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Kenya and the ICC

The Politics of the 2007 Post-Election Violence

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A dissertation submitted in fulfilment of the requirements for the award of the degree of MPhil in Transitional Justice and Conflict Resolution.

Faculty of Humanities
University of Cape Town
2012

COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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Chapter 1 Introduction

In December 2007, Kenya held a presidential election. The incumbent was Mwai Kibaki of the Party of National Unity (PNU). His political opponent was Raila Odinga of the Orange Democratic Movement (ODM). The vote was peaceful and described by many in positive terms; that is, a continuation of the positive democratic transition that Kenya began toward the end of the 1990s.¹ However, many in Kenya accused the government of foul play, when the Electoral Commission of Kenya (ECK) delayed declaring a winner for two days. The ECK eventually declared Kibaki President, and rushed the swearing-in ceremony, skipping the stipulated 72 hours.² Two days after declaring Kibaki president, Samuel Kivuitu, the chair of the ECK, admitted he did not know whether Kibaki had won the elections.³ He insisted that he had agreed to release the results and announce Kibaki as president, under pressure from above.⁴ Kenya then experienced its worst bout of violence since the Mau Mau rebellion, before independence. The Post-Election Violence (PEV) lasted two months. It was resolved following an agreement, the Kenya National and Reconciliation Dialogue (KNDR), negotiated by a Panel of Eminent Personalities. The fighting parties agreed to form a Government of National Unity (GNU), a Commission of Enquiry into the Post-Election Violence (CIPEV) and an Independent Review Commission on the General elections (Kriegler Commission). The GNU was to have Kibaki reinstated as President, to add the post of Prime Minister for Odinga, and was to undertake a reconciliation and accountability process, prosecuting perpetrators.

This thesis seeks to determine what were the politics that led Kenya to prosecute those who bore greatest responsibility for the PEV. More specifically, what were

¹ Wangari Mathaai, *The Challenge for Africa*. (London: Arrow Books, 2009).

² Ibid.

³ Nelson Kasfir, "Neo-Patrimonialism, Power Sharing and Reform in Kenya" (paper presented at the Third European Conference on African Studies, Leipzig, June 6, 2009).

⁴ Steve Snow, "Unhindered by the rule of law: ethnic terrorism and the 2007 Kenyan presidential election," *South African Journal of International Affairs* 16, no. 1 (2009): 115-127.

the politics that resulted in selecting the ICC, as the court where individuals were going to be held accountable?

1.1 Concepts and Definitions

Kenya made a surprising choice by undertaking a retributive justice process. By agreeing to two commissions of enquiries into the PEV and ECK, Kenya committed itself to achieving accountability for its governing elite.⁵ The stated aim was that it would end impunity and aid the democratic process of Kenya.⁶ However, Kenya's system of governance, as will be explored in detail, performs in a way in which the possibility of accountability and thus of losing power, presents a real danger for many in the political elite. Furthermore, because the GNU was the result of a negotiated settlement with many of the old guard present, achieving accountability in such a situation is a difficult political choice to make. It is therefore puzzling that Kenya would go beyond achieving negative peace⁷, and instead pursue an extensive and punitive Transitional Justice (TJ) programme.

A TJ process is a relatively new approach to achieving justice and ensuring peace in times of transition from conflict and/or state repression. Roht-Arriaza defines it as *"that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law"*.⁸ It is concerned with achieving national reconstruction and good governance.⁹ The goals are to heal victims and alter the conditions that allowed dictatorship, in

⁵ Godfrey M. Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions," *International Journal of Transitional Justice* 3, no. 3 (2009): 445-464.

⁶ Tim Murithi, "Situation Report: Kenya – A year after the crisis: The Quest for Electoral Reform and Transitional Justice", *Institute for Security Studies* (2009), accessed June 11, 2012, <http://www.issafrica.org/uploads/SITREPKENYA160109.PDF>.

⁷ Negative peace may be defined as the absence of direct violence.

⁸ Naomi Roht-Arriaza, "The new landscape of transitional justice", in *Transitional justice in the twenty-first century: beyond truths versus justice*, eds. Naomi Roht-Arriaza and Javier Mariezcurrena. (Cambridge: Cambridge University Press, 2006), 2.

⁹ KHRC, "Transitional Justice in Kenya: A toolkit for training and engagement" (2010): 14, accessed June 15, 2012, http://www.khrc.or.ke/resources/publications/doc_download/7-transitional-justice-in-kenya-a-toolkit-for-training-and-engagement.html.

order to prevent its return.¹⁰ With an inherently difficult environment, the challenge is to put together policies and processes that will allow a new regime to govern with legitimacy.

Retributive justice focuses on judicial tools such as prosecutions and trials, and may include lustration and vetting. Restorative justice on the other hand is directed toward truth commissions, documentation, reparations, and can include institutional and judicial reforms. The former is thus associated with ending impunity and achieving legal justice. The latter tends to be associated with reconciling societies and healing emotional and psychological wounds.¹¹ Today, the need for an approach that uses a combination of these is being increasingly recognised, although their conflicting objectives and lack of compatibility may at times be problematic without clearly mapped-out policies.¹²

A TJ process has a number of tools and mechanisms at its disposition, which have been developed, and continue to evolve through either international law or practice in the field. These mechanisms can be legal or non-legal in nature, aiming at punishing the perpetrator or satisfying and rehabilitating the victim. They can be directed toward the individual or the collective, and can be dealt with at the domestic or international level.¹³

1.1.1 Accountability: The Politics of Choices

For Kritz, any TJ programme has four basic objectives. It is implemented to (1) determine the truth by establishing a record of human rights violations in order to validate victims (2) achieve justice, (3) undertake democratic reforms with the entrenchment of the rule of law in working institutions, and (4) build

¹⁰ Tina Rosenberg, "Overcoming the Legacies of Dictatorship," *Foreign Affairs* 134 (1995): 134-152.

¹¹ Roht-Arriaza, "The new landscape."

¹² Rosemary Nagy, "Transitional Justice as Global Project: critical reflections," *Third World Quarterly* 29, no. 2 (February 2008): 275-289.

¹³ Ibid.

durable peace.¹⁴ However, it is important to acknowledge that the notion of TJ remains to a certain extent elusive, as the concept allows for multiple and elastic interpretations regarding the extent of these objectives.¹⁵ The debate ranges from those who believe TJ is a process that allows countries to immediately ‘start over’ on a clean slate and others who believe that this notion of closure is not achieved so easily.¹⁶ Proponents of TJ¹⁷ argue that history has shown that unaddressed abuses generate distrust between groups affecting the state’s capabilities and institutions.¹⁸ The International Centre for Transitional Justice argues that in most countries with records of abuse and impunity, victims’ demands for justice refuse to go away.¹⁹ Furthermore, continued impunity raises questions about the commitment of governments to the rule of law, and gives the message that political figures are above and beyond the law, potentially leading to cyclical recurrences of violence.²⁰ Thus, justice is highlighted as one of TJ’s most important aspects in the international community.

Being concerned with the politics that surrounded Kenya’s accountability process, it is important to look at what determines the choice of these processes. In answering this question, a number of variables will be analysed, including the balance of power; levels of complicity with crimes of the past regime; and the legacies left behind.

1.1.1.1 Why does a state choose retributive above restorative justice or amnesia?

Tina Rosenberg compares the transitions of countries in Latin America and Eastern Europe. The author identifies four variables that affect the choices

¹⁴ Neil Kritz, “Policy implementation of Empirical Research on Transitional Justice.” In *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, ed. Hugo Van der Merwe, (Washington DC: United States Institute of Peace, 2009): 13-21.

¹⁵ Nagy, “Transitional Justice as Global Project.”

¹⁶ Dean Peachey, “The elusive quest for reconciliation in Northern Uganda,” in *Critical Perspectives in Transitional Justice*, eds. Phil Clark et al. (Cambridge: Intersentia, forthcoming).

¹⁷ It is important to note that scholarship of TJ is dominantly Western based.

¹⁸ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002), 3-22, 53-86.

¹⁹ ICTJ. “What is Transitional Justice?” accessed May 25, 2012, <http://ictj.org/about/transitional-justice>.

²⁰ Ibid.

for TJ): ideology if and when present, the nature of repression, co-operation with tyranny, political legacies and the extent of the 'urge to purge'.²¹ Ideology is relevant mostly to the communist bloc of Eastern Europe, whose regimes were held together by the idea of the rise of the proletariat. In Latin America, the military regimes relied on guns instead.

Concerning the nature of repression, Rosenberg assesses that in Eastern Europe, it was diffuse while in Latin America it was deep²². In other words, while in the communist bloc few people suffered physical harm, almost everyone suffered some deprivation. This required the cooperation of the entire population, as it involved an entire bureaucracy. Thus, by virtue of living under communism, everyone participated in repression, resulting in a criminal regime.²³ Contrastingly, in Latin America, the atrocities committed had clear victims and clear and identifiable perpetrators, resulting in a regime of criminals.²⁴

The legacies left by these regimes also differed. In Eastern Europe, the state after the transition was still too strong and prone to abuses of political power. This was coupled with a population that had had 45 years to accustom itself to a government capable of arbitrary power, and which twisted the law for political ends. Their legacy therefore, is a strong state that seeks harsh measures to restore the past, a population that is unsure of its role vis-à-vis its government and finally a lack of judicial and civil institutions to rein in leaders.²⁵ Contrarily, Latin American countries have inherited a weak state that is too limited to impose the appropriate checks and balances on the military. The military retained its gun power post-transition, and retained the support of influential members of the elite.²⁶

These variables, according to Rosenberg, determine the type of punishment handed out by the new government in power. Accordingly, although trials are

²¹ Rosenberg, "Overcoming the Legacies."

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

crucial for democracies, they are seldom attempted²⁷. In Eastern Europe the new state was strong, however retributive justice was not attempted. This would have required holding an entire population, which had been in some way or another complicit with the communist regime, responsible. In Latin American countries with clear perpetrators, trials would have been easier than in Eastern Europe, but were only attempted in the case of Argentina; whose President Raul Alfonsin ended the trials after three military uprisings. Thus, in most cases with states too weak to control the military, trials would equate political suicide.²⁸

Huntington concurs with this analysis as he states: *“Officials of strong authoritarian regimes that voluntarily ended themselves were not prosecuted, officials of weak authoritarian regimes that collapsed were punished if they were promptly prosecuted”*.²⁹ While the former gave themselves amnesties, the latter did not yield enough power to prevent prosecutions. In transitions negotiated with a powerful opposition, amnesty is often part of the bargain. Thus according to Huntington, the implementation of retributive justice depends on the balance of power and the bargaining powers of the incoming regime.³⁰ Because the old guard have the potential of producing a backlash and a return to violence, Vinjamuri argues that new regimes will be, and ought to be risk averse in the name of keeping the peace.³¹

Pion-Berlin adds another variable that he considers influences the decision on whether to pardon or punish. According to him, it is important to consider elite preference, and their predisposition to chose punishment over pardon.³² He argues that this is affected by two sets of relationships, that of the leader and his

²⁷ Ibid.

²⁸ Ibid.

²⁹ Samuel Huntington, *The Third Wave – Democratisation in the late twentieth century* (Norman, OK: University of Oklahoma Press, 1993), 228.

³⁰ Ibid.

³¹ Jack L. Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” *International Security* 28, no. 3, (2003): 5–44.

³² David Pion-Berlin, “To prosecute or to pardon? Human rights decisions in the Latin American Southern cone,” in *Transitional Justice – how emerging democracies reckon with former regimes*, ed. Neil Kritz (Washington, DC: United States Institute of Peace, 1995), 82-103.

political party, and that of the leader and his constituency. Leaders will have to balance the needs and promises of both relationships before making a choice.³³

Elster's hierarchy of motivation may help to explain how a leader may rank these needs and preferences. He argues that motivations for achieving accountability can be understood as those belonging to *reason*; the decision to be just, *interest*; such as the will of parties to increase their share of the electorate and *emotion*, such as the need to seem just in order to hide envy, vanity or revenge.³⁴ These often exist in a hierarchy of motivations, where actors might first be motivated by self-interest (first-order motivation) and then by reason (meta-motivation). Often, actors will go to great lengths to create strategies that satisfy both their first-order motivation and meta-motivation at the same time. For the incoming regime, this can often be seen in the tension between wanting to differentiate themselves from the old regime and the desire to punish.³⁵

Applying the rule of law to its TJ process and being ready to use it for the highest echelons of the political elite for trials is a process that depends on the influence of the old guard, the popular complicity in past atrocities, and the political costs and benefits of cooperation for the political elite.³⁶ The ability to punish is extremely rare as it depends on the outright victory of the new regime, the ability to identify perpetrators and victims, as well as the leaders' preferences and predisposition to punishment.

1.1.1.2 What role do international actors play in the choice of retributive over restorative justice or amnesia?

Because of the political difficulty of imposing trials, the international community is often asked to help, or intervenes and imposes trials in the name of

³³ Ibid.

³⁴ Elster, Jon. *Closing the Books: Transitional Justice in Historical Perspective*. Cambridge: Cambridge University Press, 2004.

³⁵ Ibid.

³⁶ Brian Grodsky, "International Prosecutions and Domestic Politics: The Use of Truth Commissions as Compromise Justice in Serbia and Croatia," *International Studies Review* 11, no. 4 (2009): 687.

achieving justice and establishing long-lasting peace.³⁷ It is therefore imperative on the one hand, to understand the interplay between the local and international actors in such situations. This interaction will affect the balance of power locally, and invariably influence and often determine the choices of TJ mechanisms. On the other hand, it is also important to look at the motives of the international community in intervening in such situations.

Internationally imposed forms of retributive justice can be administered through ad hoc tribunals, such as the one for Yugoslavia and Rwanda.³⁸ Alternatively, justice can be administered through hybrid special tribunals, such as in Sierra Leone, or through the ICC. The latter can only be used as a court of last resort, which is when a state is either unable or unwilling to bring perpetrators of gross human rights violations to justice.³⁹ According to Snyder and Vinjamuri, these types of tribunals are meant to combine the expertise of the international community and the legitimacy of local actors.⁴⁰ According to Grodsky, the advantage of international pressure for prosecution lies in its ability to produce space for trials that would otherwise not have occurred. It creates conditions for justice when domestic courts are short of resources or legitimacy, by providing the counterweight to pressure the impunity-seeking elites of the previous order.⁴¹

In the rare situations in which a transition is achieved through a negotiated settlement resulting in a power sharing arrangement, such as in Kenya, the new government will include members from both the old and the new regimes. In such a case, there is the additional task for the new regime to govern with the old, while at the same time remaining legitimate in the eyes of the electorate. With the help of the international community in achieving accountability, the old

³⁷ Diane F. Orentlicher, "Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal* 100, no. 8 (1991): 2537-2615.

³⁸ Voss, Elena, Arm kolas, Ionise. "Transitional Justice in Practice: The International Criminal Tribunal for the Former Yugoslavia and Beyond". *UNISCI*. Vol. 18, 2008.

³⁹ Raub Lindsey. "Positioning Hybrid Tribunals in International Criminal Justice". *International Law and Politics* 41, no.1013 (2009): 1013-1054.

⁴⁰ Snyder and Vinjamuri, "Trials and Errors", 5-44.

⁴¹ Luc Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past," *Law & Society Inquiry* 20, no. 1 (1995): 51-78.

guard is less likely to be perceived as political revanchists.⁴² Additionally, a form of accountability that is spread across the board allows the old regime to ‘show’ that its human rights violations were justified by the actions of the opposition thus keeping their credibility in the eyes of the electorate.⁴³ These reasons, as well as the responsibility of states to protect citizens from human rights abuses from their government (R2P), are often provided to justify the international community’s intervention in TJ processes.

However, retributive justice is also where pressure from the international community is most controversial and problematic. One of the major issues of internationally imposed forms of justice is dealing with differing levels of domestic compliance.⁴⁴ Compliance with international justice will usually result in various political domestic challenges. This may then alter the dynamics of domestic TJ policy by producing unexpected and contradictory political effects.⁴⁵ This is especially true when internationally imposed forms of justice change the local balance of power.

Consequently, in a bid to balance conflicting tensions, new regimes employ a number of strategies in order to try and placate on the one hand, the victims and the international community asking for justice, and on the other hand the potential spoilers.⁴⁶ States will employ ‘window dressing’ strategies to appease international pressure, e.g. by making cosmetic changes to their domestic practices.⁴⁷ As a result, when the international community imposes justice in cases with low levels of domestic compliance, it will have two main consequences. First, because accountability may have the effect of further destabilising the country, states will attempt to find ways to please both their constituencies and the international community. Secondly, where there is a high level of complicity in past crimes, or when a high number of members of the

⁴² Orentlicher, “Settling Accounts”; Grodsky, “International Prosecutions.”

⁴³ Jon Elster, “Closing the Books”.

⁴⁴ Jelena Subotic, “The Paradox of International Justice Compliance,” *International Journal of Transitional Justice* 3, no. 3 (2009): 362-383.

⁴⁵ Grodsky, “International Prosecutions”; Subotic, “The Paradox.”

⁴⁶ Subotic, “The Paradox.”

⁴⁷ Grodsky, “International Prosecutions.”

former regime are still in government, the state may resort to the political manipulation of international justice. As Grodsky states, *“leaders are as likely to jump on the ‘justice wagon’ as they are to attempt to hijack it.”*⁴⁸

1.1.1.3 The ICC

The ICC, the highest criminal court in the world, was created on the 1st July 2002 through the Rome Statute⁴⁹. It was established to be an independent judicial institution, which would try perpetrators of crimes against humanity, genocide, and war crimes when states are unwilling or unable to carry out domestic trials.⁵⁰ However, despite initial optimism the ICC quickly became entwined in controversy. International and African scholars of both political and legal backgrounds have criticised the court’s founding document, the Rome Statute, the court’s claim of universality, its prosecutor and judges, its apparent focus on Africa, its domination by the EU and the influential role of the US despite its refusal to become a member of the ICC.⁵¹ Hoile dubs it “the Guantanamo bay of Europe”⁵², or a Western imperialist tool against the African continent. This section will focus on the politicisation of the court, and the use of its institution to serve the interests of those that dominate it: the EU and the permanent members of the UN Security Council (SC). The ICC also serves the interest of politicians, seeking to remove opponents, whose own states are being investigated by the court.⁵³

First, the court’s independence is brought into question due to its ties to the SC and its five permanent members. The ICC cannot be deemed an independent and impartial court as articles 13(b) and 16 of the ICC statute grant ‘prosecutorial’

⁴⁸ Grodsky, “International Prosecutions,” 688.

⁴⁹ ICC, “About the Court,” accessed November 12, 2012, www.icc-cpi.int/menus/ICC/About+the+Court/.

⁵⁰ Ibid.

⁵¹ David Hoile, “The International Criminal Court: Europe’s Guantanamo Bay?” *Africa Research Centre* (2010), accessed November 12, 2012, <http://www.africaresearchcentre.org/files/ICC.Europe%27s.Guantanamo.Bay.pdf>.

⁵² Ibid.

⁵³ Ibid.

rights to the SC to refer or defer an ICC investigation or prosecution.⁵⁴ Because of this, the ICC automatically depends on the will and whims of the UK, France, Russia, the US, and China; the irony being that two of these members, namely China and the USA are not members of the ICC. Yet these states have the power to decide which cases get attention and which get to be ignored. This essentially means that the most powerful governments of the world have the power to shield certain states from the court's jurisdiction, while using it to pursue their own political agendas.⁵⁵

A good example of this is the attitude of the US and the UK toward Sudan's President Omar Al-Bashir's indictment by the ICC. The Bush administration had made an offer to Sudan to halt ICC proceedings if Sudan agreed to the deployment of UN troops in Darfur.⁵⁶ Similarly, it was revealed that the UK while publicly supporting Bashir's indictment actually saw it as 'unhelpful' to peace making, and at best providing some leverage for South Sudan's independence.⁵⁷ Thus as noted by *The Economist*, "*that may be clever diplomacy, but it does nothing for the ICC's credibility to be seen as a pawn in a foreign power's chess game*".⁵⁸ In fact, it was for this very reason that India, the world's biggest democracy, had rejected the Rome statute as it provided a way out for those accused of serious crimes but with influence in the UN body.⁵⁹ Indeed, powerful states have thus far avoided prosecutions and victims of serious international crimes in Burma, Gaza, Iraq, or Afghanistan have been denied justice.⁶⁰

Secondly, the ICC is financially and institutionally dependent on the EU. It was the EU and EU funded NGOs that brought the ICC into existence.⁶¹ Not only was it

⁵⁴ John Rosenthal, "A lawless Global Court. How the International Criminal Court undermines the U.N. system," *Policy Review* 123 (February/March 2004), accessed August 9, 2012, www.hoover.org/publications/policyreview/3439981.html.

