

## THE BIG FISH WON'T FRY THEMSELVES: CRIMINAL ACCOUNTABILITY FOR POST-ELECTION VIOLENCE IN KENYA

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### ABSTRACT

This article examines the demand for criminal accountability for the atrocities committed after Kenya's contested December 2007 elections. It explains why, despite strong popular desire for accountability through prosecutions and the threat of and actual International Criminal Court (ICC) involvement, the government has failed to take concrete steps to try those believed primarily responsible. The article argues that the fundamental reason why the government has not initiated systematic prosecutions in regular domestic courts – or created, as promised, a hybrid national/international tribunal – is that those in charge of establishing these processes are, in many cases, those whom it would prosecute or their close allies. A hybrid tribunal now seems unlikely and credible national trials are an improbable alternative, though there are some reasons to be more optimistic following the new constitution of 2010. For the time being only international justice, which is beyond the government's reach, can achieve a breakthrough in criminal accountability, albeit in a very limited way.

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AFTER A VERY CLOSE PRESIDENTIAL ELECTION IN DECEMBER 2007, with extensive allegations of fraud, including irregularities in the final tallying of the vote, Kenya was wracked by two months of fratricidal violence. Supporters of rival candidates clashed with each other, divided mostly along ethno-regional lines, leaving over 1,300 dead and hundreds of thousands displaced. In February 2008, the rival parties signed a settlement, brokered by UN Secretary-General Kofi Annan and his African Union-appointed team, which established a coalition government. The accord allowed Mwai Kibaki, the incumbent President, to keep his position and

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created the new position of Prime Minister for his rival, Raila Odinga. Together, they appointed a Cabinet composed of ministers from their respective parties.

One of the thorniest issues for the National Accord and Reconciliation process, as it was known, was how to impose criminal accountability for the post-election violence. The negotiating teams agreed to appoint a special commission to investigate the violence and recommend measures to hold accountable those most responsible. Released in October 2008, the report of the Commission of Inquiry into Post-Election Violence (Waki Commission) urged the government to create a hybrid national/international Special Tribunal for Kenya, operating in Kenya but with a foreign prosecutor and only one Kenyan judge out of three, in order to insulate it from political interference. To pressure the government to adopt this recommendation, the Commission's report contained an ingenious self-enforcing mechanism: if the government did not create the tribunal, the Commission's chair would pass on evidence to the International Criminal Court (ICC) and request that it become involved.<sup>1</sup> Soon after the report was published, the government committed itself to the implementation of the report's recommendations, including the creation of the Special Tribunal.

The government never set up the tribunal, however. Efforts to present and pass a bill in Parliament failed on three separate occasions and have since been abandoned. Instead, the government regularly promised prosecutions in the national courts, but the likelihood of that actually taking place seems remote. As a result, the ICC held hearings on the possibility of confirming charges against six senior officials—three associated with Kibaki's Party of National Unity (PNU) and three with Odinga's Orange Democratic Movement (ODM)—and ultimately did so against four.<sup>2</sup> Still, even if the ICC convicts all four suspects, a large 'accountability gap' will remain. Indeed, the ICC Prosecutor himself conceives of the ICC as part of a larger project of accountability in Kenya: a 'three-pronged strategy' that would have included a hybrid tribunal to prosecute a larger number of mid-range perpetrators than the ICC could address. The failure to create the tribunal means that hundreds of suspected

1. For a more complete discussion of the ICC's involvement in Kenya, see Stephen Brown, 'Justice pénale internationale et violences électorales: les enjeux de la CPI au Kenya', *Revue Tiers Monde* 205 (2011), pp. 85–100.

2. The six were: on the PNU side, Uhuru Kenyatta, Deputy Prime Minister and Minister of Finance; Francis Kirimi Muthaura, Head of the Public Service and Secretary to the Cabinet; Mohammed Hussein Ali, Inspector General of Police at the time of the violence; and on the ODM side, William Samoei Ruto, former Minister of Agriculture; Henry Kiprono Kosgey, former Minister of Industrialization, and Joshua arap Sang, Head of Operations for KASS FM radio station. The ICC confirmed charges against Kenyatta, Ruto, Muthaura, and Sang.

perpetrators of post-election violence will never face the retributive justice system.<sup>3</sup>

This article examines why, several years after the violence ended, the Kenyan government has made no credible, systematic attempt to prosecute those believed responsible for the atrocities committed in Kenya during the final days of December 2007 and the first two months of 2008. It asks why, despite the strong popular desire for accountability through prosecutions, the threat of ICC involvement, and public assurances of support at the highest levels, the government never created the hybrid tribunal or initiated systematic trials in regular courts.

We argue that the Achilles heel of purely domestic or hybrid domestic/international prosecutions is that many of those in charge of promoting them and setting them up are in fact among those whom they would prosecute. These individuals had a clear vested interest in sabotaging the judicial process, with important support from their allies in Cabinet and Parliament. The threat of ICC intervention proved insufficient to prod MPs to pass the enabling legislation for the tribunal, because the shadow of the ICC was too small. Basically, MPs expected very few prosecutions, and that these would take place many years later – and those who feared prosecution hoped to paralyze or abort the process in the meantime. Only after ICC prosecutions became imminent did the government invoke plans for prosecutions through regular national courts in a bid to forestall international action, while it quietly dropped the idea of a plausibly more effective hybrid tribunal. Nonetheless, there is some renewed optimism that recent political breakthroughs, notably the adoption of a new constitution in August 2010 and the appointment of a new Supreme Court Chief Justice in June 2011, herald significant judicial reform, after which domestic trials might be viable.

