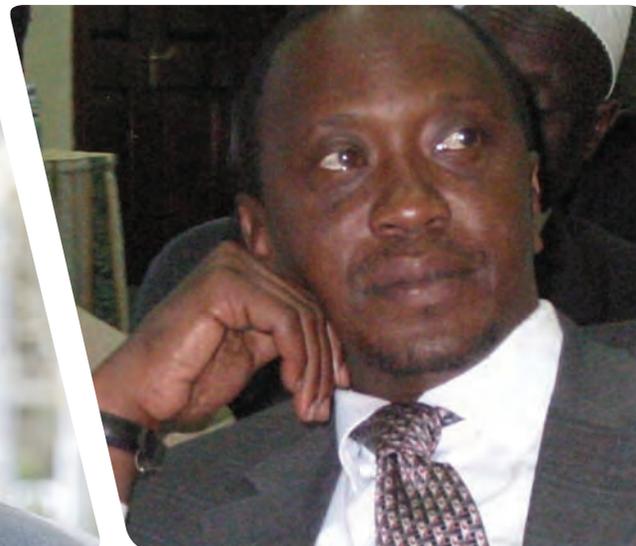




IF UHURU KENYATTA OR WILLIAM RUTO IS ELECTED PRESIDENT AND DEPUTY PRESIDENT

*Implications of a Kenyatta/Ruto
Presidency for Kenya*







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Implications of a Kenyatta/Ruto Presidency for Kenya

This report is prepared jointly by the Kenyan Section of the International Commission of Jurists (ICJ Kenya), Katiba Institute, The Kenya Human Rights Commission (KHRC) and Africa Centre for Open Governance



I. Background

Uhuru Kenyatta and William Ruto, both of whom face charges of crimes against humanity before the International Criminal Court, (ICC), have declared that they will seek office as president and deputy president in Kenya's General Elections scheduled for 4th March 2013.

The build-up of the Kenyatta/Ruto alliance was signaled by a meeting that took place in Eldoret in January 2011. The previous month, the Prosecutor of the ICC had announced the names of six individuals that he regarded as bearing the greatest responsibility for the violence that followed the disputed results in Kenya's presidential elections of 2007, and against whom he would seek a confirmation of charges before the pre-trial chamber of the court.

During the Eldoret rally, also attended by Kenya's president, Mwai Kibaki, and a large number of mainly Kikuyu and Kalenjin members of parliament, it was announced that a committee drawn from members of parliament of the two communities would be formed to bring peace between these communities, which had occupied antagonistic positions during the post election violence.

In the months after the Eldoret meeting, there emerged a new working relationship between Kenyatta, Ruto and Vice President Kalonzo Musyoka, which came to be referred to by detractors as the KKK Alliance, and whose intentions appeared to include an attempt to avoid accountability by Kenyatta and Ruto before the ICC. Throughout January 2011, Musyoka undertook a number of well-publicized foreign trips to convince member states of the African Union to support a deferral, by the UN Security Council, of the Kenyan cases at the ICC under article 16 of the Rome statute.

Over time, the working relations between the three morphed into an ever-expanding alliance, which came to be referred to as the G-7 Alliance, because it was supposed to incorporate seven of the leading political lights in Kenyan politics.

As part of the political re-alignment, Ruto, who had been elected on a ticket of the Orange Democratic Movement, (ODM), but from which he had, to all intents and purposes defected, announced in December 2010 that he had joined the United Democratic Party (UDM), a party affiliated with ODM but regarded as articulating Kalenjin interests. There followed a period of rancor within the party with the officials of UDM claiming that Ruto having come into the party uninvited had then tried to take it over by force. In January 2012, Ruto announced that he had left membership of UDM, bringing an end to a short but acrimonious stay in the party.

The following week, he announced the formation and launch of another political party, the United Republican Party, (URP) through which he said he would now seek the presidency in 2013.

On his part, Kenyatta has been carrying out his political activities under The National Alliance (TNA), a political party whose formation in the year 2000 was unremarkable. After years of dormancy, the party was re-registered in 2008. During a colourful ceremony in April 2012, TNA was rebranded, with Kenyatta formally staking his claim to the presidency.





