

# Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and Their Enemies

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## ABSTRACT<sup>1</sup>

Drawing on interviews with civil society actors and international donors, this article examines the role of Kenyan civil society in advancing accountability for serious international crimes, specifically the 2007–2008 post-election violence. We consider civil society as recipient and transmitter of norms of accountability and as transformer and user of such norms, as well as civil society strategies for engaging with actors domestically and internationally. Exploring how civil society has devised advocacy strategies relating to the International Criminal Court and domestic justice mechanisms, we challenge some of the assumptions in the literature on civil society and accountability. In particular, we question whether civil society can predominantly rely on international standards as part of a ‘justice cascade,’ arguing that the Kenyan case illustrates a more complex situation where narratives of justice and accountability continuously change and may be undermined as a consequence of counternarratives devised by those opposed to criminal justice.

**KEYWORDS:** Kenya, civil society, accountability, International Criminal Court

## INTRODUCTION

Following the 2007–2008 post-election violence (PEV) in Kenya, there has been considerable scholarly and policy debate regarding options for accountability for serious international crimes, domestically and internationally. However, much of the existing debate focuses on the role of international institutions, notably the International Criminal Court (ICC), and the interplay between the ICC process, national politics and prospects for more peaceful elections in Kenya.

In contrast, insufficient attention has been paid to the role of civil society in promoting justice for serious crimes, including the PEV. To some extent this reflects a

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more general trend where the literature on transitional justice and international justice has not sufficiently examined synergies between the local and the international, in particular the ability of civil society to interact with and influence the agendas of international institutions such as the ICC.

Our research examines the role of civil society actors in Kenya in advancing accountability for serious international crimes, specifically the PEV. We consider civil society as recipient and transmitter of norms of accountability, including international criminal justice; civil society as transformer and user of such norms; and civil society strategies for engaging with actors who promote or resist such norms domestically and internationally. Further, we explore how civil society has approached the 'impunity gap' in Kenya, including by devising advocacy strategies relating to a complementary justice process and by bringing (or at least considering bringing) into play tools such as private prosecutions and public interest litigation. In so doing, we recognize that civil society may be subject and object of international criminal justice, but also delve into its agency and strategies as an agent.<sup>2</sup>

While some of the findings in the article seem specific to the situation in Kenya, lessons from this experience may challenge some of the assumptions in the literature on civil society and accountability more broadly. Notably, we question whether civil society in countries affected by serious human rights abuses can rely primarily on international standards as part of a 'justice cascade.' Our fieldwork points to a much more complex situation where narratives of justice and accountability change continuously, in part as a consequence of counternarratives devised by those opposed to a criminal justice process. The narratives may also be undermined by actors who have the necessary resources and creativity to design an alternative version of events.

Our investigation builds upon claims about the role of civil society in the spread of human rights norms and transitional justice processes, many of which grew out of constructivist literature in international relations scholarship. Critical to the argument are the agents, specifically norm entrepreneurs, who shape and develop norms, which may then be adapted over time by norm adaptors.<sup>3</sup> These norm entrepreneurs are generally expected to be civil society activists, both local and international, often working in conjunction with like-minded states. Of particular interest are situations in which normative suasion alters states' understandings of their interests, or generates changes in behaviour that may be contrary to evident material interests. Not surprisingly, a great deal of focus has been placed upon state participation in and compliance with international legal and, more specifically, human rights regimes.<sup>4</sup> This analysis has now been applied to the global spread of transitional justice,

2 See, similarly, Emily Haslam, 'Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society,' *International Journal of Transitional Justice* 5(2) (2011): 221–240.

3 Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' *International Organization* 52(4) (1998): 887–917.

4 Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999); Christian Reus-Smit, ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004); Alison Brysk, *Speaking Rights to Power: Constructing Political Will* (Oxford: Oxford University Press, 2013); Julie A. Mertus, *Bait and Switch: Human Rights and U.S. Foreign Policy* (London: Routledge, 2004).

identifying the development of a global norm towards greater accountability for the most serious crimes committed under repressive regimes or during violent conflict.