The reason important members of the Kenyan political class have had both the will and the capacity to perpetuate impunity is that Kenya has adopted transitional justice mechanisms without a meaningful political transition having taken place. Though the one-party state gave way to multi-partyism in 1992 and the opposition won the 2002 elections, dozens of politicians who participated in the abuses of the past continue to serve in Parliament and Cabinet today, from where they have prevented effective action. The ICC currently constitutes Kenya's main hope for accountability through prosecutions, though it is not clear that the court

3. Retributive justice refers to the individualized criminal justice process, which may lead to conviction or acquittal. It is to be distinguished from restorative justice, which involves alternative measures to meet the needs of victims and communities, such as information-gathering truth commissions, apologies, and memorialization, which aim primarily to heal rather than to punish *per se*. This article addresses only retributive justice for violent atrocities in Kenya, in other words criminal trials. It therefore excludes discussion of the Truth, Justice, and Reconciliation Commission (TJRC) – the 'third prong' – and other non-judicial mechanisms for dealing with the large-scale crimes of the past.

will be able to issue any verdicts before the next elections, due by March 2013, or that this will be sufficient to deter renewed violence, a key element of many arguments in favour of accountability.

The article is organized as follows: First, we review Kenya's history of violence associated with elections and the record of complete impunity. Second, we present the efforts of the Commission of Inquiry into Post-Election Violence to achieve criminal accountability via a hybrid tribunal. Third, we analyse the failed attempts to establish a hybrid tribunal. Fourth, we explore the salient features of the politics of accountability in Kenya, including manoeuvring by a heterogeneous 'alliance of the accused'. In the concluding section, we explain how politicians and their co-conspirators blocked local and hybrid mechanisms of criminal justice, leaving by default the ICC as the only judicial actor likely to achieve some degree of accountability for past abuses in Kenya, albeit in a limited way.

### *Political violence and impunity in Kenya*

Kenya has had several serious outbreaks of election-related violence since the return to multi-partyism in 1991. In the 1990s, large-scale violence regularly accompanied Kenya's general elections. The most serious instance in the 1990s occurred immediately before and after the 1992 elections, when over 1,100 people were killed and 350,000 driven from their homes in brutal attacks both before and after the vote, mainly in Rift Valley Province. In 1997, similar attacks, though not as widespread, took place in Coast Province before the elections and in the Rift Valley afterwards. All of these attacks are best characterized as state-induced violence, as senior government and ruling party officials organized and financed the attacks on members of ethnic groups who lived in zones dominated by the ruling party, the Kenya African National Union (KANU, in power since independence), but generally supported the opposition. The attacks sought to disenfranchise, intimidate or punish these presumed opposition supporters and drive them away from areas where they were not historically 'indigenous'.<sup>4</sup>

4. See, for instance, Akiwumi Commission, *Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya* (Government of Kenya, Nairobi, 1999); Stephen Brown, 'Quiet diplomacy and recurring "ethnic clashes" in Kenya' in Chandra Lekha Sriram and Karin Wermester (eds), *From Promise to Practice: Strengthening UN capacities for the prevention of violent conflict* (Lynne Rienner, Boulder, CO, 2003), pp. 69–100; Stephen Brown, 'Lessons learned and forgotten: the international community and electoral conflict management in Kenya' in David Gillies (ed.), *Elections in Dangerous Places: Democracy and the paradoxes of peacebuilding* (McGill-Queen's University Press, Montreal, 2011), pp. 127–43; Human Rights Watch, *Divide and Rule: State-sponsored ethnic violence in Kenya* (Human Rights Watch, New York, NY, 1993); Peter Mwangi Kagwanja, *Killing the Vote: State-sponsored violence and flawed elections in Kenya* (Kenya Human Rights Commission, Nairobi, 1998); Jacqueline M. Klopp, "'Ethnic clashes" and winning elections: the case of Kenya's electoral despotism', *Canadian Journal of African Studies* 35, 2 (2001), pp. 473–517.

The 2002 general elections, however, were far more peaceful. This was due to a combination of factors: (1) both main presidential contenders were Kikuyu, leading to the non-alignment of ethno-regional identities with specific political parties and presidential candidates, which removed the utility of ethnicity-related violence as an electoral tool; (2) Kibaki and his party, the National Rainbow Coalition (NARC), had a commanding lead that could not be reversed through targeted violence; and (3) the pan-ethnic NARC promised an internal power-sharing arrangement, with the participation of numerous ethnic power brokers, which removed the usual winner-take-all incentives that encourage extreme measures on the road to government.<sup>5</sup>

However, in the relief that followed the relatively peaceful poll in 2002, the specificities of the conditions surrounding those elections were underplayed. As a result, many Kenyans and outside observers believed that election-related violence would no longer be a significant problem. Thus, the violence that followed the announcement of incumbent Mwai Kibaki's re-election in the December 2007 presidential elections was unexpected. Over a two-month period, at least 1,300 people were killed, many more were injured, including through sexual assault, and an estimated 350,000 were displaced from their homes and home districts.<sup>6</sup> By and large, the violence took one of four forms: (1) spontaneous rioting by Luos, mainly in Nyanza Province, after the Electoral Commission announced that Kibaki had beaten Luo presidential candidate Raila Odinga by a very small margin; (2) premeditated attacks in the Rift Valley and urban slums on members of the Kikuyu and other ethnic groups associated with the incumbent government, often through the use of private militias; (3) revenge attacks, mainly in Nairobi, Central Province and the Rift Valley, by members of the Kikuyu and related ethnic groups against opposition-supporting ethnicities, also including the use of militias such as Mungiki; and (4) police shooting of unarmed demonstrators, mainly in Nairobi.<sup>7</sup> The latter three types of violence were serious enough to constitute potential crimes against humanity.