⁵⁵ *Ibid.*

⁵⁶ Mahmood Mamdani, *Saviours and Survivors: Darfur, Politics and the war on terror* (New York: Pantheon, 2009).

⁵⁷ *The Economist*, "The ICC and Africa: Dim Prospects" (February, 2011), accessed August 6, 2012, www.economist.com/node/18176088/print.

⁵⁸ *Ibid.*

⁵⁹ Hoile, "The International Criminal Court."

⁶⁰ Bernard Schiff, *Building the ICC* (New York: Cambridge University Press, 2008).

⁶¹ Hoile, "The International Criminal Court."

created on the behest of the EU, but the majority of its funding comes from the EU. In 2009, the organisation provided for 60% of the court's funding, and the most dominant⁶² EU countries paid 44% of that budget.⁶³ Furthermore, in 2006 the EU-ICC co-operation and assistance agreement⁶⁴ formally tied the EU to the ICC, obliging cooperation between the two entities. The ICC stated that it hoped the exchange of classified information would further strengthen the EU's relationship with the ICC. In fact, the EU has admitted to sharing secret intelligence information with regards to the Sudan and DRC cases with the ICC.⁶⁵ The EU is also the biggest promoter of the court, often demanding that it be placed on the agenda of several of its meetings across the world, especially with those states that have not ratified it yet.

Bourguignon noted, *"The willingness to globally support international justice through the ICC is a bold initiative that supports the EU's effectiveness as a diplomatic actor..."*⁶⁶ The EU can use the Court as a tool to increase its influence and soft power in the international justice arena. As such, the ICC has been made part of the EU's policies.⁶⁷ For instance, the EU had threatened to withhold economic assistance from African Caribbean and Pacific members of the Cotonou Agreement⁶⁸, who did not take a pro-ICC stance. Yet, at the same time, the EU denounced the US for using the ICC as a pawn, when the US sought to suspend economic support to ICC state parties who refused bilateral immunity agreements.⁶⁹

Finally, another result of the ICC's vulnerability, probably unforeseen by the EU, has been the political abuse of its institution by those who seek its involvement.

⁶² Germany, the UK, France and Italy.

⁶³ Hoile, "The International Criminal Court."

⁶⁴ European Commission, "Agreement between the International Criminal Court and the European Union and assistance", Council Directive 2006/28, OJ L115/50 (April 10, 2006), accessed June 10, 2012, http://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf.

⁶⁵ Ibid.

⁶⁶ Michael Bourguignon, "The EU and the ICC: Wedding bells?", *Eurosvillage* (January 2008), accessed July 25, 2012, www.theeuros.eu/The-EU-and-the-ICC-Wedding-bells.

⁶⁷ Hoile, "The International Criminal Court."

⁶⁸ Trade agreement between the EU, the African, Caribbean and Pacific Group of States (ACP countries)

⁶⁹ Ibid.

A point in case is Ugandan President Yoweri Museveni who deferred his country to the ICC, asking it to take care of the Lord Resistance Army (LRA)'s problem. One issue is that Uganda has the judicial capabilities of trying the LRA members (once caught), and is willing to do so.⁷⁰ The question therefore is whether the ICC has the right to be involved there. It also sets forth a precedent whereby such a state would then "*wash its own hands of an insoluble internal problem*" using the resources of another institution.⁷¹ Many have noted that it looks like Museveni asked for the ICC intervention, as it was politically beneficial. Firstly, Museveni was able to present himself as the humanitarian in the international legal community and was acclaimed by the Western human rights industry.⁷² Furthermore, the self-referral was announced in a joint conference with both Museveni and ICC Prosecutor Luis Moreno-Ocampo present. This meant that the latter was perceived as being manipulated by Museveni and his government, which was itself party to the conflict. In the same token, Museveni was also able to avert the eyes of the international community and the ICC from the crimes of his own government, whose military forces have been the cause for internal displacement and extrajudicial killing, especially in the northern region of the Acholi people.⁷³ This further entrenched the perception of the ICC's partiality, and that it was being used as a tool by the Ugandan government against the LRA.

To sum-up, Thakur concludes how an initiative that was created to protect vulnerable individuals is instead being used as an instrument of power against vulnerable countries.⁷⁴ Rosenthal goes further and states that "*the ICC is not merely a matter of good intention gone awry in the face of stubborn political realities...The ICC... has been made to be abused.*"⁷⁵

⁷⁰ OTJR. "Debating International Justice in Africa." In *Oxford Transitional Justice Research*, edited by Justice and Society the Foundation for Law. University of Oxford, n.d. www.fljs.org.

⁷¹ Mahnoush Arsanjani and Michael Reisman, "The Law-In-Action of the International Criminal Court," *American Journal of International Law* 99, (2009), 394.

⁷² Phil Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda" in *Courting Conflict? Justice, Peace and the ICC in Africa*, ed. Nicholas Waddell and Phil Clark (London: Royal African Society, 2008).

⁷³ Ibid.

⁷⁴ Ramesh Thakur, "Perks of the warring states," *The Japan Times*, (March 27, 2009), accessed June 25, 2012, <http://search.japantimes.co.jp/cgi-bin/co20090327rt.html>.

⁷⁵ Rosenthal, "A lawless Global Court," 1.

1.2 Literature Review

It is apparent that electoral violence is a recent topic in the study of international relations and conflict. As such, there has been an increase in the amount of academic writing on the topic, with a specific interest on the African continent. This also holds true for TJ, where Latin America and Africa have been in focus, and the historic South African transition, which is often suggested as the template to be followed in other countries. This thesis situates itself in this field, and as such hopes to contribute to it.

Much of the literature on Kenya surrounds the events of the 2007 election, and the violence that accompanied it. This literature investigates the political and ethnic manipulation that took place before and after the election. As stipulated by the KNDR, there were empirical investigations conducted into the type of violence committed, and the likely perpetrators. This has revealed a system of governance reliant on impunity dating back to the colonial times, which was perpetuated under Jomo Kenyatta and especially under Daniel Arap Moi. This is supported by other reports⁷⁶, which have been written up for previous failed attempts at truth commissions, regarding human rights abuses and monetary scandals under these previous regimes.

There is also literature that is more concerned with the transitional justice aspects of Kenya's future, which has taken a deeper look into Kenya's justice options.⁷⁷ Authors such as Godfrey Musila,⁷⁸ show that the failure to establish a coherent approach toward achieving justice has hampered these processes. This he highlights, may have been caused by efforts by the political elite to "capture

⁷⁶ Human Rights Watch, "Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance" (2008), accessed June 5, 2012, <http://www.hrw.org/reports/2008/kenya0308/kenya0308web.pdf>; Simon Robins, "To Live as Other Kenyans Do: A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations" (2011), accessed June 8, 2012, <http://ictj.org/publication/live-other-kenyans-do-study-reparative-demands-kenyan-victims-human-rights-violations>.

⁷⁷ Jacqueline M. Klopp, "Kenya's Unfinished Agendas," *Journal of International Affairs* 62, no. 2 (2009): 43-158; Roger Southall, "Re-forming the State? Kleptocracy and the Political Transition in Kenya," *Review of African Political Economy* 26 (1999): 93-108; Steve Snow, "Unhindered by the rule of law."

⁷⁸ Musila, "Options for Transitional Justice in Kenya," 445-464.

the debate” and their “silencing of important voices”. Many scholars⁷⁹ have shown concerns about the international community’s involvement in Kenya, especially the ICC, without its actions being complemented with local approaches.

In addition, there are also a number of primary sources, mostly in the form of reports,⁸⁰ which have followed up Kenya’s supposed transition after the 2007/08 negotiations. Because the international and East African communities are concerned about Kenya’s future, especially as the country is the economic powerhouse of the region, there has been much scrutiny surrounding the Kenyan government’s actions. A survey of the literature shows that Kenya has had a long history of political manipulation, corruption, and impunity.⁸¹ Jacqueline Klopp and Tim Murithi seem to show that Kenya’s actions, or rather inactions to follow up with CIPEV’s recommendations to set up a Special Tribunal (ST) may be due to similar reasons.⁸²

Due to the fact that this thesis is concerned with more recent and on-going event than have been discussed in most of the literature, it has had to deal with a dearth of academic writing and evidence on the subject. The challenge has been to find the appropriate amount of resources to sustain some of the empirical statements made within. In an effort to alleviate this problem, this thesis has made critical use of many non-academic sources such as the press, blogs, YouTube, wikileaks cables, and other social-media sites.

⁷⁹ Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, and Matthew C Weed, “International Criminal Court Cases in Africa: Status and Policy Issues,” (Congressional Research Service Report, RL34665, Washington, DC: CRS, 2011); Evelyne Asaala, “Exploring transitional justice as a vehicle for social and political transformation in Kenya,” *African Human Rights Law Journal* 10, no. 2 (2010): 377-406; Stephen Brown and Chandra L. Sriram, “The big fish won’t fry themselves: Criminal accountability for post-election violence in Kenya,” *African Affairs* 111, no. 443 (2012): 244-260.

⁸⁰ CIPEV, “Commission of Inquiry into the Post Election Violence (CIPEV) Final Report, Vol. 2,” *Office of Public Communication, Republic of Kenya* (December 2008), accessed June 27, 2012, http://www.communication.go.ke/documents/CIPEV_FINAL_REPORT.pdf; Simon Robins, “To Live as Other Kenyans Do.”

⁸¹ Peter Kagwanja and Roger Southall. “Introduction: Kenya – A democracy in retreat?” *Journal of Contemporary African Studies* 27, no. 3 (2009): 259-277.

⁸² Klopp, “Kenya’s Unfinished Agendas.”

1.3 Chapter Outline

Chapter 2 highlights the political attributes that have existed pre-independence and that were perpetuated by Kenya's leaders, explaining the underlying themes that make up the system of governance. This will help to explain the origins of the PEV as well as the reactions of the political elite to the proposed solutions.

Chapter 3 analyses the Kenyan political system in order to explain the decision-making processes of the governing elite and the environment in which they act. It will show that the Transitional Justice process was motivated by political calculations and strategies rather than by the desire to end impunity.

Chapter 4 looks at the internationalisation of the PEV-case and its mediation. In light of the discussed difficulties with international intervention, this chapter will answer why the Kenyan government allowed it to happen, and why the international community were so eager to intervene.

Chapter 5 provides an analysis of the seemingly paradoxical choice that the Kenyan governing elite made by setting up CIPEV and allowing retributive justice to be incorporated into the KNDR agreement. Three topics will be discussed: mediation strategies, wording, and interpretation of the KNDR, and the legacies of the past.

Chapter 6 will shed light on the political manoeuvring that led to the failure to establish the Special Tribunal, leading to the involvement of the ICC. In order to do this we will highlight the various and opposing interests of some of the more prominent politicians.

Chapter 2 Historical Background

To understand Kenya's current political system it is essential to see the origin of its underlying features and how they developed thereafter. The aim of this chapter is to portray a system of governance that finds its roots in pre-independence Kenya, and that has since then dictated the way the country has been ruled. It will be shown how three related attributes can help to explain the PEV, the government's attitudes toward the Transitional Justice process and accountability, and the resulting crisis of legitimacy that Kenya subsequently experienced.

The first attribute to be highlighted is a system of governance that is dependent on patrimonialism or clientelism. This is defined herewith as a relationship between the patron and the client, whereby the patron has political power, and the client receives 'goods' and protection in exchange for political loyalty.⁸³ It will be seen how British indirect rule helped to construct this type of relationship. The result of this is a system of governance that decides, "*who is to eat, what is to be consumed and who is to be excluded*".⁸⁴

The second attribute highlighted is the competition for resources based on ethnicity, caused by the construction of a dominant ethnic group that kept close to political power for the resources it provided. This produced grievances in minority groups, and often resulted in ethnic strife, which is seen throughout Kenya's history but epitomised by the PEV. This section aims to show how the manipulation of Majimbo, initially a reform movement, which sprang from the negotiations leading to independence calling for provincial autonomy, was used for political gains.

⁸³ Crawford Young, "The End of the Post-colonial State in Africa? Reflections on changing African political dynamics," *African Affairs* 103, no. 410 (2004): 23-49.

⁸⁴ Susanne Mueller, "Government and Opposition in Kenya," in *Our turn to Eat, politics in Kenya since 1950*, eds. Daniel Branch, Nic Cheeseman and Leigh Gardner (Berlin: Lit Verlag, 2010), 52.

Lastly, this chapter will show how impunity is necessary, in order for the previously mentioned attributes to be sustained. This is especially true in light of the nature of economic crimes committed by the post independence regime. Impunity protects networks of patronage, and therefore their political power, as well as certain individuals from reformists.

2.1 A Patrimonial System

2.1.1 Patronage

The clientelist networks in Kenya historically find their roots in the colonial days of British indirect rule, which used the co-optation of the African elite to help govern the masses.⁸⁵ This system of governance and the institutions that supported it was perpetuated post-independence and characterised by the illegal grabbing and trading of land.⁸⁶ As land diminished, clientelism was further perpetuated under Presidents Moi and Kibaki, who used the allocation of government posts, and dubious state investments.⁸⁷ Branch and Cheeseman link this to the colonial idea that it is within the state's responsibility to provide for the means of production, resulting in a statist economy vulnerable to state predation.⁸⁸

To understand the nature of the current political system and the origins and sources of patronage, one must look back at the legacies left by the colonial state. As Young contends, the nature of colonialism in Africa had some unique features that cannot be ignored.⁸⁹ The process of colonialism itself was highly competitive, and was conducted via the doctrine of 'effective occupation'.⁹⁰ Since these colonies had to be profitable, it meant that Africa had to pay for its own

⁸⁵ Mahmood Mamdani, "The Invention of the Indigène," *London Review of Books* 33, no. 2 (2011): 31-33.

⁸⁶ Young, "The End of the Post-colonial State."

⁸⁷ Ibid.

⁸⁸ Daniel Branch and Nic Cheeseman, "Democratization, Sequencing, and State Failure in Africa: Lessons from Kenya," *African Affairs* 108 no. 430 (2008): 1-26.

⁸⁹ Young, "The End of the Post-colonial State."

⁹⁰ This principle was formalized by the Act of the Berlin Conference in 1885, which was the basis upon which European powers claimed rights over land.

subjugation.⁹¹ Under indirect rule, this was achieved through the co-optation of chiefs, whose appointments were dependent on education rather than their position as customary chiefs. Their loyalty was effectively bought by the state, in exchange for a position in the state and thus better access to resources. This resulted in a 'command state', whereby even though the colonial super-structure was modest it still achieved uncontested hegemony.⁹² This was coupled with the belief that the state needed to control and manage the economy to achieve modernity.

Mueller concurs, arguing that Kenya's sources of patronage and authoritarianism must be understood in the context of these colonial legacies.⁹³ Kenya by independence had inherited a centralised administration that served as the arm of the executive, a politically impotent legislature, and civil services that were given the power to control opposition countrywide. This had been designed to coerce, monopolise resources, maintain law and order, and repress and discourage dissidents.⁹⁴ The increase of authoritarianism and the banning of political parties during the state of emergency declared in 1952 after the Mau Mau uprising was simply an elaboration of methods previously used. While the anti-colonial struggle was against the white domination of Kenya, it was not against the system itself. Consequently, there was a transfer of much of the colonial system of governance to the post-independence government.⁹⁵

Sixty years of authoritarian rule had created familiarity with that system of governance and resulted in a lack of experience with any alternative forms. After independence, this translated in attempts to create a black middle-class, which was tied to the state, because of the state's monopoly over the means of production and distribution of resources, employment, and other economic rewards.⁹⁶ There was an incentive to maintain these inherited structures, as the state was able to control the production and distribution of resources. This was

⁹¹ Young, "The End of the Post-colonial State."

⁹² Young, "The End of the Post-colonial State."

⁹³ Mueller, "Government and Opposition."

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

used to satisfy the clients of the political elite, whose loyalty they were dependent on for continued political hegemony.⁹⁷

2.1.1.1 Land as source of Patronage

Land has been one of the main sources of patronage, especially under Kenyatta, and has been one of the major causes of grievance amongst the Kenyan population.⁹⁸ It is argued that many of the land-related conflicts can be attributed to colonialism, which had imposed alien land-tenure regulations introducing concepts and legislation that were at odds with the traditional land-tenure system.⁹⁹ This combined with the important problems of population pressure on land reserved for Kenyans.¹⁰⁰

By the end of the 1950s as Kenya prepared for independence, a programme for the transfer of lands from European to African ownership was formulated under the One Million Acre Scheme. This was implemented from 1962 to 1967 and facilitated the Kenyan resettlement of some 1.17 million acres of land.¹⁰¹ Under the scheme, communities living adjacent to previously white owned farms would take ownership of the plots. This meant however, that it was the Kikuyu who were able to regain the fertile land of the Rift Valley. Kanyinga argues that this policy was primarily based on the need to appease the Kikuyu peasantry because of the threat they posed to the white farmers, and the recognition of the economic necessity of protecting European interests.¹⁰² This had started to shape the ethnic dimension of the land problem, as by focusing attention on

⁹⁷ Mueller, "Government and Opposition."

⁹⁸ KHRC, "Lest we forget: The Faces of Impunity in Kenya," *The Journal of the Florida Medical Association* 77 no. 9 (2011): 797-798.

⁹⁹ Marcel Rutten and Sam Owuor, "Weapons of mass destruction: Land, ethnicity and the 2007 elections in Kenya," *Journal of Contemporary African Studies* 27, no. 3 (2009): 305-324.

¹⁰⁰ Ndungu, Paul. *Tackling Land Related Corruption in Kenya. Inquiry*. Vol. 2009, 2009

¹⁰¹ David Anderson and Emma Lochery, "Violence and Exodus in Kenya's Rift Valley, 2008: Predictable and Preventable?" *Journal of Eastern African Studies* 2, no. 2 (2008): 328-343.

¹⁰² Karuti Kanyinga, "The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya," *Journal of Contemporary African Studies* 27, no. 3 (2009): 325-344.

Kikuyu squatters, the government had failed to appreciate and recognise the Kalenjin, thus antagonising relationships between the two groups.¹⁰³

Additionally, this land was not to be given freely, but sold on a willing-buyer-willing-seller basis. Far from being a fair and inclusive process, this benefited a burgeoning middle class and excluded local landless communities.¹⁰⁴ This intensified both ethnic and class based competition, which the political elite used to improve their social bases of power, consolidating their political position as well as that of their ethnic group. For instance, the Ngwantaniro Company, formed in 1969 to help the landless Kikuyu, which ended up dominating the economy and politics of the Rift Valley after buying scores of land and increasing its membership to 30,000, drawn from the Kikuyu ethnic group.¹⁰⁵ The company was so influential that the land control board could not deny applications for land purchase. Its chair Kihika Kimani became the MP for Nakuru North and effectively ran the Rift Valley.¹⁰⁶

Furthermore, land was illegally allocated to political affiliates as rewards for political loyalty.¹⁰⁷ Land was sold at less than market value to allotted politicians and then sold to state corporations at amounts that far exceeded market values.¹⁰⁸ Government houses and properties were illegally allocated to individuals and companies. This practice lured members into Kenya African National Union (KANU), while economic and political punishment was used to scare those that defected to Kenya People's Union (KPU).¹⁰⁹ Dispensation of patronage explains the heavy regulatory framework and government involvement in the agricultural sector and legislature. This same technique was used under colonial rule to protect European settler farmers.¹¹⁰

¹⁰³ Jacqueline M. Klopp "Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya," *Africa* 47, no. 1 (2012): 7-26.

¹⁰⁴ Ibid.

¹⁰⁵ Kanyinga, "The legacy of the white highlands".

¹⁰⁶ Ibid.

¹⁰⁷ Roger Southall, "The Ndungu Report: Land & Graft in Kenya," *Review of African Political Economy* 32, no. 103 (2005): 142-151.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Mamdani, "The Invention of the Indigène."

While under Kenyatta land was concentrated in the hands of wealthy elements of the Kikuyu group (Kenyatta's ethnic group),¹¹¹ under Moi's (a Kalenjin) era, this turned around as he attempted to curb Kikuyu capital and reinforce that of the Kalenjin, in an attempt to ensure his political dominance, hence feeding into the idea of 'our turn to eat'.¹¹² The Ndungu Report¹¹³ reveals that not surprisingly, most of the illegal allocation of public land took place directly before or immediately after the multiparty elections of 1992, 1997 and 2002.¹¹⁴ Southall concludes that the *"illegal appropriation of public land was to the formation and consolidation of Kenya's political elite."*¹¹⁵

These illegal land grabbing took place against a backdrop of increasing population pressure on already scarce agricultural land. Whilst Kenya covers an area of approximately 582,646 sq. km. comprising of 97.8% land and 2.2% water surface, only 17% is fertile land.¹¹⁶ About 80% of the Kenyan population lives in rural areas and derive their livelihood from agriculture, meaning that access to agricultural land has implications for employment, income inequality as well as food security for the whole country.¹¹⁷ By 1963, the imbalance between resources and the rate of population growth had already been noted. The lack of access, or ownership of land is considered one of the major causes of poverty in the country, and makes the issue of land use policy a critical one. However, policy has been so heavily influenced by patronage that appropriate policies are only considered at times of elections, and are forgotten as soon as power is attained.¹¹⁸

¹¹¹ Rutten, Marcel and Owuor, "Weapons of mass destruction."