On 3rd December 2012, the day before a legal deadline for the deposit of formal coalition agreements, URP and TNA publicly signed and deposited with the Registrar of Political Parties, a pre-election alliance agreement, whose terms stipulated that Kenyatta would run for president and Ruto for deputy president. However, the following day, in a dramatic shift, they deposited with the Registrar of Political Parties an amended agreement in which they incorporated the United Democratic Party, whose presidential candidate was Deputy Prime Minister, Musalia Mudavadi. This was then named the Jubilee Coalition.

Mudavadi had been the deputy leader of ODM before defecting in April 2012, declaring that having run as deputy to ODM leader and current Prime Minister, Raila Odinga, in the elections of 2007 and to Kenyatta in those of 2002, it was time his name got on the ballot paper as a presidential candidate.

It was made clear that the enlarged agreement which brought in Mudavadi, would not affect Ruto's position as the candidate for deputy president for the Jubilee Coalition, but that of president would be competed for, or otherwise settled, between Kenyatta and Mudavadi.

Within a few days, however, the Jubilee alliance fractured when Mudavadi and Kenyatta were unable to agree on who between them should be the presidential candidate. While Kenyatta conceded that he had, agreed in writing to cede this position to Mudavadi, which was a pre-condition for Mudavadi joining the alliance, Kenyatta claimed that he had made this concession under duress from the devil.

The Constitution requires each presidential candidate to name a running mate as deputy president and the two then participate in the elections on a unified ticket.

As part of bolstering his presidential image, Kenyatta has been involved in regional diplomacy within eastern Africa. During the month of November 2012, together with a number of political allies, he visited several regional Heads of State including President Paul Kagame of Rwanda, Deputy President Riek Machar of South Sudan, President Jakaya Kikwete of Tanzania and President Pierre Nkurunziza of Burundi.

The visit to Tanzania took place only a few days after the TNA had branded the chief mediator in Kenya's political crisis, former UN Secretary General, Kofi Annan, and former Tanzanian President, Benjamin Mkapa, as "tourists", a reference that was regarded as offensive. The two had visited Kenya as part of their periodic monitoring of the country's implementation of the peace agreement which their mediation efforts had yielded.

II. Introduction

As Kenya gears up for elections in 2013, the politicization of the cases before the ICC threatens the elections and has become a major electoral issue. This is because notwithstanding the fact that they face charges before the ICC, two of the accused persons, Uhuru Kenyatta and William Ruto had each maintained that they would run for president in those elections. As shown above, the two have agreed to cooperate under the Jubilee Coalition in which Ruto will run as deputy president and Kenyatta will run for president.

In opinion polls on how they are likely to perform as presidential candidates, Kenyatta and Ruto have fared well and are, therefore, regarded as strong presidential candidates. It seems possible that Kenya can have Kenyatta and Ruto as president and deputy president when the elections are held in 2013.

There has been significant public debate in Kenya on whether or not Kenyatta and Ruto can run for president while facing cases before the ICC. There is even litigation in court that seeks a determination of this question.

As the country awaits the outcome of that litigation, it would be useful to consider the effect on Kenya if Kenyatta or Ruto were to be elected president and deputy president as might happen. Public debate on this question has concentrated on the possible negative effects on the country's image abroad if Kenyatta and Ruto were to be elected to the presidency. While there are implications on Kenya's diplomatic relations if Kenyatta this were to happen, there would also be domestic implication for the country resulting from a Kenyatta/Ruto presidency.

This report seeks to answer the question as to what would be the implications of a Kenyatta/Ruto presidency in view of the cases against the two before the ICC. The report considers that the international implications have been covered well in other literature and while they are also covered in the report, it is the domestic implications that are given the greatest prominence.

The report assumes that if Kenyatta and Ruto became president while facing charges before the ICC, they would choose to continue their cooperation with the court and so would attend the court at The Hague for their trial. Accordingly, the report does not address what would happen if, as is also possible, they chose not to cooperate with the court having assumed Kenya's ultimate leadership.

The report endeavours to show that, like everybody else that works, the president has a daily job. The report therefore seeks to show the ways in which the president's daily job would be affected by an ICC trial.