5. Brown, 'Lessons learned and forgotten'.

6. Human Rights Watch, *Ballots to Bullets: Organized political violence and Kenya's crisis of governance* (Human Rights Watch, New York, NY, 2008); International Crisis Group, *Kenya in Crisis*, Crisis Group Africa Report No. 137 (International Crisis Group, Nairobi/Brussels, 2008); and Waki Commission, *Report of the Commission of Inquiry into Post-Election Violence* (Nairobi, Kenya, 2008).

7. Unlike in the 1990s, when violence was overwhelmingly state-induced, in 2007–8 it was instigated by both sides, with the police actively participating on the side of the incumbent party. For an analysis of the causes of the violence, see David Anderson and Emma Lochery, 'Violence and exodus in Kenya's Rift Valley, 2008: predictable and preventable?', *Journal of Eastern African Studies* 2, 2 (2008), pp. 328–43; Daniel Branch and Nic Cheeseman, 'Democratization, sequencing, and state failure in Africa: lessons from Kenya', *African Affairs* 108, 430 (2009), pp. 1–26; Hervé Maupeu, 'Revisiting post-electoral violence' in

To date, despite ample investigation and documentation, the government has failed consistently to prosecute, let alone convict, a single high-level Kenyan official for large-scale ethnic/political violence since the early 1990s, despite detailed reports, some of them government-sponsored, that named names, as well as significant international pressure from Western aid donors and reputable human rights advocacy groups.<sup>8</sup> The Kenyan courts have only pursued relatively low-level cases for the most recent instance of political violence, with only six people convicted for serious crimes as of December 2011, most of whom were ODM-affiliated individuals, with one person convicted for killing a police officer.<sup>9</sup> No international body has pursued prosecution either, though the ICC Prosecutor initiated cases against six suspects and judges subsequently decided to confirm charges against four. Other than those steps, those responsible for the violence in 2007–8 have enjoyed complete impunity, as have those who were behind the election-related violence in the 1990s. The proposal of a hybrid tribunal in 2008 initially appeared to be a potentially highly effective way of holding the former accountable, if not the latter.

### *The Waki Commission and proposals for hybrid justice*

The February 2008 National Accord that ended the stand-off between Kibaki and Odinga via a power-sharing coalition government also included provisions for the creation of a Commission of Inquiry on

Jérôme Lafargue (ed.), *The General Elections in Kenya, 2007* (Mkuki na Nyota, Dar-es-Salaam and Nairobi, 2008), pp. 187–223; Susanne D. Mueller, 'The political economy of Kenya's crisis', *Journal of Eastern African Studies* 2, 2 (2008), pp. 185–210. On the political crisis and ensuing violence more generally, see Adam Ashforth, 'Ethnic violence and the prospects for democracy in the aftermath of the 2007 Kenyan elections', *Public Culture* 21, 1 (2009), pp. 9–19; Stephen Brown, 'Donor responses to the 2008 Kenyan crisis: finally getting it right?', *Journal of Contemporary African Studies* 27, 3 (2009), pp. 389–406; Michael Chege, 'Kenya: back from the brink?', *Journal of Democracy* 19, 4 (2008), pp. 125–39; *Journal of Contemporary African Studies*, special issue on 'Africa's Uncertain Democracies: The 2008 crisis in Kenya', 27, 3 (July), pp. 257–461; *Journal of Eastern African Studies*, special issue on 'Election Fever: Kenya's crisis', 2, 2 (2008), pp. 165–367; *Politique africaine*, special section on 'Élections et violences au Kenya', 109 (2008), pp. 107–66.

8. Patrick Kiage, 'Prosecutions: a panacea for Kenya's past atrocities?' *East African Journal of Human Rights and Democracy* 2, 2 (2004), pp. 104–18.

9. Only three additional serious cases were identified as pending before domestic courts. Human Rights Watch, "'Turning pebbles": evading accountability for post-election violence in Kenya' (Human Rights Watch, New York, 2011), pp. 39–44. The report notes with concern the lack of convictions of 'PNU-affiliated suspects, and police officers who themselves committed crimes' (p. 40). Far more typical than the killing of a police officer was the shooting of unarmed civilians by the police. During the post-election violence, the police killed over 400 people, more than one-third of the total number of casualties, as noted in Waki Commission, *Report of the Commission of Inquiry into Post-Election Violence*, pp. 311, 346 and 417–18. As a result of alleged shoot-to-kill instructions, the ICC prosecutor included on his list of suspects Mohammed Hussein Ali, who had been the Inspector General of Police at the time of the incidents.