¹¹² Klopp, "Pilfering the Public."

¹¹³ Southall, "The Ndungu Report."

¹¹⁴ Ibid.

¹¹⁵ Ibid., 150.

¹¹⁶ FAO, "Agricultural Policy in Kenya: Issues and Processes" (2006), accessed October 20, 2012, <ftp://ftp.fao.org/TC/CPF/Countries/Kenya/Agricultural%20Policy%20in%20Kenya%20Issues%20and%20Processes.pdf>.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

2.1.1.2 Financial corruption

Although the land issue is considered by many to be the crux of Kenyans grievances, Kenya's political elite did not limit themselves to land as source for patronage. Kasfir argues that Kenyatta was more dependent on his district and regional commissioners than on his party KANU. His supporters not only received land, but also jobs in the civil services with inflated salaries, often awarded for their loyalty.¹¹⁹ For instance, in 1964 when opposition party, Kenyan African Democratic Union (KADU), folded and joined the governing party KANU, Kenyatta enticed the top echelon of the party with ministerial appointments.¹²⁰ Through this patriarchal system of rule, Kenyatta managed to create a profitable system of governance, in its wake creating an embedded clientelist network within a dependent political economy.¹²¹

Financial corruption was most rife under Moi and Kibaki. The threat of the removal of patrimonial benefits in cases of disloyalty has also been substantially used. Like Kenyatta, Moi's ruling strategy was grounded in favouring his allies for key positions in the state and other profitable nongovernmental organisations.¹²² Moi's task was however somewhat harder, as on the one hand, he faced a recalcitrant Kikuyu elite, who had tried to overthrow him before he took office, and on the other, his Kalenjin supporters, who wanted to 'eat'.¹²³ Moi attempted to satisfy the Kalenjin by extending his network of patronage to them. To achieve this he taxed and destroyed Kikuyu agricultural associations, assigned members of his own ethnic group in universities and replaced the elected Nairobi City Council with an appointed Commission in order to undermine Kikuyu control of the city.¹²⁴ However, unlike Kenyatta, Moi had inherited a weakening economy and was running out of patronage sources. This

¹¹⁹ Kasfir, "Neo-Patrimonialism, Power Sharing and Reform."

¹²⁰ Matthew Costello, "State Softness as a Product of Environmental Uncertainty □: A Theory with Applications to Nigeria, Kenya, and South Korea," *Journal of Developing Areas* 28, no. 3 (1994): 345-364.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ Susanne Mueller, "The Political Economy of Kenya's Crisis," *Journal of Eastern African Studies* 2, no. 2 (2008): 185-210.

¹²⁴ *Ibid.*

exposed the weakness of the Kenyan state and its leader, who found it increasingly difficult to govern without sufficient resources to buy loyalty.¹²⁵

As a result, Moi tightened his grip on the state apparatus and became increasingly authoritarian, amending the constitution to make Kenya a *de jure* one-party state.¹²⁶ The system of rewards was increasingly reversed and used to punish. The use of violence increased, as did the plundering of the state's treasury. This resulted in the breakdown of any of the checks and balance of power and created fear amongst the population.¹²⁷ The judiciary became an appendage of the executive, and those that did not conform suffered draconian penalties including torture and detention without trial.¹²⁸

In addition to the weakening of the state and the toughening stance of Moi, there was a growing discomfort and distrust in Moi's ability to deal with the economic crisis the country was facing in the 1990s. This was combined with increasing pressure from the international community's financial institutions, the International Monetary Fund (IMF) and World Bank (WB), who held back donor money intended for structural adjustment policies, which were based on the conditionality of good governance and transparency.¹²⁹ Many argue that it is this weakening of the economy and involvement of international donors that led many to support a more competitive form of politics.¹³⁰ The Kikuyu elite, whose loyalty the state could no longer buy, increasingly saw democratic reform as the only way in which their economic power could be translated into political power.¹³¹

Many argue that with the weakening of the economy and opening of multi party democracy in Moi's later years, clientelist networks actually grew in size.¹³² As

¹²⁵ Branch and Cheeseman, "Democratization, Sequencing, and State Failure."

¹²⁶ Ibid.

¹²⁷ Mueller, "The Political Economy of Kenya's Crisis."

¹²⁸ Ibid.

¹²⁹ Frank W. Holmquist, Frederick S. Weaver, and Michael D. Ford, "The Structural Development of Kenya's Political Economy," *African Studies Review* 37, no. 1 (1994): 69-105.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Costello, "State Softness."

the regime ran out of resources to pilfer, it increasingly encroached upon the Central Bank as the remaining repository for patronage money.¹³³ This type of fiscal corruption is best epitomised by the infamous Goldenberg scandal, which involved the embezzlement of \$800 millions of government rebates for fake diamond and jewellery export.¹³⁴

In 2002, the National Rainbow Coalition (NARC), which had been established between the Liberal Democratic Party (LDP) headed by Odinga and the National Alliance Party of Kenya (NAK) headed by Kibaki won the presidency. The NARC promised that they would undertake reform, by promising devolution, and tackling the problem of corruption. However, the system of governance dependent on patronage was not abandoned. Kibaki has also been accused of favouring the Kikuyu from his area, commonly known as the Mount Kenya Mafia, and ignoring corruption within his inner circle.¹³⁵ The lure of government employment increased especially as MPs could decide on their own salaries, which inflated to about \$190,000 annually.¹³⁶

To summarise, this section has exposed the prominence of the ‘politics of the belly’ as being a fundamental part of the country’s system of governance. This system dates back to British indirect rule, whose authority depended on the loyalty of a small constructed African elite. While in 1963 Kenya won independence, it kept the tools and system of colonial rule. As such, although Kenyatta had a relatively inclusive one party state, he never prevented the favouritism of his Kikuyu allies.¹³⁷ In fact, Kenyatta perpetuated it through the illegal allocation of fertile land. This system was further accentuated under Moi who set about replacing the Kikuyu elite with his own Kalenjin ethnic group. This was famously epitomised by a KANU MP who proclaimed, *“Now is our turn to eat.*

¹³³ Roger Southall, “Moi’s flawed mandate: the crisis continues in Kenya,” *Review of African Political Economy* 25 (1998): 37-41.

¹³⁴ Ibid.

¹³⁵ Mueller, “The Political Economy of Kenya’s Crisis.”

¹³⁶ Ibid.

¹³⁷ Daniel Branch and Nic Cheeseman, “Introduction: Our Turn to Eat,” in *Our turn to Eat, politics in Kenya since 1950*, eds. Daniel Branch, Nic Cheeseman and Leigh Gardner (Berlin: Lit Verlag, 2010).

You Gikuyu [kikuyu] had yours".¹³⁸ When demands for patronage increased and the state capabilities to meet those decreased, it resulted in a combination of a weak state accompanied by an increasingly autocratic leader. The saying 'our turn to eat' had become so popular in Kenya that by the 2007 election year, many misinterpreted it to be ODM's (headed by Odinga) official slogan.¹³⁹ The government had become the most important driver of the accumulation process and dispenser of resources, so that control over the state became the main concern of politics.

2.2 Ethnicity and Resource Competition: Majimbo Manipulated

This section will show how ethnicity was constructed and used by the governing elite to determine who gets to eat. This section will explain how the notion of Majimbo, calling for autonomous provinces, was used to manipulate ethnicities. The manipulation of Majimbo will help to explain why it was considered imperative for individuals to vote for the leader that would guarantee their group's access to the state. The fears of domination by one ethnicity has over the years been exacerbated and manipulated by the political elite as a means of controlling the state apparatus.

As seen earlier, under indirect rule the co-optation of an African elite became the means to manipulate the distribution of resources, with the aim of creating a productive but subservient middle class. The exclusion from resource distribution had resulted in the infamous Mau Mau uprising at the end of the 1950s. The rebellion had cost more than 10,000 lives¹⁴⁰ and had resulted in the declaration of the state of emergency that was to last a decade. This resistance movement was a direct response to white settler farms in the Kikuyu land of the Rift Valley highlands.¹⁴¹ In response to these grievances, the concept of

¹³⁸ Ibid., 2.

¹³⁹ Ibid.

¹⁴⁰ Times Live, "Kenyans sue Britain over Mau Mau abuses" (July 16, 2012), accessed September 8, 2012, <http://www.timeslive.co.za/africa/2012/07/16/kenyans-sue-britain-over-mau-mau-abuses>.

¹⁴¹ Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (New York, NY: Henry Holt, 2005).

Majimboism promoted the idea of provincial autonomy for independent Kenya. The Majimbo state, would have kept the provincial boundaries created by the colonial government, which had been designed to keep ethnicities separated. Majimboism according to its proponents would allow provinces to govern themselves, thus avoiding ethnic competition and strife by safeguarding minorities.¹⁴² Majimbo was in essence a reform movement that hoped to minimise the system of governance that favoured certain groups to the detriment of the others.

This movement involved a minority of the wealthier white settlers, who were looking to secure a relationship with the conservative African middle class with whom they hoped to share Kenya's future. This was done to protect their commercial farms, as a decentralised constitution would safeguard minority rights.¹⁴³ Communities that were host to various minority groups and migrants from other areas, who had come to work on white settler farms, also supported the Majimbo movement. A number of these migrants were also Kikuyu who had been pushed out of their homeland of Central Province by extreme land pressures. Many of these were the same labourers that had been the backbone of the Mau Mau revolt.¹⁴⁴ Additionally, the newly formed party KADU,¹⁴⁵ whose constituency was in parts of the Rift Valley and coastal areas, believed that a Majimboist constitution would be crucial to the party's political survival.

As the Lancaster House Conferences¹⁴⁶ were underway, KADU constantly defended regionalism as a first principle for the discussions. It soon became the key issue in their manifesto. However, with a cumbersome and heavy bureaucracy, the structure that KADU was proposing was seen as too costly and

¹⁴² David Anderson, "Majimboism: The Troubled History of an Idea," in *Our turn to Eat, politics in Kenya since 1950*, eds. Daniel Branch, Nic Cheeseman and Leigh Gardner (Berlin: Lit Verlag, 2010), 23-52.

¹⁴³ Ibid.

¹⁴⁴ Jacqueline M. Klopp, "Can Moral Ethnicity Trump Political Tribalism? The Struggle for Land and Nation in Kenya," *African Studies* 61, no. 2 (2002): 269-294.

¹⁴⁵ The party was created to defend the rights of the KAMATUSA- an acronym for Kalenjin, Maasai, Turkana and Samburu ethnic groups.

¹⁴⁶ The Lancaster House conferences were three meetings (1960, 1962, 1963) in which Kenya's constitutional framework and independence were negotiated.

difficult to implement.¹⁴⁷ As a result, a compromise was found that would include regional constituencies in the constitution, but the exact composition of these constituencies would be organised after the negotiations. Consequently, when KANU won the national elections in 1963, it set about dismissing Majimboism and KADU as anti-nationalist and tribalist.¹⁴⁸ As KADU's position seemed to crumble, many, including future president Moi, crossed the floor to the winning party, resigned to the fact that it was better to be part of the new government than not at all.¹⁴⁹ Unsurprisingly, in November 1964 the Majimboist constitution was laid to rest when a bill to amend the constitution succeeded to garner a two-third majority in the House of Representatives.¹⁵⁰

The idea of Majimboism was, however, far from buried and forgotten, and its resurrection in the early 1990s resulted in the most violent outbreak between government supporters and the opposition, that Kenya had seen since independence.¹⁵¹ As pressure was mounting against Moi's repressive regime, KANU's power found itself threatened by the return of multi-party politics. It thus sought ways to control the electorate, which was done by calling on Majimboism.¹⁵² While KANU officially equated Majimbo with federalism, they used it to counter the democratic processes by evoking the fear of Kikuyu domination. To this end, multi-party governance was portrayed as an anti-government movement, as well as a tool of Western domination.¹⁵³ Majimbo rallies were launched throughout Kenya, but mostly within the Rift Valley region, and violence between ethnic groups broke out.¹⁵⁴ This was spurred by five rallies all held over six weeks in late 1991, under the eyes of politicians, such as Nicholas Biwott¹⁵⁵, who aligned themselves with Moi and aspired to fight off multi-partyism. KANU MP Joseph Misoi declared, *"unless those clamouring for*

¹⁴⁷ Anderson, "Majimboism."

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Robert Maxon, *Kenya's Independence Constitution – constitution-making and end of empire* (Maryland: Fairleigh Dickinson University Press, 2011).

¹⁵¹ Klopp, "Can Moral Ethnicity Trump."

¹⁵² Snow, "Unhindered by the rule of law."

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Biwott was a prominent MP, who entered government service in 1965.

political pluralism stop, we must devise a protective mechanism by launching the movement".¹⁵⁶

These rallies served two main purposes. Firstly, using Majimboism as a defence mechanism implied that the Kikuyu would dominate the other smaller tribes. The Kalenjin were made to believe that the Kikuyu would persecute them if KANU and Moi lost power. Thus, one can talk of the invention of the fear of Kikuyu domination.¹⁵⁷ Secondly, due to the need to create KANU 'areas,' caused by a clause in Kenya's constitution stipulating that candidates needed 25% of the votes in at least five of the eight provinces, Majimbo was used to 'purify' multi-ethnic regions.¹⁵⁸ KANU targeted 'outsiders' and aimed at policing regional boundaries to cleanse migrants and swing voters out of their electoral strongholds to dissipate dissent, as well as to simply get rid of recalcitrant voters.¹⁵⁹

The injustices of colonial land distribution, which continued after independence, seemed to provide the confirmation of the fear of domination.¹⁶⁰ Thus, the violence that accompanied the Majimbo rallies was justified by claiming that they were expelling people who were illegally occupying land, which traditionally did not belong to them. Because of this violence, the Kikuyu started feeling persecuted by the other ethnic groups.¹⁶¹ The land issue is therefore also essential in understanding why Majimboism was such a compelling idea.

Despite the historic elections of 2002, which ended KANU's reign, ethnic manipulation did not end. Having promised the people a new constitution, NARC led by Kibaki, established the Constitution of Kenya Review Commission (CKRC). Its task was to make recommendation on *"the structure and system of government in the constitutional organization of the republic; and the extent of*

¹⁵⁶ Collin Kahl, *States, Scarcity, and Civil Strife in the Developing World* (Princeton, NJ: Princeton University Press, 2006), 142.

¹⁵⁷ Elisha S. Atieno-Odhiambo, "Hegemonic Enterprises and Instrumentalities of Survival: Ethnicity and Democracy in Kenya," *African Studies* 61, no. 2 (2002): 223-249.

¹⁵⁸ Snow, "Unhindered by the Rule of Law."

¹⁵⁹ Klopp, "Can Moral Ethnicity Trump."

¹⁶⁰ Atieno-Odhiambo, "Hegemonic Enterprises."

¹⁶¹ Anderson, "Majimboism."

devolution of power to local authorities".¹⁶² This restructuring and devolution of power was meant to transfer authority to sub-national entities, in a bid to strip the executive of the unbridled power that it had enjoyed under Kenyatta and Moi. Many, especially minority groups, associated devolution with a form of federalism, similar to KADU's proposed Majimbo constitution.¹⁶³

Due to the history of Majimboism, the discussion over the new constitution and what would constitute devolution quickly became politicised. The first model of devolution drafted, if applied would have diminished the capacity of the central government to dominate and manipulate local communities. The structures proposed would have created a central government concerned with defence, foreign affairs, law enforcement, elections and other overreaching national matters, but would have left the day-to-day running to District governments.¹⁶⁴ However, this draft was denounced as another Majimboist trap. The government was divided between those who did not accept the proposition because they were afraid of the hardening of ethnic divisions, and those who were afraid to break networks of patronage and the ability of the central government to protect the political and economic interests of their groups.¹⁶⁵ In the end, the NARC failed to establish a new constitution failing to deliver its promise to Kenyans. Kibaki was, rightly or not, blamed for this failure and it appeared to Kenyans as if once again, the government had demonstrated its inability of putting the need of its people before its own self-interest.

Later Odinga used Kibaki's failure as a political platform for the election of 2007 under his new party the ODM, once more invoking devolution.¹⁶⁶ While Odinga never officially endorsed Majimboism, this was how many Kikuyu interpreted his campaign. This was partly caused by the presence of members of the 'former regime' in the ODM, those who had served KANU and had been part of the

¹⁶² Makau Mutua, *Kenya's Quest for Democracy – Taming Leviathan* (London: Lynne Rienner Publishers, 2008), 124.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

militant Majimboism of the 1990s.¹⁶⁷ These included: William Ruto of the rift valley, Franklin Bett, Zako Cheruiyot, William ole Ntimama and Jackson Kibor. According to Anderson, the population of the Rift Valley interpreted ODMs devolution campaign as the endorsement of the expulsion of the alien and the restoration of land to the Maasai and Kalenjin. As a result, a reported 10,000 Kikuyu voters fled from the region before the elections.¹⁶⁸ Kenya's 2007 elections, with the popular '41 against 1 tribe' slogan, thus revived Majimboism and the fear of renewed violence was felt throughout the country.

This section has shown how the failed reform movement of Majimbo was at the root of many of Kenya's later issues. Its failure perpetuated a system of governance used by the British, which in the end divided the ethnic groups. It also allowed for the manipulation of Majimbo, used by the political elite to revive the fears of minority groups, and to ensure the stronghold of the leader in power. By creating distrust and fear amongst groups about what would happen if the 'other' took control of the state, Majimbo ensured KANU's electoral victories of 1991, 1994, and 1997. Additionally, the failure of the movement also meant that the desire to reform the Kenyan state never completely died. This explains how Kibaki's party won in 2002, but also how it ended up facing a crisis of legitimacy when it failed to implement the promised reforms. As warned by de Tocqueville, there is a danger in failed or aborted attempts at reforms as they are often the causes of revolutions.¹⁶⁹

2.3 Impunity: Accountability, Trials and Tribulations

For its clientelist and manipulative state to survive, Kenya's system of governance has relied on impunity. Despite numerous documents and commissions that have unravelled the truth about corruption scandals, political detainees, torture, the contracting of gangs to intimidate voters and the

¹⁶⁷ Anderson, "Majimboism."

¹⁶⁸ Ibid.

¹⁶⁹ Alexis De Tocqueville, *L'Ancien Régime et la Révolution*. (Paris: Folio, 1985).

government's apparent incapability to stop violence, none in the political elite have ever been brought to justice. Various attempts at accountability have invariably pitted the relatively small group of reformers against politically cunning veterans who have every interest in keeping the status quo. The latter have used the nation-building project to serve narrow sets of interests, ensuring the continuity of impunity thus allowing personal accumulation of wealth and control. Comparing these previous attempts of democratic transitions with that of the PEV, highlights some dangerous continuations of this trend.

After the PEV, the Transitional Justice process was accompanied by a general feeling of enthusiasm by both Kenyans and the international community. The KNDR, the Kriegler commission, and CIPEV have all been considered as indispensable for the positive progress of the new government.¹⁷⁰ Although many have expressed regret for the failure to establish the Special Tribunal and have raised concerns over the extent of accountability achieved, the involvement of the ICC seems to have fulfilled, at least in part, the desire for justice.¹⁷¹ An air of hope and of having been granted a 'new start' at politics, swelled through the Kenyan population and much of the international community. However, it is crucial to be reminded that such feelings and attempts at accountability and reform are not new in Kenyan history. In fact, previous attempts at reaching a form of accountability have mostly failed. The most that any of these commissions and reforms has ever achieved has been the production of reports, which have unearthed information on the extent of corruption and political violence.¹⁷² While acquiescing that, that in itself is an achievement, which has provided Kenyans with an objective account of the past, these commissions have not, however, brought Kenya much closer to an accountable, legitimate and wholly democratic government.

In May of 1992, amidst pressure from the population and civil society, parliament selected a Committee to investigate the ethnic clashes that had taken

¹⁷⁰ Brown and Sriram, "The big fish won't fry themselves."

¹⁷¹ Ibid.