This was first termed the ‘justice cascade’ by Ellen Lutz and Kathryn Sikkink. The claim, simply put, is that states initiate or permit a range of trials for past human rights abuses, despite the risk that the trials may disrupt a transition or upset elites, because they come to believe that accountability is important. They may be persuaded by the normative value of protecting human rights, the importance of legal/judicial accountability specifically, and may in particular be attentive to their reputations as law-abiding or ‘good’ states. In some cases, it is a range of international and domestic civil society actors who are expected to engage in this norm promotion and suasion. The claim is that a normalization of the expectation of transitional justice has occurred, such that in the wake of serious violence, domestic and international actors assume that trials or other processes will follow.<sup>5</sup>

In Kenya, however, we find a somewhat different situation, one which illustrates the role of international civil society in promoting accountability, particularly criminal justice, and of domestic civil society in engaging with these norms and mechanisms, such as the ICC. It also shows a domestic civil society that, in the face of increased government pressure, has experienced limited capacity to exercise normative suasion. Yet, our study shows not only the engagement of local civil society with international norms, but also its adaptability in reacting to political and security constraints, and recognition of the limitations of legalistic norm promotion.

Our research is based upon interviews conducted in Kenya in February 2014, under the auspices of a grant from the British Academy. We conducted semistructured interviews with domestic human rights activists, legal practitioners and academic experts within the country as well as representatives of donors, international organizations and international nongovernmental organizations (NGOs). We also conducted two workshops, under the Chatham House Rule, with activists in Kenya in February 2014 and scholars and practitioners in the UK in May 2014. In addition to snowball approaches, interviewees and workshop participants were drawn heavily from what we refer to as the ‘justice group’ because of its influence on the trajectory of decisions about accountability in Kenya. The interviews reflect not only the challenges faced by civil society actors but also the tactics they have adopted, their own self-criticism and their adaptation to changing conditions.<sup>6</sup>

5 Ellen Lutz and Kathryn Sikkink, ‘The Justice Cascade: The Evolution and Impact of Foreign Human Rights in Latin America,’ *Chicago Journal of International Law* 2(1) (2001): 1–34; Kathryn Sikkink, *The Justice Cascade: How Human Rights Trials Are Changing World Politics* (New York: W.W. Norton and Company, 2011); Ruti G. Teitel, ‘Transitional Justice Genealogy,’ *Harvard Human Rights Journal* 16(1) (2003): 69–94; Aaron P. Boesenecker and Leslie Vinjamuri, ‘Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms,’ *International Journal of Transitional Justice* 5(3) (2011): 345–365.

6 Eleven official interviews were conducted for this project in Nairobi in February 2014, and about 10 participants took part in each of the workshops in Nairobi in February 2014 and London in May 2014, meaning that about 30 respondents informed this research. Since most respondents requested generic attribution or anonymity, we cite their statements in a manner that only identifies the type of respondent in question and the date and location of the interview or workshop. Inevitably, analysis in this article also draws upon earlier research conducted by the authors in Kenya and elsewhere. Where specific points in this article are derived from interviews conducted in the context of other research projects, citations to relevant interviews are made, but again in a generic form due to the same considerations as mentioned

## RESPONSES TO THE POST-ELECTION CRISIS AND OTHER SERIOUS CRIMES IN KENYA

Since the establishment of a multiparty system in 1992, violent clashes among supporters of different political parties have frequently accompanied elections in Kenya. Both the 1992 and the 1997 elections were characterized by widespread violent attacks. This violence was incited or planned by politicians and government officials with the aim of intimidating presumed supporters of the opposition, creating ethnic and therefore supposedly more politically homogenous voting blocs, as well as driving the opposition out of areas where they were seen to have no claims to land.<sup>7</sup> Partly because the 2002 elections were relatively peaceful compared to the 1992 and 1997 elections, some were surprised that the 2007 elections were accompanied by widespread killings, displacement, sexual violence and other serious crimes.

