

## Kenya's Power-Sharing Arrangement and Its Implications for Transitional Justice

### I. Introduction

On paper, few power-sharing arrangements have offered a better promise for dealing with past human rights abuses than Kenya's. The agreements reached in connection to the 2008 power-sharing arrangement – including commitment to pursue accountability, truth-seeking, victims' redress and reforms – seemed to provide a comprehensive framework for addressing the roots of political violence and other human rights abuses in the country. Given international involvement and the formal status of the agreements surrounding the power-sharing deal, many had hoped that these tools could lead the road to a profound transition, both politically and peacefully.

Yet, as this Article will demonstrate, the now partly ongoing processes, conceptualized by many as "transitional justice",<sup>1</sup> have so far remained detached from a fundamental transformation. The fact that transitional justice in Kenya has materialized as a highly manipulated project, often captured by elites, is related to a number of factors. Chief among them, this Article argues, is the very nature of the power-sharing arrangement. While the Kofi Annan led mediation process that followed the 2007/8 post-election violence (PEV) was successful in that it ended the violence by creating a coalition government where both sides to the disputed elections gained influence, it is exactly these conditions that have rendered transitional justice in Kenya a rather blunt affair.

A key premise of the mediation process was seemingly that progressive political and societal change would be the outcome of establishing a legal framework, formally accepted by elites and with build-in carrots and sticks. However, as this Article will argue, the engineers of the mediation process, known as the Kenyan National Dialogue and Reconciliation (KNDR), forgot that the disease is not caused by the symptoms. In other words, whereas political violence and other human rights abuses in the country may on the surface seem the *result* of rule of law problems and other deficits of Kenya's constitutional order, these flawed legal structures should be seen as tools deliberately engineered to maintain a political culture where access to government is associated with access to resources and control of abusive state institutions. By facilitating a power-sharing deal between political elites struggling for power and wealth – and allowing these political elites to exercise significant control over the justice process – the KNDR has enabled a continuation, perhaps even a consolidation, of this political culture, which, as will be shown in this Article, poses a serious obstacle to achieving a much needed transition.

Notwithstanding these fundamental problems, Kenya's power-sharing arrangement should not be written off as a total failure. Besides ending the violence which threatened to escalate further, civil society organizations and others have utilized the framework adopted in the context of the 2008 political settlement to add pressure on the political leadership. As a result, political elites can no longer

take the existence of a self-empowering political culture for granted, but at least now have to struggle to maintain status quo.

## **II: A brief overview of the KNDR**

### ***A. National and International Responses to the 2007/8 Political Violence***

Following a disputed presidential election in December 2007, where both incumbent president Mwai Kibaki (PNU political party) and his challenger Raila Odinga (ODM political party) claimed victory, large-scale violence erupted in various parts of Kenya.<sup>2</sup> During the course of a few weeks, more than a thousand Kenyans died in clashes between supporters of Kibaki and Odinga, many of the victims being targeted simply on the basis of their ethnicity and thus perceived support for rival politicians.<sup>3</sup> The attacks, which drove several hundred thousand Kenyans into internal displacement, were driven by armed youth groups and the Mungiki criminal gang, but the police are also alleged to have been involved in the violence, responsible for perhaps one-third of the total casualties.<sup>4</sup>

Amidst intensified violence, various attempts were made to bring Kibaki and Odinga to the negotiation table. As it became clear that a nationally brokered solution was unviable, Archbishop Desmond Tutu of South Africa and other regional and international authorities attempted to mediate between the parties to the dispute. However, Kibaki and Odinga refused to engage in dialogue, the former insisting he was the democratically elected president and the latter claiming the elections had been rigged and his victory stolen.<sup>5</sup> Some have argued that these uncoordinated mediation attempts complicated reaching a solution because they created the possibility of “mediator shopping” for the most favourable outcome.<sup>6</sup> Others, however, claim that these efforts laid the ground for a successful outcome of the KNDR because they “gradually shifted the dynamic towards acceptance of a mediated solution.”<sup>7</sup>

Then on 8 January, 2008, Ghanaian President John Kufuor, in his capacity as Chairman of the African Union (AU), arrived in Kenya with the purpose of making the parties agree to external involvement in a mediation process. Though Kufuor did not succeed bringing the parties together, shortly after leaving Kenya, he announced the establishment of an AU Panel of Eminent African Personalities (the Panel) to facilitate resolution of the crisis.<sup>8</sup> Kufuor approached Kofi Annan who agreed to chair the Panel, which also came to include former President Benjamin Mkapa of Tanzania and former First Lady Graça Machel of Mozambique.<sup>9</sup>

The KNDR, which was officially launched by the Panel on 29 January, 2008, enjoyed the support of major international players such as the EU and US, and received technical support of United Nations agencies as well as the Geneva-based Centre for Humanitarian Dialogue (HD Centre).<sup>10</sup>

The objectives of the mediation were twofold: (1) to bring about a political resolution in order to end the violence; and (2) to facilitate a dialogue to address the longer term structural problems in Kenya that had enabled this level of violence.

### ***B. Ending the Violence through Power-Sharing***

Endorsing a political settlement, which entailed power-sharing, as opposed to a re-run or other possible ways of responding to the electoral dispute, is generally accepted to have been a useful, if not necessary, tool for ending the violence. Kofi Annan himself explains the rationale of the strategy as follows:

“I had come to an early conclusion that a rerun would be a bad decision, and bad decisions get more people killed [...] So I felt that we needed to find a way of dealing with the disagreement over the election by looking forward, and not trying to rerun, repeat or something that would not give you the result you want, but may also get people killed. And when looking at the election results, it was clear to me that there was no way that either party could run the government effectively without the other. So some type of partnership/coalition was going to be necessary.”<sup>11</sup>

This strategy shaped the KNDR from the outset. One of the first efforts of Annan involved getting the two leaders together in public for them to shake hands. Annan thought this would send a strong message to the supporters of the two rivals, but did nonetheless not stop the violence from further escalating, perhaps because both Kibaki and Odinga used to opportunity to promote their individual agendas, and neither condemned the violence.<sup>12</sup>

On February 28, 2008, after around 6 weeks negotiations, Kibaki and Odinga signed a power-sharing agreement, which recognized that “neither side is able to govern without the other”, accepted that Kibaki would remain the President, but created the post of Prime Minister for Odinga, and otherwise stipulated that the composition of the coalition government shall reflect the parties’ relative power in parliament.<sup>13</sup> As noted by Elisabeth Lindenmayer and Josie Lianna Kaye, “[i]t is impossible to know in exact terms what was prevented or what might have been, but all the warning signals indicate that a failure to solve this crisis may have resulted in significantly more violence, bloodshed, and loss of life, with huge implications for the entire region.”<sup>14</sup>

One way of explaining the Partners’ acceptance of the power-sharing deal it is to say that as the violence continued, there was a “hurting stalemate” where both Parties were pushed to a corner, making them inclined to accept measures that they had initially been opposed to. As noted by Lindenmayer and Kaye, “the rising number of deaths and increasing numbers of accusations of police brutality made it impossible [for the PNU side] to continue insisting that the country was not in crisis.”<sup>15</sup>

### *C. Creating a Framework for Transitional Justice*

Besides bringing an immediate end to the violence, the KNDR provided a comprehensive framework for dealing with the causes of the violence and other forms of injustice. The two parties to the dispute signed agreements with regard to establishing a number of mechanisms aimed at addressing Kenya's legacy of political violence, including criminal prosecutions; a Truth, Justice, and Reconciliation Commission (TJRC); a constitutional review process; and other measures discussed just below.<sup>16</sup>

While the KNDR has been labelled “a successful ‘African solution to an African problem’”,<sup>17</sup> there appears to be nothing particular “African” about the way it deals with past human rights abuses. Instead, the solutions called for seem to reflect a global trend whereby societies are encouraged to rely on “transitional justice”, including criminal trials, truth-seeking, reparations and reforms, to come to terms with serious human rights abuses.<sup>18</sup> For example, agenda item number two concerning “immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration” stipulated that further discussions were to be held concerning how to ensure “the impartial, effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty are brought to justice”.<sup>19</sup> Agenda item number four further expressed commitment to 1) undertaking constitutional, legal and institutional reform; 2) tackling poverty and inequity, as well as combating regional development imbalances; 3) tackling unemployment, particularly among the youth; 4) consolidating national cohesion and unity; 5) undertaking land reform; and 6) addressing transparency, accountability and impunity.<sup>20</sup>

The nature of the tools to be utilized was further clarified in a series of agreements reached on 4 March 2008. First, an agreement was reached on Long-Term Issues and Solutions, including agreement on the creation of implementation agencies for constitutional reform.<sup>21</sup> Second, an agreement was reached on the TJRC, including the principles that should guide the Commission's work, composition and other crucial issues.<sup>22</sup> Third, an agreement was reached to create the Commission Investigating the Post-Election Violence (CIPEV), which was mandated to investigate the violence and make recommendations on how to prevent its recurrence, including recommendations with regard to the prosecution of organizers and perpetrators of the PEV.<sup>23</sup> Finally, an agreement was reached to create the Independent Review Committee (IREC), which among others was mandated to review the legal framework for elections and recommend electoral reforms.<sup>24</sup>