¹⁷² Ibid.

place in the past year surrounding the election. The 238-page Kiliku report found that “779 persons had been killed, 674 injured, 1236 arrested, 248 charged, 243 prosecuted and 54 000 displaced.”¹⁷³ Furthermore, it collected evidence that incriminated many members of the government. Amongst the most prominent, the list included Vice-President George Saitoti, Minister for Energy Nicholas Biwott, Minister of state William Ntimama, Chairman of Nakuru Wilson Leitich, and the Speaker of the House Professor Ngeno.¹⁷⁴ The report stated that the causes for such abuse were politically motivated, and geared at reducing the numbers of non-Kalenjin voters in the Rift Valley by evicting or disenfranchising them.¹⁷⁵ The report however faded away, as President Moi not only rejected its recommendations, but also publicly praised Biwott for ensuring that KANU dominated in the Rift Valley Province. Moi’s reward was to appoint Biwott to a ministerial role. Furthermore, the report failed to deter such actions, as the government went ahead to support or incite ethnic violence in the next electoral year of 1997.¹⁷⁶

Moi set up another judicial commission of enquiry in 1999, following the 1997 electoral violence. It issued the Akiwumi Report in 2000, which was only published on the eve of parliamentary elections in November 2002. The report was mandated to look into the causes of the ethnic clashes and recommend action to be taken against perpetrators.¹⁷⁷ During the hearings, various attempts at having the senior members of the government who were implicated in the violence appear before the inquiry, were continuously frustrated. The government replaced the original Lead Counsel of the Commission with one of their own, as the Counsel had allowed incriminating evidence by key witnesses to be adduced by the Commission.¹⁷⁸ Despite this, the report still provides some

¹⁷³ Republic of Kenya. *Report of the Parliamentary Select Committee to investigate the Ethnic Clashes in Western and Other Parts of Kenya (The Kiliku Report)*, (September 1992): Exhibit 136A.

¹⁷⁴ Rok Ajulu, “Kenya: One Step Forward, Three Steps Back: the Succession Dilemma,” *Review of African Political Economy* 28 (2001): 197-212.

¹⁷⁵ Ibid.

¹⁷⁶ Elisha S. Atieno-Odhiambo, “Ethnic Cleansing and Civil Society in Kenya 1969-1992,” *Journal of Contemporary African Studies* 22, no. 1 (2004): 29-42.

¹⁷⁷ Walter O. Oyugi, “Conflict in Kenya: A periodic Phenomenon” (2002), accessed June 13, 2012, <http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan010963.pdf>.

¹⁷⁸ Ibid.

information and recounts in detail forced detentions, political murders, and instances of torture showing that the violence was an orchestrated political act aimed at disrupting and curtailing the democratisation process. It also shows that no action was ever taken by the government and its security forces to prevent or stop the violence.¹⁷⁹ Despite finally agreeing to publicise the report, no action was ever taken to apprehend the perpetrators or restore land and other lost property.

Further attempts at accountability were undertaken by the NARC under Kibaki. Having won the 2002 elections on a bid to reform the government and put an end to corruption, Kibaki instigated an 'anti-corruption drive'.¹⁸⁰ Kibaki immediately created the new Ministry of Justice and Constitutional Affairs (MoJCA) mandated to coordinate this anti-corruption drive and to identify and create the legislation needed to do so.¹⁸¹ John Githongo, who had so far worked at Transparency International, was appointed to the new position of Permanent Secretary in the Office of the President for Governance and Ethics. His appointment was seen as an indication of how serious the government was about eradicating the pervasive corruption of the state.¹⁸² Furthermore by May 2003 the Anti-Corruption and Economic Crimes Act (ACECA) was signed creating the Kenya Anti-Corruption Commission (KACC). Another act, the Public Officer Ethic Act (POEA) was also put in place, which provided a code of conduct for government officials. These new legislative acts and institutions were to enquire and set up commissions to look into injustices of the past and instances of corruption such as the Goldberg scandal, in order to bring individuals involved in corruption to court and undertake asset recovery. This was based on the new pillars of leadership, political will in 'dealing with the past' and a 'zero-tolerance policy' toward corruption.¹⁸³ It is because of these institutional reforms that the

¹⁷⁹ Bosire Akiwumi and Sarah Chibai Ondeyo, "Akiwumi Report", *Human Rights Watch* (2002), accessed May 27, 2012, <http://www.hrw.org/news/2002/10/31/kenya-report-politicians-fueled-ethnic-violence>.

¹⁸⁰ Kagwanja and Southall, "Introduction: Kenya."

¹⁸¹ Gladwell Otieno, "The NARC's Anti-Corruption Drive in Kenya," *African Studies Review* 14, no. 4 (2005): 69-79.

¹⁸² Ibid.

¹⁸³ Ibid.

IMF resumed lending at the end of 2003. Many had described this time in Kenyan politics as the transition they had been waiting for.¹⁸⁴

The first of these commissions to be set up was the Ndungu Commission, in June of 2003, which was mandated to inquire into the illegal allocation of public lands. The commission was to identify officials involved in illegal allocations and make recommendations for the restoration of this land to its proper purpose and for appropriate criminal prosecutions.¹⁸⁵ It produced a 244 page-long report with two even longer appendices. The report shows constant abuse of presidential discretion in giving land grants to individuals without consideration of public interest, under both Kenyatta and Moi.¹⁸⁶ One of the report's recommendations was to establish a tribunal that would deal with the issue of land reforms exclusively. It would assess individual cases and oversee the revocation and rectification of land titles. Unfortunately, government delays in publishing the report (six months after being presented to Kibaki) raised suspicions of manipulation of the conclusions.¹⁸⁷ Many suspect that the report would have otherwise incriminated several more MPs and civil servants.¹⁸⁸ Furthermore, its recommendations remain largely unimplemented and corrupt dealings in public land have continued under Kibaki.¹⁸⁹

In 2004, the NARC set up a judicial commission to investigate into the Goldenberg scandal, whose findings were released in February 2006. There was a long commission hearing, which showed gross corruption under Moi's government, and the bypassing of financial controls. Witnesses reported up to 60 billion shillings (a 5th of Kenya's GDP) looted from the Central Bank through the Exchange Bank belonging to Kamlesh Patti, the scandals' mastermind.¹⁹⁰ The report named government officials, including former Vice-President Saitoti, former President Moi and other MPs. Although several of those involved have

¹⁸⁴ Makau, "Kenya's Quest."

¹⁸⁵ Southall, "The Ndungu Report."

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Kagwanja and Southall, "Introduction: Kenya."

¹⁸⁹ Ibid.

¹⁹⁰ BBC, "Moi 'ordered' Goldenberg payment" (February 17, 2004), accessed May 27, 2012, <http://news.bbc.co.uk/2/hi/africa/3495689.stm>.

been prosecuted, excluding the former Vice-President and Moi who were granted immunity, none have been convicted.¹⁹¹

NARC's drive against the Goldenberg scandal ground to a halt as Kibaki's government itself became marred in its own corruption scandal; the Anglo-Leasing affair. Despite Kibaki's claim that under his leadership, true reforms would take place and impunity would end, the government was scrutinised by Kibaki's very own anti-corruption tsar, John Githongo. The latter revealed corruption, which involved money laundering away from a new security and passport printing system, in order to finance the NARC's election bid in 2007.¹⁹² As this information was unearthed, incriminating the highest echelons of the government, Githongo went into exile as threats and accusations of disloyalty were made against him.¹⁹³ While one must recognise that corruption and state predation under Kibaki lessened, they re-emerged after the 2005 failure of the constitutional referendum and the split of the NARC.¹⁹⁴ This severely compromised the legitimacy of its institutions. As underlined by *The Economist*, although corruption had lessened under Kibaki, his regime still contained former KANU members, who jumped ship as it became clear that Moi would not last another election, and had been implicated in many of the aforementioned corruption scandals.¹⁹⁵

Therefore, while Kibaki at first seemed to have wanted to implement reforms along the lines of his election campaign, this became more of a 'show and tell' rather than an indication of his dedication to reforming the Kenyan system of governance. This section has also highlighted the economic nature of the crimes committed by members of the governing elite. With proper auditing, it would be easy to accuse and imprison individuals for such crime, hence explaining the strong grip that the culprits have kept on the system of governance.

¹⁹¹ BBC, "Kenya's Saitoti escapes charges" (July 31, 2006), accessed May 27, 2012, <http://news.bbc.co.uk/2/hi/africa/5232852.stm>.

¹⁹² Kagwanja and Southall, "Introduction: Kenya."

¹⁹³ *The Economist*, "Corruption in Kenya: How to ruin a country" (February 26, 2009), accessed May 29, 2012, <http://www.economist.com/node/13176864>.

¹⁹⁴ Southall, "The Ndungu Report."

¹⁹⁵ *The Economist*, "Scandals then and now. Is Kenya's reformist government losing its way?" (July 8, 2004), accessed May 29, 2012, <http://www.economist.com/node/2910110>.

Furthermore, one can see the value of drawing the links with previously failed commissions to those carried out after the PEV. The observations of CIPEV and Kriegler Commissions support much of the information discovered in previous investigations. All of them show that any members of society who attempted to follow the rule of law and bring perpetrators to justice or report infringements were systematically punished. Those who turned a blind eye or were involved in fraudulent activities were rewarded for their loyalty to their leaders. No government, thus far, has shown the ability to let go of the benefits of a tight hold on the state-apparatus.¹⁹⁶

2.4 Conclusion

Kenya's system of governance is characterised by three main attributes; patrimonialism, ethnic based competition for resources and impunity. These originated from British indirect rule, which artificially created an African elite to control the masses. The colonial state's authority relied on the loyalty of a handful of people, who were rewarded with access to fertile land. The leaders of independent Kenya, who relied on patronage, not only to win elections, but also to reward loyalty and punish disloyalty, perpetuated this system. In the end, this strengthened the executive to the point that Kenya became a one party state under KANU. During Moi's reign, the Kenyan state weakened as patronage sources diminished, and Moi responded by becoming increasingly authoritarian. In his later years with the democratisation of Kenya, clientelist networks increased in numbers as more individuals with political ambitions came to the fore, each requiring their own support network. As a result, as Mueller states, *"Over time the state outside the president developed the seemingly contradictory characteristics of being deliberately weak and simultaneously predatory."*¹⁹⁷

These clientelist networks and political affiliations are often rooted in ethnic groups. This is caused by the competition for resources, whose access is

¹⁹⁶ Mueller, "Dying to win."

¹⁹⁷ Ibid., 104.

determined by political affiliation. Under Kenyatta, this competition was detrimental for minorities, as he had privileged the Kikuyu - both to appease their grievances from the colonial times, and to gain their loyalty. However, under Moi, the fear of Kikuyu domination was amplified by manipulating Majimbo. KANU used the idea that Kenya needed a Majimboist constitution, giving provinces more autonomy, by arguing that otherwise the Kikuyu majority would always dominate politics. Majimbo was used to justify driving certain ethnicities out of provinces in order to rid KANU provinces of recalcitrant voters. Reviving fears of Kikuyu domination further exacerbated the perception of the need to vote for one's ethnic group in order to secure access to resources. This shows how the failure of the reform movement meant that much as under British rule, many felt unrepresented and thus harboured grievances against the state.

Lastly, this chapter has shown how impunity is necessary for this system of governance to be sustainable. As we have seen, amassing patronage resources often required corruption and dubious land dealings. Would a reformist opposition win power, they would not only want economic restoration, but also call for the punishment of such unlawful conduct - in part to ensure legitimacy and in part because of the desire for political revenge. Thus, any attempts at ending impunity have been half-hearted, as a genuine attempt would have been damaging, personally and economically to many in Kenya's governing elite. One can thus talk of a system of governance that is heavily guarded by members of the political elite.

In light of the historical overview and continuous politicking of the current coalition, this thesis, while recognising the new institutions and constitution that have been formed post-PEV, questions their effectiveness in changing this system without the local impetus to do so. It is further important to question whether the ICC, a body whose legitimacy has often been questioned¹⁹⁸ could realistically help change the state of affairs, with the prosecution of a mere four members of the polity. Furthermore, in light of the incentives to keep the status

¹⁹⁸ Nagy, "Transitional Justice as Global Project."

quo, one could question whether the presence of the ICC is benign and simply the result of a confused and dazed political class, or rather another tool to be manipulated for political gain?

Chapter 3 Kenya's Political Landscape

This chapter analyses the politics leading up to the PEV. I divide this politics into the long and the short term:

In the long term, three main features of Kenya's politics are highlighted. These are what help explain the decision-making processes of the governing elite and the formation and drivers of political parties. Firstly, Kenya's political landscape is characterised by a fragmented opposition and fluid political parties. Secondly, political parties seek votes in their ethnic constituencies due to the client-patron social structure that frames the relationship between the governing elite and its population. Finally, it is in the political elites' and the clients' interest to maintain the status quo, their position as the governing elite, and the continuation of 'politics-as-usual'.

In light of these three features, it will be shown that the events of the PEV, international mediation, and subsequent choice to begin an accountability process, were motivated by political calculations and strategies rather than by the simple desire to see peace and justice be done, as is often assumed of Transitional Justice processes.

In the short term, the intention of this chapter is to show the tense and sensitive situation Kenya found itself after the 2007 elections. This will be done by taking a closer look at the timeline of events that led up to the involvement of the ICC.

3.1 In the Long Term

3.1.1 A Fragmented Political Environment

In 2005, the NARC split; the official reason for this was Kibaki's renegeing of the previously agreed Memorandum of Understanding (MOU).¹⁹⁹ The MOU

¹⁹⁹ Makau, "Kenya's Quest."

would have resulted in constitutional amendments and the creation of the post of Prime Minister to be allocated to Odinga.²⁰⁰ This combined with the failure to establish a new constitution, led to the complete rejection of the MOU and the collapse of the NARC.²⁰¹ As a result, Odinga formed the ODM to challenge Kibaki in the next elections. A few months later, the ODM itself split, with Musyoka Kilonzo²⁰² creating the ODM-K, which then did a U-turn in support of Kibaki's new party, the PNU.²⁰³ Thus by the time of the 2007 election, Kenya had a very fragmented political elite.

This political situation, if framed in the context of Kenya's electoral politics of the last ten years, is not so surprising. The previous election in 2002 had been a historic moment, as it had marked the end of the one-party state. The coalition had defeated KANU, which had been in power since 1963.²⁰⁴ However, in 1992, Moi had been obliged to liberalise due to internal and external pressures, and held Kenya's first multi-party elections in 26 years. Despite the opening of competitive politics, KANU survived the first two democratic elections against its three main opposition parties.²⁰⁵ While both elections were subject to some controversy due to state repression and irregularities, election observers said that the results reflected Kenyans' wishes.²⁰⁶

By the 2002 elections however, the opposition had learnt its lesson, and readying itself to counter-balance the dominant party, formed the NARC coalition. In these elections, Moi nominated Uhuru Kenyatta as his successor, which prompted Kibaki to defect from KANU. He formed his own party, the National Alliance of Kenya (NAK), a conglomeration of 12 other smaller parties. Kibaki also sought out a number of other defectors who had formed the LDP (headed by Odinga).²⁰⁷

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Former Minister of Foreign Affairs under Moi and Kibaki; current Vice President.

²⁰³ Makau, "Kenya's Quest."

²⁰⁴ Ibid.

²⁰⁵ The major opposition parties were Forum for Restoration of Democracy Kenya (FORD-Kenya), FORD-Asili and the Democratic Party (DP). Each received substantial votes in 1997, but fell short of expectations.

²⁰⁶ ARI, "Kenya: A nation fragmented" (2008), accessed June 2, 2012, <http://africaresearchinstitute.org/newsite/wp-content/uploads/2013/03/BN-0801-KenyaFragmented.pdf>.

²⁰⁷ Ibid.

Wangari Maathai wrote; “the fact that the many of the country’s different micro-nations had come together to bring an end to a discredited regime by democratic means [...] led me and others to believe that 2002 might finally be when Kenya turned a page on the negative, competitive politics between the micro-nations [...].”²⁰⁸ However, while the NARC coalition was successful in overthrowing KANU, it was itself a fragmented party whose main goal had been to win an election.

Many would argue that fluid and fragmented parties, which tend to form coalitions, are neither unique nor surprising for such a new democracy.²⁰⁹ Politicians frequently switch parties or create new ones, often resulting in short-lived organisations, fluid personnel and unclear policy agendas.²¹⁰ As a result, the image of the party may not always reflect its members, or clearly show who is a member of a governing coalition and who belongs to the opposition. Party switching means that politicians have fewer incentives to implement policies and act on behalf of the electorate.²¹¹

Furthermore, as Sartori states, coalitions such as the NARC are the means to challenge a hegemonic party system and transition toward institutionalising democracy. Whether they then hold or break depends on socio-economic conditions.²¹² African political parties, especially when looking at those that participated in the Third Wave of democratisation, have often been considered weak.²¹³ This weakness is defined by the lack of their reach beyond the capital, and their lack of organisation, combined with poor socio-economic conditions such as the general lack of a politically independent middle class in African

²⁰⁸ Maathai, *The Challenge for Africa*, 193.

²⁰⁹ Samuel P. Huntington, “How Countries Democratize,” *Political Science Quarterly* 106, no. 4 (1992): 579-616; Vicky Randall and Lars Svåsand, “Political Parties and Democratic Consolidation in Africa,” *Democratization* 9, no. 3 (2002): 30-52.

²¹⁰ Jakub Zielinski, Kazimierz Slomezynski, and Goldie Shabad, “Electoral Control in New Democracies: The perverse Incentives of Fluid Party Systems,” *World Politics* 57, no. 3 (2005): 365-395.

²¹¹ *Ibid.*

²¹² Giovanni Sartori, *Parties and Party systems – A framework for Analysis*, 2005 ed. (Essex: European Consortium for Political Research, 1976).

²¹³ Randall and Svåsand, “Political Parties.”

economies, the strength and resources available to civil society, and the salience of ethnicity in politics.²¹⁴

Olson, in his comparison of new democratic governments after the fall of communism in central Europe, further characterises the nature of new democratic parties emerging after dominant one-party regimes. According to the author, unstable party formations are common as parties search for ways to organise themselves internally and present themselves externally.²¹⁵ Efforts to combine into larger coalitions are a result of elite and leadership strategy and experiment, and reflect an overall concern for votes rather than members. Once the overarching goal of removing the dominant party is achieved, the basis for internal unity is destroyed.²¹⁶ This reflects the lack of a common agenda and specific policies for governance. Instead, such coalitions depend on vague slogans and catchall phrases to appeal to feelings of national well-being.²¹⁷ In Kenya, this had been the promise of ‘reforms’ and ending ‘corruption and impunity’. The priority however, had been the defeat of KANU, thereby gaining access to the state and its resources. This explains the disintegration of the coalition in 2005, which contributed to the last-minute creation of new opposition parties that were to compete in 2007.

3.1.2 Political Parties and Their Ethnic Constituencies

Kenyan political parties have ethnic support bases. By the 2007 elections, this situation had split the country between Kibaki’s Kikuyu ethnic group and Odinga’s Luo and Kalenjin ethnic groups.²¹⁸ The apparent ethnic character of much of African politics has long been the subject of academic scrutiny. Authors argue that its sources can be found in the patron-client interactions that

²¹⁴ Ibid.

²¹⁵ David M. Olson, “Party Formation and Party System Consolidation in the New Democracies of Central Europe,” *Political Studies* 46, no. 3 (1998): 432-464.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ajulu, “Kenya: one step forward.”

structured power relations in pre-colonial times.²¹⁹ These forms of interaction in the past existed for the dual purpose of providing protection for the people, and ensuring loyalty to and the stature of the leader. At the time however, ethnic and tribal identities were fluid, contested, and in constant creation and re-creation.²²⁰ It was only because of colonially imposed structures of social relations that static ethnic groups were created. Under colonial rule, for the African elite, access to the state and patronage was the key to the accumulation of wealth, and ethnicity was a means to access these resources.²²¹ Thus according to Mamdani, political identities were created to facilitate colonialism creating the 'moral ethnicity' present in many African states today.²²²

At independence, competitive elections and the 'Africanisation' of the state began to make ethnicity increasingly important as the foundation for political support and access to the higher levels of the state apparatus.²²³ At the grassroots, ethnic identity and membership were reinforced as the basis for access to the state and its resources. Thus, the mobilisation of ethnic communities was not only sought after by the governing elite, but also by the grassroots.²²⁴ Lake and Rothchild define this situation in the modern state as the 'ethnic contract', which is the formal or informal understanding that channel politics in peaceful times.²²⁵ A number of safeguards are put in place to protect this contract, which may take the form of ethnic balance in the government, military and electoral rules.²²⁶

The danger in parties with ethnic support bases is that groups may become locked into competitions for resources and state power. With the winner-take-all outcome of majoritarian elections, such as was the case in Kenya, and the knowledge that a change of balance of power may occur, fear of domination and

²¹⁹ Bruce J. Berman, "Ethnicity, Patronage and the African State: The Politics of Uncivil Nationalism," *African Affairs* 97, no. 388 (1998): 305-341.