The PEV occurred in the context of a disputed presidential election, where both incumbent President Mwai Kibaki of the Party of National Unity (PNU) and his challenger Raila Odinga of the Orange Democratic Movement (ODM) claimed victory. Over a period of two months, more than 1,000 people were killed, many more were injured and hundreds of thousands were displaced. What started as spontaneous protests and rioting by Odinga supporters in Nyanza Province soon took a more organized form. This included premeditated attacks committed by armed youth groups against members of ethnic groups seen to support Kibaki, as well as revenge attacks committed by the Mungiki gang and other youth groups against members of ethnic groups perceived to be Odinga supporters. The police were allegedly responsible for around one-third of the total casualties.<sup>8</sup>

The PEV crisis received significant international attention. Following some failed attempts at mediating the crisis, in January 2008 the chairman of the African Union (AU) announced the establishment of an AU Panel of Eminent African Personalities to facilitate a resolution of the crisis. The AU Panel, which received significant support from key international players, including the European Union and the US, initiated a mediation process known as the Kenyan National Dialogue and

above. Because of the relative dominance of the 'justice group,' they were predominant in our interviews, which may have skewed our understanding of overall civil society strategies. We have sought to minimize potential bias by drawing on other sources, including desk research and previous and subsequent interviews.

- 7 Participant, workshop with experts, London, UK, 6 May 2014. On the election violence in the 1990s, see Akiwumi Commission, *Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya* (1999); Human Rights Watch, *Playing with Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya* (May 2007); Stephen Brown, 'Quiet Diplomacy and Recurring "Ethnic Clashes" in Kenya,' in *From Promise to Practice: Strengthening UN Capacities for the Prevention of Violent Conflict*, ed. Chandra Lekha Sriram and Karin Wermester (Boulder, CO: Lynne Rienner, 2003); Peter Mwangi Kagwanja, *Killing the Vote: State-Sponsored Violence and Flawed Elections in Kenya* (Nairobi: Kenya Human Rights Commission, 1998).
- 8 On the 2007 elections and the causes of the PEV, see, Commission of Inquiry into Post-Election Violence, *Report of the Commission of Inquiry into Post-Election Violence* (2008); Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence* (2008); Human Rights Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance* (2008); Susanne D. Mueller, 'The Political Economy of Kenya's Crisis,' *Journal of Eastern African Studies* 2(2) (2008): 185–210; Thomas Obel Hansen, 'Political Violence in Kenya: A Study of Causes, Responses, and a Framework for Discussing Preventive Action,' Institute for Security Studies Occasional Paper 205 (2009).

Reconciliation (KNDR). The KNDR had two overall objectives: to bring about a political resolution in order to end the violence and to facilitate a dialogue to address the longer-term structural problems in Kenya that had enabled the violence. On 28 February 2008, Kibaki and Odinga signed a power-sharing agreement whereby Kibaki would remain president and Odinga would assume the newly created post of prime minister. The agreement stipulated that the composition of the coalition government should reflect the parties' relative power in parliament.

Kibaki and Odinga also formally agreed to establish several mechanisms aimed at addressing the legacies of Kenya's political violence, most notably a criminal justice process, the Truth, Justice and Reconciliation Commission (TJRC) and a constitutional review process.<sup>9</sup> The parties agreed to create the Commission of Inquiry into the Post-Election Violence (known as the Waki Commission after its chairman Justice Philip Waki), mandated to investigate the violence and make recommendations with regard to the prosecution of PEV crimes. The Waki Commission recommended the establishment of a so-called Special Tribunal, composed of Kenyan as well as non-Kenyan staff, to try those most responsible for the abuses. This recommendation built upon the model of the Special Court for Sierra Leone in its hybrid nature, and was informed by a Commission employee who had worked for that Court, illustrating the role of regional norm or institutional dissemination. However, the Commission also handed over to Kofi Annan a sealed envelope with the names of those it deemed most responsible for the PEV, which was to be forwarded to the ICC if the Kenyan government failed to act on the recommendation.<sup>10</sup> The tribunal was not created, and on 31 March 2010 the ICC formally announced the opening of an investigation into the Kenyan situation.