Post-Election Violence.<sup>10</sup> When the government appointed the Waki Commission, as it became known (after its chair, Justice Philip Waki of the Kenyan Court of Appeal),<sup>11</sup> many Kenyans and outside observers expected it to be merely one more in a long series of commissions that would give the appearance of action, while in fact forestalling any effective measures to pursue high-level perpetrators of serious crimes. It is only a small exaggeration to claim that no commission of inquiry in Kenya has ever led to anything beyond a report. Numerous commissions have investigated massive graft by senior government and ruling party officials (the Goldenberg scandal, the Anglo-Leasing scandal), political assassinations (of Foreign Minister Robert Ouko), land grabbing (the Ndung'u Commission) and electoral violence (the Kiliku and Akiwumi commissions). Most commission reports have named numerous high-level officials as allegedly responsible for serious crimes, yet none has ever led to a conviction, or even a prosecution.<sup>12</sup>

The Waki Report, issued in October 2008, recommended among other things the creation of a hybrid national/international 'Special Tribunal' to pursue those bearing the greatest responsibility for the crimes committed. The prosecutor and two of the three judges would come from other Commonwealth countries, while the remaining judge would be Kenyan. The African Union's Panel of Eminent African Personalities, which had brokered the National Accord, would provide a list of qualified international officials to the President of Kenya, who would make his selection in consultation with the Prime Minister.<sup>13</sup>

To prevent the government from ignoring this recommendation, the authors of the Waki Report included a clever self-enforcing mechanism: Justice Waki handed over to Kofi Annan, former UN Secretary-General and head of the Panel of Eminent African Personalities, a sealed envelope containing the names of some 20 suspected perpetrators, accompanied by numerous boxes of evidence. If the government failed to create the Special Tribunal within 105 days of the publication of the Waki Report or

10. On the Western countries' and the African Union's role in the reaching of the agreement, see Brown, 'Donor responses to the 2008 Kenyan crisis'; Monica Kathina Juma, 'African mediation of the Kenyan post-2007 election crisis', *Journal of Contemporary African Studies* 27, 3 (2009), pp. 407–30; Gilbert M. Khadiagala, 'Regionalism and conflict resolution: lessons from the Kenyan crisis', *Journal of Contemporary African Studies* 27, 3 (2009), pp. 431–44. On the content of the accord, see Jacqueline M. Klopp, 'Kenya's unfinished agendas', *Journal of International Affairs* 62, 2 (2009), pp. 143–58.

11. Itself a hybrid national/international body, the Waki Commission's other two members were Pascal Kambale, a Congolese human rights lawyer, and Gavin McFadyen, a senior police officer from New Zealand.

12. The Ndung'u Commission constitutes a partial exception, as it did lead to further investigations by other government bodies, causing some land titles to be revoked. It has not, however, led to the prosecution of any senior officials to date.

13. Waki Commission, *Report of the Commission of Inquiry into Post-Election Violence*, p. 474.

if it created an ineffective tribunal, Annan was to turn over the documents to the International Criminal Court, with a request that the prosecutor undertake investigations and prosecutions.<sup>14</sup> If it were not for the Waki envelope, it is highly unlikely that the legislation to create the tribunal would have made it to Parliament at all. This 'shadow of the ICC' remained highly influential in subsequent events, as discussed below.

Having concluded that the domestic judiciary was incapable of holding genuine proceedings in relation to the post-election violence, the Waki Commission proposed the creation of a hybrid tribunal. Hybrid tribunals are a relatively recent innovation in the emergent practice of international criminal accountability. A growing number of tribunals have combined national and international components, for instance in Cambodia, Sierra Leone, and Timor-Leste. They have been created to mitigate limitations to both national and international justice. In the words of one scholar, they are designed to 'right-size' international criminal justice.<sup>15</sup>

More specifically, hybrid tribunals are designed to address some of the criticisms of international criminal tribunals. For instance, those set up for Rwanda and the former Yugoslavia were widely considered too slow, too expensive, and too distant – both physically and psychologically – from the country in which the atrocities were committed. Proponents of hybrid tribunals also expect them to mitigate a number of weaknesses and limitations of domestic judicial systems in conflict-affected countries. In countries such as Kenya, where the judiciary may be subject to direct interference by state officials or other powerful individuals, the chances of conducting a fair trial are minimal and, should one ever be conducted, it would lack legitimacy in the eyes of a population suspicious of a politicized or bribable judiciary. In fact, the Waki Commission's recommendation for a hybrid tribunal was explicitly linked to concerns about the independence of the Kenyan judiciary. In the words of a Kenyan local politician, 'when the hyena is the judge, the goat will never have justice'.<sup>16</sup> The participation of international judges, prosecutors, and other staff in a hybrid tribunal in Kenya was expected to limit potential bias.

The main advantage of a Special Tribunal for Kenya would be its avoidance of relying solely on national courts, which sorely lack credibility, notably given Kenya's record of impunity and notoriously corrupt

14. *Ibid.*, p. 473.

15. Beth Dougherty, 'Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone', *International Affairs* 80, 1 (2004), pp. 311–28. Compare with Chandra Lekha Sriram, 'Wrong-sizing international justice? The hybrid tribunal in Sierra Leone', *Fordham International Law Journal* 29, 3 (2006), pp. 472–506.

16. Musa Dimbil, an elected councillor in Wajir County, cited in 'Analysis: Truth and consequences in Kenya', IRIN News, 23 May 2011, <[www.irinnews.org/Report.aspx?ReportID=92788](http://www.irinnews.org/Report.aspx?ReportID=92788)> (8 July 2011).



judiciary.<sup>17</sup> A purely Kenyan process would appear more likely to be subverted than a hybrid one, as high-level officials among the accused and their collaborators could mobilize their networks to undermine cases against them, including by threatening the judges' and the prosecution's security and intimidating or tampering with witnesses. The international dimension would provide greater legitimacy, integrity, and impartiality, while still locating the process in the country. Despite its limitations, the proposed hybrid tribunal was expected to try hundreds of alleged perpetrators of the 2007–8 post-election violence. In so doing, it could potentially do what the ICC, which can prosecute only a small number of relatively high-level individuals, cannot. Thus the Prosecutor of the ICC saw the creation of a hybrid body as an indispensable part of a three-pronged strategy to address post-election violence in Kenya.<sup>18</sup> The next section examines the multiple attempts, all unsuccessful, to set up such a tribunal in Kenya.