Although the measures created were envisaged to respond to the 2007/8 crisis, some of the institutions established, including the TJRC, are intended to address human rights abuses and other injustices in a comprehensive manner, covering the entire post-colonial period.<sup>25</sup> This reflects that the 2007/8 violence does not stand alone: Large-scale human rights abuses have taken place on a number of other occasions in the country, particularly in the context of elections.<sup>26</sup> Nonetheless, while debates about

transitional justice have taken place on a number of occasions in Kenya's history,<sup>27</sup> the KNDR emphasized accountability, truth-seeking, reform and a number of related topics as necessary responses to the 2007/8 crisis and for preventing the recurrence of political violence.<sup>28</sup>

Because elite acceptance of justice tools in the context of a power-sharing arrangement is not necessarily correlated to a profound transition, conceptualizing these tools as transitional justice may not be self-evidently correct. Whereas the early scholarship tended to view the existence of a liberalising political transition as a precondition for speaking about transitional justice, the contemporary field increasingly seems to expect that transitional justice is what will bring about such political transformation or other forms of fundamental and progressive change.<sup>29</sup> A key purpose of this Article involves critically examining whether or not in the case of Kenya the justice tools in question actually have the ability – and were ever intended – to actually promote different forms of progressive change. Without making any premature conclusions in this respect, the Article utilizes the term “transitional justice” in its discussions of these institutions and processes.

### **III. Why it was possible to include Transitional Justice Measures in the Context of Kenya's Power-Sharing Deal**

On the surface of it, the Partners' commitment to include agreements concerning transitional justice in the KNDR might seem illogical since these processes, if operating in a legitimate and credible way, would target those behind organizing the post-election violence, and thus likely key members of the newly formed coalition government. Kenya's transitional justice process seems thus to have been initiated, or at least accepted, by the very leaders who had mobilized for mass action or a violent crack-down on protests, making them the most likely target of criminal investigations, truth-seeking and other transitional justice processes. Moreover, key members on both sides belong to an economic elite that has historically proven opposed to reform measures, including redistribution of land and other measures envisaged with the KNDR agreements. Explaining what thus appears to be a paradox requires that attention be paid to various aspects of the KNDR.

#### ***A. The Composition and Strategies of the Mediation Team***

One relevant factor concerns the nature of the Annan-led mediation team and the strategies it adopted. With years of mediation experience and being an internationally renowned figure seen to have moral authority, Annan is widely held to possess extensive political experience as well as excellent negotiating skills.<sup>30</sup> However, Annan may also stand out in the pool of mediators due to his strong commitment to human rights and humanitarian goals, as illustrated by his leading role in formulating the concept of R2P.<sup>31</sup> Kofi Annan himself explains:

“...protecting Kenya and keeping Kenya together was foremost on my mind – the people who were dying. It was when I got on the ground and saw the ethnic nature of the killings and the conflict that the responsibility to protect, and the Rwandan and the Yugoslavian stories came to my mind. It came to me very strongly that we need to work very fast to contain it before it got out of hand.”<sup>32</sup>

Annan’s commitment to humanitarian ideals is not only a relevant factor for understanding the mediation team’s insistence on swiftly ending the PEV, but may also explain why transitional justice tools were integrated in the KNDR. According to the mediation team, utilizing these tools would be necessary to prevent the recurrence of ethnic/ political violence in Kenya. Annan’s stated this perception clearly: “The crisis has mutated from an electoral dispute into much deeper problems with a high potential for recurrence. We cannot accept that this sort of incident takes place every five years or so and no one is held to account. Impunity cannot be allowed to stand [...] Any attempt to resolve the issue must go beyond electoral dispute if a lasting solution is to be found [or] we will be back here again after three or four years.”<sup>33</sup>

Accordingly, Annan made a number of crucial decisions, which seem to have had an impact on the possibility of initiating a transitional justice process in the context of the KNDR. Notably, the mediation team ensured that the “road map” adopted separated the short-term issues from the long-term issues, while at the same time insisting that the agreement made should cover all the items spelled out in the road map. Because the key controversies between the PNU and ODM negotiation team concerned issues pertaining to the short-term issue of power-sharing, the early adoption of such a strategy seemed to ensure that transitional justice issues would remain on the agenda without necessarily acquiring significant attention by the Partners.<sup>34</sup>

### ***B. International Pressure and the Enhanced Normative Power of the Transitional Justice Paradigm***

Another factor to take into account understanding why the KNDR included transitional justice tools concerns the massive and relatively coherent involvement of the international community in the mediation process.

Key actors, including the US and the EU, clearly accepted Annan’s leading role, giving him the leeway he needed to create his own strategies and tools for reaching an agreement. Moreover, these actors, sometimes at Annan’s request, added timely pressure on the Kenyans.<sup>35</sup> The US for example issued an ambiguous statement on the potential need for an “external solution,” without giving any details of what such a solution could entail.<sup>36</sup> Furthermore, the US and Canada threatened that they would impose travel bans on those who were accused of being involved in the PEV, or on those who obstructed the talks,<sup>37</sup> and several major countries, including the US, stated that as long as the crisis remained unresolved, Kenya could never enjoy “business as usual” with them.<sup>38</sup> The U.N. Security Council also

added pressure on the Kenyan leaders, stating that it would get involved in solving the crisis if the Kenyans did not find a timely agreement.<sup>39</sup>

It seems clear that such pressure contributed to finding a timely political solution to the crisis and thus eventual acceptance of the power-sharing deal, but international involvement may also have impacted the decision to include transitional justice tools.<sup>40</sup> As noted by Samwel Mohochi, “With the overwhelming international pressure on the two protagonists to engage in dialogue and the apparent role of the United Nations and African Union in the mediation it was assured that human rights would play an integral part in the resolution of the conflict as was identified in the preamble of the pre-negotiating agreement”.<sup>41</sup> Major players, including the US and the EU had a clear interest that Kenya returned to its (perceived) past stability,<sup>42</sup> and these international actors increasingly perceive transitional justice a useful, or even necessary, tool for guaranteeing peace and stability, especially in the long-term.

Whereas in the early days of the field, transitional justice was seen to concern justice tools in exceptional political circumstances, which needed to be balanced against the need to secure a peaceful democratic transition, achieving such transformation is increasingly seen to be contingent on the use of these justice processes.<sup>43</sup> This change in perceptions, where “peace *versus* justice” discourses have largely been replaced by “peace *and* justice” discourses, is correlated to various other developments, including the human rights movement’s effective lobby-work for victims’ rights.<sup>44</sup> While one could question if there is always a positive connection between peace and justice, the inclusion of transitional justice in the KNDR seems to reflect an emerging norm where the legitimacy and value of peace agreements is seen to be contingent on their ability to deal judicially with past human rights abuses.<sup>45</sup>

### ***C. The Role of Civil Society***

The fact that the KNDR adopted a framework for pursuing transitional justice was also influenced by civil society organizations. Many of these organizations seemingly perceived the KNDR a window of opportunity for attending to some of the main causes of human rights abuses and violent conflict in the country, and therefore added pressure on the Partners and the mediators to agree on accountability, truth-seeking and reform measures.<sup>46</sup>

Civil society groups were formed specifically with the objective of addressing the crisis. Immediately after Kibaki had announced his victory in the elections and the violence erupted, a group of key civil society leaders formed the “Concerned Citizens for Peace”, described as a “multilevel peace initiative which became a rallying point for peace activists and an interlocutor within the peace process”.<sup>47</sup> This and other groups, such as the Kenyans for Peace with Truth and Justice (KPTJ), the Kenyan Civil Society Congress (KCSC) and Vital Voices Women’s Group, informed and guided the Annan-led mediation team.<sup>48</sup>

Kofi Annan explains that before the initial meetings with the political leaders he “saw all the NGOs, civil society, Churches, businesses, and I promised them a transparent process, because I wanted them to stay involved. I wanted them to know what was happening to maintain the pressure on the politicians, and I promised them that any agreement that was signed, I would make public immediately.”<sup>49</sup> The fact that the concerns and grievances of civil society were heard in the phase where the dialogue process was still being prepared seems to have influenced the agenda. For example, one of the mediators, Graça Machel, was clearly attentive to the needs expressed by women with regard to addressing the abuses, including the call made by Kenyan women’s groups in a Memorandum to the Panel to ensure that SCR 1325 was implemented and that the KNDR could be used to initiate a constitutional reform process.<sup>50</sup>

Though the KNDR was elite based in that the negotiating partners were limited to a selected group of high profile politicians and took place behind closed doors, civil society thus effectively made use of the internationally-sponsored mediation process to promote a human rights and transitional justice agenda.

