and politicians. Mutunga's longstanding reform credentials earned him much-needed, broad-based confidence. Recent surveys show that the judiciary is now the most trusted institution in the country and its effective independence could persuade politicians to take their grievances to the courts rather than the streets.<sup>188</sup>

The constitution has made significant changes to the way power is shared between the three branches of government. Additional power transferred to the judiciary could provide more effective checks against executive abuse. Specifically, the Judicial Service Commission (JSC) has been significantly strengthened. It now has the power to recommend the removal or discipline of registrars, magistrates, judicial officers and their staff.<sup>189</sup> This was put to the test when the JSC recommended to President Kibaki the suspension of Deputy Chief Justice Nancy Baraza in January 2012; previously such matters would have been handled by the executive branch – the appointing authority. Her suspension, pending trial by a special tribunal, was a defining moment in evolving judicial reform and independence, and seen by the public as a welcome display of progress in addressing impunity.<sup>190</sup>

The centrepiece of judicial reform is the vetting of justices and magistrates to identify and dismiss those found to be corrupt, impartial and incompetent.<sup>191</sup> The process began on 23 February 2012 with the investigation and subsequent dismissal of Justice Riaga Omolo, Kenya's most senior court of appeal judge, by the Vetting of Judges and Magistrates Board.<sup>192</sup> There is still a long way to go before the judiciary is fully reformed, but under Willy Mutunga's leadership much progress has been made. The chief justice noted that "the present judicial reform is embryonic, it needs to be deepened".<sup>193</sup> The judiciary may well play a significant role in the upcoming election.<sup>194</sup>

The court ruling on whether Kenyatta and Ruto can contest the upcoming election is an eagerly awaited decision that could impact the next election significantly. However, huge expectations have been placed on the judiciary, and especially the

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per cent of Kenyans expressed satisfaction with the judiciary's performance. "Agenda Item 4 Reforms Longstanding issues and solutions Progress Review Report", The Kenya National Dialogue and Reconciliation Project (KNDR) Monitoring Project (South Consulting), March 2012.

<sup>188</sup> Satisfaction with the performance of the judiciary has increased from 31 per cent in 2008 to 78 per cent in September 2012. "Kenya's 2013 General Election", op. cit., p. 8. According to an opinion poll by Infotrak Harris, 84 per cent of Kenyans have confidence in the administration of justice, "Infotrak Poll: Kenyans happy with judiciary", *Citizen News*, 3 October 2012.

<sup>189</sup> Kenyan Constitution, Chapter 10: Judiciary, Part 4: The Judicial Service Commission.

<sup>190</sup> See fn. 51.

<sup>191</sup> Justices are to be reviewed in light of Article 73 of the 2010 constitution and the 2011 Vetting of Judges and Magistrates Act. Article 73 outlines qualities required of leadership, placing particular significance on broad characteristics like competence, integrity and accountability.

<sup>192</sup> "Four senior Kenyan judges sent home", *The Nation*, 25 April 2012. On 18 December 2012, the Court of Appeal was scheduled to hear two appeals of the Judges and Magistrates Vetting Board's rulings that declared Riaga Omollo and several others unfit. The appeals, however, did not proceed as scheduled and are not due to be heard before sixteen recently appointed judges start sitting in January 2013, mounting four courts-of-appeal-benches to hear the 6,707 pending cases. "Sacked judges 'struck off payroll'", *Daily Nation*, 18 December; "Judiciary on a drive to clear appeal cases", *Capital FM*, 14 January 2013.

<sup>193</sup> Crisis Group interview, Washington DC, 10 September 2012.

<sup>194</sup> See Section III.A.



chief justice, to backstop all other institutions.<sup>195</sup> The danger is that if these expectations are not managed carefully, they could easily lead to disenchantment.

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<sup>195</sup> “So far Willy Mutunga has raised the standard of public engagement, and this has given the judiciary the much-needed image boost, but this will not stop those who are unhappy with the direction the courts are taking to try and bring him down”. Crisis Group interview, human rights activist, Nairobi, 24 October 2012. See also, “Uhuru faults Mutunga on integrity and leadership”, *The Standard*, 1 August 2012.

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## VI. The Media

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Kenya's media is vibrant; newspapers and radio stations provided a platform for the opposition groups during the struggle for multiparty politics, highlighted the Moi regime's corruption, and called on him to open up political space. Over the last decade, there has been a proliferation of radio stations. However, at the same time politicians and politically connected businessmen have been buying stakes in many media houses and increasing their influence.

The media were ill-prepared for the 2007-2008 post-election violence. They were unable to communicate the election results and the subsequent violence without partisan flavour. Worse still, some media houses, particularly the vernacular radio stations, stirred tensions by taking sides and providing politicians with avenues to disseminate hate speech.<sup>196</sup> One of the four ICC indictees is Joshua Arap Sang, a DJ and head of operations at Kass FM, a Kalenjin-language station, who is charged with having contributed to the commission of crimes against humanity.<sup>197</sup> Later, as violence intensified, some media houses advocated for peace.<sup>198</sup>

Both the Waki and Kriegler reports identified hate speech as a key issue and offered recommendations for improving media regulation. Enforcing a ban on hate speech must take place on two levels: stopping and prosecuting those who employ it, as well as ensuring media bodies do not play a complicit or active role in its dissemination. The 2008 Kenya Communications (Amendment) Act was passed to address some of these issues.<sup>199</sup> In addition, the National Cohesion and Integration Commission (NCIC) was established in 2008 to end hate speech and foster national cohesion and integration.<sup>200</sup> There have been some attempts to curb hate speech, although more could be done. On 4 July 2012, three musicians were charged with hate speech

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<sup>196</sup> The Waki commission collected data regarding the media's involvement in the post-elections violence. The report concluded the media contributed to the ethnic fervour as well as confusion and misinformation, which fuelled the violence.