Although discussions about accountability for serious crimes have taken place on a number of occasions in Kenya's history, the current debate has focused on the PEV and the mechanisms set up in its wake.<sup>11</sup>

### KENYAN CIVIL SOCIETY ACCOUNTABILITY STRATEGIES

It is critical to understand that, prior to the PEV, Kenya had developed a vibrant civil society, one that remains active, diverse and creative despite the closing political space. By civil society, we refer largely to organized activists operating within NGOs,

- 9 On the mediation process and the agreements reached, see, Elisabeth Lindenmayer and Josie Lianna Kaye, *A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya* (New York: International Peace Institute, 2009); Martin Griffiths, *The Prisoner of Peace: An Interview with Kofi A. Annan* (Geneva: Centre for Humanitarian Dialogue, 2008); Nic Cheeseman and Tendi Blessing-Miles, 'Power-Sharing in Comparative Perspective: The Dynamics of "Unity Government" in Kenya and Zimbabwe,' *Journal of Modern African Studies* 48(2) (2010): 203–229; Thomas Obel Hansen, 'Kenya's Power-Sharing Arrangement and Its Implications for Transitional Justice,' *International Journal of Human Rights* 17(2) (2013): 307–327.
- 10 On the Waki Commission and its recommendations, see, e.g., Chandra Lekha Sriram and Stephen Brown, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact,' *International Criminal Law Review* 12(2) (2012): 219–244.
- 11 While the PEV crisis was the 'trigger' for proposals of various mechanisms for accountability, the TJRC was mandated to address human rights, political violence and other injustices committed since independence. For an outline of the earlier debates on accountability, see, e.g., Godfrey M. Musila, 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions,' *International Journal of Transitional Justice* 3(3) (2009): 445–464.

which first actively sought to promote multiparty democracy and accountability under the Moi regime. Many activists, particularly human rights activists, became part of the government after the move to multiparty rule. This organized form of civil society grew as the formal democracy developed, with numerous groups dedicated to human rights, anticorruption, development and peace and stability. These groups would play greater or lesser roles in the context of the PEV.

Civil society groups' strategies towards achieving accountability for the PEV and other serious crimes in Kenya have changed significantly over time, in part in response to the changing political environment and the actions and responses of other actors. To explain the development of these strategies, we identify three main phases. Phase 1 ran from the PEV crisis until the formal opening of the ICC investigation in March 2010. Phase 2 concerns the period from March 2010 until Uhuru Kenyatta and William Ruto, both facing ICC charges, were elected president and deputy president respectively in April 2013. Phase 3 ran from April 2013 until the conclusion of our field research in May 2014.

### **Phase 1: The PEV Crisis to the Opening of the ICC Investigation**

During the PEV crisis, civil society organizations essentially divided into two groups: one that began advocating for criminal accountability while the violence was still ongoing, and one that took initiatives aimed at ending the violence but saw accountability as less important or even sought to exclude it from the national agenda. Following the terminology used by many of our interviewees, we refer to these two groups as the 'justice group' and the 'peace group,' respectively.

The justice group, which included organizations involved with human rights and democracy issues, organized under the banner of Kenyans for Peace with Truth and Justice (KPTJ), and engaged with international human rights NGOs such as Human Rights Watch and the International Center for Transitional Justice. While the formation of KPTJ can be seen as a direct response to the PEV, many of the groups that joined KPTJ had worked together before, starting with the anticorruption campaign and justice sector reforms initiated by the Kibaki administration in 2003. These existing relationships generated trust, something that respondents noted was important for KPTJ's effectiveness.<sup>12</sup>