²²⁰ Ibid.

²²¹ Mahmood Mamdani, "Indirect Rule, Civil Society, and Ethnicity: The African Dilemma," *Social Justice* 23, no. 1/2 (1996): 145-150.

²²² Mamdani, "The Invention of the Iniegence."

²²³ Berman, "Ethnicity, Patronage and the African State."

²²⁴ Ibid.

²²⁵ David A. Lake and Donald Rothchild, "Containing Fear: The Origins and Management of Ethnic Conflict," *International Security* 21, no. 2 (1996): 41-75.

²²⁶ Ibid.

exclusion from access to the state increases.²²⁷ In such situations, ethnicity provides a key marker for politicians seeking to build constituencies in order to attain or maintain political power. This results in ‘ethnic outbidding’, driving even the more moderate politicians to draw electoral support from their ethnic community.²²⁸ This situation can be observed in the year preceding the 2007 elections, as both the ODM and PNU slogans and public speeches were geared toward amassing votes from their respective ethnic constituencies.

3.1.3 Maintaining the Status Quo

Kenya’s governing elite seeks to maintain the status quo.²²⁹ This is the maintenance of their position as the governing elite and the continuation of ‘politics-as-usual’: one without accountability that may threaten their position and result in their imprisonment. Klopp explains corruption as a response to the need to win elections and to remain in power.²³⁰ While Kenya may have moved away from one-party domination, this did not destroy the social structures of the client-patron relationships. Both Klopp and Kasfir argue that the logic of the clientelist system can be organised to work with more than one hierarchy of patronage distribution.²³¹ A system of decentralised patrimonialism evolves with democratisation that sustains these numerous fragmented political parties. This is what Kasfir named ‘decentralised clientelism’.²³²

This theory fits Robert Bates’s framework, suggesting that with liberalisation and falling revenues come increased political uncertainty, state predation and economic decline.²³³ In Kenya, as Bates suggests, this also meant that political violence increased with state informalisation, especially during the post KANU

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Kagwanja and Southall, “Introduction: Kenya.”

²³⁰ Klopp, “Kenya’s Unfinished Agendas.”

²³¹ Ibid.; Kasfir, “Neo-Patrimonialism, Power Sharing and Reform.”

²³² Kasfir, “Neo-Patrimonialism, Power Sharing and Reform.”

²³³ Robert Bates, *When Things Fell Apart: State failure in late century Africa* (Cambridge: Cambridge University Press, 2008).

era.²³⁴ Parties surrounded themselves by militia gangs²³⁵ for ‘protection’. As argued by Cheeseman and Branch, with political fragmentation, the militarisation of society becomes more likely. Using militias permits political leaders to carry out tasks they would never have been able to with the police or army during the one-party era.²³⁶ However, this is dangerous in the long-term as it decentralises the control of the use of force and reduces the ability of the state to control conflict, as seen during the PEV. Importantly, it also raises the stakes of reform and accountability, which further explains the refusal of the elite to disband some of these groups.²³⁷

Furthermore, because clientelism is understood to mean discrimination in the distribution of resources and in the appointment of officials by regions that are defined ethnically²³⁸, it provides the incentive to cling to power and support ‘*a protective clique in power at all costs*’.²³⁹ Accordingly, impunity is needed by patrons who give benefits, as well as by the clients who receive them. Without it, the partnership will dissolve as the patron loses his power to protect and consequently loses the loyalty of the client.²⁴⁰ In addition, politicians who have attained their place in the patronage chain using violence will also need protection from the law.²⁴¹ Thus, any change in the political management and structures of Kenya’s polity endangers the credibility of the party and the well being of individual politicians.

²³⁴ Ibid.

²³⁵ Such as the Mungiki, Baghdad Boys and the Taliban.

²³⁶ Branch and Cheeseman, “Democratization, Sequencing, and State Failure.”

²³⁷ Kasfir, “Neo-Patrimonialism, Power Sharing and Reform.”

²³⁸ Ibid.

²³⁹ Klopp, “Kenya’s Unfinished Agendas,” 153.

²⁴⁰ Kasfir, “Neo-Patrimonialism, Power Sharing and Reform.”

²⁴¹ Ibid.

3.2 In the Short Term

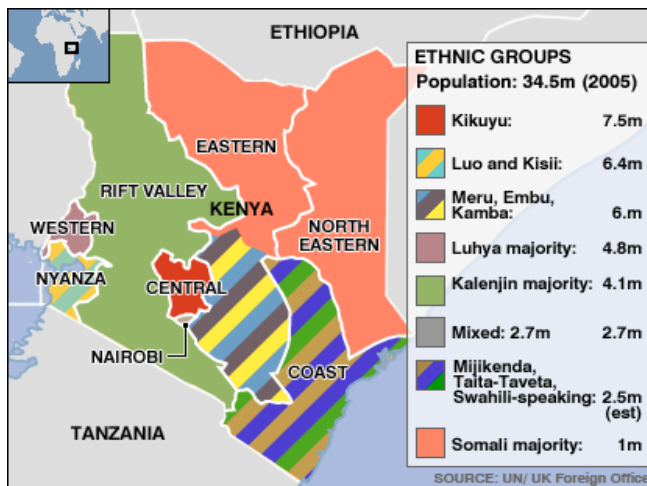


Figure 1: <http://news.bbc.co.uk/2/hi/africa/7168551.stm>



Figure 2: www.ushaidi.com

The PEV resulted in more than 1,200 deaths and the displacement of over 500,000 people. The violence that ensued took on an ethnic dimension due to Kenya's political landscape, pitting the Kikuyu ethnic group supporting the PNU against the Luo and Kalenjin ethnic groups supporting ODM. First, the violence started out as spontaneous uprisings in the multi-ethnic regions of the country, in both rural and urban areas. The affected areas included; Nairobi, Mombasa, Kisumu, Nakuru, Naivasha, Eldoret and the rural areas of the rift valley and Nyanza.²⁴² This was soon followed by a campaign of organised violence orchestrated by the ODM political elite against PNU supporters in the Rift Valley region. In retaliation,

criminal gangs such as the Mungiki and Taliban carried out their own campaigns of violence against ODM supporters, allegedly at the behest of the PNU. This was accompanied by state violence from the police force and security agencies.²⁴³

After weeks of fighting, on the 28th of February 2008, amid pressure from the international community, the National Accord and Reconciliation Act were signed. The Act, establishing a power sharing arrangement was set up to serve Kenya for five years until the next elections, with the task of undertaking a

²⁴² Rutten and Owuor, "Weapons of mass destruction."

²⁴³ Peter Kagwanja, "Courting genocide: Populism, ethno-nationalism and the informalisation of violence in Kenya's 2008 post-election crisis," *Journal of Contemporary African Studies* 27, no. 3 (2009): 365-387.

number of institutional reforms to ensure a peaceful and just transition. The signing of the Act was aided by mediation by the international community, which had congregated in Kenya in an attempt to intervene as soon as the violence had erupted.

On the 8th of January 2008, John Kufuor, then the Chair of the African Union (AU), visited Kenya in order to meet with Kibaki and Odinga. While the AU Chairman did not manage to bring the two to meet face-to-face, a series of meetings did result in the acceptance and creation of a mediation team; a panel composed of eminent personalities from Africa. Former UN Secretary General, Kofi Annan, former Tanzanian President, Benjamin Mkapa and former South African First Lady, Graça Machel mediated the KNDR.²⁴⁴ The Tanzanian President, Jakaya Kikwete, joined the panel in the last stages of the mediation. In order to structure the mediation the panel drew up a four-point agenda, with both short and long term provisions for a peaceful future. These were:

- 1) Immediate action to stop the violence and restore fundamental rights and liberties;
- 2) Immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration of calm;
- 3) Overcome the political crisis (by creating a coalition government);
- 4) Long-term issues and solutions (including constitutional and institutional reforms, consolidating national cohesion and unity, poverty and unemployment).²⁴⁵

In addition, the parties to the KNDR agreed to establish a number of institutional frameworks to support the implementation of the Agenda and achieve a peaceful and just transition.

²⁴⁴ Elisabeth Lindenmayer and Josie Lianna Kaye, "A choice for Peace? The story of 41 days mediation in Kenya. Crisis," *CICR* (2009), accessed June 5, 2012, http://www.cicr-columbia.org/wp-content/uploads/2009/08/KenyaMediation_EPUB.pdf.

²⁴⁵ KNDR, "Agenda item 1 – Immediate Action to stop Violence and Restore Fundamental Rights and Liberties." (2009), accessed June 5, 2012, [http://www.dialoguekenya.org/Monitoring/\(January%202009\)%201ST%20Review%20Report%20Agenda%201%20%20Immediate%20action%20to%20stop%20violence%20and%20restore%20Fundamental%20rights%20and%20liberties.pdf](http://www.dialoguekenya.org/Monitoring/(January%202009)%201ST%20Review%20Report%20Agenda%201%20%20Immediate%20action%20to%20stop%20violence%20and%20restore%20Fundamental%20rights%20and%20liberties.pdf).

The GNU agreed to:

- 1) Establish an Independent Review Commission on the General elections held in Kenya on 27th December 2007 (*Kriegler commission*). The KC was mandated to identify weaknesses and inconsistencies in the electoral laws, examine the structure and management of the Electoral Commission of Kenya (ECK) and to investigate electoral participation. The Commission submitted its report to the President on 17th September 2008 ²⁴⁶
- 2) Establish a Commission of Inquiry into the Post-Election Violence (CIPEV). CIPEV was mandated to investigate the circumstances surrounding the election violence, including the actions or omissions of State security agents and to make recommendations on criminal accountability and reconciliation.²⁴⁷ On October 15th 2008, it released its findings in a 529-page report, commonly known as the Waki Report. ²⁴⁸
- 3) Establish a Truth, Justice and Reconciliation Commission (TJRC). The TJRC was mandated to investigate, analyse, and report upon abuses of economic and human rights between 12 December 1963 and 28 February 2008.
- 4) Pursue a constitutional review process²⁴⁹ to lead to the writing of a new constitution.

CIPEV was composed of Kenyan Chair Philip Waki and two international experts, Gavin Alistair McFadyen and Pascal K. Kambale.²⁵⁰ The report records 3,561 injuries, 117,216 instances of property destruction, and 1,133 deaths.²⁵¹ It not only shows the failures of the state security agencies to contain the violence, but also that they were the culprits for many of the deaths and injuries.²⁵² The report also discovered that 1600 Administrative Police had been organised by state officials to carry out a clandestine operation to disrupt polling in Nyanza Province. The PNU used their positions in the National Security Advisory

²⁴⁶ Murithi, "Situation Report."

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ CIPEV, "Final Report."

²⁵² Ibid.

Committee to order the Kenyan Police Force to use force against ODM strongholds. It was also alleged that Uhuru Kenyatta²⁵³ financed and facilitated a meeting between the Mungiki criminal gang and the Head of Public Services Francis Muthaura to organise retaliatory violence in Nakuru and Naivasha.²⁵⁴ In addition, the ODM counterpart was found to have prepared a plan to attack and punish PNU supporters in the Rift Valley. William Ruto²⁵⁵ (ODM) and Henry Kosgey²⁵⁶ (ODM) also allegedly established a network with the objective of killing and oppressing PNU supporters in Eldoret, Rift Valley.²⁵⁷

With these findings in mind and to address the large-scale abuse, amongst its recommendations the Waki Report called for a number of actions to be undertaken to end impunity by bringing the culprits to accountability. It established that the Kenyan government should set up a Special Tribunal (ST) composed of both local and international experts to try those who bore greatest responsibility. In order to ensure compliance the report was accompanied by a sunset clause stating that a list of names given to Annan by CIPEV for confidential keeping would be sent to the Prosecutor of the ICC if Kenya failed to comply by September 2009.²⁵⁸

During the following year, Kenya politicised the justice process²⁵⁹ and failed to establish the ST. As Musila shows, the year of 2009 was marred by intense political debate between those who endeavoured to set up a Tribunal in an attempt to avoid the case going to The Hague, while others argued that only an international court could bring justice, due to the corruption of Kenyan's justice system.²⁶⁰ Many have argued that the efforts to establish the ST were frustrated by partisan politics, individual interests as well as ethnic interests of certain

²⁵³ The son of Kenya's founding father Jomo Kenyatta, one of Kenya's richest businessmen and PNU supporter.

²⁵⁴ CIPEV, "Final Report."

²⁵⁵ Secretary General under KANU, MP for Eldoret North Constituency since 1997.

²⁵⁶ Chairman of ODM and MP for Tinderet Constituency.

²⁵⁷ CIPEV, "Final Report."

²⁵⁸ Ibid.

²⁵⁹ Musila, "Options for Transitional Justice in Kenya."

²⁶⁰ Klopp, "Kenya's Unfinished Agendas."

leaders.²⁶¹ Members of the political elite vacillated between the different options, uncertain which one would provide the best protection for their own agendas.²⁶² Some have argued that this politicking is not only indicative of a lack of willingness to bring the culprits to accountability and end the systemic impunity present in Kenya's system of governance, but also of politicians' attempts at 'fixing' opponents. Many in Kenya argued that this marked the continuation of 'business as usual'.²⁶³

After giving the country numerous opportunities to resuscitate its own proceedings, and a year of back and forth negotiations, including numerous meetings with Annan, the former UN Secretary General handed over the list of names to the ICC Prosecutor.²⁶⁴ Subsequently, the ICC announced it would proceed with preliminary investigations, while Ocampo used the power of *proprio motu*²⁶⁵ for the first time in the ICC's history. After some attempts at fighting this decision, the Kenyan government eventually stated that it acknowledged that the ICC investigations were caused because of a lack of appropriate local judicial mechanism, but affirmed its belief in justice and reconciliation.²⁶⁶

As a result, in December 2011, the ICC summoned six Kenyans allegedly responsible for planning and facilitating the post election violence. The prosecutor opened two court cases for investigation. The first case, summoned Uhuru Kenyatta; former chief of police, Mohammed Hussein Ali; and the head of the public service, Francis Muthaura, for 'committing or contributing' to the killings of supporters of the opposition (ODM), their deportation or forcible transfer, rape and other sexual assaults, the persecution of civilians based on

²⁶¹ Musila, "Options for Transitional Justice in Kenya."; Klopp, "Kenya's Unfinished Agendas."

²⁶² Klopp, "Kenya's Unfinished Agendas."

²⁶³ Musila, "Options for Transitional Justice in Kenya."

²⁶⁴ Antonina Okuta, "National Legislation for Prosecution of International Crimes in Kenya," *Journal of International Criminal Justice* 7, no. 5 (2009): 1063-1076.

²⁶⁵ Giving the prosecutor the power to refer a case to the ICC for investigation.

²⁶⁶ Musila, "Options for Transitional Justice in Kenya."

their political affiliation, and other inhumane acts.²⁶⁷ The second case, summoned former Higher Education Minister, William Ruto; former Minister for Industrialisation, Henry Kosgey and radio executive, Joshua Arap Sang, for forming a network to attack PNU supporters in the Rift Valley area.²⁶⁸

On the 23rd of January 2012, the ICC Pre-trial Chamber delivered its judgement on the confirmation of charges for the Prosecutor vs. Mr Kenyatta, Mr Muthaura and Mr Sang as well as for the Prosecutor vs. Mr Ruto, Mr Sang and Mr Ali. The ICC Pre-Trial Chamber II confirmed the charges against Mr Ruto as an indirect co-perpetrator, pursuant to article 25(3)(a) of the Rome Statute.²⁶⁹ In addition it also confirmed the charges against Mr Sang, who was accused of contributing to the commission of the aforementioned crimes against humanity, pursuant to article 25(3)(d)(I) of the Rome Statute. However, in relation to Mr Kosgey, it was found that the evidence presented did not meet the evidentiary threshold required.²⁷⁰

Concerning Case II, Pre-Trial Chamber II confirmed the charges against Mr Muthaura and Mr Kenyatta. The Chamber was satisfied by the evidence presented, accusing the two of being indirect co-perpetrators, pursuant to article 25(3)(a) of the Rome Statute, and of having gained control over the Mungiki criminal gang and subsequently directing them to commit the crimes.²⁷¹ However, in relation to Mr Ali, the Chamber declined to confirm charges as it

²⁶⁷ ICC, “Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,” ICC-01/09-30 (2010), accessed May 30, 2012, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/filing%20of%20the%20participants/office%20of%20the%20prosecutor/Pages/30.aspx.

²⁶⁸ ICC, “Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,” ICC-01/09-31 (2010), accessed May 30, 2012, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/filing%20of%20the%20participants/office%20of%20the%20prosecutor/Pages/31.aspx.

²⁶⁹ ICC, “Summary of decision in the two Kenya cases” (2012), accessed May 30, 2012, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/background%20information/Pages/summary%20of%20decision%20in%20the%20two%20kenya%20cases.aspx.

²⁷⁰ Ibid.

²⁷¹ Ibid.

found that the evidence presented did not provide substantial grounds to believe that the Kenya Police participated in the attack in or around Nakuru and Naivasha²⁷²

3.3 Conclusion

One can conclude that Kenya's political landscape before the 2007 election violence was fragile:

First, the politics of Kenya after the fall of the one-party state were characterised by party fragmentation. This can be attributed, in part, to the instability that multi-party politics may bring to new democracies, as parties attempt to form and organise themselves in order to maximise their chances of winning. Due to this fluidity, politicians have little incentive to implement policies or remain accountable to their party's electorate. The formation of parties and coalitions are thus driven by political stratagems, and as in Kenya's case, often have as main aim the removal of the incumbent party.

Secondly, ethnic constituencies vote for the party that can deliver protection and access to resources. This is what sustains political parties. The incentive in Kenya is that winning not only guarantees political power, but also economic gratification for the client, and loyalty for the patron. Old networks of client-patron relationships essentially both lock politicians to their ethnic groups and allow them to be voted in power. This creates competition amongst the ethnic groups, and fear of the 'other's' domination, which invites politicians to use ethnic outbidding.

Lastly, since any change in this system and in balance of power may cause harm to the party and certain individuals, the costs of losing elections are high. This is especially true if the new incoming party demands accountability for past misconduct. This has created a situation whereby members of the 'former

²⁷² Ibid.

regime' have to protect their interests; this can only be done through the maintenance of impunity and the status quo.

In the short run, in light of the involvement of the political elite in the PEV and the country's' system of governance the eventual transition and coalition government that Kenya created after the PEV has two striking features. The first is the acceptance of the involvement of the international community in Kenya's internal affairs, and the international community's willingness to become involved. The second striking feature is Kenya's acceptance of undertaking a process for accountability.

Chapter 4 The Internationalisation of the Transitional Process

This chapter is concerned with the international aspect of Kenya's PEV, mediation and agreement that followed it. As we have seen, Kenya's acceptance of the international community in its internal affairs, and the international community's willingness to do so is puzzling. This is both in light of Kenya's politics as analysed in the previous chapters, as well as the fact that the costs of allowing an international body to interfere in domestic affairs, such as the loss of absolute sovereignty, of decision-making autonomy and of domestic legitimacy and credibility are usually avoided by states.²⁷³ Cries of neo-colonialism, Western domination and the right to self-determination are the usual crux of African states arguments against the involvement of the international community.²⁷⁴

This chapter will first explain the motivations of Kenya in allowing mediation by a third party to take place. It will be seen how both parties had reached a stalemate, where neither could foresee an acceptable outcome with the continuing violence, yet neither was ready to lose.²⁷⁵ On the one hand, mediation can be explained by the need for Odinga to turn the balance of power against the incumbent. On the other, Kibaki's reluctant acceptance of this situation was due to the socio-economic impact a prolonged conflict would have had and the risk of antagonising foreign investors and donors.

Secondly, it will be shown that the willingness of the international community to involve itself in the internal affairs of a sovereign state should be understood in the geo-political context and strategic placement of Kenya in the Horn of Africa and East Africa. As such, the interest of the Western world in the PEV will be

²⁷³ John Akokpari, "Globalization and the Challenges for the African State," *Nordic Journal of African Studies* 10 no 2 (2001): 188-209.

²⁷⁴ Kwame Ninsin, "Globalization and the Future of Africa," AAPS Occasional Paper 4 (1), (Harare: AAPS, 2000).

²⁷⁴ Akokpari, "Globalization and Challenges."