<sup>197</sup> "Pre-trial Situation in the Republic of Kenya", ICC-01/09, at [www.icc-cpi.int](http://www.icc-cpi.int).

<sup>198</sup> Jacqueline M. Klopp, "Kenya's unfinished Agendas", *Journal for International Affairs*, vol. 62, no. 2 (Spring/Summer 2009), p. 11. Some Waki commission interviewees defended the media, claiming it actually refrained from publishing the majority of inflammatory and hate speech. "The Commission of Inquiry into the Post Election Violence Report", op. cit., p. 297.

<sup>199</sup> The purpose of the act is "to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce". The Kenya Communications (Amendment) Bill, 2008, p. 1. It has been criticised for overstepping the boundary between regulation and censorship by tightening government regulation of the media. Particularly controversial is the provision allowing the internal security minister to raid media premises and confiscate property during national emergencies, "in the interest of public safety and tranquillity". "Kenya media law stirs controversy", Voice of America, 16 February 2009.

<sup>200</sup> The 2008 National Cohesion and Integration Act defines "hate speech" as a person who: "a) uses threatening, abusive and insulting words or behaviour or displays any written material; b) publishes or distributes written material; c) presents or directs the public performance of a play; d) distributes, shows or plays, a recording of visual images; or e) provides, produces or directs a programme; which is threatening, abusive or insulting [and which] thereby intends to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up". Section 13, The National Cohesion and Integration Act, 2008, 24 December 2008. The NCIC has set up an early warning and early response system in collaboration with the police operation department, the criminal investigation department and the national steering committee on peace, which will be operational soon.

and incitement to violence – the case is still pending – and some parliamentarians have also been charged.<sup>201</sup> Others have been acquitted.<sup>202</sup>

New binding media guidelines published on 2 April 2012 by the Media Council of Kenya (MCK) intend to promote accurate, comprehensive, impartial, fair and responsible coverage of the upcoming elections and to ensure journalists are sensitive to the risk of conflict. Their objective is to enable voters to make informed choices and to hold media houses to account for their content, with the MCK publishing a monthly monitoring report on the press.<sup>203</sup> However, according to a news editor, the media have learned little from the last elections violence, and, if anything, remain polarised.<sup>204</sup> Following the commitment to the new guidelines, the media will stage live televised presidential debates that will also be broadcast over the radio. Three debates featuring all the presidential candidates have been planned, with a possible fourth to be organised should the election lead to a run-off.<sup>205</sup>

On 19 September 2011, the MCK complaints commission issued an important judgment against *The Standard* newspaper for violating Article 4 of the Code of Conduct for the Practice of Journalism in Kenya when it published an article that falsely accused Francis Muthaura, an ICC suspect, of attempting to orchestrate Kenya's

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<sup>201</sup> The NCIC summoned Nairobi Metropolitan Minister Jamleck Kamau, Makadara parliamentarian Gideon Mbuvi (Sonko) and Limuru parliamentarian Peter Mwathi for alleged hate speech made during a rally on 2 February 2012, at Kinoru Stadium, Meru. "National Cohesion and Integration Commission response on hate speech charges against Hon. Peter Mwathi, Hon. Gideon Mbuvi Sonko and Minister Bon. Jamleck Irungu Kamau", press statement, 15 August 2012. The men denied the allegations. "MP Mwathi in court to block hate speech prosecution", *The Nation*, 14 August 2012; "MP Mwathi fails to block hate speech charges", *The Nation*, 28 August 2012; and "DPP lines up more hate speech charges against MPs", Capital FM, 12 August 2012. Its investigation was passed on to the director of public prosecutions, Keriako Tobiko, who approved the prosecution of Kamau and Mwathi for hate speech but rejected charges against Mbuvi on the grounds of insufficient evidence. "DPP approves prosecution of MPs on hate speech claims", *The Nation*, 12 August 2012. NCIC confirmed that charges against Nairobi Metropolitan Minister Jamleck Kamau, Assistant Water Minister Ferdinand Waititu and Limuru parliamentarian Peter Mwathi are still pending and the cases will be heard in court in February 2013. Crisis Group telephone interview, 17 January 2013.

<sup>202</sup> For example, in December 2011, two Kenyan parliamentarians and a businesswoman were acquitted of hate speech charges during the campaign against the 2010 constitutional referendum. "Kenya MPs acquitted of hate speech charges", Mwakilishi ([www.mwakilishi.com](http://www.mwakilishi.com)), 14 December 2011. Since its inception the NCIC has investigated and referred to the public prosecutor a number of politicians for hate speech crimes, but they were not convicted. In most cases obtaining a hate speech conviction, especially when the constitution guarantees broad freedom of speech and expression rights, is extremely challenging. Punishments also have been criticised as lenient. The National Cohesion and Integration Act stipulates that a person convicted for hate speech (ie, encouraging ethnic hatred) shall receive a maximum of KSh1 million (\$ 11,760) fines, three years in jail, or both. The punishment for incitement to violence is five years imprisonment without the option of a fine. "Is NCIC toothless? Matua thinks so", *The Star*, 19 March 2012.