It needs to be pointed out that under both the Rome Statute of the ICC, and Kenyan law, one is presumed innocent until proved guilty. Kenyatta and Ruto must be given the full benefit of this legal position, and this report should not be understood as trying in any way to depart from this legal position. However, the effects that a trial before the ICC would have on their presidency is a practical matter and raises questions that must be fully appreciated by the country as it goes to the elections.

The report is divided into three sections. The first section identifies the president's daily job, and the attributes that the president is assumed to have under the Constitution. The second part discusses the effects on domestic affairs, if Kenyatta and Ruto were to be elected to the presidency and the third discusses the international implications. There is a brief conclusion that follows at the end of these discussions.

III. The President's Day Job

Part I: Attributes and Functions of the President

(a) Attributes of the President

The Constitution of Kenya, 2010, clothes the President with a number of attributes and also confers on the holder of this office a number of functions. Among the attributes of the President is that:

- (a) The President is the symbol of national unity;
- (b) The President is the custodian of the national values stipulated under article 10 of the Constitution and must submit to the National Assembly, an annual report on the progress made in fulfilling those values.

(b) Other offices that the President occupies

By virtue of the office which the President occupies, the Constitution confers on the president other offices. Thus the president is:

- (a) The Head of State and Government;
- (b) The Commander-in-Chief of the Armed Forces; and
- (c) The Chairperson of the National Defence Council.

(c) Functions of the President

The Constitution confers on the president a number of functions. Among these, the President:

- (a) Assents to Bills, and also has power to seek the adjustment of the provisions of any Bill presented to him for assent by requiring the legislature to reconsider any particular matter;
- (b) Addresses the opening of each newly elected Parliament, and addresses a special session of parliament each year. The president may also address parliament any other time;
- (c) Chairs all cabinet meetings;
- (d) Directs and co-ordinates the functions of ministries and government departments;
- (e) Exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries;
- (f) Nominates and, with the approval of the National Assembly, appoints, and may also dismiss a number of public officials including Cabinet Secretaries, the Attorney-General, the Secretary to the Cabinet, Principal Secretaries, high commissioners, ambassadors and diplomatic and consular representatives; and any other public officer whom the Constitution authorizes him to appoint or dismiss;
- (g) Receives diplomatic and consular representatives;
- (h) Confers honours in the name of the people and the Republic;
- (i) Declares a state of emergency;
- (j) Exercises the power of mercy;



- (k) Declares war, with the approval of Parliament;
- (l) The President is the custodian of Kenya's international obligations and ensures these are fulfilled through the actions of the relevant Cabinet Secretaries. As part of this the president is required to submit to parliament, once every year, the progress made by Kenya in fulfilling its international obligations.
- (m) The president may suspend a county government in an emergency arising out of internal conflict or war; or in any other exceptional circumstances.

The Deputy President

The Constitution provides that the Deputy President shall be elected on the same ticket with the President. The Deputy President is the Principal Assistant to the president and:

- a) Performs the functions conferred by the Constitution and any other functions of the President as the President may assign;
- b) When the President is absent or is temporarily incapacitated, and during any other period that the President decides, the Deputy President acts as the President.

IV. Possible implications If Uhuru Kenyatta or William Ruto is Elected President

Part 2: The Domestic Level

1. The Oath of Office

Article 141 of the Constitution provides that the President-elect assumes office by taking and subscribing the oath or affirmation of allegiance, and the oath or affirmation for the execution of the functions of office, as prescribed in the Constitution.

Further, article 74, which deals with ethics and integrity, provides that a state officer, who include the president and deputy president, before assuming a State office, shall take and subscribe the oath or affirmation of office.

Kenya's elections take place on 4th March 2013 and if there is no person qualified to be declared a winner a runoff will be held between the first two candidates. The runoff is currently scheduled to take place on or about 10th April, 2013, the same time that trials for Kenyatta and Ruto commence at The Hague. If there is no winner in the first round and a runoff is necessary, and if the two or one of them is elected as president or deputy president, during such a runoff, this will lead to difficult choices for the country.