#### ***D. The Partners’ Perception of the Proposed Transitional Justice Measures***

A final, and perhaps most crucial, factor to take into account understanding why the KNDR included transitional justice measures in the context of power-sharing concerns the Partners’ perceptions of the consequences of these agreements. Taking into account how investigatory commissions in Kenya have in the past been manipulated to serve political purposes or simply been destroyed by political interference, the Partners may have expected that the justice tools mentioned in the KNDR agreements would never materialize as independent and strong transitional justice mechanisms.<sup>51</sup>

Importantly, some of the decisions pertaining to transitional justice solutions made within the KNDR may deliberately have been kept in a language vague enough for the Partners to avoid panicking over the prospects of criminal accountability, fundamental reform of the system of governance and other possible consequences of a genuine transitional justice process. For example, the 1 February 2008 Annotated Agenda simply stated that “discussions will be conducted to identify and agree on the modalities of implementation of immediate measures aimed at [...] Ensuring the impartial, effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty are brought to justice”.<sup>52</sup> Similarly, while the 14 February 2008 agreement between the Partners recognized the need for “addressing issues of accountability and transparency” and identify and prosecute the perpetrators of violence, it did not spell out the details of how a criminal justice process should be developed and who would be in charge of it.<sup>53</sup> It is therefore likely that the Kenyan leaders accepted the provisions concerning transitional justice in part because they thought these promises of justice, as so often the case in the country, would never result in an independent accountability process,



fundamental reforms and other credible solutions to Kenya's crisis of governance that would be beyond their control.<sup>54</sup>

Consequently, the Partners might have expected that the transitional justice tools envisaged with the KNDR would either not be created, or alternatively that they would lack independence and could be used for political purposes, such as targeting political opponents. For example, as the PNU side supported "independent investigations" of the violence, this might have been thought of as a way to have confirmed their stand that the PEV was the result of ODM's decision to call for mass action.<sup>55</sup> As noted by Samwel Mohochi, the decision to integrate a justice agenda in the KNDR can therefore in part be seen as an expectation that the "*ping pong blame game*" that had surrounded the peace talks would continue in the newly formed coalition government, and that these tools could be utilized in this game.<sup>56</sup>

Having identified these explanations for why transitional justice solutions were included in the KNDR, the Article will now turn to an assessment of how the power-sharing agreement – and the politics it has brought about – has impacted the pursuit of transitional justice.

#### **IV. Why Kenya's Power-Sharing Deal has posed an Obstacle to Transitional Justice**

##### ***A. Elite Capture as an Obstacle to Transitional Justice***

Though the Annan-led mediation team was committed to listening to the voices of civil society when negotiating the KNDR, as noted in the Section above, the entire mediation process was based on the premise that once elites could be brought together, legitimate agreements could be made concerning the system of governance, improved protection of human rights and prevention of new violations. However, the Kenyan leaders have proven to be less interested in creating legitimate and credible responses to the violence than to take control of the processes to ensure they would never serve their stated goals. For example, rather than giving way to truth and victims' redress, the Kenyan leadership has been remarkably efficient undermining the truth-seeking process, which could ideally have helped overcome ethnic divides, constructing a national identity and promoting victims' redress.

On paper, Kenya's truth-seeking process generally complies with international standards relating to independence, and the TJRC is given broad powers to implement its mandate. The KNDR agreement of March 4, 2008, which sets out the principles on which the Commission should rely,<sup>57</sup> was seemingly faithfully transformed into law with the adoption of the TJRC Act in late October 2008.<sup>58</sup> The TJRC's independence is explicitly guaranteed through a provision which states that "in its performance of its functions under this Act, the commission shall not be subject to the control or direction of any person or authority" (art. 21(1)). Another provision stipulates that the commissioners and staff members serve in their individual capacity, independent of political parties, the government, or other organizational

interests, and must avoid taking action which could give an impression of partiality or otherwise harm the credibility or integrity of the Commission (art. 21(2)). The TJRC Act also stipulates that the TJRC enjoys financial autonomy (art. 8(b-d)), and creates a Truth, Justice and Reconciliation Fund (art. 43(1)), which has been seen to “minimise the chances of political influence as would have been the case were the Commission’s budgetary control under central government”.<sup>59</sup>

However, these legal safeguards have limited value if there is no real commitment at the level of the political leadership to establish a credible truth-seeking process. The Kenyan leadership has seemingly deployed a strategy aimed at subtly compromising and delegitimizing the process, while at the same time allowing it to continue, perhaps to avoid international criticism for failing to implement the KNDR agreements and making sure that no alternative (and credible) process be established.

Underfunding the TJRC presents one such way of compromising transitional justice. In 2011, as the mandate of the Commission was about to come to an end, the TJRC stated as follows: “Perhaps the single greatest challenge that the Commission has faced since its inception is the lack of sufficient finances and resources to [run] its operations. The preliminary cost of fulfilling the Commission’s mandate effectively and efficiently was estimated to be approximately \$27 million for the two-year operational period [...] For the 2010-2011 fiscal year, the Commission submitted to the Treasury a budget of [around \$10 million] but it was only allocated [around \$1,6 million]” (though with subsequent supplementary funding the Commission in total received around \$5,5 million for the mentioned financial year).<sup>60</sup> According to the TJRC, these financial restraints resulted that the Commission was unable to pay staff salaries as well as commencing many of its mandate-related operations.<sup>61</sup> It is in this light that former Vice Chair of the TJRC Betty Murungi argues that political forces have “promote[d] a non-performing, un-resourced TJRC with little or no capacity to find the truth but to keep it alive nonetheless so that it can be buried forever”.<sup>62</sup>

Perhaps the most significant challenge facing Kenya’s truth-seeking process involves the controversies surrounding the composition of the Commission. Again on paper, the framework relating to the appointment process seems rather solid. According to the TJRC Act, the Commission shall be composed of six Kenyan commissioners short-listed by a Selection Panel, on which civil society groups are granted significant influence (art. 9(1)), and three non-Kenyans selected by the Panel of Eminent African Experts (art. 10(1)). The TJRC Act also establishes high thresholds for the professional competence of the commissioners (art. 10(5)), and requires that gender equality and regional balance be taken into account appointing the commissioners (art. 10(4)). Furthermore, the TJRC Act aims at securing the integrity of the commissioners, for example through a requirement that the commissioners generally enjoy the confidence of the people of Kenya and cannot have been involved, linked or associated with the perpetrators or supporters of acts investigated by the Commission (art. 10(6)).

Yet, political players have succeeded undermining the TJRC through a flawed selection process with little public participation.<sup>63</sup> In late July 2009, President Kibaki announced the names of the TJRC commissioners, and his decision to appoint Ambassador Bethuel Kiplagat as Chairman of the Commission.<sup>64</sup> Kiplagat, who served as a high-ranking civil servant during Daniel A. Moi's dictatorship, was named by the so-called Ndung'u Commission as being among those who have illegally acquired land; he is suspected of having been untruthful in his testimony to the Parliamentary Select Committee concerning an investigation into the killing of Robert Ouko; and there is credible information that Kiplagat played a role in the Wagalla massacre in 1984 which targeted Kenyan Somali Muslims.<sup>65</sup> Whether or not all of these allegations are actually true, the fact that information concerning Kiplagat's alleged role in serious human rights violations was publically available prior to his appointment as Chair of the TJRC suggests that political forces deliberately opted for a controversial chair whose leadership would inevitably spark criticism of the TJRC and limit the Commission's ability to fulfil its mandate.

And this is exactly what has happened. The TJRC itself acknowledges that it "lost a significant amount of time and credibility at the beginning of its term due to the controversy that surrounded the suitability of its Chairperson".<sup>66</sup> In reality, however, the controversy surrounding Kiplagat's leadership has not only presented an obstacle for the Commission to commence its work, but rather poses a much more fundamental problem resulting that the TJRC is likely to be remembered as yet another compromised Kenyan commission, captured and destroyed by politicians who are opposed to truth, reforms and reparations to victims.