<sup>203</sup> The guidelines, signed by over fifteen media institutions, were developed together with the IEBC, the Kenya Union of Journalists and other media stakeholders, as well as with the government and were largely borrowed from the BBC.

<sup>204</sup> Crisis Group interview, Nairobi, May 2012.

<sup>205</sup> The debates are to be broadcast on eight television channels and 32 radio stations nationwide. The first one aired on 26 November. The debates are supposed to provide voters with balanced, real-time information on the candidates' political platforms and offer them the choice to compare the candidates and make informed decisions. Having the candidates defending their political positions side by side could reveal that the differences are not so much defined along tribal lines as they are along political ones.

withdrawal from the Rome Statute. The newspaper was ordered to pay KSh250,000 (\$2,900) and the authors obliged to write an apology.<sup>206</sup>

The extensive media training that the MCK and the IEBC had planned together in March 2012 has yet to take place.<sup>207</sup> To effectively deter media violations in the upcoming elections, the commission will need to sharpen its teeth – and use them.

Another emerging trend is the increasing ownership of media houses by politicians. This reduces editorial independence and exacerbates political competition in the media. The main focus appears to be radio stations, especially vernacular ones, but some mainstream newspapers and television stations have also reportedly been purchased by wealthy politicians. In the end the line between what is a political campaign and what is news is often blurred.<sup>208</sup>

Some media houses, like the Nation Media Group, which owns several newspapers, TV stations and radio stations have made a deliberate effort not to give more prominence to opinion polls.<sup>209</sup> Prior to the 2007 election, some polls whose veracity could not be established were published.<sup>210</sup> In the minds of many, they were seen as a referendum on one political party, and it did not help that most of the polls placed Odinga and his ODM party in the lead, albeit with a small margin. Politicians spun this to scare their base to come out and challenge an ODM victory, or lull the Party of National Unity (PNU) into believing that regardless of whether they vote or not, ODM would form the next government.<sup>211</sup>

While much work remains to be done, an act regulating the publication of electoral opinion polls has been passed.<sup>212</sup> In the 2007 election, intense media competition to be the first to release election results led to unverified and inaccurate reports that conflicted with official electoral commission tallies, causing further confusion. This exacerbated the already febrile atmosphere by creating an impression of vote-rigging and providing more ammunition to those engaged in hate speech.<sup>213</sup>

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<sup>206</sup> “Complaints Commission Sanctions Newspaper”, Media Council of Kenya ([www.mediacouncil.or.ke](http://www.mediacouncil.or.ke)), 19 September 2011.

<sup>207</sup> “Media Council of Kenya and IEBC to train journalists”, Media Council of Kenya, January 2012.

<sup>208</sup> “The minister’s radios and the imams”, *The Indian Ocean Newsletter*, no. 1334, 9 June 2012; and “Defence Minister’s radio stations”, *The Indian Ocean Newsletter*, no. 1318, 15 October 2011. “Each minister has his own local radio”, *The Indian Ocean Newsletter*, no. 1339, 8 September 2012.

<sup>209</sup> “At *The Star*, we have not yet made that decision”. Crisis Group interview, Nairobi, Kariuki Mwangi, editor, *The Star*, 29 May 2012.

<sup>210</sup> Not all opinion polls were poor; some published by Synovate (now Ipsos-Synovate) were fairly accurate.

<sup>211</sup> The effect of opinion polls on voters’ preferences and the role they played in the violence is difficult to ascertain. It is clear that they can affect voters’ perceptions of the likelihood of their preferred candidate winning and this can influence their voting decisions. Furthermore, the divergence of results shown by opinion polls and official results provides potential “evidence” of electoral fraud for parties unsatisfied with the results, fuelling post-electoral disputes. The changes in opinion poll results as the election neared in 2007 have been attributed by some not to natural fluctuations in voters’ preferences, but rather to ethnic allegiance “trump[ing] professional integrity”. Thomas P. Wolf, “Poll poison”? Politicians and polling in the 2007 Kenyan election”, *Journal of Contemporary African Studies*, vol. 27, no. 3 (2009), p. 289.

<sup>212</sup> Among other things, the 2011 Electoral Opinion Polls Act prohibits the publication of opinion polls 48 hours before election day with penalties of KSh500,000 (approximately \$5,900) or one year of jail time for its contravention.

<sup>213</sup> Prior to the election, many media outlets released opinion polls that predicted high numbers for their preferred candidate. This added to the anger and accusations of vote-rigging, when the official ECK tallies diverged from these opinion polls. The Krieger commission identified this as a contrib-

## VII. Conclusion

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The risk of political violence before, during and after the 2013 elections is still unacceptably high. The 2010 constitution, a new election commission and reformed and assertive judiciary should help, but the competition for power, both in Nairobi and the 47 new counties, remains fierce. The potential for local violence is especially high, as politicians compete for new and potentially powerful positions away from the spotlight on Nairobi and a few perennial hotspots. Forthcoming trials before the ICC of Uhuru Kenyatta and William Ruto, who deny the charges and have recently announced they will run together, have also raised the stakes tremendously in the presidential contest. Politicisation of the ICC cases and ethnic polarisation have set the stage for a charged campaign.