²⁷⁵ William Zartman and Saadia Touval, "International Mediation in the Post-Cold War Era," in *Managing Global Chaos*, eds. Chester Crocker, Fen Hampson and Pamela Aall. (Washington, D.C.: United States Institute of Peace Press 1996): 445-461.

clarified by the presence of International Organisations and the *NGO-isation*²⁷⁶ of Kenya. Although neither the UN, nor any North American or European state leaders had been directly involved in the mediation processes, the pressure they exerted has been described as indispensable to ending the PEV.²⁷⁷

Lastly, we will show that the involvement of the AU was motivated by both the interests of the organisation itself and of its member states, showing a rare display of unity. Showing the interests of the AU and of its member states will once more illustrate that the willingness to mediate in the Kenyan PEV had as much to do with political calculations than with democratic values and norms.

4.1 Negotiators: The First Internationals

Despite Kibaki's insistence that the crisis needed to be sorted out domestically, the PEV resulted in the flocking-in of the international community to attempt to mediate the PEV. The first attempts at mediation by an international third party started on 2nd January 2009, as South African Archbishop Desmond Tutu intervened to try to stop the crisis. However, Tutu failed to bring the two parties together.²⁷⁸ This intervention was soon followed by a second attempt on 8th January, this time with the AU Chairman Kufuor and WB Country Director, acting as facilitator. As progress was slow, another intervention was attempted by South African Cyril Ramaphosa,²⁷⁹ but was soon dismissed by Kibaki's faction. However, eventually after much stalling from Kibaki's side, the parties agreed that there should be an end to the violence, and that there should be a dialogue to be conducted through a Panel of Eminent African Personalities. To this end, Kufuor selected Kofi Annan to head the Panel, a renowned figure with worldwide

²⁷⁶ The title 'NGO-isation' is taken from Julie Hearn, "The 'NGO-isation' of Kenyan society: USAID & the restructuring of health care," *Review of African Political Economy* 25 no. 75 (2007): 37-41.

²⁷⁷ Lindenmayer and Kaye, "A choice for Peace?"

²⁷⁸ Ibid.

²⁷⁹ Ibid.

moral authority and political reputation. Meanwhile the EU, the US, the UN and other international agencies, heavily supported these attempts.²⁸⁰

As the election crisis developed, Kibaki, having declared himself President, was intent on controlling the state by force, flooding the streets with security forces and putting a ban on media broadcasts. According to him, the only way the electoral dispute could be resolved was through local courts.²⁸¹ On the other hand, Odinga was adamant that the Presidency had been stolen from him. He stated that he was willing to negotiate but not without international guarantees, as local courts would be unable to deliver a just outcome.²⁸² He called for negotiations to create a transitional coalition government, implement reforms and have a re-count of the votes for a re-election. Odinga's strategy was to call for mass action in order to pressure Kibaki and draw the attention of the international community.²⁸³

For Odinga it would have been clear that the imbalance of power between him and Kibaki, an entrenched Head of State with control of the state machinery would have made any negotiations asymmetric. Kibaki's government had appointed most senior officials in the judiciary, police, administration, and army. This amount of executive power stems from the history of one-party dominance, which, conflating state and party, had politicised the state, affecting both the legislature and judiciary. Thus, state institutions were weighted toward the PNU.²⁸⁴ Furthermore, the constitution, having been amended numerous times by previous leaders, could not provide a credible judicial process for resolving the electoral dispute. Thus, had Odinga accepted to take the local route, Kibaki as the declared winner, would have enjoyed all the benefits of office and have had no incentives to make concessions. Furthermore Kibaki's protective clique²⁸⁵, the

²⁸⁰ ICG. "Kenya: Impact of the ICC Proceedings". (2012), accessed May 25, 2012, <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/kenya/b084-kenya-impact-of-the-icc-proceedings.aspx>

²⁸¹ Lindenmayer and Kaye, "A choice for Peace?"

²⁸² ICG. "Kenya: Impact of the ICC Proceedings".

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ Namely five individuals, all Kikuyu, were associated with this clan and were responsible for all decision-making: Minister for Constitutional Affairs Martha Karua, Minister for Finance Amos

group that controlled decision-making and benefited from state patronage, seemed determined to stay in office for another 5 years.²⁸⁶ The ODM would thus have concluded that in order to succeed and remove Kibaki, it had no option but to internationalise the crisis in order to alter this asymmetry; therefore explaining Odinga's insistence on continuing to call for mass action unless negotiations were to be internationally mediated.

On the other hand, the economic sanctions and freezing of assets by international bodies such as the IMF and WB²⁸⁷, as well as the escalation of violence would have forced Kibaki's hand in accepting international intervention. Kenya's international image as the only stable country and hegemon in the region was at stake, and damaging that reputation was dangerous for both the economy and politics of the country.²⁸⁸ Additionally, with Odinga continuously raising the stakes by calling for mass action, the PNU may have perceived an impending catastrophic escalation of violence. With mounting pressure from the international community playing on the perception of the need for an immediate solution, Kibaki would have realised that the costs of continuing the struggle exceeded the benefits to be gained.²⁸⁹

4.2 Negotiators: NGOs

4.2.1 The NGO-isation of Kenya

The vested interests of the international community in Kenya cannot be underestimated. Many foreign investors, from multinational cooperation to the UN and WB have their regional headquarters based in Nairobi, together with a plethora of INGOs and NGOs that have created their niche in Nairobi. In fact, Nairobi is the UN's third largest headquarters with more than 1000 international

Kimunya, Minister for roads John Michuki, former minister of state defence Njenga Karume and Presidential adviser Nathaniel Kang'ethe.

²⁸⁶ ICG. "Kenya: Impact of the ICC Proceedings".

²⁸⁷ Ibid.

²⁸⁸ Zartman and Touval, "International Mediation."

²⁸⁹ Ibid.

staff and 3000 national staff.²⁹⁰ Kenya has also long been an ally of the US, and after 2001 became the US's partner in anti-terrorism in the region. Furthermore, Kenya is the platform for relief operations to Somalia and Sudan, a haven for refugees, and a logistic hub for humanitarian interventions. Thus, Kenya's geo-political and strategic position, political stability despite its authoritarianism and bouts of violence, and economic stability especially compared to the rest of the region have essentially made the country the international communities' home base. Any paralysis or crippling of the country's infrastructure would deprive bordering countries of access to basic commodities, reduce trade, and damage foreign investment and disrupt donor programmes.²⁹¹ The stability of Kenya is therefore paramount for the interests of all international actors involved.²⁹²

While external donors and institutions are largely regarded as being autonomous and politically independent agents, this section seeks to show that their relationship with the state and other local NGOs is more blurred than is commonly acknowledged.²⁹³ This makes these members of the international community, with their vested interests, political actors within Kenya. Because of the ability of donors and International Organisations (IO) in setting the global agenda and influencing international relations, they form an important lobby group, one that had many interests in keeping Kenya peaceful and stable.²⁹⁴

4.2.2 The Growth of NGOs

NGOs proliferated most rapidly in the 1990s, as donors turned their attention away from the state. This was born out of the assumption that NGOs

²⁹⁰ Hearn, "The 'NGO-isation' of Kenyan society."

²⁹¹ ICG. "Kenya: Impact of the ICC Proceedings".

²⁹² Patricia Kameri-Mbote, "The Operational Environment and Constraints for NGOs in Kenya: Strategies for Good Policy and Practice," *International Environmental Law Research Centre* (2000), accessed June 25, 2012, www.ielrc.org/content/w0002.pdf.

²⁹³ William F. Fisher, "Doing Good? The Politics and Antipolitics of NGO Practices," *Annual Review of Anthropology* 26 (1997): 439-464.

²⁹⁴ Julie Hearn, "Roundtable African NGOs: The New Compradors?" *Africa* 38, no. 6 (2007): 1095-1110.

were more efficient conduits for development than the state.²⁹⁵ This trend was associated with the global political transformation of the time, led by the Thatcher-Reagan driven emphasis on free markets, which saw the state as having a minimal role in development.²⁹⁶ This was enshrined in the New Policy Agenda of the 1990s, which had two main goals; economic development despite the state, and the *sine qua non* 'good governance' that would allow this to happen.²⁹⁷ NGOs were regarded as being transparent, autonomous, and participatory, as being intrinsically democratic and overall legitimate bodies. Governments were seen as diametrically opposed to NGOs, being partisan, interested in power and nefarious for development.²⁹⁸ The international community thus decreased funding to states in the developing world, and increased resources available to NGOs. Donors were seen as market based actors with no vested interests, and NGOs were equated with civil society and seen as 'the magic bullet' for Africa.²⁹⁹ At the same time, this relationship was premised on the respect for the sovereignty of the state. Whether this turned out to be empirically valid is beside the point of this thesis, however it serves to highlight both the economic and political interests and agenda of these external donors - those not supposed to have any 'vested interests' involved. Hearn goes as far as to insist that NGOs are key pieces in the Western foreign policy jigsaw, being the 'appendages of Northern agencies' and 'implementing agents' of the New Policy Agenda.³⁰⁰

Because of this ideological shift, both Western-based INGOs and local African NGOs soon caught up with the changed global order. In 1988, about 8,000 to

²⁹⁵ Michael Edwards and David Hulme, "Too Close For Comfort? The Impact of Official Aid on Nongovernmental Organizations," *Science* 24, no. 6 (1996): 961-973.

²⁹⁶ Ibid.

²⁹⁷ Gerard Clarke and Alan Thomas, "Nongovernmental organizations, governance and development governance" in *International Development governance*, eds. Ahmed Shafiqul Huque and Habib Zafarullah (London: Routledge, 2006): 415- 428

²⁹⁸ Hearn Julie, "The Ngo-isation of Kenyan Society: USAID & the restructuring of health care".

²⁹⁹ Igoe, Jim, and Tim Kelsall, *Between a Rock and a Hard Place: African NGOs, Donors, and the State* (Durham: Carolina Academic Press, 2005).

³⁰⁰ Hearn Julie, "The Ngo-isation of Kenyan Society: USAID & the restructuring of health care", 1106.

9,000 NGOs were recorded in the whole of Africa.³⁰¹ Today there is an estimate of over 350,000 organisations in the NGO sector, in Kenya alone.³⁰² The growth of NGOs however, was not matched throughout the continent, with less stable countries such as Mozambique with 150 registered NGOs, and Sierra Leone's 285 registered NGOs.³⁰³ In Kenya, in the decade following independence, the sector grew four-fold; 44% of new NGOs were foreign. During the period of 1988-1996 local NGOs grew by 131%, tripling the number of foreign NGOs. Then between 1996-2003, the NGO sector grew from 511 local and international registered NGOs to 2,511. By 2005, it was estimated that there were between 3000 and 3,500 NGOs operating in Kenya, with over 300,000 membership groups and grass-root organisations. Despite a recent shift away from NGOs with aid being channelled back to governments in the wake of anti-terrorist foreign policy, today \$125-230 million are channelled to the country through its NGOs annually, which is estimated at 12-25% of the total external resources allocated to Kenya.³⁰⁴ In 2007 the WB alone had agreed to assist Kenya with an estimated \$800 million package for projects through June 2008.³⁰⁵

As stated by Igoe, Jim and Kelsall, the relationship between the state, foreign aid and NGOs is a murky one.³⁰⁶ Officially, donors have very little influence, apart from providing funding and promoting good governance. The idea that donors are external revolves around the assertion that they do not interfere in domestic affairs. However, as the authors state *"The reality of the matter is starkly different, however, since donors interfere in the internal affairs of African countries all the time."*³⁰⁷ This coupled with the imbalance of power between the donor and the recipient, creates dependency on the donors. According to Pronk, giving aid

³⁰¹ Stephen N. Ndegwa, *The Two Faces of Civil Society: NGOs and Politics in Africa* (USA: Kumarian Press, 1996).

³⁰² Patrick Osodo and Simon Matsvai, "Partners or Contractors: the Relationship between official agencies and NGOs in Kenya and Zimbabwe," INTRAC Occasional Papers 16 (1997).

³⁰³ USAID, "2009 NGO Sustainability Index for Sub-Saharan Africa" (2010), accessed May 27, 2012, http://pdf.usaid.gov/pdf_docs/PNADW488.pdf.

³⁰⁴ Osodo and Matsvai, "Partners or Contractors."

³⁰⁵ World Bank, "Kenya Projects and Programs" (2012), accessed July 12, 2012, <http://www.worldbank.org/en/country/kenya>.

³⁰⁶ Igoe, Jim and Kelsall, "Between a Rock and a Hard Place"

³⁰⁷ *Ibid.*, 24.

creates an interest for donors to produce results that are in accordance with their beliefs and criteria for success.³⁰⁸

4.2.3 The NGO sector in the Kenyan Mediation

The size of the NGO sector and its respective donors has made it a formidable force in the international sphere, often setting the global agenda and influencing policymaking. This is also true for Kenya. Brown adds that election violence and extrajudicial killings were not a new phenomenon in Kenya, but that it had never drawn the attention of the international community, despite the authoritarianism and abuse of human rights of the Moi regime.³⁰⁹ He argues that the attraction this time was because the PEV mostly affected the Nairobi area, where the national and international media and donors were stationed, and that the PEV threatened the long-term stability of the country.³¹⁰ This would have been detrimental to all their efforts within Kenya but also to Kenya's status as the gateway to the rest of the region.

The weight that big NGOs carry often means that they feel like entitled legitimate actors that are part of the Kenyan political scene.³¹¹ However, it is important to note that many such NGOs are not always created or inspired by 'voluntarism' or philanthropic ideals. Instead, many are created as ways to make money, and are run like small businesses. Fowler compiled a list of 'pretender NGOs'. To name a couple that are prevalent in Africa: a BRINGO (briefcase NGO) is an NGO that is no more than a briefcase with a well-written proposal and does nothing. GRINGOs (Government run and initiated-NGOs) are bodies created by government with the aim of countering the actions of real NGOs.³¹² It is somewhat ironic that such NGOs are considered part of the Kenyan civil society, demanding accountability of the Kenyan government.

³⁰⁸ Jan P. Pronk, "Aid as a Catalyst: A Rejoinder," *Development and Change* 34, no. 3 (2003): 383-400.

³⁰⁹ Stephen Brown, "Donor responses to the 2008 Kenyan crisis: Finally getting it right?" *Journal of Contemporary African Studies* 27, no. 3 (July 2009): 389-406.

³¹⁰ Ibid.

³¹¹ Alan Fowler, *Striking a Balance: A Guide to Enhancing the Effectiveness of Non-Governmental Organisations in International Development* (London: Earthscan, 1997).

³¹² Ibid.

For example, in his study of the workings of peace NGOs in Kenya, Eaton notes many occasions where these organisations were corrupt, had members with strong political ambitions, needed to please disconnected donors, or existed for the sole purpose of making money.³¹³ The author shows, that at times, certain politicians who often head peace talks use the money they receive to fund their own electoral campaigns.³¹⁴ Eaton concludes that in many of the poorer regions of East Africa, peace work is a lucrative business, and one of the largest sources of patronage. Eaton further argues that while peace work has become increasingly lucrative, donor monitoring has decreased, leading to widespread corruption and mismanagement.³¹⁵ Such NGOs are however able to continue to function due to the perception that these bodies are legitimate. The irony is that in Kenya, it is these same non-elected and often illegitimate organisations that call for TJ, transparency and accountability.

Concerning the PEV, at first not knowing which side would win, donors remained neutral, not declaring whether they believed or not that the PNU and ECK had tampered with the elections.³¹⁶ Two notable exceptions were the US and the WB. The former initially congratulated Kibaki for his re-election, but two days later retracted the statement saying it was a mistake. The latter showed its inclination toward Kibaki's regime when its representative Colin Bruce wrote in a leaked memo that the UN endorsed the re-elections, and that he believed the ECK's results.³¹⁷ A statement by the UN denied ever taking such a position. As analyst Chris Blattman states, this was probably not so much an indication of a particular partisan position by the WB, but rather illustrated the interest of the WB in having the crisis resolved, and believing the incumbent would manage to stay in power.³¹⁸ However, as the opposition ODM continued to make the country

³¹³ Dave Eaton, "The Business of Peace: Raiding and Peace Work along the Kenya-Uganda Border (Part II)" *African Affairs* 107, no. 427 (2008): 243-259.

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Chris Blattman, "World Bank Blunder in Kenya" (2008), accessed May 28, 2012, <http://chrisblattman.com/2008/01/10/world-bank-blunder-in-kenya/>.

³¹⁷ Daily Nation, "Kenya World Bank Boss Under Fire" (January 13, 2008), accessed July 11, 2012, http://www.ethiomeia.com/access/world_bank_boss_under_fire.html.

³¹⁸ Blattman, "World Bank Blunder."

ungovernable, donors had to find a way to stabilise the state, and found the solution to lie in a power-sharing arrangement. This also demonstrates how donors' motivations lie in economic stability and immediate security, rather than in democratic processes and outcomes.

In early 2008, donors pressured the incumbent to recognise that the elections had been tampered with. This marked one of the first times that donors exercised so much pressure after contested elections.³¹⁹ The parties to the conflict dragged their feet in coming to an agreement, *“expecting the donors to cave-in as they had done in Kenya and elsewhere in the past”*.³²⁰ It is believed that the power-sharing arrangement would not have been possible without the coordinated and sustained pressure from the international community.

Therefore, donors and their recipients have vested interests in Kenya, either due to the necessity of perpetuating their own existence, or the need to appear successful in order to continue with their jobs and ensure the continuation of their day-to-day activities. The international community had as first priority the quick stabilisation of Kenya. The process used to reach that goal would thus be chosen by its ability to do the job quickly and successfully, rather than based on democratic values and norms or humanitarian and philanthropic principles. This need for quick action explains the immediate attention the international community paid to the PEV as opposed to the usual laxer and less timely reactions. We have further seen that it is important not to romanticise the role of donors in the Kenyan mediation, who do not always call for justice and peace for the right reasons. Nonetheless, these are actors, who by virtue of being called 'NGO', have become enmeshed as legitimate actors within Kenyan politics.

4.3 Negotiators: The African Union

³¹⁹ Brown, “Donor responses.”

³²⁰ *Ibid.*, 393.

Despite being notoriously inactive and incapable of resolving the continent's problems, the AU took the initiative and the lead in mediating the PEV. It must be noted that the decision to intervene, for an organisation like the AU is affected by and dependent on the interests of all of its member states, which in the AU's case, includes 54 states. In addition, this section will show how the AU is not only interested in peace making, but also in the promotion and existence of the AU itself. Many argue that the AU has been used by member states to assert their aspirations for leadership, protect their interests in regional conflict and to reinvigorate the relevance of the AU on the continent.³²¹

The AU, which was created in 2002, has as one of its purposes the promotion of cooperation and solidarity among its member states in order to address the problems facing the continent.³²² As such, one of its primary goals is the institutionalisation and operationalisation of its peace and security structures. In this regard, the Constitutive Act entrenched the right to intervene. It created the Peace and Security Council complemented by a Panel of the Wise,³²³ and the intention to create the African Standard Force.³²⁴ While the AU is now legally able to intervene in the internal affairs of its member states in the name of peace and security, one of its most widely recognised challenges is the implementation and operationalisation of these norms and institutions.³²⁵

With its recent failures, such as the on-going Somalia and South Sudan crises, the AU has yet to establish itself as the peacemaker of the continent. African unity between states barely exists, and the political will to address internal issues of authoritarianism, misappropriation of state-resources and internal conflict is mostly inexistent at the organisational level.³²⁶ The majority of African leaders have held onto the norm of non-intervention in order to continue with 'business

³²¹ Zartman and Touval, "International Mediation."

³²² Møller Bjørn, "The African Union as Security Actor: African Solutions to African Problems?" *Danish Institute for International Studies*, no.57 (2009).

³²³ To be formed by experts in mediation and peace-building to inform and advice the AU.

³²⁴ In 2003, the panel of the wise was expected to be established by 2010.

³²⁵ Bjørn, "The African Union as Security Actor: African Solutions to African Problems?"

³²⁶ Juma, Monica Kathina. "African mediation of the Kenyan post-2007 election crisis" *Journal of Contemporary African Studies* 27, no.3 (2009): 407-430.

as usual'.³²⁷ In light of these glaring difficulties the AU still needs to build its own image and reputation on the continent as well as internationally if it wants to keep the Western world away and live up to the ideals of Pan-Africanism.³²⁸ The Kenyan PEV presented an opportunity for the AU to do just that.

No African states, much like the rest of the international community, could deny the importance of a stable Kenya.³²⁹ The economy of the East African Community (EAC)³³⁰ depends on Kenya. Moreover, the political security of the entire Horn³³¹ and the viability of the regional organisation Intergovernmental Authority on Development (IGAD)³³² largely depend on Kenya as a state, which has played a major role in stabilising the conflict ridden region.³³³ As stated by the then chair of the AU Commission, Alfa Konare *"Kenya is a country that was a hope for the continent [...] if Kenya burns there will be nothing for tomorrow [...]. We cannot sit with our hands folded"*.³³⁴

This was therefore one of the rare times where the interests of the members of the AU coincided with one of its 'raison d'être': the making of peace. One must recognise however, that the fulfilment of these motivations had largely been aided by on the one hand, the insatiable pressure of the rest of the international community. On the other, the eventual acceptance of the mediation efforts by the conflicting parties made the AU's job easier, especially with Kibaki's acceptance of mediation, but only with an 'African solution'. Despite the fact that this was most likely due to his belief that such an intervention would leave him better off than one by the UN or Western states, it still legitimised the AU's mediation.