KPTJ soon became the most important actor advancing accountability in Kenya. During the crisis KPTJ placed observers and investigators in the field to document human rights abuses and report on the ongoing violence, to make information available to Kenyans notwithstanding the media 'blackout.'<sup>13</sup> After the violence ended, the justice group sought to advance the accountability agenda by engaging the Annan-led mediation team and later the Waki Commission. Although some respondents emphasized that these human rights NGOs considered a variety of (quasi) judicial options for justice from the outset,<sup>14</sup> the justice group initially advocated strongly for a domestic accountability process within the framework of a Special

12 Personal interview, NGO official, Nairobi, Kenya (No. 6), not for attribution (hereinafter 'NFA'), 25 February 2014.

13 Personal interview, NGO official, Nairobi, Kenya (No. 6), NFA, 25 February 2014.

14 Participant, workshop with experts, London, UK, 6 May 2014.

Tribunal, as proposed by the Waki Commission, and some KPTJ members were involved in the drafting of the Special Tribunal bill. Once it became clear that domestic prosecutions were unlikely to happen due to political leaders' resistance, the justice group shifted its focus to the ICC.<sup>15</sup> At the same time, it advocated for the establishment of other transitional justice processes, notably the TJRC.<sup>16</sup>

While civil society groups operating within the framework of KPTJ did not agree fully on the rationale for pursuing accountability, the consensus was that criminal justice for the PEV was a prerequisite for securing long-term peace and stability in Kenya and avoiding the recurrence of election-related violence. Justice and peace were seen as mutually reinforcing principles, reflected in the name Kenyans for Peace *with* Truth and Justice.<sup>17</sup> The PEV crisis and the mediation process that followed were viewed as a window of opportunity for addressing Kenya's long-lasting problems with impunity.

The peace group, in contrast, did not see accountability as necessary to end the violence and stabilize the country. This group – involving multiple actors, including senior statesmen and civil servants such as Emmanuel Kiplagat, later the TJRC's chairperson – was much looser in organization. The justice and peace groups strongly opposed each other.<sup>18</sup> These tensions appear at least partially related to the groups' associations with the two political coalitions at the time, the PNU and the ODM. Those who demanded peace but did not advocate for justice were generally seen as being supportive of Kibaki and his group, while those who advocated for justice were viewed as associated with Odinga and his group.<sup>19</sup>

There are several factors that help to explain why the justice group was able to strongly influence the agenda at this time. First, businesspeople were generally supportive of the justice group's agenda, in part because their businesses had been affected by the violence and many feared further escalation in the absence of the threat of accountability. The business community may have joined the justice group out of 'self-interest,' as one interviewee observed, but their support was important because of their connections with politicians.<sup>20</sup>

Second, the Annan-led mediation team was sympathetic to the justice group's agenda and consulted members concerning how justice concerns could be brought into the power-sharing deal. The general feeling in the justice group was that Annan and the mediation team 'relied much more on the KPTJ group' than on the peace

15 As one respondent noted, 'when the hybrid tribunal was on the table, we put all of our energy into that, but when it failed we urged for the ICC to come in.' Participant, workshop with experts, London, UK, 6 May 2014.

16 Actual engagement with the TJRC mostly took place in phase 2 and hence is discussed below.

17 As one interviewee observed, 'we said at the time, peace and justice are both good things, why can't we have both?' Personal interview, NGO official, Nairobi, Kenya (No. 8), NFA, 26 February 2014.

18 One interviewee observed that the peace and justice camps 'were mutually annoyed with one another,' while another referred to the peace group as 'idiots' who wanted to maintain the status quo. Personal interviews, NGO officials, Nairobi, Kenya (Nos. 6 and 8), NFA, 25 and 26 February 2014.

19 One interviewee explained that the organizations associated with the ODM wanted political justice 'because they felt had been robbed of election' and that they advocated for accountability for the violence because 'they felt they had been targeted, especially by police shootings.' At the same time, the justice group was supportive of the power-sharing proposal, which would bring Odinga and the ODM into government. Personal interview, NGO official, Nairobi, Kenya (No. 8), NFA, 26 February 2014.