Ending bad political practice will remain a key challenge. Politicians must stop ignoring rules, exploiting grievances and stoking divisions. Kenya's new institutions, as well as business and religious leaders and civil society, must work together for a free, fair and peaceful vote. Regional and wider international partners should help them, including by making clear that those who jeopardise the stability of the country and region by using or inciting violence will be held to account. If these elections, run under a new constitution, do not move Kenya away from its violent political culture, prospects for development in an already volatile region will remain precarious.

**Nairobi/Brussels, 15 January 2013**

Appendix A: Map of Kenya's Counties



Source: <https://www.opendata.go.ke/facet/counties>

Baringo	Isiolo	Kitui	Migori	Nyeri	Vihiga
Bomet	Kajiado	Kwale	Mombasa	Samburu	Wajir
Bungoma	Kakamega	Laikipia	Murang'a	Siaya	West
Busia	Kericho	Lamu	Nairobi	Taita Taveta	
Elgeyo Marakwet	Kiambu	Machakos	Nakuru	Tana River	
Embu	Kilifi	Makueni	Nandi	Tharaka Nithi	
Garissa	Kirinyaga	Mandera	Narok	Trans Nzoia	
Homa Bay	Kisii	Marsabit	Nyamira	Turkana	
	Kisumu	Meru	Nyandarua	Uasin Gishu	

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## Appendix B: Structural Conflict Drivers

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Many of the structural drivers of conflict identified by the National Accord (Agenda IV) and the Waki commission that the new constitution seeks to address are still relevant. These include continued reliance by politicians on mobilising voters along ethnic lines, longstanding ethnic competition over land and other resources, resettlement, poverty and youth unemployment.

### Continuing reliance on ethnicity

Ethnicity remains a principal political organising platform that appears to have thrived under Kibaki's watch. All previous presidents stuffed public administration with people from their ethnic group; similarly, all key strategic state organs are manned by people from Kibaki's community, raising concerns that he has continued institutionalising ethnicity.<sup>214</sup> This polarisation was a precursor to the 2007-2008 violence and the subsequent virulent anti-Kikuyu rhetoric that has pervaded the political discourse.<sup>215</sup> While the action of the NCIC and the warning by the ICC<sup>216</sup> have contributed to lowering the temperature on hate speech and ethnic rhetoric, political mobilisation and support still run largely along ethnic and clan lines. This is occurring at the national level in how political alliances have formed (see Section III), but also at the county level. As the Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, noted:

Conflicts emerge from disputes over resources, such as access to grazing areas, but transform into local political conflicts when politicians begin to support different groups. They become conflicts over control of power because whoever controls political power after the next elections will have control over local resources. For this reason, groups in multi-ethnic regions are forming local political alliances to compete against others. Some fear that those who lose in the next elections will be marginalised in the political and economic spheres. Some of the violence witnessed in recent times in northern Kenya and the Tana River region result from these dynamics – the conflicts are now about gaining control of the new electoral units, and control of the counties in particular.<sup>217</sup>

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<sup>214</sup> See "What do Kibaki men know or what are they planning?", *Sunday Standard*, 26 November 2011. The Kikuyu and Kalenjin combined occupy 39 per cent of public sector jobs, and President Kibaki's office is overwhelmingly Kikuyu (his tribe), making up 361 of 373 employees. [www.cohesion.or.ke/index.php/departments/research-policy-planning?id=79](http://www.cohesion.or.ke/index.php/departments/research-policy-planning?id=79).

<sup>215</sup> A key campaign message against Kenyatta's presidency is that the Kikuyu will not be third time lucky, which apparently resonates with a majority of other ethnic groups. David W. Throup, "Reading the Tea Leaves on the Kenyan Elections: Patterns of Violence and Political Alliances", Center for Strategic and International Studies, 16 November 2012.

<sup>216</sup> The presiding judge of Pre-Trial Chamber II Justice Ekaterina Trendafilova stated, "it came to the knowledge of the Chamber by way of following some articles in the Kenyan newspapers that there are some movements towards triggering fresh violence by way of using some dangerous speeches". Evelyne Kwamboka and Peter Opiyo, "The Hague: ICC warns suspects over hate speech", *The Standard*, 8 April 2012.

<sup>217</sup> "Kenya's 2013 General Election", *op. cit.*, p. 17.