The other commissioners of the TJRC made it clear that they cannot work under Kiplagat's leadership, and filed a court case to have the chairman expelled from the post.<sup>67</sup> While a tribunal was eventually set up to investigate the conduct of Kiplagat and the TJRC has made it clear that the embattled Chairperson will himself take the witness stand before the Commission in connection to allegations of land grabbing, Kiplagat did not formally step aside.<sup>68</sup> It is telling that as Archbishop Desmond Tutu of South Africa and other former heads of truth commissions made a united call for Kiplagat to resign,<sup>69</sup> political forces in Kenya, including former president Moi, expressed their sympathy for the Chairman, noting that he has a "good track record".<sup>70</sup>

Partly as a consequence of these controversies, the TJRC has had little appeal to the victims of human rights abuses in Kenya. A recent survey showed that many victims (around 23 percent) have never heard of the TJRC, and those who have generally lack confidence in the process (only nine percent of the victims consulted in recent survey said they had faith that the TJRC could address their demands).<sup>71</sup>

Kenya's truth-seeking process has thus been almost entirely destroyed by a series of controversies and obstacles, which are largely the result of lack of political will for a strong and independent truth commission. There are several likely reasons for elite opposition to the TJRC. Notably, because

manipulation of history and ethnicity has proven a central method for politicians to mobilize support, a strong and independent TJRC is likely to have been seen as a danger since it could have helped overcome ethnic myths and create a shared national narrative. Further, some segments of the political leadership might believe that continued disempowerment and marginalization of specific communities provide them with a power-base that can be mobilized in the context of elections, perhaps also explaining why no reparations programme has been created and why thousands of Kenyans displaced in the context of the PEV continue to live in IDP camps.<sup>72</sup>

Though the KNDR seemed to create a framework for establishing a legitimate and credible truth-seeking process, the fact that the political elites, who were brought to power by the KNDR, were allowed to shape this process has almost completely undermined truth-seeking and victims' redress. That the KNDR treated political elites with limited or no interest in truth, reform and victims' redress as the key actor for giving effect to Kenya's truth-seeking process has thus resulted in a deeply contested process with limited value for the peoples of Kenya, including the victims of human rights abuses.

### ***B. Elite Opposition as an Obstacle to Transitional Justice***

While truth-seeking and victims' redress have thus been restricted due to political elites' ability to capture the processes, other aspects of transitional justice in Kenya have proven to be at least partly out of control of these elites. Where this has been the case, key segments of the coalition government have opposed transitional justice, using a variety of methods aimed at eliminating the process. Most clearly this is the case with regard to the accountability process, which due to the absence of a local process has become internationalized in the form of ICC proceedings. The Kenyan leadership has – perhaps unsurprisingly given high-profile members from both sides are among the ICC suspects – used significant government resources attempting to get rid of the ICC. Following the ICC prosecutor's announcement that he intended to prosecute William Ruto and Uhuru Kenyatta, who have both announced their candidature for the next presidential elections, as well as President Kibaki's right hand, Francis Muthaura who at the time headed Kenya's civil service, the leadership made a series of moves to eliminate the ICC process.<sup>73</sup>

On December 22, 2010, almost immediately following Ocampo's request to have summonses issued on the six Kenyans he deemed most responsible for the PEV, the Kenyan parliament passed a motion requiring the Kenyan government to take “appropriate action to withdraw from the Rome Statute.”<sup>74</sup> The motion was passed under threat that any failure to comply with its contents within sixty days would lead to actions against the Kibaki administration, including sabotaging government business in the Parliament.<sup>75</sup> However, even if some cabinet members had initially indicated support for acting on the motion, the government rightly understood that a withdrawal would not impact the ongoing cases and have thus so far refrained from acting on it.<sup>76</sup>

Instead, the Kenyan government – spearheaded by Vice President Kalonzo Musyoka – launched diplomatic efforts aimed at convincing other countries that the U.N. Security Council should defer the cases under Article 16 of the Rome Statute.<sup>77</sup> While the Kenyan government swiftly obtained the support of the African Union,<sup>78</sup> permanent members of the Council, including the US, the UK and France, made it clear they would not support Kenya’s request should it come to a formal vote, thus dismissing the government’s claim that the ICC process poses “a real and present danger to the exercise of government and the management of peace and security in the country.”<sup>79</sup>

Further, on March 31, 2011, the Kenyan government filed an application with the ICC challenging the admissibility of the cases pursuant to Article 19 of the Rome Statute, which states (with reference to Article 17 of the Statute) that the Court cannot exercise jurisdiction if a state with jurisdiction is investigating or prosecuting the case.<sup>80</sup> The admissibility challenge pointed to “the fundamental and far-reaching constitutional and judicial reforms very recently enacted in Kenya,” and argued that the “[n]ational courts will now be capable of trying crimes from the post-election violence, including the ICC cases, without the need for legislation to create a special tribunal, thus overcoming a hurdle previously a major stumbling block.”<sup>81</sup> However, Pre-Trial Chamber II rejected the admissibility challenge, stating that no credible information had been provided to show that Kenya was in fact investigating the ICC suspects, a ruling that was upheld by the Appeals Chamber.<sup>82</sup>

When analyzed in conjunction, it seems clear that the main purpose of these moves has been to avoid criminal prosecutions of the masterminds of the PEV altogether. On the one hand, the government has sought a deferral of the ICC cases, claiming that prosecuting the ICC suspects will jeopardize peace and stability in the country. On the other hand, the government has attempted to challenge the admissibility of the ICC cases, arguing that a domestic accountability process involving the ICC suspects has commenced. The government’s support for the ICC suspects has been made clear in various official statements. Vice President Musyoka has stated this support in clear terms: “[y]ou [Ruto and Kenyatta] should not lose hope because of being named in the ICC list. The Government will do its best to assist you, because we want to ensure that every Kenyan feels part and parcel of the next dispensation.”<sup>83</sup>

This elite opposition to the ICC stands in contrast to ordinary Kenyans’ support for the justice process. An April 2011 survey found that 78 percent of Kenyans support ICC investigations, and correctly observed that there is a clear “disconnect between the political elite and ordinary citizens in terms of how to deal with post-election violence cases”.<sup>84</sup> The fact that popular support for the ICC process has since declined to around 55 percent seems related to political elites’ manipulation of the process, as will be discussed below in Section C.<sup>85</sup>

As the charges have been confirmed against four of the initial six suspects,<sup>86</sup> there is a clear risk that the government's failure to capture the process will result in an outright rejection of it. Recent developments have created doubts as to whether the Kenyan government will eventually cooperate with the ICC should the suspects fail to appear voluntarily in The Hague. In late March 2012, Justice Minister Mutula Kilonzo, who has consistently supported the ICC process to the annoyance of Kenyatta, Ruto and their supporters, was transferred to a position (the Ministry of Education) where he cannot influence Kenya's response to a potential request for arresting and transferring the suspects. He was replaced by a well-known supporter of the ICC suspects, Eugene Wamalwa, who will also take over Kilonzo's seat in the Cabinet sub-Committee on ICC. Commentators have questioned whether not these cabinet changes were dictated by Kenyatta – the son of the founding father, a close ally of President Kibaki and among the wealthiest and most powerful politicians in the country – who has a strong personal interest in non-cooperation with the ICC.<sup>87</sup> Most recently, the Kibaki administration stated that it wishes to “transfer the ICC cases” to the African Court of Justice or the East African Court of Justice, though these courts are currently neither mandated nor resourced to conduct such trials. In any event, the Rome Statute does not offer a basis for transferring ongoing ICC cases to a potentially competing regional court.<sup>88</sup> These statements, therefore, point not to the government's commitment to accountability principles, but rather an intension to confuse the debate about accountability, possibly aimed at laying the ground for non-cooperation with the ICC.

Because the KNDR power-sharing arrangement accepted that leaders allegedly involved in the PEV could form part of the country's leadership, the formal acceptance of accountability principles has not been associated with any real commitment to individual criminal accountability for the PEV. As will be discussed just below; key members of the coalition government have attempted – and partly succeeded – disseminating a picture that ICC intervention amounts to plot driven by foreign and “unpatriotic” domestic forces who wish to remove two presidential candidates – Ruto and Kenyatta – from the race, and hence with Kenyan logic, the aspiration of the Kalenjin and Kikuyu communities to access political power.

### ***C. Elite Manipulation and “Blame Game” as an Obstacle to Transitional Justice***

The conclusions above concerning opposition to key elements of transitional justice are important, but it is equally important to note that the government's policies towards the ICC have not been based on consensus.<sup>89</sup> These internal struggles in the coalition government have not been driven by a principled debate about the most appropriate forum for a legitimate accountability process, and what goals such a process should serve. Rather, members of Kenya's political elite have tended to support different accountability forums based on other considerations, notably the prospects of compromising justice and/ or gaining personal advantage by seeing political opponents targeted.<sup>90</sup>

This continuation of the KNDR “blame game” is evident from various events. When in February 2012, the Kenyan parliament had voted down a bill concerning the establishment of a Special Tribunal to handle the PEV cases,<sup>91</sup> many of the members of parliament explained their opposition to a local accountability process with reference to lack of judicial independence in Kenya and emphasized their preference to conduct the trials in The Hague. William Ruto, for example, argued, “Kofi Annan should hand over the envelope that contains names of suspects to the International Criminal Court at The Hague so that proper investigations can start.”<sup>92</sup> This support unsurprisingly changed once it became clear that he was himself a suspect in an ICC case.<sup>93</sup> Many other members of parliament similarly rejected a local tribunal, citing their preference for “The Hague Route”, but later changed their minds, once the ICC process actually materialized.<sup>94</sup> On the other hand, Odinga, who was initially in favour of the local option, became a strong supporter for ICC trials once the suspects – some of whom (Ruto and Kenyatta) are now in political opposition to Odinga – were named.<sup>95</sup> Consequently, supporters of Odinga made clear their opposition to the government’s official reactions to ICC intervention. For example, ODM Secretary General Anyang’ Nyong’o – an ally of Odinga – sent a letter to the U.N. Security Council, supposedly on behalf of the ODM political party, urging the Council not to order a deferral of the ICC cases as had been requested by the (PNU side of the) government.<sup>96</sup> More recently, Odinga and other ODM members have become less vocal in their support of the ICC. Perhaps fearing that the accountability process could end up promoting support for political rivals, in June 2012 Odinga changed his mind stating that the ICC suspects should be allowed to run for presidency.<sup>97</sup> The fact that Ruto, Odinga and many others have continuously reversed their stance on *where* to conduct trials illustrates, as Musila notes, how political elites “have vacillated between the various options, unsure which would safeguard their own agendas: trials in The Hague or local trials; trials before the Special Tribunal or national courts; and/or the TJRC.”<sup>98</sup>