### *The rise and fall of the Special Tribunal for Kenya*

Soon after the Waki Report was published, the President, Prime Minister, and Cabinet unanimously endorsed its recommendations, including the creation of the Special Tribunal. Despite the preparation of three versions of the legislation required to establish the tribunal, the latter was never created and the proposal was eventually abandoned.

The original deadline from the Waki Commission was 30 January 2009, after which date Annan would hand over the envelope to The Hague. Justice Minister Martha Karua introduced legislation, which was debated in Parliament and defeated in a vote on 6 February. Though Parliament had previously expressed its support for the Special Tribunal and a small majority did vote in favour of the legislation, the bill did not garner the required two-thirds majority of votes because of an odd alliance of MPs with opposing perspectives.<sup>19</sup> MPs voted against the bill either because they were worried that the tribunal provisions would be ineffective (loopholes included the possibility of presidential pardon) or because they feared it actually would be effective and they themselves

17. International Bar Association and International Legal Assistance Consortium, 'Restoring integrity: an assessment of the needs of the justice system in the Republic of Kenya' (February 2010).

18. 'ICC Prosecutor supports three-pronged approach to justice in Kenya', ICC-OTP-20090930-PR456, 30 September 2009, <<http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/pr456>> (14 September 2011).

19. The legislation required a two-thirds majority, rather than a simple one of 50 percent + 1, because the establishment and insulation of the Special Tribunal required amendments to the constitution.

or their close allies ran a high risk of being prosecuted and convicted. Some MPs also opposed the legislation because they felt the government was trying to impose it on them, without sufficient time for debate.<sup>20</sup> Significantly, the government did not introduce any amendments that might have improved the draft and satisfied critics.

Though the government introduced the bill to comply with international pressure and avoid the ICC's involvement, The Hague must have seemed like a rather distant possibility to those parliamentarians whose names might have appeared on the Waki list. Moreover, whereas the Special Tribunal could prosecute hundreds of suspects, the ICC could only pursue a half-dozen perpetrators at the highest level. This meant that MPs who were implicated but who were not among the 'big fish' had little to fear from the ICC. In fact, for some of the politicians, the ICC might prove useful in removing political rivals from either the other side or within their own party. They joined those who were truly sceptical of any Kenya-based tribunal under the slogan, 'Don't be vague, let's go to The Hague'.<sup>21</sup>

The government subsequently promised to reintroduce improved legislation to take into account specific objections to the loopholes of the first version and Annan granted two successive extensions, effectively forestalling any ICC involvement. By July 2009, however, he had tired of the Kenyan government's games and stalling tactics, as well as politicians' double-speak. Annan handed over the Waki envelope and evidence to the ICC Prosecutor, Luis Moreno-Ocampo.

After Annan transferred the names and evidence to The Hague, the ICC was one step closer to intervening. Kenyan cabinet ministers held emergency meetings to develop a new strategy. Cabinet reviewed the second draft bill, which the new Minister of Justice, Mutula Kilonzo, had prepared to try to close some of the loopholes of the first draft.<sup>22</sup> Cabinet was unable to agree on or unwilling to adopt a plan to reintroduce legislation that might have a chance of passing, and abandoned the idea of a hybrid tribunal. Instead, at a press conference attended by the entire Cabinet, President Kibaki announced that, rather than set up a special tribunal, the government would first reform the judiciary and the police – a Herculean task – and only then try suspects in regular national courts.

20. Godfrey M. Musila, 'Options for transitional justice in Kenya: autonomy and the challenge of external prescriptions', *International Journal of Transitional Justice* 3, 3 (2009), p. 452.

21. The widely used expression suggests that national and even hybrid national/international trials would be subject to undue interference on behalf of the accused, and that only the ICC could impose the required impartiality and credibility necessary for fair trials to take place.

22. Kilonzo was appointed after the previous Minister Martha Karua resigned in April 2009 to protest President Kibaki's appointment of a number of judges to the High Court and the Court of Appeal without consulting her.

At that time, this scenario was highly unlikely to come to fruition, as one of the main problems with the judiciary and the police was the extent to which the executive could hold influence over many of them.<sup>23</sup> Moreover, the police were implicated in hundreds of deaths in the post-election violence, not to mention extrajudicial executions.<sup>24</sup> Few believed that the government's commitment to reform was sincere. In fact, the Prime Minister and others quickly disowned the plan, despite the 'unanimous' Cabinet support that Kibaki had announced. In addition, Kibaki suggested that the Truth, Justice, and Reconciliation Commission (TJRC), which had recently been appointed, could be given a greater role, widely interpreted as including prosecutions. The TJRC commissioners rejected this proposal, which would have involved a significant amendment to its mandate.