### Competition for land and resources

Conflict over land has fuelled violence since the colonial period.<sup>218</sup> After independence, corrupt resettlement schemes facilitated the purchase of much of the vacated land by politically connected Kenyans.<sup>219</sup> This still continues on a smaller scale. For example, the measures under the Kenyatta government resettled predominantly Kikuyus, who received better education, health and other social benefits, than the natives on the Coast Province. They were joined by other up-country Kenyans displaced by the 2007-2008 post-election violence, who were given land in Lamu county. Today, the number of up-country Kenyans is so high in the province, between 20,000-25,000, that they have changed the political balance and no politician can be elected without their support.<sup>220</sup> Many coastal people remain landless, and local land grievances are used by politicians to whip up support. Historically, politicians employed *majimbo* (regions, ie, devolution) rhetoric to demand that residents from “outside” ethnic communities vacate land that they “unjustly” acquired.<sup>221</sup> However, a closer look at local conflicts over land reveals a significant class-based dimension as well. Land conflict is inextricably linked with inequality.<sup>222</sup>

Crucial land reforms were outlined in Agenda IV of the 2008 National Accord. But change has been superficial. While parliament managed to anchor important features of the agreement in the new constitution, the land ministry has failed to establish the crucial National Land Commission (NLC). The Land, Land Registration and National Land Commission bills were passed in 2011; what remains is the procedure for operationalising them.<sup>223</sup> Moreover, even if the reforms are implemented, they run the

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<sup>218</sup> There is not much arable land, 70 per cent is arid and semi-arid and only conducive for pastoralism. Most arable land is concentrated in the south west. For more, see Paul Syagga, “Public land, historical injustices and the new Constitution”, Society for International Development, Constitution Working Paper Series No. 9, 2011.

<sup>219</sup> Many of these were from the Kikuyu community, helped by their ties to Kenya’s first president, Jomo Kenyatta.

<sup>220</sup> Unlike indigenous peoples, many new arrivals have titles to their land. Crisis Group interview, Lamu resident, Lamu, February 2012. Lamu is a small constituency, where small demographic changes can have a major political impact. Reports on the ground suggest that up-country people registered in higher numbers than indigenous communities, perhaps because of calls by the Mombasa Republican Council to boycott the elections. This could lead to greater tensions in Coast Province. Crisis Group email correspondence, Kenya expert, 12 January 2013.

<sup>221</sup> 28.9 per cent of the population is landless and 32 per cent occupy less than one hectare of land per household. Paul Syagga, *op. cit.* In Swahili “majimbo” means “regions”. However, it has historically been used to refer to devolution. In Kenya devolution is often understood as power for traditional residents, and was the rationale for forceful evictions of people considered non-indigenous. For example, politicians close to President Moi targeted the non-Kalenjin communities residing in Rift Valley. Politicians whip up their constituents by asserting their lack of land is a function of *madadao* (outsiders) flooding their homeland.

<sup>222</sup> Jaqueline M. Klopp, “Can Moral Ethnicity Trump Political Tribalism? The Struggle for Land and Nation in Kenya”, *African Studies*, vol. 60, no. 2 (2002), p. 283. Most post-election fighting took place between landless and poor Kenyans. Duncan Okello, executive director of Nairobi’s Society for International Development (SID), asserts that inequality is Kenya’s true Achilles heel, and has not received the attention it deserves. For example, Kenyans living in the south-west province of Nyanza can expect on average to die nineteen years earlier than their counterparts in the Central Province. “Kenya: Breaking the conspiracy of silence on inequality”, AllAfrica, 8 September 2009.

<sup>223</sup> Agenda IV called for the creation of the NLC to address grievances and manage information and registration, adoption of legislation on the issue and establishment of a land dispute tribunal. The NLC is stipulated in Articles 67-68 of the constitution but parliament has not established it. While the interim commission has managed to establish the Land Reforms Transformation Unit, it is not



risk of exacerbating tensions if it is not done transparently. Many Kenyans who possess fake deeds, or have purchased dispossessed property in good faith, may face losses. If the process of redistributing unjustly acquired land is not transparent and fair, it could create fresh land grievances that can be exploited by politicians.<sup>224</sup>

In Tana River delta, a dispute between the Pokomo farmers and the Orma herders left at least 100 people dead and 6,000 displaced in September 2012. Agro-pastoralist conflict in the area between these two communities has been ongoing since the 1970s, but the casualties have never reached this magnitude.<sup>225</sup> The principal cause of violence between these two communities is access to the Tana River water and pasture, but in the lead-up to the elections, the politics of who gets elected to the new offices of the governors, senators and county representatives, as well as the leasing of land to investors outside the county, have played a role.<sup>226</sup> President Kibaki's appointment of a judicial commission of inquiry to investigate the Tana ethnic violence – to establish the origin and the probable, immediate and underlying causes of violence, is the wrong solution.<sup>227</sup>

Superficial land reform will not address longstanding grievances; the process must be expedited and intensified, as existing policies will only postpone the inevitable relapse of violent conflict in the long term.

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operational and has already been accused of inefficiency and lack of independence. The public reaction to the slow land reform process has been very negative. In December 2011, only 35 per cent polled by South Consulting expressed "satisfaction" with the process. More than half felt corruption had not been reduced and their land rights were still not being protected. "Agenda Item 4 Reforms Longstanding issues and solutions Progress Review Report", op. cit.