As it became clear that the ICC process will continue, two of the ICC suspects (Ruto and Kenyatta) formed a coalition, known as G-7, which has been labelling itself as an alternative to Odinga’s plans for gaining presidency in the upcoming elections. Apparently, the main objective of the G-7 coalition, which also involved vice president Musyoka and a number of other prominent politicians, is to avoid accountability for the PEV, eliminate Odinga’s presidential plans and gain power. To facilitate this, the coalition has attempted to instrumentalise the ICC process, arguing that Odinga has influenced the ICC’s decision to target Ruto and Kenyatta; that the process targets certain ethnic communities (as opposed to individuals); and that Odinga ought to be the one standing trial since he called for mass action in the context of the disputed 2007 elections.<sup>99</sup> To help disseminate this picture of the ICC process, the suspects have mobilized tribal and religious leaders and hired PR firms.<sup>100</sup> Although internal disagreement in the coalition may lead to its dissolution prior to the elections, its formation and methods point to political elites’ ability and willingness to instrumentalise the accountability process for narrow political purposes, to the detriment of a meaningful debate about the need to end impunity at all levels of society and put in place profound reforms to prevent the recurrence of new political violence. A KNDR monitoring report stated the problem clearly:

“Findings show that divisions within the Grand Coalition Government have created an opportunity for impunity to re-organise and undermine progressive reforms and interventions aimed at ending impunity [and] the fight against impunity has been personalised, politicised and ethnicised. [...] Further, new political alliances are emerging not based on the need to deepen reforms that would prevent recurrence of another violent conflict but rather on the need to use ethnic platforms to promote and protect the political careers of particular individuals considered to be regional leaders.”<sup>101</sup>

However, the accountability process is not the only aspect of transitional justice that has been characterized by attempted – and partly succeeded – elite manipulation and is being used as a tool to fight political opponents, raising doubts as to how effective transitional justice will ultimately be bringing about political and peaceful transformation.

A new constitution adopted in August 2010 offers a sound framework for reforming hereto abusive and corrupt state institutions such as the judiciary and the security forces; limits presidential powers and improves checks and balances; and entails a comprehensive catalogue of constitutionally protected rights. However, due to opposition in Parliament and various government bodies, there have been significant obstacles to implementing these constitutional provisions, and crucial issues such as land reforms are yet to be designed in detail. Disagreement between the coalition partners and lack of commitment to give effect to the provisions concerning reforms has been among the key obstacles for creating a new constitutional order in Kenya.

While progress has taken place in some areas (notably judicial reforms), devolution, reforms of the security sector, land reforms and other reform measures have been delayed or completely neglected as the reform process is being manipulated and used to fight political opponents, or simply left behind because political elites have no interest in promoting them. Internal struggles in the government, including mutual allegations of abuse of office, corruption and nepotism, have tended to direct attention from effective coordination and implementation schedules.<sup>102</sup> The progress that has nonetheless taken place has often been surrounded by a political drama, including mutual allegations that one or the other of the coalition partners have failed to respect the provisions of the power-sharing deal. For example, though a new Chief Justice (Willy Mutunga), generally accepted as competent and committed to human rights and the rule of law, was eventually appointed, struggles between Kibaki and Odinga (and their respective supporters) significantly delayed the process and led to compromises where other key posts in the legal sector – including the powerful post of Director of Public Prosecution – were filled by political appointees who are unlikely to support accountability principles and promote the installation of a human rights culture.<sup>103</sup> The problems surrounding judicial nominations are symptomatic of the challenges facing the constitutional reform process as such, with open disagreement between different government actors such as the Commission for the Implementation of the Constitution, the Attorney-



General and political actors.<sup>104</sup> The reform process has also tended to fall short in terms of public participation.<sup>105</sup>

The KNDR brought to power politicians with limited or no interest in working together as a coherent government. Rivalry between these politicians has posed a significant obstacle to implementing the KNDR agreements which aim at improving human rights protection and paving the way for a transformation of the system of governance. There has been a continuation of the “blame-game” that surrounded the KNDR mediation process, where various fractions of the political leadership mutually blame each other for the slow implementation of transitional justice, such as constitutional reforms, or alternatively use aspects of Kenya’s envisaged transitional justice process, including the accountability component, as a tool for fighting political competition. Bringing together political opponents through power-sharing seems to entail the risk that the parties will instrumentalise transitional justice in internal power struggles, as opposed to using the justice tools to achieve profound change.

#### ***D. The KNDR as a Framework for Advocacy and Long-Term Change?***

Despite the many obstacles, including elite capture, political opposition and manipulation of transitional justice, discussed above, the fact that some of these processes are nonetheless ongoing can largely be attributed to the framework and processes created in the context of the KNDR. Though contested and partly undermined by the political leadership, some of these processes may ultimately help promote some level of progressive change.

For example, as much as Kenyan civil society and other reform oriented actors had pushed for constitutional reforms for two decades, political actors and others opposed to change in the system of governance had successfully undermined earlier attempts at creating a new constitutional framework which could pave the way for a fundamental reconstruction of the state.<sup>106</sup> With the mediation process that followed the political dispute that had triggered the PEV, national and international actors alike increasingly recognized that constitutional change was a prerequisite for preventing the recurrence of large-scale electoral violence, and thus tipped the balance in favour of constitutional reforms.<sup>107</sup> Despite slow implementation and internal struggles in the coalition government, the constitutional reform process has its own dynamics, and new offices created with the constitution may ultimately prove to be key drivers of a deeper transformation in Kenya.

Furthermore, ICC intervention in Kenya, though formally triggered by the Prosecutor using the proprio motu powers in article 15 of the Rome Statute, seems partly the result of developments that took place in consequence of the KNDR agreements. In its October 2008 publication, CIPEV recommended the establishment of a Special Tribunal composed of Kenyans and foreigners to prosecute those responsible for organizing the 2008 post-election violence.<sup>108</sup> However, this proposal was made under the threat that, if the government failed to immediately comply with the recommendations, it would

forward “a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal” to the ICC prosecutor.<sup>109</sup> Though such a communication can of course not trigger ICC intervention, the fact that CIPEV recommended ICC trials should the Kenyan leadership fail to create a credible national process, seem important when understanding why the Prosecutor eventually chose to use the *proprio motu* powers.<sup>110</sup>

More generally, continued international involvement in the process that followed the KNDR and strong civil society pressure on the Partners to commit to the agreements made during the KNDR has sometimes impacted Kenya’s transitional justice process in a positive manner. For example, civil society groups operating in Kenya, such as the International Center for Transitional Justice, Kenya Human Rights Commission and the International Centre for Policy and Conflict have closely monitored the developments and offered critical input to the public debate.<sup>111</sup> Together with (somewhat inconsistent) international pressure on the Kenyan leadership, this has seemingly contributed to increased scepticism among ordinary Kenyans concerning the current political leadership’s ability to promote reforms and justice.

Besides ending the PEV, from a human rights perspective perhaps the greatest asset of the mediation process is therefore that it has promoted a critical debate, which could in the best event lead to fundamental change in the country’s economic, political and cultural life. Given the current political climate in Kenya, the most credible tools for addressing past human rights abuses and preventing new ones from recurring are therefore also likely to be those most externalized from the government. In particular, the ICC process – despite political elites’ manipulation – could prove an important tool for countering Kenya’s culture of impunity.<sup>112</sup>

## **V. Conclusions**

Power-sharing arrangements are often seen as a necessary evil; as an effective method to end civil war or other forms of violent conflict, which entails compromises, notably with respect to human rights and transitional justice.<sup>113</sup> Yet, while Kenya’s power-sharing deal clearly did entail compromises, many also thought the mediation process offered a window of opportunity for addressing past human rights abuses and prevent new ones from recurring. An International Peace Institute report states the perception clearly: “The opportunity [...] was that the crisis could be used to actually address deeply rooted problems: the simmering grievances, repeated ethnic migrations, and the cycles of dispossession which have characterized Kenya’s colonial and postcolonial years. This was indeed an opportunity to create a political system which could attempt to address the vast disparities in wealth and the endemic sense of marginalization.”<sup>114</sup>

However, as much as the KNDR was successful on paper integrating a power-sharing arrangement and agreements concerning measures that could address Kenya's legacy of political violence and other human rights abuses and injustices, the political elites gaining or maintaining power with the power-sharing arrangement have generally shown a lack of interest in establishing credible and independent transitional justice processes, which could help transform the country's structures of governance, the political culture and abusive and corrupt state institutions. While the power-sharing deal seems to have been the only viable option for swiftly ending the PEV, it also appears to have consolidated a political culture characterized by disrespect for human rights, the rule of law and democratic principles. In most ways, it is "business as usual" in Kenya, and it is uncertain whether another possibility for remedying the root causes of the country's legacy of violence, human rights abuses and injustices will arise in any near future.