On the one hand, as required by the Constitution, a person cannot assume office as president or deputy president before subscribing to an oath of office and on the other hand they will not be in Kenya at that time to take such an oath. The choices will be:

- a) To absent themselves from trial so as to take an oath of office;
- b) To attend their trial and keep the country waiting for when they will next be available to take their oaths of office, and therefore assume office.

It follows that the act of setting up a government following the elections will also be delayed as the two cannot legally appoint the government until they are president.

After a highly difficult set of elections, Kenya may remain leaderless if its president has to abandon the election process midway and go to The Hague for trial.

Alternatively, the president defying the ICC will remain in the country to take the oath of office. It is unlikely that he will thereafter submit to trial before the International Criminal Court.

2. On Executive Authority

The Constitution provides that the President and the Deputy President constitute the executive authority of the government.

In practice the executive authority is exercised through the cabinet which is made of the President, Deputy President and cabinet secretaries.

By tradition the cabinet meets once every week and provides overall leadership to the entire government. If either Kenyatta or Ruto is elected president or deputy president, he will be forced to be permanently absent from meetings of the cabinet while attending trial at The Hague.

This is undesirable and would lead to a situation where the heart of the government will operate without leadership and direction.

3. On the armed forces and national security

The President is the Commander-in-Chief of the Armed forces. A commander-in-chief is the person exercising supreme command authority of a nation's military forces.

The Kenya Defence Forces Act, 2012, elaborates on the constitutional role of the president as the Commander-in-Chief. As Commander-in-chief, the president appoints, and is also responsible for the removal of, the Chief of the Defence Forces, Vice Chief of the Defence Forces and the three Service Commanders of the army, air force and navy. In this role the president is also responsible for the organization and command of the Defence Forces, and is required to ensure that there is national representativeness in these appointments.

The Act provides for the establishment of such units and formations in the Defence Forces as the President may, in consultation with the Defence Council, determine. Further, under the direction of the President, the Cabinet Secretary shall, by notice in the Gazette, assign names to units and formations of the Defence Forces and vary or replace any such names.

The cabinet secretary for defence is constituted the main advisor of the president on matters relating to defence policy and is also the main advisor to the president and parliament on matters relating to the defence forces.

On his part, the Chief of the Defence Forces is the main advisor to the President and to the cabinet secretary on matters of defence and is required to "comply with any lawful direction issued by the Cabinet Secretary under the authority of the President". (section 12(c) of the Kenya Defence Forces Act.).

Thus the president is central to the architecture of the national defence and is required to directly command the military himself. The cabinet secretary merely communicates such command and has no authority to exercise military command of his own.

Currently, Kenya's military is involved in the war against al Shabaab in Somalia. Also, as a result of the vastly deteriorated security situation within Kenya, the military is, for the first time in the history of the country, involved in law enforcement and peacekeeping responsibilities within Kenya. As part of this there is an on-going security operation led by the military following the attack in Baragoi, Turkana, which led to the massacre of more than 40 police officers. Also, the military is involved in the pacification of Garissa following the influx of al Shabaab elements who have been responsible for the killing of more than 4 soldiers in isolated terrorist attacks.

It is fair to say that the situation in relation to the fight against al Shabaab is highly dynamic and although there is increased pacification of lawless Somalia, there is increasing evidence that threats by al Shabaab are increasingly being staged on Kenyan soil, either in Garissa, or within the city of Nairobi.

Since the prevailing security situation remains fluid, it would be desirable that the Commander-in-Chief remains personally engaged in the management of what may happen. Secondly, it is simply inconceivable and highly offensive to military honour, that the commander-in-chief is a person facing prosecution in a court of law.

As regards national security, the Constitution establishes the National Security Council consisting of the President; the Deputy President; the Cabinet Secretary responsible for defence, the Cabinet Secretary responsible for foreign affairs; the Cabinet Secretary responsible for internal security; the Attorney-General; the Chief of Kenya Defence Forces; the Director-General of the National Intelligence Service; and the Inspector-General of the National Police Service.

The Council exercises supervisory control over national security organs and performs any other functions prescribed by national legislation.

The President shall preside at meetings of the Council.