<sup>224</sup> A community leader said, "I have lived my whole life in Lamu [island], and while I do not have a title deed to my land, several non-residents, and non-indigenous mainly from the mainland have genuine titles to their land, including some who were displaced during the last election. They were brought by politically connected individuals". Crisis Group interview, community leader, Lamu, February 2012. Plans to develop a new deep-water port near Lamu and connect it to Kenya's neighbouring countries feed into such longstanding grievances as speculators have engaged in a mad-rush for land in Lamu, and parts of Isiolo district, in the eastern part of the country. Most of the people buying these lands are non-indigenous and this will increase resentment. Residents of Lamu say they are not opposed to the project, but ask why they have not been consulted, Crisis Group interview, community activist, Lamu, February 2012. Such longstanding marginalisation and grievances of the coastal people have found an avenue of expression through the Mombasa Republican Council (MRC), whose slogans are "*Pwani si Kenya*" (the Coast is not part of Kenya), and "*Tumechoka na Ahadi*" (we are tired of promises). The group argues that the only way in which the rights of the coastal people could be realised is if they secede from Kenya. The integrated household budget survey (Kenya National Bureau of Statistics, 2007) ranks the Coast below all provinces except North Eastern in rural poverty, and reports that urban poverty in Mombasa is higher than in the other major cities. Crisis Group interview, Randu Nzai Ruwa, secretary general, MRC, Mombasa, February 2012. For more on how government neglect has fomented radicalisation of young Somali Muslims, see Crisis Group Briefing, *Kenyan Somali Islamist Radicalisation*. As a Lamu resident noted, "it's unsurprising that some of our sons have been lured into Al-Shabaab". Crisis Group interview, Lamu, February 2012.

<sup>225</sup> The two hardest-hit villages are Riketa and Killegwani, where 52 and 38 people were killed respectively.

<sup>226</sup> The impact of devolution on the elections will be analysed more fully in a forthcoming Crisis Group briefing.

<sup>227</sup> The short timeframe (one month, though with an extension) and the commission's inability to carry out investigations of suspects – which can only be led by the police – mean its impact will be limited. Moreover, there is commission of inquiry fatigue in Kenya presently – the number of commissions has multiplied, costing a lot of money and producing little. In most cases the commissions are launched with fanfare only for their recommendations to be ignored.

## Resettlement

Although it has been five years since electoral violence rocked many regions, efforts to resettle, compensate or reintegrate internally displaced people (IDPs) – many displaced in previous bouts of political violence – have often been patchy, ill-informed and, at times, fraught with alleged corruption.<sup>228</sup> In the lead-up to the election, pressure to resettle and compensate them is mounting.

After the conclusion of the National Accord, the ministry of state for special programmes was tasked to address the IDP issue. Rather than inviting international and civil society participation, the ministry worked independently, without transparency and amid growing allegations of fraud and corruption. This reinforced tensions between displaced persons from different ethnic communities.<sup>229</sup> The government began to hastily resettle IDPs after the 2008 National Accord in the hope of completing the process before the elections, but these renewed efforts have been criticised for the method and motive of resettlement.<sup>230</sup>

IDP resettlement has taken two forms: a return to ancestral homes (people returning to their own properties, often untitled) or to habitual homes (resettlement on rented land).<sup>231</sup> Both pose significant challenges, with specific security implica-

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<sup>228</sup> In the wake of the violence, 663,921 people were displaced and 78,254 homes destroyed. These numbers reflect only those displaced in 2007-2008, but internal displacement is a historical problem. Political violence from 1991 to 1997 was responsible for the displacement of 600,000 people in the Coast, Rift Valley, Nyanza and Western Provinces. At the end of 2007, 380,000 of them had yet to be resettled and reintegrated. "Gains and Gaps: A Status Report on IDPs in Kenya 2008-2010", Kenyan Human Rights Commission, February 2011. Further, there are IDPs in Kenya who have been displaced for multiple reasons, at various times and from many different areas. Nuur Mohamud Sheekh, Horn of Africa analyst at the Internal Displacement Monitoring Centre (IDMC) explains, "we have those historically displaced during the colonial days from their land in Central and Rift Valley provinces; those displaced as a result of human rights violations like the case of Wagalla massacre and lately in Mount Elgon [western Kenya]; those displaced as a result of politically instigated violence in 1992 and 1997; the 2007-2008 post-election displaced; the Mau evictees; those displaced by natural disasters; those displaced as a result of violation of Kenya's territories and; finally, those who are regularly displaced as a result of conflict over water and pasture resources". "Analysis: IDPs as political pawns in Kenya", Integrated Regional Information Networks, 26 May 2011.

<sup>229</sup> In Nyanza Province, many Luo victims were paid KSh10,000 (\$120) while non-native returnees were paid the same amount plus an additional KSh25,000 (\$290) as compensation for loss of homes and property. This led many Luo to feel discriminated against by the government. Tensions have exacerbated inadequate reconciliation processes. "Durable Solutions to Internal Displacement, Reconciliation, and Restoration of Human Dignity of IDPs in Kenya: A Situation Report", UN Development Programme (UNDP), September 2011. See also "Analysis: IDPs as political pawns in Kenya", op. cit.

<sup>230</sup> Some IDPs feel they are completely forgotten while the country is transfixed by the ICC cases. Many of them said they will not participate in the next election because they were ignored until recently, when everyone suddenly wanted to be seen addressing their concerns to get elected. Crisis Group interviews, IDPs, Eldoret, January 2012. In some places, Kalenjins argue resettlement schemes favour non-Kalenjin IDPs. Especially in the Rift Valley, displaced Kalenjins often found shelter with relatives, as opposed to IDP camps, and therefore their losses are less visible and their compensation lower. They have also often complained of being framed as aggressors during the post-election violence, resulting in less compensation and aid. Crisis Group interviews, IDPs, Eldoret, January 2012. See also "Minister alleges bias in IDP resettlement", *Daily Nation*, 26 March 2012.