One key lesson from the Kenyan case is that in the absence of political will, a power-sharing arrangement's formal inclusion of transitional justice tools has limited value if these tools are not safeguarded against elite capture and manipulation. If not, these elites may capture the transitional justice process, and if they cannot, they may attempt to sabotage it. A central conclusion is therefore that in cases where the political culture is characterized by disrespect for the rule of law, human rights and democratic principles – and where power-sharing arrangements may be necessary to end ongoing violence – transitional justice should have as a primary objective to challenge this culture. Changing a political culture is of course no easy task, but allowing that transitional justice processes are owned by the people, not the elites, could eventually translate into a critical pressure, which would leave elites with no other choice than accepting fundamental change.

While this Article has emphasized problems related to elite capture and manipulation of transitional justice, it is important to remember that peaceful and political transition in Kenya is not merely conditioned on change at the level of the political leadership and state institutions, but requires a deeper transformation of society. Put otherwise, election violence and related problems are not only the outcome of the elites' vested interests, but also the result of bottom-up pressure that encourages political tribalism, the dependence culture and widespread acceptance of violence. Ultimately, only a shared desire among the peoples of Kenya for change can drive a potential transition in Kenya.

Finally, international actors also face a responsibility for the partial failure of transitional justice in Kenya. While members of the international community played an important role for ensuring the integration of a transitional justice agenda in the power-sharing agreements, international actors have not always added sufficient pressure on the Kenyan leadership to commit to implementing the agreements made in the context of the KNDR.<sup>115</sup>



## ENDNOTES

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<sup>1</sup> See e.g. Godfrey M. Musila, 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions', *International Journal of Transitional Justice* 3 (2009) (hereinafter Musila, 'Options for Transitional Justice in Kenya'); Thomas Obel Hansen, 'Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns', *California Western International Law Journal* 42 (2011) (hereinafter Hansen, *Transitional Justice in Kenya?*).

<sup>2</sup> See generally Commission of Inquiry into the Post-Election Violence, *Report of the Commission of Inquiry into the Post-Election Violence* (2008) (<<http://www.dialoguekenya.org/docs/PEV%20Report.pdf>>) (hereinafter CIPEV Report); Human Rights Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance* (2008) (<http://www.hrw.org/sites/default/files/reports/kenya0308web.pdf> **BALLOTS TO BULLETS**) (hereinafter HRW, *Ballots to Bullets*).

<sup>3</sup> CIPEV Report, 305

<sup>4</sup> CIPEV Report, 384-85.

<sup>5</sup> Elisabeth Lindenmayer and Josie Lianna Kaye, 'A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya', *International Peace Institute* (August 2009), (<[http://www.marsgroupkenya.org/pdfs/2009/10/A\\_Choice\\_for\\_Peace.pdf](http://www.marsgroupkenya.org/pdfs/2009/10/A_Choice_for_Peace.pdf)>), 4 (hereinafter Lindenmayer and Kaye, 'A Choice for Peace').

<sup>6</sup> Lindenmayer and Kaye, 'A Choice for Peace', 5.

<sup>7</sup> Meredith Preston McGhie and E. Njoki Wamai, 'Beyond the Numbers: Women's Participation in the Kenya National Dialogue and Reconciliation', *Centre for Humanitarian Dialogue* (March 2011) 15-16 (hereinafter McGhie and Wamai, 'Beyond the Numbers').

<sup>8</sup> McGhie and Wamai, 'Beyond the Numbers', 15-16.

<sup>9</sup> Martin Griffiths, 'The Prisoner of Peace: An interview with Kofi A. Annan', *Centre for Humanitarian Dialogue* (May 2008), 3 (hereinafter Griffiths, 'The Prisoner of Peace').

<sup>10</sup> Lindenmayer and Kaye, 'A Choice for Peace', 2

<sup>11</sup> Griffiths, 'The Prisoner of Peace', 4.

<sup>12</sup> Griffiths, 'The Prisoner of Peace', 3; McGhie and Wamai, 'Beyond the Numbers', 15-16; and Lindenmayer and Kaye, 'A Choice for Peace'.

<sup>13</sup> The National Accord and Reconciliation Act 2008 (<[http://www.dialoguekenya.org/docs/Signed\\_National\\_Accord\\_Act\\_Feb28.pdf](http://www.dialoguekenya.org/docs/Signed_National_Accord_Act_Feb28.pdf)>).

<sup>14</sup> Lindenmayer and Kaye, 'A Choice for Peace', 2.

<sup>15</sup> Lindenmayer and Kaye, 'A Choice for Peace', 8.

<sup>16</sup> See Kenyan National Dialogue and Reconciliation, 'Annotated Agenda and Timetable' (1 February 2008), (<[http://www.dialoguekenya.org/docs/Signed\\_Annotated\\_Agenda\\_Feb1st.pdf](http://www.dialoguekenya.org/docs/Signed_Annotated_Agenda_Feb1st.pdf)>) (hereinafter KNDR Annotated Agenda); Kenyan National Dialogue and Reconciliation, 'Statement of Principles on Long-Term Issues and Solutions' (23 May, 2008) (<[http://www.dialoguekenya.org/docs/S\\_of\\_P\\_with\\_Matrix.pdf](http://www.dialoguekenya.org/docs/S_of_P_with_Matrix.pdf)>).

<sup>17</sup> Griffiths, 'The Prisoner of Peace', 2.

<sup>18</sup> For a further analysis of these developments in the field, see e.g. Thomas Obel Hansen, 'Transitional Justice: Toward a Differentiated Theory', *Oregon Review of International Law* 13 (2011) 1-46 (hereinafter Hansen, 'Transitional Justice: Towards a Differentiated Theory'); Paige Arthur, 'How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice', *Human Rights Quarterly* 31 (2009) 321-67.

<sup>19</sup> KNDR Annotated Agenda, agenda 2.

<sup>20</sup> KNDR Annotated Agenda, agenda 4.

<sup>21</sup> Kenya National Dialogue and Reconciliation, 'Long-Term Issues and Solutions: Constitutional Review Agreement' (4 March 2008) (<[http://www.dialoguekenya.org/docs/KenyaNationalDialogue\\_IRC.pdf](http://www.dialoguekenya.org/docs/KenyaNationalDialogue_IRC.pdf)>).