In November 2009, backbench MP Gitobu Imanyara introduced a revised bill to create a tribunal. This third version was the result of consultations with a number of civil society groups, with the goal of further tightening the provisions of the bill. The government officially supported this bill, but it was never debated in Parliament. The readings were unable to take place, as a boycott by MPs, allegedly with support from their party leaders, prevented the Assembly from reaching quorum whenever the bill was due to be discussed. By January 2010, not even the bill's sponsor expected it ever to be passed.<sup>25</sup> This left only two options: purely national courts and the International Criminal Court.

### *Domestic politics and national vs international justice*

For decades, shifting alliances by opportunistic ethno-regional power brokers have characterized Kenyan politics. Bitter enemies before one election can find themselves on the same side in the run-up to the next one. In 2002, in search of the numbers needed to defeat KANU's monopoly of political power since independence in 1963, leading opposition challenger Mwai Kibaki accepted anyone who wanted to join his alliance, regardless of their democratic credentials or human rights records. Some of those responsible for the worst abuses during President Daniel arap Moi's 25-year rule thus defected from KANU to the NARC opposition

23. It is worth noting, however, that the Kenyan judiciary does count many highly competent, independent, and uncorrupted judges among its ranks. Interviews, Willy Mutunga, Representative, Ford Foundation (appointed Chief Justice of the Supreme Court in June 2011), Nairobi, 20 January 2010 and François Grignon, Africa Programme Director, International Crisis Group, Nairobi, 21 January 2010.

24. Waki Commission, *Report of the Commission of Inquiry into Post-Election Violence*.

25. Interview, Gitobu Imanyara, Member of Parliament for Imenti Central, Nairobi, 20 January 2010.

alliance, in several instances merely weeks before the 2002 elections, and found themselves back in government (even in Cabinet), despite the alternation in political parties in power.<sup>26</sup> Kibaki depended on such regional power brokers throughout his presidency.

The threat of criminal accountability for the 2007–8 post-election violence subsequently prompted another major realignment. Before the elections, Kibaki, current Deputy Prime Minister Uhuru Kenyatta, and other members of the Kikuyu and closely related ethnicities in and around Central Province formed the core of the PNU. Their main opponents were Raila Odinga (a Luo from Nyanza Province) and his deputy and rival William Ruto (a Kalenjin from Rift Valley Province). The 2007–8 violence was mainly perpetrated across those lines. At the elite level, any sense of animosity for those grave acts is overshadowed by what one could call the ‘anti-accountability alliance’. Odinga and his community played relatively little part in the worst of the post-election violence, whereas many Kalenjin were victims and/or perpetrators. All three ODM members that the ICC pursued are Kalenjin: Ruto, fellow minister Henry Kosgey and radio station entrepreneur Joshua arap Sang. The three PNU suspects were Kenyatta, Head of the Civil Service and Cabinet Secretary Francis Muthaura, and former head of the police Hussein Ali. Kenyatta and Ruto made strange bedfellows in their quest to escape prosecution – as both figured prominently on the list of those alleged to have had an important role in organizing and financing the post-election violence. Together, they strongly opposed all efforts to introduce legislation on a hybrid tribunal, arguing that only the ICC could ensure accountability.<sup>27</sup> However, when the Prosecutor, Moreno-Ocampo, identified them as prime suspects, they and their associates did everything they could to discredit the ICC – alleging chauvinism against their ethnic groups and other sinister agendas.

Though senior government officials disagreed internally on the desirability of the ICC pursuing the cases, the government itself – despite oft-repeated promises of full support and cooperation – refused to refer the situation to The Hague, while clearly being unable or at least unwilling to try perpetrators at home.<sup>28</sup> After the ICC initiated investigations

26. Stephen Brown, ‘Theorising Kenya’s protracted transition to democracy’, *Journal of Contemporary African Studies* 22, 3 (2004), pp. 327–42.

27. ‘Ruto, Uhuru led onslaught in Parliament against local tribunal’, *Standard*, 6 April 2011.

28. For an in-depth discussion of the principle of complementarity (one of the criteria for admissibility of a situation or case under which the ICC can only get involved when a national government is unable or unwilling to investigate and prosecute the crimes itself in credible proceedings) and its application to Kenya’s post-election violence, see Chandra Lekha Sriram and Stephen Brown, ‘Kenya in the shadow of the ICC: complementarity, gravity and impact’, unpublished manuscript presented at the International Studies

into the six PNU and ODM officials in November 2009, the government took a series of increasingly desperate measures to try to abort the ICC process. In December 2010, Parliament passed a (non-binding) motion to withdraw from the ICC, which the government had hoped to embed – for greater legitimacy – in a wider pan-African movement to protest the ICC's focus on Africa. The African Union, however, did not endorse withdrawal at its January 2011 summit, though it did support Kenya's attempt to have the ICC defer its proceedings.<sup>29</sup> In any case, withdrawal could not retroactively remove the ICC's jurisdiction. Only the UN Security Council could postpone the ICC's involvement, but the Kenyan government failed in February/March 2011 to convince the permanent members that ICC trials would endanger international peace and security (the only allowable justification). While arguing in New York that trials posed a serious threat of renewed violence, the Kenyan government simultaneously argued in The Hague that it would conduct trials domestically and that the ICC therefore lacked jurisdiction. The claim was rather preposterous, as the ICC would require clear evidence of the initiation of a credible process that would try the same alleged perpetrators for the same crimes as the ICC, which the government was unable to provide.<sup>30</sup>

Though politicians resurrected the idea of a local tribunal – domestic, not hybrid – mainly to try to prevent the ICC's involvement, rather than to fight impunity, some recent changes in the Kenyan political-legal landscape provide some reason for cautious optimism regarding the potential of domestic courts. The post-election violence and subsequent National Accord provided the extra impetus for the drafting of a new constitution, approved by popular referendum and promulgated in August 2010, with important ramifications for the judiciary. Though there was a risk, as often in the past, that the government would not apply the rule of law, President Kibaki's unconstitutional attempts to appoint unilaterally the Chief Justice of the Supreme Court, the Attorney-General, and other high-level positions were thwarted by a combination of political opposition, civil society mobilization, and popular outcry. The appointment process was reinitiated in accordance with the prescribed process and, among other outcomes, Kenya can boast Willy Mutunga, a prominent legal scholar and former human rights activist, as new Chief Justice.