³²⁷ Ibid.

³²⁸ Murithi, "Situation Report."

³²⁹ Khadiagala Gilbert, "Regionalism and conflict resolution: Lessons from the Kenyan crisis". *Journal of Contemporary African Studies* 27, no.3 (2009).

³³⁰ Uganda, Tanzania, Burundi, Rwanda and Kenya

³³¹ Somalia, Ethiopia, Eritrea and Djibouti

³³² Djibouti, Eritrea, Ethiopia, Somalia, South Sudan, Sudan, Uganda and Kenya

³³³ Khadiagala, "Regionalism and conflict resolution: Lessons from the Kenyan crisis".

³³⁴ Juma, "African mediation of the Kenyan post-2007 election crisis", 408.

4.4 Conclusion

This chapter has shown that the internationalisation of the mediation of Kenya can be explained by three main factors. Firstly, the need for a third party mediation was recognised by Odinga's need to shift the balance of power if he were to achieve an acceptable outcome, and by Kibaki eventually recognising the excessive costs of escalated violence. Secondly, the immediate attention of the international community was driven by its many vested interests in Kenya. The geo-strategic position of the country had made it the home of many IOs and NGOs, and its stability was paramount for the continuation of their activities. Kenya further represented the perfect opportunity for peace groups and the humanitarian community to 'show-off', and to sell their ideals. Lastly, the AU's surprising unity and willingness to intervene in the domestic affairs of one of its member states, can be explained by the convergence of two needs. On the one hand, the Kenyan case provided an opportunity for the organisation to remain legitimate and be recognised as valuable both on the continent and internationally. On the other, Kenya's geo-strategic location and its position as the economic powerhouse in one of the poorest regions of the world meant that its stability was in the interest of most member states of the AU. This resulted in a situation where all actors would benefit in the immediate resolution of the conflict, whose democratic process would have mattered little.

Chapter 5 Kenya's Way

This chapter will explore how Kenya ended up with the KNDR and its promises of accountability by looking at the mediation process and the features that allowed retributive justice to be incorporated. Three topics will be discussed: mediation strategies, wording and interpretation of the KNDR, and the legacies of the past. These will help answer the seemingly paradoxical choice that the Kenyan governing elite made by setting up CIPEV.

It is important to note that Kenya is in two ways not a typical TJ case.³³⁵ Firstly, the TJ process was chosen during the mediation, when the two opposing parties were not only attempting to put an end to violence, but also trying to find ways to govern as one unit. Secondly, Kenya did not experience war or a complete break from the past. No regime was taken over and no long running conflict was ended. Because of this peculiar situation, most of the actors involved before, and during the election violence, were engaged in the negotiations and are still present in the government today.³³⁶

However, Kenya had been emerging from 20 years of repression under KANU. Whilst as we have seen it can be argued that this lessened under Kibaki, full-fledged competitive democracy had not been achieved and Kenya was a restricted democracy at best. For patrimonialism to be so widespread, corruption was a daily affair, with most of the population in one way or another complicit. As with Eastern Europe under communism, although state violence was significantly less serious in Kenya, the population participated in the day-to-day corruption of their government. Additionally, the transition was also instigated by electoral violence. As opposed to a civil war where the majority of the population is involved for a protracted time, the PEV lasted two months with

³³⁵ Asaala, "Exploring transitional justice."

³³⁶ Klopp, "Kenya's Unfinished Agendas."

clear acts of murder and extrajudicial killings, and with clearly identifiable perpetrators.

Thus, Kenya is a state that since 2002 has been emerging from a regime of criminality; but with the election violence, perpetrators and instigators of that violence can clearly be identified. As we have seen, the balance of power still weighs toward a strong former regime that would do anything to avoid reforms and prosecutions. It is therefore unlikely that Kenya would have willingly '*jumped on the justice wagon*' and more likely, that it would try to hijack it. However, on the surface, Kenya would seem to be an exception to the rule, as those who had called for mass-action and planned the PEV, were also the same individuals who called for a TJ process with an accountability component. Because of this apparent paradox, Kenya's situation begs the question as to why the GNU would have agreed to Annan's four point agenda.

5.1 Mediation Strategies

5.1.1 A Paradox

The mediation process began on the 22nd of January three weeks after the PEV erupted. It was to last forty-one days. First, an important factor in establishing a TJ process as part of this mediation was the individual who led it, and his expertise in designing mediation strategies. Annan stands out as mediator due to his strong commitment to human rights ideals, such as his role in the formulation of the Responsibility to Protect, explaining why TJ tools were included in his mediation. The Kenyan case is a good example of the growing international interest in including TJ to mediation, which, as will be seen, can be a form of intervention. It also reflects the current understanding in TJ scholarship that a combination of mechanisms must be used, both restorative and retributive.

In his strategy to include TJ mechanisms in the mediation process, Annan separated the short-term issues from the long-term issues. Because the main

challenges for the disputing parties were the short-term issues of ending the violence and of power-sharing, meant that the longer-term issues did not receive as much attention, as they seemed less important at the time.³³⁷ Additionally, as Elster shows, an even-handed treatment of both parties is essential when dealing with power-sharing arrangements³³⁸. Had Annan allowed for either party to emerge victorious, would have risked a return to violence. Allowing for the prospect of TJ, which would investigate the violence in all communities, power sharing was made a political possibility. Furthermore, by ensuring that there would be only one mediation team, and keeping the process inclusive and transparent, Annan created a double-edged sword. The pressure from below and above reinforced the urgent need to find a peaceful solution, allowing Annan to 'slip in' principles of TJ.³³⁹

5.1.2 Mediation: Wording

An important feature that allowed accountability measures to be included was the vague wording of the KNDR. While the agreement underscored a consensus to 'deal' with the injustices of the past, there was little consensus on how this would be achieved. The agreement provided for broad reforms and measures, but with no agreement on which TJ mechanisms would be chosen, how these would be deployed, and how they would fit within the constitutional and institutional reforms proposed.³⁴⁰ Concerning measures for accountability, Agenda 4 took two, almost competing resolutions. On the one hand, Kenya was to establish a TJRC that would make recommendations for accountability, as well as prescribe the granting of unconditional amnesty for violations of human rights, except international crimes, for the past 40 years. However, CIPEV was also to make recommendations for measures to bring individuals to accountability. Musila argues that the TJRC's mandate might obfuscate possibilities for legal

³³⁷ Snyder, Jack and Vinjamuri. "Trials and Errors." *Human Rights* 28, no. 3 (2004): 5-44.

³³⁸ Elster, "Closing the Books".

³³⁹ Ibid.

³⁴⁰ TJRC. "KNDR: Commission of Inquiry on Post-Election Violence". (2008), accessed June 19, 2012, <http://ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf>.

accountability, as its role in the larger context of the TJ process was unclear, with little prescriptions on how it would relate to the question of accountability.³⁴¹

A third aspect to consider is the parties' interpretation of this agreement. In view of past efforts at accountability and Kenya's numerous failed commissions, one could see how the governing elite may have expected the same outcome from CIPEV. In addition, both parties of the new coalition would have wanted to differentiate themselves from the previous regime, in order to gain credibility and legitimacy. They would have made the calculation that a degree of accountability would help achieve this goal. The PNU's support for investigations would be its way to confirm that the PEV had been caused by the ODM's call for mass action. Members of government may have thought it possible to manipulate the commission to serve their political interests, or destroy the commission altogether with enough political interference. In this light, it is likely that the vagueness of the accountability process was deliberate. At the very least, it helped convince the parties that the accountability process would be easily influenced. Holding control over the judiciary, PNU would have taken the risk of including accountability, if convinced of the partiality and loyalty of a judicial system that already worked in its favour.³⁴² On the other hand, the ODM would want to posit itself as 'reformers', those working toward democracy and justice. Samwel Mohochi writes that the decision to integrate a justice agenda in the KNDR can be seen as belonging to the 'ping pong blame game'.³⁴³ Mohochi warned that this would continue in the GNU, and that TJ tools could be manipulated to serve this game.³⁴⁴

³⁴¹ Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions."

³⁴² Ibid.

³⁴³ Samwel Mohochi, "Prosecuting perpetrators of injustice is the best method of dealing with the past atrocities – The case of Kenya," *National Coalition of Human Rights Defenders* (2011), accessed June 19, 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1847470.

³⁴⁴ Ibid.

5.2 Legacies of the Past

Kasfir argues that in order to understand how the compromise was reached, and the subsequent difficulties of the power sharing arrangement, one must take into account the legacies left by the former regime and how they helped tame the fears of retribution for the PEV.³⁴⁵ The author argues that clientelist calculations shaped the strategy throughout the negotiations, and explains why the outcome was agreeable for both parties. Concurringly, Klopp states that because the accord entrenched the key culprits of the PEV into government, the agreement worked by using the lure of joint access to the state resources.³⁴⁶ The arrangement made for the power sharing was to split ministerial roles equally between both parties. This resulted in the largest and most incoherent cabinet Kenya had ever had, as posts were created in order to reward key players of both parties.³⁴⁷ The inclusion of the former regime in the new power sharing government, would have further entrenched their belief in their own safety from prosecutions, as, in Kenya political power is equated with impunity.

Therefore, we have seen that the inclusion of TJ in the KNDR was not a sign of the unequivocal acceptance of justice. It was however the result of a number of other factors. First, it was helped by the intervention and mediation strategy led by Annan, one of the most well known proponents of human rights. Secondly, the ambiguity and vagueness of how the process would unfold allowed the political elite to believe that the process could be manipulated to serve their interests. In view of Kenya's history with commissions of enquiries, this is not too hard to believe. This time, it would be motivated by the need to put on a show of wanting to end impunity in order to achieve legitimacy by blaming the other or by posing as reformers. Lastly, the structure of the GNU kept much of the system of governance intact, allowing and encouraging patrimonialism as means of gaining

³⁴⁵ Kasfir, "Neo-Patrimonialism, Power Sharing and Reform."

³⁴⁶ Klopp, "Kenya's Unfinished Agendas."

³⁴⁷ Ibid. ; Kasfir, "Neo-Patrimonialism, Power Sharing and Reform."

loyalty: a quality that would be much needed in a government made up of as many foes as friends.

5.3 Conclusion

One cannot separate the TJ process from its political and economic context. In Kenya, this context brings to light much of the politicking that went on behind closed doors. The mediation took place within deeply entrenched politics of clientelism and impunity, with the balance of power weighted toward those supporting that system. The imperative for the political elite to safeguard their position of power deeply affected the way they perceived the process of accountability, as well as their reactions to it. We have seen that, the paradox that is Kenya's pursuit of accountability can be explained by a number of political factors that do not consider the moral need for ending impunity.

For the international community and Annan, accountability would allow the formation of a politically acceptable power sharing government that would build its credibility domestically and abroad.³⁴⁸ It also served to show that TJ is a process that works, and is a worthwhile enterprise.

For the incoming party (ODM), it provided the opportunity to set itself apart from the previous regime, as well as from the PNU, by presenting itself as the just and unspoilt party in the GNU. It also enabled the old regime (PNU) to shift some of the blame onto the ODM for participating in abuses of human rights, and to justify its own actions in the face of the assault led by ODM. Furthermore, it provided the opportunity to distinguish itself from the mistakes of the past regimes. As explained in chapter three, this was further aided by the fluid party system, as by switching parties the incumbent can "*conceal individual responsibility behind the collective reputation of the new party*".³⁴⁹

³⁴⁸ This was an important aspect for the panel, whose international reputation depended on the success of the mission.

³⁴⁹ Zielinski et al., "Electoral Control," 367.

Secondly, the accountability process was created with the perception that it was a vague and distant idea, which would be unlikely to come to fruition. One can see how the vagueness and lack of a detailed plan of how these processes would work together and establish accountability would have led the parties to believe they would find loopholes in the system. Hence, as we have seen, CIPEV was possibly created in the view that it would be easily destroyed or manipulated.

Chapter 6 The International Criminal Court

In this final chapter, we will take a closer look at CIPEV, its recommendations and the reactions of members of government to it. This will help to explain how three of Kenya's political elite and a radio broadcaster are now awaiting trial at the ICC. We will first take a brief look at the timeline of events following the publishing of CIPEV's report. This will show the back and forth politicking that took place away from the public's eye, and will highlight that the motives of many individuals for being for or against the Special Tribunal, had little to do with ending impunity. However, despite the recognition of politically driven decision making, this thesis rejects the hypothesis that either of the parties were able to use the Commission to fix political opponents.

The second section will provide an analysis of the motives and reasons behind these political positions, and indicate who stood to benefit from certain outcomes and why. It will be argued that when CIPEV released its recommendations, the GNU had not expected such strong measures for accountability. Whilst unforeseen and politically detrimental to the GNU, the special tribunal recommendation and the potential involvement of the ICC also provided for new political opportunities. It will be seen how the justice process was marred by attempts from both parties to shape it to favour their credentials for the 2013 elections, as well as to be protected from retribution.

6.1 Failure to Establish the Special Tribunal

As seen in the introduction of this thesis, in October 2008 CIPEV's Report established that the GNU was to set up a Special Tribunal composed of both local and international experts to try those who bore greatest responsibility for the PEV. In order to ensure compliance, the report was accompanied by a sunset clause which stated that if the Kenyan government failed to establish a Special Tribunal by the 30th September 2009, a list of names given to Annan by CIPEV for

confidential keeping would be sent to the Prosecutor of the ICC.³⁵⁰ On the 16th of December, the GNU signed an agreement to fully implement the Waki Report. This section will highlight the numerous attempts of the GNU at establishing the ST, their failures, and the actions that led to Ocampo's decision to exercise his *proprio motu* powers.

As CIPEV handed in the report to the government, it was immediately published as stipulated by the KNDR. The commission called for the parties to recognise the report and sign an agreement stating that its recommendations would be implemented.³⁵¹ The Waki report was received by MPs with contempt, especially by hardliners from both the ODM and PNU.³⁵² There was much controversy surrounding the report, and many called foul play. CIPEV was accused of having gone beyond its mandate, of being speculative and relying too heavily on the NGO the Kenyan Human Rights Commission.

Despite local accusations, most have recognised CIPEV as having been transparent and unbiased. While there have been rumours of fixing, as of yet these remain unfounded. As stipulated by its mandate, CIPEV's chair, Judge Philip Waki was chosen by the Panel of Eminent African Personalities, in consultation with PNU and ODM.³⁵³ It would seem that the punitive recommendations of CIPEV came as a surprise to both Kenya and the international community. For instance, before the reports' publication, the US Ambassador had warned his government not to be overly optimistic of CIPEV, as he feared Kenya had 'caught commission fever'.³⁵⁴ Additionally, Miguna Miguna states, *"It is crystal clear that the ODM was not formally involved in the ICC proceedings at all, nor did any "outside forces" intervene on the party's behalf. Had that happened, no senior ODM member would or could have been investigated and*

³⁵⁰ CIPEV, "Final Report."

³⁵¹ Okuta, "National Legislation."

³⁵² Brown and Sriram, "The big fish won't fry themselves."

³⁵³ CIPEV, "Final Report."

³⁵⁴ Michael Ranneberger, former US Ambassador to Kenya, "Update On Commission Of Inquiry Into Post-election Violence And Commission For Truth, Justice, And Reconciliation" (May 7, 2008) *Wikileaks*, 08NAIROBI1170, accessed July 15, 2012, <http://www.cablegatesearch.net/cable.php?id=08NAIROBI1170&q=commission%20election%20post%20violence>.

*indicted. In addition, those alleging “political interference” haven’t credibly substantiated their claims.”*³⁵⁵ One can assume that the recommendation of setting up a special tribunal with its accompanying sunset clause was unforeseen by the parties.

Despite the controversy that CIPEV caused, the GNU still decided to sign the agreement thus committing itself to a transparent accountability process. What may have had an enormous influence on Kibaki and Odinga to sign the agreement was international pressure. There was much diplomatic pressure from the US.³⁵⁶ However, perhaps the more persistent actor was the EU. The latter’s Head of Delegation, Eric Van der Linden and French Ambassador, Elisabeth Barbier, asked the GNU to immediately accept both the Kriegler Commission and CIPEV recommendations. The EU, which is also the largest donor bloc for Kenya, stated that if Kenya refused to accept the implementation of these reports, the EU would cease giving Kenya grants.³⁵⁷ Acceptance of the commissions was a non-negotiable basic condition that Kenya had to meet, if it wished to continue receiving aid money. Barbier stated that if Kenya accepted the commissions, the EU would fund development projects with approximately 400 million euro for the next five years.³⁵⁸ In light of the economic condition of Kenya, which in 2008 had a budget deficit of 5.3 billion shillings, and whose economy was expected to plummet, it may not be as surprising that the GNU felt compelled to sign the agreement.³⁵⁹ The GNU officially stated that it was committed to follow through with accountability measures, and cited the need to end impunity.

³⁵⁵ Miguna Miguna, *Peeling back the mask* (London: Gilgamesh Africa Publishing, 2012), 393-407.

³⁵⁶ Michael Ranneberger, former US Ambassador to Kenya, “EU Threatens to Withhold Aid” (November 19, 2008), *Wikileaks*, 08NAIROBI2614, accessed July 15, 2012, <http://www.cablegatesearch.net/cable.php?id=08NAIROBI2614&q=waki>.

³⁵⁷ *Ibid.*

³⁵⁸ Standard Digital, “EU: No Waki, no Donor Money” (2008), accessed June 21, 2012, http://www.standardmedia.co.ke/?articleID=1143999572&story_title=eu-no-waki-no-donor-money&pageNo=2.

³⁵⁹ Daily Nation, “EU threatens to withhold aid” (2008), accessed June 21, 2012, <http://www.nation.co.ke/News/-/1056/492082/-/tm2s2e/-/index.html>

In order to establish the ST, Kenya needed to implement legislation that would allow the country to prosecute for international crimes. This required two pieces of legislation: a bill entitled ‘The Special Tribunal for Kenya Bill’ and a Constitutional Amendment Bill to ensure that the Special Tribunal would not breach the Kenyan Constitution.³⁶⁰ When the Constitutional amendment bill was introduced on 12th February 2009, it failed to garner the required two-thirds majority of votes. Both President Kibaki and Prime Minister Odinga were pressurising the government to sign the bill. They promised Annan they would reintroduce an improved draft, and Annan granted two successive extensions.³⁶¹

Failing that, on the 3rd July 2009, the Government sent a delegation to the ICC to discuss the Kenyan situation with the ICC Prosecutor. It was agreed that if by September Kenya had not committed itself to establishing the ST, Kenya should refer itself to the ICC. In the meantime, CIPEV and Annan sent boxes of evidence and the secret envelope to Ocampo. On 31st July 2009, the government announced that the suspects would be dealt with through the local courts and the TJRC. Prime Minister Odinga stated that the *“Defeat of the government bill is only a temporary setback. The government is still determined to set up a local tribunal. Those pushing for The Hague option are merely delaying justice”*.³⁶²

The TJRC however refused to do so as it would require the alteration of its mandate. Ocampo visited Kenya and announced that since there was no proof that the country had undertaken serious measures to try suspects, he would ask the ICC to start investigating.³⁶³ Later that month there was a last attempt at having the ST established, as MP Gitobu Imanyara introduced another revised bill. The government officially supported this bill, but it was never debated in Parliament. Thus, on 26th November, Ocampo requested authorisation to open an investigation into the alleged crimes and their perpetrators for the PEV since Kenya had not shown a commitment to judicial proceedings, and refused to refer

³⁶⁰ Okuta, “National Legislation.”

³⁶¹ Ibid.

³⁶² Kenya Stockholm, “Kenya; who is fixing the Ocampo six.”

³⁶³ Okuta, “National Legislation.”

itself to the ICC.³⁶⁴ On 31st March 2010, Pre-Trial Chamber of the ICC declared that Ocampo should be allowed to investigate into the Kenyan situation. The ICC released the names of six suspects on the 15th of December 2010.