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- <sup>22</sup> Kenya National Dialogue and Reconciliation, 'Truth Justice and Reconciliation Commission, Agreement' (4 March, 2008) (<[http://www.dialoguekenya.org/docs/KenyanNationalDialogue\\_Truth&Justice.pdf](http://www.dialoguekenya.org/docs/KenyanNationalDialogue_Truth&Justice.pdf)>).
- <sup>23</sup> Kenya National Dialogue and Reconciliation, 'Commission of Inquiry on Post Election Violence, Agreement' (4 March, 2008) (<[http://www.dialoguekenya.org/docs/Agreement\\_Commission\\_on\\_Post\\_Election\\_Violence.pdf](http://www.dialoguekenya.org/docs/Agreement_Commission_on_Post_Election_Violence.pdf)>).
- <sup>24</sup> Kenya National Dialogue and Reconciliation, 'Independent Review Committee, Agreement' (4 March 2008) (<[http://www.dialoguekenya.org/docs/KenyaNationalDialogue\\_IRC.pdf](http://www.dialoguekenya.org/docs/KenyaNationalDialogue_IRC.pdf)>).
- <sup>25</sup> See further Evelyne Asaala, 'Exploring Transitional Justice as a Vehicle for Social and Political Transformation in Kenya', *African Human Rights Journal* 10 (2010): 395-404.
- <sup>26</sup> See further Thomas Obel Hansen, 'Political Violence in Kenya: A Study of Causes, Responses, and a Framework for Discussing Preventive Action', *Institute for Security Studies (Occasional Paper No. 205)* (2009) (hereinafter Hansen, 'Political Violence in Kenya'); Susanne D. Mueller, 'The Political Economy of Kenya's Crisis', *Journal of East African Studies* 2 (2008).
- <sup>27</sup> See e.g. Wanza Kioko, 'The Place of Transitional Justice in Kenya's Impending Political Transition', in *Building an Open Society: The Politics of Transition in Kenya*, ed. Lawrence M. Mute, Kichamu Akivaga & Wanza Kioko (Nairobi, Kenya: Claripress, 2002), 306.
- <sup>28</sup> See similarly Musila, 'Options for Transitional Justice in Kenya'.
- <sup>29</sup> Indicating this expansion of the field, see e.g. Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, 'Justice Discourses in Transition', *Social and Legal Studies* 13 (2004), 305-328; Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'', *The International Journal of Transitional Justice* 3 (2009) 5-27. For a further discussion of these trends, see e.g. Hansen, 'Transitional Justice: Towards a Differentiated Theory'.
- <sup>30</sup> Lindenmayer and Kaye, 'A Choice for Peace', 7.
- <sup>31</sup> See e.g. International Coalition for the Responsibility to Protect, Former UN Secretary-General Kofi Annan Receives MacArthur Award for International Justice (21 March 2008) (<<http://www.responsibilitytoprotect.org/index.php/component/content/article/42-learn-about-the-responsibility-to-protect/1601-macarthur-foundation-awards-kofi-annan-for-developing-the-principle-of-r2p>>).
- <sup>32</sup> Griffiths, 'The Prisoner of Peace', 18.
- <sup>33</sup> Kofi Annan statement at press conference on 26 January, 2008 in Nairobi as cited in Ben Sihanya and Duncan Okello, 'Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement', in *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, ed. Karuti Kanyinga and Duncan Okello (Nairobi, Kenya: Society for International Development, 2010), 680 (hereinafter Sihanya and Okello, 'Mediating Kenya's Post-Election Crises').
- <sup>34</sup> Lindenmayer and Kaye, 'A Choice for Peace', 22.
- <sup>35</sup> Lindenmayer and Kaye, 'A Choice for Peace', 17-18.
- <sup>36</sup> Lindenmayer and Kaye, 'A Choice for Peace', 11.
- <sup>37</sup> Lindenmayer and Kaye, 'A Choice for Peace', 12.
- <sup>38</sup> Lindenmayer and Kaye, 'A Choice for Peace', 17-18.
- <sup>39</sup> See further Sihanya and Okello, 'Mediating Kenya's Post-Election Crises', 682-3.
- <sup>40</sup> Lindenmayer and Kaye, 'A Choice for Peace', 11.
- <sup>41</sup> Mohochi, 'African Union Mediated Peace', 5.
- <sup>42</sup> See further Sihanya and Okello, 'Mediating Kenya's Post-Election Crises', 672.
- <sup>43</sup> See e.g. Linda M. Keller, 'The False Dichotomy of Peace versus Justice and the International Criminal Court', *Hague Justice Journal* 3 (2008)12-47; Ruti G. Teitel, 'Editorial Note – Transitional Justice Globalized', *International Journal of Transitional Justice* 2 (2008) 1-4.
- <sup>44</sup> See e.g. International Center for Transitional Justice, *Peace Versus Justice: A False Dilemma* (<<http://ictj.org/news/peace-versus-justice-false-dilemma>>).

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- <sup>45</sup> See e.g. Stef Vandeginste and Chandra Lekha Sriram (2011) Power Sharing and Transitional Justice: A Clash of Paradigms? *Global Governance* 17, No. 4, pp. 489-505.
- <sup>46</sup> See further Friends Committee on National Legislation (FCNL), *Policy Brief 2009: Kenya: Temporary Ceasefire or Lasting Peace?* (<[http://responsibilitytoprotect.org/Kenya\\_Book\\_Web.pdf](http://responsibilitytoprotect.org/Kenya_Book_Web.pdf)>), 3-4.
- <sup>47</sup> Lindenmayer and Kaye, 'A Choice for Peace', 8.
- <sup>48</sup> See further McGhie and Wamai, 'Beyond the Numbers', 16; and Sihanya and Okello, 'Mediating Kenya's Post-Election Crises', 672-3.
- <sup>49</sup> Griffiths, 'The Prisoner of Peace', 9.
- <sup>50</sup> McGhie and Wamai, 'Beyond the Numbers', 17.
- <sup>51</sup> See e.g. CIPEV Report, 26.
- <sup>52</sup> KNDR Annotated Agenda, para. 2.
- <sup>53</sup> Kenyan National Dialogue and Reconciliation, 'Agenda Item Three: How to Resolve the Political Crisis (Tsavo Agreement)' (14 February 2008), (<[http://www.dialoguekenya.org/docs/14\\_Feb\\_08\\_TsavoAgreement.pdf](http://www.dialoguekenya.org/docs/14_Feb_08_TsavoAgreement.pdf)>).
- <sup>54</sup> For an analysis of the failures of past commissions – such as the "Kiliku Committee", the Standing Committee on Human Rights and the Akiwumi Commission – to promote justice for politically inspired violence, see further CIPEV Report, 445-54.
- <sup>55</sup> See Lindenmayer and Kaye, 'A Choice for Peace', 13.
- <sup>56</sup> Mohochi, 'African Union Mediated Peace', 4.
- <sup>57</sup> See Kenyan National Dialogue and Reconciliation, Truth, Justice and Reconciliation Commission, Agreement (4 March, 2008), (<[http://www.dialoguekenya.org/docs/KenyanNationalDialogue\\_Truth&Justice.pdf](http://www.dialoguekenya.org/docs/KenyanNationalDialogue_Truth&Justice.pdf)>).
- <sup>58</sup> Truth, Justice, and Reconciliation Commission Act no. 6 of 2008.
- <sup>59</sup> Evelynne Asaala, 'Exploring Transitional Justice as a Vehicle for Social and Political Transformation in Kenya', *African Human Rights Law Journal* 10 (2010), 396 (hereinafter Asaala, Exploring Transitional Justice as a Vehicle for Social and Political Transformation in Kenya).
- <sup>60</sup> Truth, Justice and Reconciliation Commission, *Progress Report to the National Assembly submitted pursuant to Section 20(3) of the Truth, Justice and Reconciliation Act No. 6 of 2008* (24 June, 2011), 39-40 (hereinafter TJRC, *Progress Report*).
- <sup>61</sup> TJRC, *Progress Report*, 39-40.
- <sup>62</sup> Otieno Otieno, *Africa – Hidden Hand Behind Crisis at Kenya Truth Commission* (<<http://www.offnews.info/verArticulo.php?contenidoID=25615>>).
- <sup>63</sup> For an analysis of how the calls for consultations with civil society have been ignored, see International Centre for Policy and Conflict, *Monitoring Report of the Truth, Justice and Reconciliation Commission (April 2008 – June 2010): A Case of Concealing Truth to Reward Impunity* (2010), 6 (hereinafter ICPC, 'April 2008 – June 2010 Monitoring Report').
- <sup>64</sup> State House (Kenya), *Press Release: President Kibaki appoints Members of TJRC* (22 July, 2009) (<<http://www.statehousekenya.go.ke/news/july09/2009220701.htm>>).
- <sup>65</sup> On these allegations, see further Africa Confidential, *Bethuel Kiplagat (Profile)* (<<http://www.africa-confidential.com/whos-who-profile/id/360/Bethuel-Kiplagat>>); Roy Gachuhi, *Portrait of Bethuel Kiplagat, Isolated at the Helm of TJRC* (<http://www.roygachuhi.com/?cat=8>).
- <sup>66</sup> TJRC, *Progress Report*, iv.
- <sup>67</sup> ICPC, 'April 2008 – June 2010 Monitoring Report', 8-11.
- <sup>68</sup> See Nzau Musau, *Kiplagat to appear before TJRC*, *The Star*, March 20, 2012.
- <sup>69</sup> Mars Group Blog, *Desmond Tutu and Other International Justice Figures Call on Ambassador Bethuel Kiplagat Kenyan TJRC Chair to Step Down* (25 February, 2010) (<<http://blog.marsgroupkenya.org/?p=1865>>).
- <sup>70</sup> ICPC, 'April 2008 – June 2010 Monitoring Report', 8.

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<sup>71</sup> International Center for Transitional Justice, “*To Live as Other Kenyans Do*”: A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations (July 2009) (<<http://ictj.org/sites/default/files/ICTJ-Kenya-Reparations-Demands-2011-English.pdf>>), 43-44 (hereinafter ICTJ, “*To Live as Other Kenyans Do*”).

<sup>72</sup> See generally ICTJ, “*To Live as Other Kenyans Do*”; The KNDR Monitoring Project, *Draft Review Report: April 2011*.

<sup>73</sup> See generally Hansen, *Transitional Justice in Kenya?*; Susanne D. Mueller, *Dying to win: Elections, political violence, and institutional decay in Kenya*, *Journal of Contemporary African Studies*, 29, 2011 99-117; Stephen Brown and Chandra Lekha Sriram, *The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya*, *African Affairs*, 2012, 244–260.