<sup>231</sup> For those returning to their habitual places of residence, a distinction must be made between those having land and those who are only securing shelter. "We are being resettled in places where basic facilities like bathrooms are nonexistent". Crisis Group interviews, IDPs, Eldoret, January 2012. Many of those who have returned to their land lack adequate shelter. Also, many refuse to

tions. Those who returned to their ancestral homes are often rejected by their relatives due to previous migration and the difficulty of finding employment.<sup>232</sup> Returnees to habitual homes often need reconciliation with communities perceived to have violently driven them away. Considerable efforts toward reconciliation and reintegration have been made in such communities, especially in the Rift Valley.<sup>233</sup> In December 2011, 62 per cent of Kenyans interviewed by South Consulting believed that “just a little” reconciliation had occurred between rival communities.<sup>234</sup> For example, Kikuyu IDPs in Nakuru said little reconciliation had taken place between them and the Kalenjin. Regardless of the alliance between Ruto and Kenyatta, “IDPs still feel extremely vulnerable”.<sup>235</sup> In light of recent rising tensions, IDPs’ safety must be monitored.<sup>236</sup>

At the heart of the IDP issue, competing land claims and ethno-demographic realities fuel conflict. Five years later, the ownership of much of the IDPs’ land is still not known. In many cases, it is still retained by people who displaced them. Land allocation and compensation for lost property is very touchy, and is exacerbated by the failure to prosecute individuals responsible for post-election violence.<sup>237</sup> Moreover, IDP resettlement is reportedly riddled with corruption and mismanagement.<sup>238</sup>

The location of resettlement is increasingly important, because it has implications for voting patterns and the distribution of votes in particular constituencies.<sup>239</sup> This could influence elections, with significant consequences in tight races. Furthermore, pre-2002 election violence included the forced displacement of a rival’s supporters in attempts to win local elections. Land rights activist Odenda Lumumba argues:

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sleep on their farms for fear of attacks, returning only during the day to cultivate crops. “Durable Solutions to Internal Displacement, Reconciliation, and Restoration of Human Dignity of IDPs in Kenya: A Situation Report”, UNDP, September 2011.

<sup>232</sup> Ibid.

<sup>233</sup> These efforts have largely been led by the NCIC in cooperation with district peace commissions.

<sup>234</sup> 8 per cent answered none had taken place. A notable exception was in the North Eastern Province where 50 per cent of respondents felt that a lot of reconciliation had taken place. “Progress and Implementation in Implementation of the Constitution and Preparedness for 2012”, Kenya National Dialogue and Reconciliation Monitoring Project, January 2012.

<sup>235</sup> Crisis Group interviews, IDPs, Nakuru, 26 November 2012.

<sup>236</sup> Alliances between the Kikuyu and Kalenjin (the main participants in the violence in the Rift Valley) in the forthcoming election should not be interpreted as indicating a disappearance of conflict risk between the two communities. Grievances between the two groups go beyond short-term political affiliations. Crisis Group interviews, IDPs, Eldoret, January 2012

<sup>237</sup> Local prosecution of post-election violence perpetrators has not been done with speed, and only a few cases of low-level perpetrators have been successfully tried. But Chief Justice Willy Mutunga said there is still room for trials to take place. Crisis Group interview, Willy Mutunga, Washington DC, 10 September 2012.

<sup>238</sup> Of particular concern is the failure to consult the displaced or their new host communities. Often they reportedly are simply informed where they will be living, or what communities they will be receiving. This has caused tension between host communities and resettled IDPs. There were also reports of forced resettlement, harassment and neglect of landless IDPs. See “A Tale of Force, Threats and Lies ‘Operation Rudi Nyumbani’ in Perspective”, Kenyan Human Rights Commission, 28 October 2008.

<sup>239</sup> “We are not going to allow any visitors ferried to my constituency until all local leaders are widely consulted to ensure squatters sitting on the land bought for the IDPs are given priority in the program”. “Plan to resettle IDPs opposed”, *Daily Nation*, 22 October 2012.

Resettlement in its current form is perceived to be a way of creating political enclaves similar to those in the Rift Valley blamed for the cycle of violence that erupts at every election time .... There is fear the exercise is creating a strategy for political dominance. The people who vote in constituencies such as Molo, Kuresoi, Saboti, Subukia, Taveta, Changamwe and Nakuru are not indigenous. They were resettled there for political reasons. It is feared the current resettlement of IDPs is intended to achieve the same result in the long run.<sup>240</sup>

The political dimension to IDP resettlement is inescapable. Whether they are resettled or remain where they are, as well as where they are resettled, has direct consequences for specific parties and candidates. Registration of voters has started, and IDPs are registered in their camps and may eventually vote there. The IEBC has set up polling stations closer to the camps. However, others have argued that there are few IDPs left, and most of those who are in the camps are “professional IDPs”, they never owned land even before the violence; they were hawkers, and even then they have been compensated for the lost properties.<sup>241</sup>

### Poverty and youth unemployment

One area where Kibaki has stood out is the economy. When he took over it was in the doldrums, and to his credit he resuscitated it through large-scale construction and infrastructure projects.<sup>242</sup> Public spending increased to roughly \$9 billion in 2012.<sup>243</sup> But economic growth has done little to bridge widening inequality and rising inflation that has kept many poor despite wage increases.<sup>244</sup> Growing inequality, coupled with the staggering youth unemployment rate, are significant structural factors that make Kenya vulnerable to conflict.