At another level is the National Intelligence Service Council, which is chaired by the cabinet secretary, and has other cabinet secretaries as members including the secretary for defence, for justice and constitutional affairs, finance, foreign affairs, and the director general. The Committee directly advises the president on security matters in the country, and takes overall responsibility for the wellbeing of the country.

Thus, president is at the heart of the national security architecture and chairs the highest security organ, of which the deputy president is also a member. At the lowest level, the security apparatus is the district security committee made of security operatives at that level. At the highest level is the As part of this, only the president, with the approval of the National Assembly, can declare a state of emergency. Also, only the president can declare a war. The power to declare a state of emergency or war is an extension of the president's role as the commander in chief. This is why the president is at the centre of the national security information.

If the president or the deputy president is to be restricted to The Hague for trial, this will have direct and profound effects on the security situation in the country, as both of them have direct roles in this regard.

Secondly, this will hamper the capacity of security organs to make security decisions in the public interest.

4. On Diplomatic Relations

The president is at the heart of diplomatic relations. According to universal diplomatic practice, ambassadors, high commissioners, and other representatives of foreign governments are not authorized to represent their governments before the host government's foreign ministry until their credentials have been formally presented in person and have been accepted by the host government's head of state. A diplomat whose credentials are accepted is regarded to have been accredited to the host government and is considered an officer of the host government as well as his own.

This protocol has been codified in the Constitution which provides that the president "receives diplomatic and consular representatives." In practice, when foreign diplomats arrive in Kenya, they remain inactive and cannot meet with any representatives of the Kenya government, until they have presented their credentials to the president.

If the president or the deputy president has to be away for trial, there will be profound and direct effects on diplomatic practice as has been practiced until now.

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5. On the President's role in the legislative process

The President assents to all bills enacted by parliament before these become law. In 2011, the President assented to 34 bills which thereby became law. In 2012, the president assented to 31 bills.

It is expected that as Kenya implements the Constitution, Parliament will remain busy in enacting the necessary legislation to give effect to the Constitution.

After the elections in 2013, Parliament will have two chambers, the National Assembly and the Senate, in place of the one chamber that has existed until now. Since each of the houses can originate legislation, the legislative agenda may become even busier. Further, as the passing of legislation will involve two houses, rather than one, as has been the case until now, the legislative processes will become longer and more bureaucratic.

Presidential assent to bills must be done within 14 days and these must be published within 7 days thereafter.

The Constitution confers on the President a veto power over bills enacted by Parliament. Where the President declines to assent to a bill, he must refer it back to Parliament explaining the reasons that led to the refusal to assent. Parliament can override the President's objections if the Bill, as originally passed, receives the support of 2/3 of the members of the National Assembly, and, in case it has implications on devolution, 2/3 of the members of the Senate.

The power to veto bills is a check on legislative excesses. During his term in office President Mwai Kibaki has exercised this power thrice: in 2009 he queried aspects of the Fiscal Management Act the bill which had been sponsored in Parliament by a private member. As a result of the president's interventions, the bill was altered, after which he signed it into law. In 2012 the President refused to assent to the Finance Bill 2012 in which Members of Parliament had awarded themselves a generous severance pay of Sh.9.3 million each. Earlier in 2012 the President refused to assent to the Statute Law (Miscellaneous Amendments) Bill 2012 because the bill proposed to amend the Political Parties Act 2011, to allow for continued party hopping by Members of parliament. The President observed that the matter of the consequences of defecting from political parties or changing allegiance between parties was already the subject of court petitions further noting that matters which are before the Court should not be the subject of legislation by the National Assembly.

It will require an engaged president to support the realization of the provisions of the Constitution as regards the legislative process. This is partly because the timelines for assent and publication of legislation are tight and also because a disengaged president exposes the country to parliamentary tyranny as he cannot exercise the veto power effectively. As the country continues to implement the new Constitution, heavy reliance will continue to be placed on an efficient legislative process. An absentee president will not add to such efficiency. Also, the fact that the country will have a second chamber of the legislature, creating a new experience in the legislative process makes it more compelling for the president to be fully engaged in this process.