A few days after the release of the names of the suspects, Parliament passed a (non-binding) motion to withdraw Kenya from the ICC. The motion was however dropped, as a withdrawal from the ICC would not protect the PEV, and would portray Kenya as a pariah state in the international community.³⁶⁵ While the AU did not endorse this proposal to defect from the Rome Statute, it did attempt to help Kenya pressure the UN and Security Council to ask the ICC for an extension in order to establish local courts. However, with the UK and the US stating that they would not grant any more extensions, that avenue was exhausted.³⁶⁶ Later, on 31st March 2011, Kenya filed an application challenging the admissibility of the cases, on the basis that the ICC did not have jurisdiction for the PEV-cases. The Pre-Trial Chamber II and later the Appeals Chamber however rejected the admissibility challenge, stating that no credible information had been provided to show that Kenya was investigating the ICC suspects.³⁶⁷

In the end, four years after the PEV, Kenya was facing an accountability process, involving the highest criminal court in the world. It has been shown from the reactions of various members of the government as well as that of the international community that the parties did not expect the harsh recommendations of CIPEV. Many of the political elite within Kenya attempted to convince the GNU leaders that CIPEV had gone beyond its mandate and that its recommendations should not be tabled. While it would have been easier to completely reject CIPEV, Odinga and Kibaki also had to handle domestic and international pressure. The EU threat of removing all aid to Kenya might very well have been a decisive factor. Once the initial agreement had been signed, there were many attempts at stopping or at the very least delaying the justice process.

³⁶⁴ Ibid.

³⁶⁵ Brown and Sriram, "The big fish won't fry themselves."

³⁶⁶ Okuta, "National Legislation."

³⁶⁷ ICC, "Summary of decision in the two Kenya cases."

6.2 Actors and their Interests

Since there is an apparent dichotomy between what the Kenyan leaders publicly stated and what their actual efforts in establishing the Special Tribunal were, it is important to look at who the actors in favour or against the ST and/or the ICC are, and for what reasons. A number of hypotheses can be derived from this situation. First, the members of the GNU that delayed the process genuinely did not want to set up the Special Tribunal, as they believed proper justice could only be done at The Hague. Second, these actors believed that Kenya would be able to thwart the ICC, and thus voting against the ST would help the country avoid any form of accountability. Third, some of these actors preferred the ICC process, not to end impunity but rather to get rid of certain members of government. This section will look at which of these hypotheses is most likely, for whom and for what reasons.

As government signed the agreement that accepted CIPEVs' recommendations, many MPs officially stated that they were for the ST, but later voted against the bill. Many stated that their main reason for voting against it was that they did not believe in the capacity of Kenya to try its own governing elite due to a biased judiciary. For instance, William Ruto had strongly opposed any attempts at having the ST established; *"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"*.³⁶⁸ Some have noted the irony of the situation, as Ruto later turned out to be on Ocampo's list. Since then, he has been one of the most outspoken MPs against the ICC. He denounced the ICC as having been politicised by Odinga, arguing that Ocampo was following the Prime Minister's requests.³⁶⁹ Many other Members of Parliament, including Lewis Ngunyai, Isaac Ruto and Ekwe Ethuro, had also initially showed their preference for the ICC. However, when the names of the six suspects were released, these

³⁶⁸ Daily Nation, "Ruto: Why I prefer The Hague Route" (February 21, 2009), accessed June 17, 2012, <http://www.nation.co.ke/News/-/1056/533390/-/u2h24m/-/index.html>.

³⁶⁹ Ibid.

MPs changed their minds.³⁷⁰ This divided the ODM as Ruto and his allies defected and made an alliance with Uhuru Kenyatta, to oppose Odinga.

Furthermore, it has been noted that those indicted by the ICC have excluded many of the bigger names of Kenya's political elite, such as the President and Prime Minister. However, the panic caused amongst all involved shows how even seeing the 'smaller fish' on the way to court, is cause for worry for the rest, as the ones standing trial may well give away the names of many others. This also explains the rallying of men behind the indicted.

It is interesting to note that a Wikileaks cable dated 4th November 2008, written by US ambassador Michael Ranneberger, already speculates; "*Ruto is almost certainly on the Waki Commission list, and considered by many Kenyans to be the instigator of PEV*".³⁷¹ According to the cable, Ruto had threatened a return to violence if either the ICC or the Special Tribunal were invoked in parliament.³⁷² Another cable also shows that both the US and some in Kenya also suspected Uhuru Kenyatta to be on the Waki list.³⁷³ The latter was by then already paving his way to the 2013 Presidency. Accordingly, Kenyatta's appointment as Minister of Finance by Kibaki was widely seen as an endorsement of Kenyatta as his successor. Kenyatta had submitted a new enlarged budget to Parliament, designated for the Constituency Development Fund (CDF). The CDF, if used transparently could have been used to kick-start the economy, but was feared by the US Ambassador to have been mobilised to increase support with parliamentarians and ensure that a ST would not be voted in.³⁷⁴

The US Ambassador noted that those opposed to the ST understood that if the ICC would get involved, it was likely to take years to investigate. The delay would thus favour the suspects, as a ST would likely be much faster and thus put a quick

³⁷⁰ Nic Cheeseman, "The internal dynamics of power-sharing in Africa," *Democratization* 18, no. 2 (2011): 336-365.

³⁷¹ Michael Ranneberger, former US Ambassador to Kenya, "Kenya: Debate Rages Over Special Tribunal" (August 17, 2009), *Wikileaks*, 09NAIROBI1725, accessed 15 July, 2012, <http://www.cablegatesearch.net/cable.php?id=09NAIROBI1725&q=icc>.

³⁷² *Ibid.*

³⁷³ Kenya Stockholm, "Kenya; who is fixing the Ocampo six."

³⁷⁴ *Ibid.*

end to their political careers.³⁷⁵ Brown and Sriram also support this analysis, as they state that the “*shadow of the ICC was too small*”. They further argue that the ‘big fish’ in Kenya would never willingly give themselves up to prosecutions.³⁷⁶ As seen previously, protecting their party members from the ICC is as important as protecting themselves.

On the other hand, many have noted that Odinga, who had originally appeared to be opposed to the ICC trials, later became a strong supporter of the ICC once the names of the suspects had been made public. For instance, ODM Secretary General Anyang Nyong’o who is an ally of Odinga’s, sent a letter to the UN Security Council on behalf of ODM, urging the Security Council not to allow for a deferral of the ICC cases as had been requested by the PNU side of the government.³⁷⁷ Odinga stands much to benefit with the ICC’s involvement, as it removes two of his major opponents for the 2013 elections. As a result, Ruto defected from the ODM in February of 2009, making an alliance with Uhuru, and joining other PNU hardliners in an attempt to side line Odinga and his allies.³⁷⁸ Many in Kenya see this as proof that Odinga has had a hand to play in the involvement of the ICC, and accuse Odinga of fixing the indictment of Ruto and Kenyatta. This seems to be partly supported by a Wikileaks cable, which notes that Kibaki and Odinga both had met with other parliamentarians and were present for the vote on the draft bill to establish the ST, this may have been a ‘window dressing strategy’ as there had been no strong behind-the-scene push.³⁷⁹ Additionally, Miguna states that the Prime Minister “*consistently told me how much he hoped and prayed that Uhuru Kenyatta and William Ruto were confirmed, tried and convicted at The Hague. [...]*”³⁸⁰ The author concludes that

³⁷⁵ Michael Ranneberger, former US Ambassador to Kenya, “U.S. Policy, The Reform Agenda, And Impact Of President Obama's Election” (February 26, 2009), *Wikileaks*, 09NAIROBI407, accessed 15 July, 2012, <http://www.cablegatesearch.net/cable.php?id=09NAIROBI407&q=icc>.

³⁷⁶ Brown and Sriram, “The big fish won’t fry themselves.”, 3.

³⁷⁷ The Star, “Nyong’o reaffirms ODM objective to ICC deferral” (March 28, 2011), accessed June 28, 2012, <http://www.the-star.co.ke/news/article-68311/nyongo-reaffirms-odm-objective-icc-deferral>.

³⁷⁸ Cheeseman, “The internal dynamics.”

³⁷⁹ The Star, “Karua, Raila and Mudavadi to benefit from ICC trials” (March 11, 2011), accessed June 28, 2012, <http://www.the-star.co.ke/news/article-69856/raila-karua-and-mudavadi-benefit-icc-trials-wikileaks>.

³⁸⁰ Miguna, *Peeling back the mask*, 393.

Odinga publicly pretended to support the ST but in fact supported the Hague option, not for reasons of justice, but in order to remove his political rivals.³⁸¹

What is however more likely and what the Wikileaks cables seem to support, is that once the report and the envelope had been written, the names of those on the list, were not so secret after all.³⁸² From that point forward, it would have been easy for Odinga to manipulate the justice process and use the ICC as a tool to get rid of his political rivals. With so many in parliament being against the ST, ironically from the help of Ruto and Kenyatta themselves, Odinga was able to appear to be pushing for the ST. Odinga would also have seen, based on his own dealings with Annan and members of the international community, that they were unlikely to let go of the Kenya case. Furthermore, it would have looked bad for the ICC not to go through with investigations, as it would have further discredited the Court, already in danger of losing legitimacy beyond European borders. Thus, Odinga might have calculated that if he appeared to be in favour of the ST, he would gain legitimacy, while knowing that the likelihood of the involvement of the ICC was high.³⁸³

Therefore, Odinga used the need to reform the Kenyan governing system as a way to hide his personal interests. While he did not make the choice of mechanism for the accountability process, it provided him with the opportunity to side line his political opponents. While Odinga has since the end of the one party state been the prominent figure calling for reforms, it is also important to recognise that he had worked under KANU and is 'an old school politician' widely recognised in Kenya as being particularly cunning. Thus, while possibly wanting some reforms and political accountability, it is unlikely that he would have been so encouraging of the process, would he not have benefited from it.³⁸⁴ On the

³⁸¹ Ibid.

³⁸² Cheeseman, "The internal dynamics."

³⁸³ Ibid.

³⁸⁴ Michael Ranneberger, former US Ambassador to Kenya, "Post-election Violence Commission Report: Politicians Divided Over Implementation" (November 4, 2008), *Wikileaks*, 08NAIROBI2551, accessed July 15, 2012, <http://www.cablegatesearch.net/cable.php?id=08NAIROBI2551&q=commission%20election%20post%20violence>.

other hand, politicians such as Ruto, who had initially proclaimed their commitment to justice, which in turn could only be achieved through The Hague, had no interest in seeing the end of impunity.

The high likelihood for some of them to appear on the Secret List ironically made them believe that they would be safe if the Special Tribunal was not set up. While publicly supporting the ICC, these actors would have applied pressure on the GNU to thwart its involvement in Kenya. Moreover, the belief that any ICC involvement would take years at best would have convinced them of their safety. This largely reflects the short-term view many Kenyan politicians have concerning politics, seeking immediate power as a means to escape accountability.

This takes us to the role of the international community. Odinga's election in 2013, with him belonging to the Luo ethnic group, was increasingly seen not only as likely, but also as preferable.³⁸⁵ His election would potentially take away the problems of Kikuyu domination, which was increasingly seen in Kenya's business elite and in the US as a "*recipe for serious instability*", which held the potential for a more dangerous breakdown than in 2007.³⁸⁶ The election of Odinga with a clear win would likely appease ethical tensions in the country.³⁸⁷ This could further explain the international community's support of the ICC cases in Kenya, and the Security Council's refusal to allow for a deferral of the cases, as requested by the Kenyan government. It is un-doubtful that in their view a complete democratic transition in Kenya first demanded accountability. However, a second order motivation may also have been the belief that Odinga would be the best man to lead the country, as he would at least bring stability. This explains the international community's continued support for the ICC and their refusal to allow for a deferral of the cases. The quicker the ICC cases would be dealt with, the surer Odinga's win against Kenyatta and Uhuru.

³⁸⁵ The Economist, "The odd couple: Two old political enemies form a surprising alliance" (April 14, 2011), accessed September 2, 2012, <http://www.economist.com/node/18561197>.

³⁸⁶ Ranneberger, "Kenya: Debate Rages Over Special Tribunal."

³⁸⁷ The Economist, "The odd couple."

6.3 Conclusion

This chapter has explored four hypotheses:

- Hypothesis 1: CIPEV, with the ICC clause, was created to fix political opponents.
- Hypothesis 2: the politicians standing against the establishment of the ST genuinely believed that only the ICC could deliver justice.
- Hypothesis 3: Many did not believe the ICC would get involved, thus stopping the ST from being set up, would ensure that no accountability process would be undertaken.
- Hypothesis 4: Some actors preferred the ICC process, as it would remove certain political opponents.

The justice process of Kenya has been far from straightforward. From an analysis of the reactions of certain actors and their interests, one may conclude that although it may have appeared as if the government genuinely wanted to end impunity, this hypothesis has been rejected. The first hypothesis has also been rejected, as it would have required access and influence over CIPEV. However, impunity was not a major priority at the time for anyone. For those who, in reality stood in the anti-reformist camp, it was purely a desperate attempt at avoiding the process. For others it provided a perfect opportunity to ensure their political ambitions. The justice process was therefore used and manipulated to serve narrow political goals, marking a continuation of the system of governance that has been described in this thesis.

For the international community, Kenya has provided the perfect opportunity to 'market' its ideals of justice, asserting Africa's need to end its pervasive impunity. The hypocrisy of this notion has been noted herewith, especially with regards to the ICC, which ignores the international crimes of the states that support it. Furthermore, the ICC has not only been used as a tool to fix political opponents in Kenya, but has also become the key issue around which political coalitions and partnerships have been formed. This is to the detriment of a true democratic process whereby parties' form based on similar ideologies and policies, rather

than on the need to garner the votes of certain ethnic constituencies or of having a common enemy to defeat. The invocation of achieving accountability through an internationally supervised body and the use of the ICC as a guarantee for justice, has in fact, been detrimental to Kenya's democratic transformation. It has resulted in further fragmentation of political parties and of the opposition. This will mean that the 2013 elections, as is slowly becoming apparent, will be shrouded in secrecy, conspiracy theories and the legacies of the PEV, rather than on the need to move Kenya's politics away from patronage, ethnicity and the maintenance of the former regime.

Chapter 7 Conclusion

What were the politics that led Kenya to prosecute those who bore greatest responsibility for the PEV? What were the politics that resulted in the ICC being the court where individuals were going to be held accountable?

When states transit from war, authoritarianism or restricted democracy, the choice to bring perpetrators of past crimes to accountability depends on the convergence of a number of factors. These are: the degree of cooperation with the previous regime, the legacies left behind by the previous regime (the balance of power in the new government), and finally elite preferences (relationships with various constituencies and motivations). When the international community imposes retributive justice while these factors are not aligned, states will devise strategies to avoid accountability. This will be done by either compromising to please all sides (usually by establishing Truth Commissions) or by 'hijacking' the justice process.

This thesis has posited that to understand Kenya's accountability process, one cannot dissociate it from its political context. It has been seen that Kenya's transition was peculiar in that it took place after a relatively short-lived period of post-electoral violence, with identifiable perpetrators and victims. Peace was achieved via a negotiated settlement between the fighting parties, creating a government of national unity. The GNU included much of the former regime in the new government, with the balance of power strongly tilted in their favour. Additionally, Kenya's leaders have historically shown to prefer impunity to accountability in order to sustain political careers.

In light of this, one would not normally expect retributive justice to be attempted in Kenya's transition. What one would expect to see is a compromised transition – i.e. with only restorative justice and a Truth Commission, or an attempt by the political elite to hijack the process. Surprisingly however, Kenya appeared to be strongly in favour of punitive accountability, so much so that the ICC became involved. This demonstrates the importance of asking what were the politics that

led to such a decision, and undertaking an extensive analysis of whether Kenya's claim of wanting to end impunity reflected a genuine quest for justice.

This thesis has thus provided an analysis of Kenya's system of governance. Finding its roots in British indirect rule, this system can be characterised as politically fragmented, with parties dependent on ethnic constituencies, and a social-political relationship framed by patrimonialism. This system was perpetuated and accentuated under KANU's one-party reign, which only ended in 2002 with NARC's win. Kibaki, while opening up some of the political space, however did not change this system of patrimonialism and it remained as the background against which decision-making processes took place, resulting in Kenya becoming a restricted democracy at best. The combination of these factors led to a government that was made up of political parties concerned first and foremost with winning elections, political power and the perks that it provides, which in turn exacerbated ethnic competition, impunity and the maintenance of the status-quo.

Therefore, by the 2007 elections, Kenya was in a politically volatile situation. The NARC had failed to utilise the democratic space created in 2002, the reformers had lost the battle to re-write the constitution and the institutions that allowed corruption and impunity to take place were left intact. Parties were highly fragmented, and once more in Kenyan history, defined by their ethnic constituencies, all waiting for their 'turn to eat'. This resulted in a government largely concerned with the protection of its political elite and the status quo, over the concern for its citizens well being. With this in mind, it has been argued herewith that Kenya's PEV and transition has two striking features: its internationalisation and the inclusion of an accountability process and the involvement of the ICC.

As has been shown, the internationalisation of the post-PEV process can be explained by a number of variables. First, the escalation of violence combined with Odinga's continued pressure, which pushed Kibaki to accept negotiations and international intervention. Secondly, Odinga's sustained pressure was

caused by the recognition of the need to shift the balance of power to his favour, which could be achieved with the help of the international community. Thirdly, the international community, including the AU, recognised the importance of Kenya as its geo-strategic position had made it the gateway of NGOs and the UNs third largest headquarters. Kenya's stability was thus paramount for the continuation of their activities. For the mediators themselves, it provided the opportunity to include and promote transitional justice.

With regard to accountability, it has been argued that its inclusion in the transition was not a reflection of the political elite's will to end impunity, but has rather been used as tool to be manipulated for political ends. CIPEV was not created in order to 'fix' Odinga's political opponents. However, it was created in the view that accountability was a distant and vague idea that was unlikely to come to fruition. With Kenya's history in mind, this should not come as a surprise. The wording of the KNDR, which allowed for ambiguity with regards to who would be investigated and how accountability would be undertaken, as well as the focus on the short-term and immediate problems that Kenya faced, furthered this impression. Hence, the PNU calculated that CIPEV would allow them to share the blame of the PEV with the ODM. The ODM, on the other hand, could use this process as a political platform in order to posit itself as the 'new regime' unsoiled by political corruption.

Having seen that the inclusion of accountability was not intended to end impunity, this thesis turned to analysing what led to the failure to establish the Special Tribunal, allowing for the ICC's involvement. CIPEV's harsh recommendation was surprising to many, including the international community. The controversy that it created was understandable, but its acceptance by the President and Vice President was puzzling to many. However, the European Union's ultimatum to Kenya: to cut aid as one of Kenya's major donors, in the event of a refusal to table CIPEV's recommendations, helps to make sense of the puzzle. The debate that followed within Kenya, which led to the failure to establish the Special Tribunal, was the result of the attempts from the actors involved, to shape the process to fit their interests.

In this regard, this thesis has supported two hypotheses. For some, such as Ruto and Kenyatta, supporting the ICC was based on the calculation that it would stop domestic prosecutions and buy time, as ICC proceedings would take years at best. For others, namely Odinga and his supporters, the strategy was to appear to support the Special Tribunal, to gain legitimacy domestically, and yet support the ICC option behind the scenes. This thesis has rejected the idea that justice was pursued genuinely, or that it was calculated and fixed from the outset, to ensure Odinga's win in the next elections.

We can therefore conclude that the ICC is vulnerable to being 'hijacked' for political ends in transitional justice processes. It can be used to serve and protect the interests of globally powerful states who use it as a tool to influence and direct international justice while at the same time being immune from it. Moreover, it can be utilised and manipulated by individuals within states under investigation, to remove political 'hindrances'. The lessons derived herewith, are hoped to show the dangers and difficulties of imposing democratisation processes through the Western lens of justice. The Kenyan case may be one more example of the West's obsession with its ideals of a 'just society' for the African continent, and the ease with which these ideals may be manipulated and subverted by all actors involved.

The consequences of this unfolding of event and manipulation of justice will of course mostly be felt by Kenya itself. While toward the end of the one-party rule, the overthrow of the government was the main aim of political parties, today, the main aim of political parties has been to counter the weight of the ICC and protect as many culprits as possible. Not only is it likely that only a handful of the 'smaller fish will be fried', but also that this situation will result in further fragmentation of parties and the continuation of patrimonialism as a means of acquiring power and protection. While the PEV was shocking enough to scare politicians, was it enough to stop ethnic outbidding? This seems unlikely, as already Kenyans as well as the international community are already looking to support Odinga in the 2013 elections, in part because he is not a Kikuyu. Thus

the international intervention, which imposed a process of judicial accountability onto a government that was not ready for it, impeded the democratic process of the country.

In the words of Wangari Maathai “*The greatest loss is in those who died, as well as the destruction of the goodwill and comradeship that Kenyans from a majority of micro-nations had for each other in 2002. It has yet to be recaptured.*”³⁸⁸

³⁸⁸ Maathai, *The Challenge for Africa*, 208.

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