Association Annual Convention, Montreal, QC, 16–19 March 2011, and at the International Conference on Africa and the Future of International Criminal Justice, University of the Witwatersrand, Johannesburg, South Africa, 14–16 July 2010.

29. 'AU endorses bid for ICC deferral', *Daily Nation*, 1 February 2011.

30. For additional details on the Kenyan government's unsuccessful attempts to have the ICC case dismissed or deferred, see International Crisis Group, *Kenya: impact of the ICC proceedings*, Africa Briefing No. 84 (International Crisis Group, Nairobi/Brussels, 2012), pp. 8–10.

Mutunga adopted reform of the judiciary and the police as his main goal – though he cautioned from the outset that his five-year term would be insufficient to carry out all the required changes.<sup>31</sup>

Even though the various attempts to establish a special tribunal have failed, the debates have fed demand for accountability and have unwittingly provided a great civic education programme among Kenyans on the ICC and other justice mechanisms.<sup>32</sup> In 2011, when asked their preferred means to deal with the alleged perpetrators, 61 percent of the 2,000 Kenyans polled chose trials at the ICC, compared with 24 percent for a hybrid tribunal and only 8 percent for the regular courts.<sup>33</sup> Still, a sizeable number of individuals can be mobilized in opposition to ICC involvement. When Ruto and Kenyatta returned to Nairobi in April 2011, after their initial hearings in The Hague, they were given a public heroes' welcome. Accused of crimes against humanity and other serious charges, they have cast themselves as political victims of national and international plots against them and retain a significant public support in their own ethno-regional communities.

### *Conclusion: Transitional justice without a transition*

The Waki Commission's recommendation of a hybrid tribunal and its ingenious mechanism to force the government to act in order to prevent international scrutiny and trials in The Hague, brought Kenya closer than it had ever been before to achieving any judicial accountability for the abhorrent election-related violent crimes – if only for the 2007–8 post-electoral violence. Even so, the interests of an important segment of Kenyan political elites, though the latter are divided by ethno-regional identity and party rivalries, have converged around the continuation of

31. 'CJ – justice system needs overhaul', *Daily Nation*, 30 June 2011. The adoption of the new constitution has also impelled a more proactive approach to fighting corruption. For instance, two cabinet ministers were suspended (albeit at half-pay), pending corruption charges. Nonetheless, other motives may be in play. Both of them, Ruto and Kosgey, were on the ICC's list of suspects and at the centre of the Rift Valley/Kalenjin wing of the ODM that poses significant challenges to Prime Minister Odinga's faction within their party. The corruption case against Ruto subsequently collapsed for lack of evidence. On the PNU side, Kenyatta resigned as Minister of Finance but remained Deputy Prime Minister, and Muthaura retained his high-ranking position, while Ali was transferred from his position as head of the police to head of the post office.

32. Interview, Mugambi Kiai, Programme Officer, Open Society Initiative for East Africa, Nairobi, 15 January 2010.

33. Synovate, 'Kenyans' perception towards the ICC process', 6 April 2011, <[http://www.synovate.co.ke/spr/index.php/site/poll/kenyans\\_perception\\_towards\\_the\\_icc\\_process\\_6th\\_april\\_2011](http://www.synovate.co.ke/spr/index.php/site/poll/kenyans_perception_towards_the_icc_process_6th_april_2011)> (10 July 2011). A high level of support also exists for the prosecution of alleged perpetrators other than the six accused by the ICC prosecutor, in other words for closing the accountability gap. In the same poll, respondents indicated a strong preference for a hybrid court: 48 percent, compared to 29 percent who favoured local courts.



the total impunity that has characterized Kenya for decades. Top government officials publicly advocated the creation of a Special Tribunal for Kenya, but privately opposed it. While performing sham compliance, the government dragged its feet and delayed and undermined the process as much as it could, without repudiating it. It also made vague promises of fundamental judicial and police reform, to be followed after an unspecified number of years by domestic trials.

If the Kenyan government were to establish an effective Special Tribunal or successfully hold fair trials in domestic courts, it might be able to try a larger number of accused perpetrators of post-election violence than the ICC. This would be a tremendous and unprecedented achievement. However, though several years have passed since the violence occurred, only a few low-level individuals have been convicted of any post-election crime and efforts to create a hybrid tribunal all failed. The ICC will now hold four high-ranking officials accountable for crimes related to the post-election violence, while the threat of ICC intervention temporarily moved the domestic process forward in fits and starts (indeed, were it not for the ICC, the Waki Report recommendations would probably have been ignored, as has been the case for virtually all other commissions of inquiry). It nonetheless remains an unrealistic expectation that, as one Kenyan put it, 'the big fish will fry themselves'. The shadow of the ICC has proven insufficient to help establish accountability mechanisms in Kenya through prosecutions. The Kenyan government demonstrably lacks the political will to try its own cabinet ministers, MPs and associates.