6. On the President's other Relationships with Parliament

Under the Constitution, the president will no longer be a Member of Parliament. However, the president still has other relationships with Parliament outside of the legislative process. The President is required to make an address at the opening of every newly elected Parliament, and at least once a year thereafter.

This is the constitutional mechanism that will enable the president to communicate to brief parliament as to his policy intentions and overall leadership direction.

As things stand, there is a danger that if elected as president, Kenyatta or Ruto will not make even the maiden address as he will already be away on trial. Thereafter, the president will remain disconnected with Parliament and there will be a policy and leadership gap resulting from this.

Further, under the National Assembly (Powers and Privileges) Act, no public officer may produce before the National Assembly or a committee of the Assembly, any paper, book, record or document; or give evidence before the Assembly or a committee, relating to the correspondence of any naval, military or air force matter, except with the consent of the President.

Also, except upon the direction of the President, no public officer may refuse to produce before the Assembly or a committee any paper, book, record or document; or give evidence before the Assembly or a committee, relating to the correspondence of any civil department or to any matter affecting the public service; and secondary evidence shall not be received by or produced before the Assembly or a committee of the contents of any such paper, book, record or document which the President has directed shall not be produced.

Parliamentary scrutiny of the government is dependent on information being provided by the executive to parliament and its committees. The president has a direct role in the relationship as he is required to authorize the release to the National Assembly and its committees, of matters regarded as confidential by the executive.

A disengaged president will not be able to preside over this role effectively. The fact that Kenya will have a bicameral legislature will further make this role more critical in the functioning of the legislature.

7. On Cabinet Meetings

The president chairs cabinet meetings. Cabinet meets once every week. This represents an intensive work programme. In addition, cabinet has several sub-committees of itself which are advisory to the entire cabinet and to the president. Since the president is at the centre of cabinet affairs, it is unthinkable how cabinet would operate when faced with a long absence of the president from the country.

8. On the devolved Government

The President is directly involved in the management of the devolved governments. The president may suspend a county government in an emergency arising out of internal conflict or war; or in any other exceptional circumstances. A county government can only be suspended if an independent commission of inquiry has investigated allegations against the county government, and the President is satisfied that the allegations are justified and the Senate has authorized the suspension.

Such suspension lasts for only 90 days, and thereafter, there must be elections to constitute a new county government.

The Intergovernmental Relations Act puts the president at the centre of the relations between the national and county governments. It establishes the National and County Government Co-ordinating Summit as the apex body for intergovernmental relations. The Summit comprises the President, or in the absence of the President, the Deputy President, as the chair, and the governors of the forty-seven counties.

The Summit promotes co-operation between the national and county governments and gives policy direction to other coordinating levels such as the Intergovernmental Relations Technical Committee and the sectoral working groups or committees.

Devolution of power, which has led to the creation of 47 counties and their governments, is by far the most ambitious set of provisions in the new Constitution.

9. On the Nomination, Appointment and removal of Constitution office holders

Under the former Constitution, the appointment of persons to fill most of the important constitution office holders was the sole preserve of the President. The Constitution of Kenya, 2010, makes the appointment of these constitution office holders a collaborative exercise between the president and other organs of the state, including Parliament and the Judicial Service Commission. For example, the President appoints the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly.

Also the Constitution expands the category of offices the filling of which is the subject of this collaborative approach. For example the appointment members of all the independent Commissions established under the Constitution involves this special procedure of appointment.

Further, the Constitution also makes the removal from office of certain persons that have been appointed to these offices the subject of collaboration between the president and other organs. For example, the National Assembly may, by resolution, require the president to remove a cabinet secretary from office. The removal process is subject to investigation by, and the recommendation of, a committee of the National Assembly. An absentee president will be forced to helplessly follow from outside the country, lengthy removal proceedings as they go on in Kenya.

The very nature of the appointment and removal process, therefore, requires significant and direct engagement on the part of the president. For example, the Independent Office Holders Act, 2010, passed to provide a roadmap for the appointment of the Controller of Budget and the Auditor General, puts the president at the centre of the appointment process by requiring him to commence the appointment process within 7 days after the occurrence of a vacancy in these offices. The president thereafter nominates a candidate for appointment and the National Assembly may reject such a candidate in which case the president is required to name a fresh candidate from among those that had been interviewed. This is demonstrably a very involved process.