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<sup>240</sup> “Political leverage linked to failed IDP resettlement”, *The Standard*, 30 April 2011.

<sup>241</sup> Crisis Group interviews, Osman Warfa, provincial commissioner, Rift Valley Province, Nakuru, 26 November 2012.

<sup>242</sup> For an alternative take, see “Kenya: Voodoo economics and development corruption”, *Sunday Nation*, 16 October 2011. During Kibaki’s second term, several highways and facilities were constructed with Chinese assistance. The Lamu Port and Southern Sudan-Ethiopia Transport Corridor (LAPSSET) is an ambitious blueprint to construct roads, railways, and pipelines from Lamu to Ethiopia, South Sudan and Uganda. However, international funding is critical for the project, and in the present global financial environment, Kenya will be hard-pressed to find a donor. Crisis Group interview, Western diplomat, Nairobi, February 2012. The local population, while welcoming development, also complains it was not consulted. Crisis Group interview, Lamu, February 2012. Such marginalisation feeds into the narratives of the Mombasa Republican Council (MRC). “Since independence we have not been treated well, all the jobs at the port, all tourism facilities, the coastal land have all been taken over by the people from the main land, the only way to stop this is by seceding, which is legal under international law”. Crisis Group interview, Richard Lewa, MRC adviser, Mombasa, February 2012.

<sup>243</sup> From 2002 to 2011 public spending increased from roughly \$3.6 billion to \$12.5 billion. “Kibaki’s political failures obscured a legacy of economic and social progress”, *The East African*, 24 July 2011.

<sup>244</sup> The country’s top 10 per cent earn 42 per cent of the total income while the bottom 10 per cent earn less than 1 per cent. “Pulling Apart Facts and Figures on Inequality in Kenya”, Society for International Development, 2004, p. 3. Considerable progress in education and social services is offset by significant income inequality. While there is universal free primary education, income disparity is still rife, children from well-off families are twice as likely to perform well in school and get a good job. “Are our children learning? Annual Learning Assessment Report Kenya 2011”, Uwezo, 2011.

Kenya has a very high youth unemployment rate. Unemployment is 40 per cent, and youths make up 64 per cent of this total.<sup>245</sup> Much of the local post-election violence was motivated by underlying social and economic factors. Unemployment makes young people susceptible to recruitment for participation in violence.<sup>246</sup> While the most visible trend has been recruitment into ethnic or criminal gangs like the Mungiki,<sup>247</sup> idleness also contributes to the growing risk of radicalisation of Muslim youths.<sup>248</sup> This issue was identified as a key target for policy reform in Agenda IV of the National Accord.<sup>249</sup>

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<sup>245</sup> Youth unemployment rates in urban areas are particularly high at around 33 per cent of the total youth population. "Agenda Item 4 reforms long-standing issues and solutions: progress review report", op. cit., p. 31.

<sup>246</sup> "Commission of Inquiry into the Post Election Violence", op. cit., and David Anderson and Emma Lochery, "Violence and Exodus in Kenya's Rift Valley, 2008: Predictable and Preventable?", *Journal of Eastern African Studies*, vol. 2, no. 2 (2008). Groups like the Mungiki target disenfranchised youths by providing a sense of belonging and economic gains through the provision of general services like trash collection and road refurbishment as well as illegal tax collection in some cases. Recruitment surges often follow periods where many Mungiki are jailed, which suggests that they may use the correctional facilities to attract new members. This is significant considering the high number of youths serving jail time in Kenya. "Resurgence of criminal gangs", *The Standard*, 13 September 2011; and "Commission of Inquiry into the Post Election Violence", op. cit. Additionally, groups like the Somali militant Al-Shabaab have been able to recruit youth from slums of Nairobi by providing money. See Crisis Group Briefing, *Kenyan Somali Islamist Radicalisation*, op. cit.

<sup>247</sup> On the surface the Mungiki menace seems to have been addressed, but it is still alive, especially in the Central Province. They have mutated, shifting to other activities and now make most of their money as debt collectors. If someone refuses to pay a debt, it is possible to ask the Mungiki. Once the payment is submitted, they are paid "service charge". Crisis Group interview, political activist, Nyeri, February 2012.

<sup>248</sup> For example, a young man interviewed claimed, "whoever is condemning MRC is misplaced, this is going to be our saviour. You see we have no jobs, yet people from other communities have come here and grabbed lucrative jobs .... I am a trained accountant yet I hop around with a *boda boda* [motorcycle taxi]". "Tame the MRC threat now, State urged", *All Kenyan News*, 26 March 2012.

<sup>249</sup> Specific measures to be taken were the creation of 740,000 new jobs each year from 2008-2012, increasing the capacity and outreach of the Youth Enterprise Development Fund, construction of youth empowerment centres and youth polytechnics in all constituencies, upgrade of National Youth Service institutions and the enactment of the National Youth Council Bill.