<sup>74</sup> Kenya National Assembly, Motion 144 (22 December, 2010), (<[http://www.parliament.go.ke/index.php?option=com\\_docman&task=doc\\_download&gid=636&Itemid=>](http://www.parliament.go.ke/index.php?option=com_docman&task=doc_download&gid=636&Itemid=>)). (hereinafter Motion 144)

<sup>75</sup> Motion 144

<sup>76</sup> See e.g. Thomas Obel Hansen, ‘Why the Ocampo Six Should Not Become Kenya’s Six’, *OpenDemocracy* (14 February, 2011) (<<http://www.opendemocracy.net/thomas-obel-hansen/why-ocampo-six-should-not-become-kenya%E2%80%99s-six>>>).

<sup>77</sup> See e.g. Njeri Rugene, ‘Kalonzo Defends Shuttle Over ICC Trials’, *Daily Nation*, 8 February, 2011 (<<http://www.nation.co.ke/News/politics/-/1064/1103784/-/70cyvn/-/index.html>>).

<sup>78</sup> Assembly of the African Union, Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII), A.U. Doc. Assembly/AU/16 ¶ 6 (30-31 January, 2011).

<sup>79</sup> Letter from Macharia Kamau, Kenya’s Permanent Representative to the U.N. in New York, to the President of the Assembly of State Parties to the Rome Statute (28 February, 2011) (<<http://news2.onlinenigeria.com/news/general/81922-Kenyas-letter-ICC-President.html>>).

<sup>80</sup> Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang and Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-01/11 and ICC-01/09-02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute (31 Mar, 2011) (<<http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf>>) (hereinafter Kenya’s Admissibility Challenge).

<sup>81</sup> Kenya’s Admissibility Challenge, para. 2.

<sup>82</sup> Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (30 May, 2011) (<<http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf>>); Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (30 May, 2011) (<<http://www.icc-cpi.int/iccdocs/doc/doc1078823.pdf>>).

<sup>83</sup> ‘Raila Rivals Toy with Single Candidate Plan’, *Daily Nation*, 16 January, 2011 (<<http://www.nation.co.ke/News/politics/Raila+rivals+toy+with+single+candidate+plan+/-/1064/1090904/-/13rakrr/-/index.html>>).

<sup>84</sup> The KNDR Monitoring Project, *Draft Review Report: April 2011*, paras. 8-9 & Figure 5 (on page 9).

<sup>85</sup> The KNDR Monitoring Project, *Review Report: May 2012*, 24-28.

<sup>86</sup> See Hansen, *Transitional Justice in Kenya?* at 32-35.

<sup>87</sup> ‘Conspiracy against The Hague?’, *The Standard*, 29 March, 2012 (<[http://www.standardmedia.co.ke/InsidePage.php?id=2000055124&cid=4&story=Conspiracy against The Hague?>](http://www.standardmedia.co.ke/InsidePage.php?id=2000055124&cid=4&story=Conspiracy+against+The+Hague?>)>); ‘Kilonzo transfer linked to his stand on Ocampo Four cases’, *Daily Nation*, 27 March, 2012 (<<http://www.nation.co.ke/News/politics/Kilonzo+transfer+linked+to+his+stand+on+Ocampo+Four+cases+/-/1064/1375050/-/11gxvad/-/index.html>>).

<sup>88</sup> See further Thomas Obel Hansen, *Masters of Manipulation: How the Kenyan Government is paving the Way for Non-Cooperation with the ICC*, *OpenDemocracy*, May 2012.



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<sup>89</sup> ‘Kenya: Who is in Charge Here’, *Africa Confidential*, 1 May, 2009, at 10; and The KNDR Monitoring Project, *Draft Review Report: April 2011*, p. 45.

<sup>90</sup> See generally Hansen, *Transitional Justice in Kenya?*.

<sup>91</sup> See further KNDR Monitoring Project, *Draft Review Report: April 2011*, at p. 23.

<sup>92</sup> See ‘Ruto: Why I Prefer The Hague Route’, *Daily Nation*, 21 February, 2009 (<<http://www.nation.co.ke/News/-/1056/533390/-/u2h24m/-/index.html>>).

<sup>93</sup> See Benjamin Muindi, ‘ICC: Uhuru, Ruto Lash Out at PM’, *Daily Nation*, 26 March, 2011 (<<http://www.nation.co.ke/News/politics/-/1064/1133610/-/7q7klt/-/index.html>>).

<sup>94</sup> ‘They Voted for Hague but are now praying with ICC Suspects’, *Daily Nation*, 4 February, 2012 (<<http://www.nation.co.ke/News/politics/They+voted+for+Hague+but+now+pray+with+suspects/-/1064/1320534/-/21daw6z/-/index.html>>).

<sup>95</sup> See ‘Ruto: Why I Prefer The Hague Route’, *Daily Nation*, 21 February, 2009 (<<http://www.nation.co.ke/News/-/1056/533390/-/u2h24m/-/index.html>>).

<sup>96</sup> Peter Leftie, ‘Reject Kenya Plea, Orange Asks UN’, *Daily Nation*, 13 March, 2011, (<<http://www.nation.co.ke/News/politics/Orange+asks+UN+to+reject+Kenya+plea+/-/1064/1124530/-/v7vewrz/-/index.html>>).

<sup>97</sup> See e.g. Bernard Namunane, ‘How Raila Plans to Split G7 Supporters’, *Daily Nation*, 15 June 2012 (<http://www.nation.co.ke/News/politics/How+Raila+plans+to+split+G7+supporters/-/1064/1428630/-/c0xdbiz/-/index.html>); Muchemi Wachria, ‘Raila Praises ICC for Freeing Kosgey’, *Daily Nation*, 7 July 2012 (<http://www.nation.co.ke/News/politics/Raila+praises+ICC+for+freeing+Kosgey+/-/1064/1448204/-/114nfs9z/-/index.html>).

<sup>98</sup> Musila, ‘Options for Transitional Justice in Kenya’ 450.

<sup>99</sup> See generally Hansen, *Transitional Justice in Kenya?*; KNDR Monitoring Project, *Draft Review Report: April 2011*, at pp. 37-48.

<sup>100</sup> See e.g. Lillian Aluanga, ‘ICC Trials put Clergy’s Conduct under Radar’, *The Standard*, 31 March 2012 (<<http://www.standardmedia.co.ke/InsidePage.php?id=2000055325&cid=289>>); Jonathan Komen, ‘ICC Tops Agenda at Rift Leaders’ Meeting’, *Daily Nation*, 3 April, 2012 (<<http://www.nation.co.ke/News/politics/ICC+tops+agenda+at+Rift+leaders+meeting+/-/1064/1379642/-/137tfkq/-/index.html>>).

<sup>101</sup> KNDR Monitoring Project, *Draft Review Report: April 2011*, para 6.

<sup>102</sup> See International Center for Transitional Justice, *The Kenya Transitional Justice Brief, vol. 1, no.2, August 2011: One Year Since Promulgation: Assessing the Reform Process in the new Constitutional Dispensation* (September 2011).

<sup>103</sup> See e.g. Ngirachu “Private lives of CJ, deputy nominees queried” (7 June 2011) *Daily Nation* (<<http://www.nation.co.ke/News/politics/-/1064/1176526/-/7spse7/-/index.html>>).

<sup>104</sup> See further KNDR Monitoring Project, *Draft Review Report: January 2012*.

<sup>105</sup> The KNDR Monitoring Project, *Draft Review Report: April 2011*, para. 18.

<sup>106</sup> On the earlier attempts at adopting a new constitution, see generally Kagwe ‘The unfinished reform agenda and the 2007 general elections in Kenya’ in *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, ed. K Kanyinga & D Okello (2010), 415.

<sup>107</sup> Sihanya and Okello, ‘Mediating Kenya’s Post-Election Crises’ 697.

<sup>108</sup> CIPEV Report, 472–75.

<sup>109</sup> CIPEV required the coalition partners to make and sign an agreement to establish a special tribunal within 60 days after presenting the report to the Panel of Eminent African Personalities. See CIPEV Report, 473.

<sup>110</sup> See further Hansen, *Political Violence in Kenya*, 9.

<sup>111</sup> See these organizations’ monitoring reports at <http://ictj.org/our-work/regions-and-countries/kenya>; <http://www.khrc.or.ke/>; <http://www.icpcafrica.org/site/index.php>.

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<sup>112</sup> See further Hansen, *Transitional Justice in Kenya?*

<sup>113</sup> Canan Gündüz and Laura Davis, 'Peace Mediation, Power-Sharing and Transitional Justice: Challenges and Options for the EU', *European Forum for International Mediation and Dialogue*, October 2011, 2.

<sup>114</sup> Lindenmayer and Kaye, 'A Choice for Peace', 1.

<sup>115</sup> See further Stephen Brown, 'Lessons Learned and Forgotten: The International Community and Electoral Conflict Management in Kenya' in *Elections in Dangerous Places: Democracy and the Paradoxes of Peacebuilding*, ed. David Gillies (Montreal: McGill-Queen's University Press, 2011), 127-43.