A long absence out of the country for any reason would have an effect on the capacity to collaborate in the filing of these positions. Also, the removal process involves the personal judgment of the president, who must make the decision that a particular removal is called for. It would be difficult for a disengaged president to make this decision. Secondly, as vacancies arise all the time, it is not possible to plan around the president's absence on how these are to be managed.

10. On the Administration of Justice

The post-election violence gave rise to horrendous crimes the bulk of which have unfortunately remained unpunished. While the ICC trial are intended to bring justice in relation to persons regarded as bearing the greatest responsibility for crimes committed during the post-election violence, it is to be expected that national processes will seek accountability against other persons alleged to have committed crimes during the violence. This is based on the fact that the ICC is a court of last resort and prosecutes only when national processes have failed or are unable to do so.

The Kenya government is current following several prongs, including a task force appointed by the Director of Public Prosecutions, that suggest a commitment to prosecute these crimes.

It would be incongruent for Kenya to pursue national prosecutions against crimes of the post-election violence with the president and deputy president also undergoing trial abroad. There would be no confidence that the president and deputy president can provide full political support for prosecutions in which they are also part of the accused group.

Another prong that the country has been following in the search for justice is the Truth Justice and Reconciliation Commission whose mandate, deliberately covers the period of the post-election violence. After more than three years of work, the Commission is currently writing its report which is expected to be released in 2013. Persons facing charges for post-election violence crimes would not be ideally placed to offer ultimate leadership on the implementation of the report.

II. On the Administration of other Laws

The president has a role in the administration of a large number of pieces of legislation that are in force. The Interpretation and General Provisions Act defines the term “minister” as “a person appointed as a Minister of the Government of Kenya under the Constitution, or the President, the Vice-President or the Attorney-General”. The effect of this provision is that where legislation confers a role on the minister who is not identified or designated, the President has the residual role of ensuring that the role is carried out and is therefore the minister for purposes of the legislation.

Also, in very many instances, ordinary legislation confers direct responsibilities on the President. Examples include the Advocates Act which sets up the Roll of Senior Counsel and stipulates that the appointment to this Roll is to be carried out by the President Through legislation, Parliament has established a large number of the boards of public corporations the appointment of which requires the participation of the President, on whom is conferred the role of appointing the chair, and sometimes other members, of the board. The president is also central to the administration of Commissions of Inquiry Act, as only he can appoint a commission of inquiry.

The President also has a role in the general administration of the government which is based on laws that have been passed by the legislature. A long absence by the president will leave a vacuum in the administration and will delay or defeat ordinary consultations as is necessary for daily decision-making which supports efficient administration.

Part 3: The International Level

I. International Relations

Kenya strives to be an upright member of the international community and has joined several multilateral arrangements such as the East African Community, the African Union, and the United Nations.

If ICC suspects became president, this will exert strains in the existing foreign relations at several levels. It has been suggested that if the two fail to attend their trial, they will be restricted to travelling only within certain countries in Africa and will be unable to travel outside of the continent for fear of arrest.

This assertion is based on the experiences of Sudanese president, Omar el Bashir, against whom the ICC has issued two arrest warrants and who has had to curtail travel to a few countries for fear of arrest.

The assertion is only partially correct. It is correct in stating that Kenyatta and Ruto will be unable to travel outside of Africa but incorrect in assuming that they can travel to any African country: in July 2012, the AU summit scheduled to be held in Malawi had to be moved to Addis Ababa, Ethiopia after President Joyce Banda made it clear that her country was unable to host President Bashir as to do so would have violated Malawi's obligation as a member of the ICC, to arrest the President if he should travel to the country.

Malawi was not the first African country to refuse to host President Bashir for the same reason: South Africa and Botswana have made it clear that should Bashir be found on their soil, he would be arrested and handed over to the ICC. Also, Uganda has twice failed to assure Bashir of his safety from arrest leading to a decision by him not to travel to Uganda.