The fact that many of those responsible for grievous abuses in the past (not only the post-electoral violence of 2007–8, but also the violence in the 1990s and serious economic crimes during the same period) remain in public office, despite there having been a turnover in ruling parties in 2002, demonstrates the extent to which we see continuity between the present and Kenya's authoritarian past. In the absence of a meaningful transition, it is difficult to envisage how domestic or hybrid national/international transitional justice mechanisms could function effectively and achieve criminal accountability. This is the case in Kenya because of the Faustian bargains made in 2002 to ensure victory by a united opposition with as broad a base as possible. It is therefore understandable that impunity continued to reign and corruption scandals multiplied.<sup>34</sup>

34. Jérôme Y. Bachelard, 'The Anglo-Leasing corruption scandal in Kenya: the politics of international and domestic pressures and counter-pressures', *Review of African Political Economy* 37, 124 (2010), pp. 187–200; Godwin R. Murunga and Shadrack W. Nasong'o, 'Bent on self-destruction: the Kibaki regime in Kenya', *Journal of Contemporary African Studies* 24, 1 (2006), pp. 1–28; Oscar Gakuo Mwangi, 'Political corruption, party financing and democracy in Kenya', *Journal of Modern African Studies* 46, 2 (2008), pp. 267–85;

Kenya's 2010 constitution holds some promise. Among other things, it contains provisions for judicial reform and the vetting of judges, after which more effective domestic prosecutions could potentially take place, though perhaps only under a future government that did not rely on the support of the architects of past violence. Given the unlikelihood of credible national prosecutions or an effective Special Tribunal for Kenya in the near future, the only realistic hope that remains for judicial accountability is the International Criminal Court, despite its limited proceedings, as it is beyond the government's reach.

Still, it would be wrong to place the Waki Report alongside the reports of other commissions of inquiry on metaphorical dusty shelves. The Special Tribunal was not its only recommendation and, moreover, the Waki Commission played a key role in convincing the ICC that it needed to investigate Kenya's post-election violence. The Commission may have failed in its efforts to have a hybrid tribunal established, but had it not cleverly used the 'shadow of the ICC' as leverage, it is unlikely that The Hague would have become involved in Kenya at all. It also contributed to the momentum that led to the adoption of a new constitution, a first step in the Herculean task of judicial reform.

The ICC's procedures may be lengthy and will only apply to the most recent violence. It will try only four individuals. Even if those accused perpetrators are found guilty before the next elections, a highly unlikely scenario, many more alleged criminals will remain at large and run again for public office. Come 2013, many could once again sit in Parliament and Cabinet. Slowly chipping away at impunity is far better than nothing, but the limited scope of ICC prosecutions – both in numbers indicted and for the temporal period covered – will hardly be sufficient to establish accountability and provide effective deterrence.<sup>35</sup> The vast majority of Kenyans want to hold other alleged perpetrators to account, either through a hybrid tribunal or purely national courts, though neither is likely to produce a credible process in the near future – and the passage of time renders convictions more difficult, as witnesses' memories fade and evidence becomes less compelling. Sadly, a new outbreak of

Shadrack Wanjala Nasong'o, 'Political transition without transformation: the dialectic of liberalization without democratization in Kenya and Zambia', *Africa Studies Review* 50, 1 (2007), pp. 83–107; Peter Anyang' Nyong'o, 'Beyond the political economy of corruption: the Kenyan challenge', in Richard Joseph and Alexandra Gillies (eds), *Smart Aid for African Development* (Lynne Rienner, Boulder, CO and London, 2009), pp. 163–79; Michela Wrong, *It's Our Turn to Eat: The story of a Kenyan whistle blower* (Fourth Estate, London, 2009).

35. On potential non-prosecutorial strategies to prevent future violence, see Jacqueline M. Klopp, Patrick Githinji, and Keffa Karuoya, 'Internal displacement and local peacebuilding in Kenya: challenges and innovations' (Special Report 251, United States Institute of Peace, Washington, DC, September 2010).

large-scale violence remains highly possible in conjunction with Kenya's next elections.

The lack of a meaningful political transition to a government committed to the rule of law has enabled interested parties to block domestic and hybrid national/international prosecutions. The presence of powerful actors believed responsible for large-scale political violence at the core of the Kenyan government has prevented not only criminal accountability, but potentially other forms of justice as well.

More broadly, the lacklustre performance of transitional justice in Kenya, linked to the incomplete political transition, could have important implications elsewhere. Notably, it serves as a cautionary signal to those who might envisage similar mechanisms under comparable circumstances. For instance, in a post-Mugabe Zimbabwe, Kenya's experience suggests that, as long as important *ancien régime* officials remain in power, be it as ZANU-PF members of a governing coalition or as defectors to a victorious opposition party or alliance, there is a strong risk that they will take drastic measures to derail the fight against impunity. Whether in future sub-Saharan Africa (eventually including Angola, Cameroon, Equatorial Guinea, Ethiopia, Gabon, and Togo, among many others), North Africa, or further afield, former single-party or dominant-party illiberal regimes undergoing a transition of sorts will have to grapple with their own complex politics of accountability. These will surely complicate any relatively straightforward attempts to apply transitional justice mechanisms developed under different contexts – and they will not be able to count on the ICC to fill the accountability gap.