The fact that Uganda takes seriously her responsibilities under the Rome statute is potentially problematic for Kenya than any other country. First, the two are contiguous and have very strong economic ties. Second, as both belong to the East African Community and IGAD, it would bring unimaginable difficulties

in the two organizations if the relationship between Kenya and Uganda was to become dysfunctional as a result of the cases facing its top leaders.

On its part, the United Nations has a policy not to relate with persons facing charges for international crimes. An opinion issued in 2006 by the UN legal advisor on “Peace and Justice in Post-Conflict Societies—

The UN Position” states as follows:

Contacts between UN representatives and person indicted by international criminal jurisdictions holding positions of authority in their respective countries should be limited to what is strictly required for carrying out UN mandated activities. The presence of any UN representatives in any ceremonial or similar occasion with such individuals should be avoided. When contacts are absolutely necessary, an attempt should be made to interact with non-indicted individuals of the same group or party.

Some western countries have also taken strong individual positions regarding interactions with persons facing charges like those that Kenyatta and Ruto do. These positions will affect Kenya’s relationship with those countries if either Kenyatta or Ruto becomes president. For example, on 4th August 2011 US President Barack Obama signed a proclamation giving power to the Secretary of State to prevent the entry into the US of persons who participate in serious human rights and humanitarian law and related violations

The proclamation suspends entry into the United States, as immigrants or nonimmigrants, of “any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, war crimes, crimes against humanity or other serious violations of human rights, or who attempted or conspired to do so”.

While the US has not actually put measures to implement this proclamation in relation to Kenyatta and Ruto, this will almost certainly happen if the two defy the ICC whether or not any of them is elected president.

Some European countries have adopted a similar approach which will severely limit the movement of Kenyatta and Ruto if elected president.

V. Conclusion

Kenya enacted a new Constitution in 2010 which is the sum of the collective experiences of the country. The Constitution represents shared aspirations as to peace justice and prosperity, but also represents shared aspiration that violence such as has been experienced in Kenya's politics in the recent past, will be a thing of the past. The forthcoming elections provide a good opportunity to consolidate the aspirations that made the country vote so overwhelmingly for the new Constitution, and also the chance to demonstrate that the country has learnt something from the recent violence.

As demonstrated in the report, the next president of Kenya will have a more demanding role in running the country's affairs and offering leadership. After the elections Kenya will re-align its governance structure with the Constitution and the newly elected leaders in the categories of county representatives, Women representative, Senate representative, Members of Parliament, Deputy President and President. This is a significant shift on governance for the country and therefore equally demanding for the leadership of the country to ensure that the new structures are implemented effectively as anticipated by the Constitution. It follows that a fully dedicated leadership cannot be overlooked.

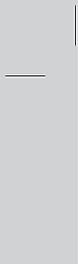
Also, it is to be hoped that the report of the Truth Justice and Reconciliation will be released soon after the next elections and that the report will set an agenda for justice for victims of the post-election violence, including the provision of reparations. In such a case, the president and deputy president would be expected to lead the implementation of the agenda. However, it would be practically difficult for them to do so effectively while facing a trial. Further, victims may not have confidence in the leadership that they will provide.

As indicated above national trials for post-election crimes are expected to occur after the next elections. A president and deputy president facing charges before the ICC would be in a position of conflict if heading a government that is also prosecuting crimes of a kind that the president and deputy president face.

This report affirms the innocence of Kenyatta and Ruto until they are proved guilty upon trial, the fact of being accused persons places practical limitations on their lives which in turn make it impractical that they can run a country. Also, their status as accused persons places them in positions of conflict with victims of crimes who expect justice, and also with other government functionaries who are required to cooperate in their prosecution and at the same time pay them allegiance as the top leaders of Kenya.

For the reasons canvassed in this report, presidency by persons facing prosecution before the ICC would be inherently problematic. Even if the courts clear them to run for office, and even though they undoubtedly are popular, a presidency by either Kenyatta or Ruto is likely to hobble Kenya as it would be impossible to conduct national affairs while the president is away on trial. In the event of non-cooperation in the trial another chapter of difficulties will be opened for the country.

While Kenyans have the right to elect whoever they want, and while it would be necessary to respect democratic choices, this will not take away these well-founded concerns.





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