20 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014.

group and quickly became opposed to the idea of a political settlement that excluded justice components.<sup>21</sup>

Third, the Waki Commission was receptive to the justice group's agenda. One respondent emphasized how the Kenya National Commission on Human Rights (KNCHR) influenced the work of the Waki Commission through its 2008 report, *On the Brink of the Precipice*, and by handing over evidence to the Waki Commission.<sup>22</sup> Additionally, George Kegoro of the International Commission of Jurists (ICJ)-Kenya took leave to serve in the Waki Commission, which appears to have provided a foundation for bringing in ideas about international justice as conceptualized by the ICJ-Kenya leadership.<sup>23</sup>

Fourth, at this time there was some support for accountability among political actors. As one expert observed, historically civil society actors have 'never been able to hold to account the coalitions they go into partnership with,' but the 'interface was massive in 2008' because key political actors, specifically important segments of the ODM, shared interests with the justice group.<sup>24</sup> Even if key political actors, including then President Kibaki, opposed the ICC's intervention, civil society's ability to advocate for and shape the accountability agenda seems to have been furthered by political support for accountability, especially among ODM leaders, which in turn helped create popular support for the accountability process and some of civil society's agenda.<sup>25</sup>

Lastly, interviewees suggested that the justice group's ability to influence the agenda at this stage resulted from the organization of KPTJ. It facilitated 'burden-sharing' on different agenda items outlined in the KNDR, seemingly making the advocacy more efficient. At the same time KPTJ, as an umbrella organization, often handled the more sensitive aspects of advocacy, perhaps reducing the risk for individual organizations.<sup>26</sup>

Accordingly, phase 1 was characterized by the formation of a coalition of like-minded civil society groups (KPTJ), which effectively advocated for bringing in the accountability agenda to the political settlement overseen by the AU mediators. These segments of civil society in Kenya were empowered by a context where key political actors (in particular ODM leaders) as well as international actors were supportive of addressing the PEV through accountability measures. Interestingly, and perhaps counter to expectations that accountability norms trickle down from international to domestic actors, this cluster of domestic civil society actors helped to ensure that accountability was placed squarely on the regional mediators' agenda. Rather

21 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014. These observations are in line with the findings of other studies. See, e.g., Meredith Preston McGhie and E. Njoki Wamai, *Beyond the Numbers: Women's Participation in the Kenya National Dialogue and Reconciliation* (Geneva: Centre for Humanitarian Dialogue, 2011).

22 Personal interview, government official, Nairobi, Kenya (No. 2), NFA, 20 February 2014.

23 According to an interviewee, this 'helped to give a platform; propagate the ideas they had.' ICJ-Kenya may thus have 'planted the seed of international justice' in the Commission. Personal interview, NGO official, Nairobi, Kenya (No. 8), NFA, 26 February 2014.

24 Participant, workshop with experts, London, UK, 6 May 2014.

25 Participant, workshop with experts, London, UK, 6 May 2014.

26 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014; personal interview, NGO official, Nairobi, Kenya (No. 9), NFA, 27 February 2014.



than *persuading* reluctant political actors as suggested in constructivist literature outlined above, in Kenya the influence of human rights NGOs in terms of bringing accountability norms into the process of conflict resolution was in significant part premised on their ability to *build alliances* with political players, which may primarily have supported accountability for different reasons. However, while the justice group helped shape the accountability agenda in phase 1, there is danger in overemphasizing its role.<sup>27</sup>

### Phase 2: The Opening of the ICC Investigation to the 2013 Elections

This phase was characterized by close interactions between the justice group and ICC bodies, in particular the Office of the Prosecutor (OtP). Despite government opposition to the ICC investigation, some key political actors supported the ICC. At the same time, there was widespread international support for the accountability agenda. In combination, these factors created opportunities for civil society groups to promote accountability by engaging with the ICC. Again, this illustrates how civil society's ability to drive an accountability agenda depends on building partnerships with other actors, national and international, but, as pointed to below, also how close interactions with such actors can later have a 'boomerang effect,' as civil society's impartiality may be questioned by actors opposed to accountability. However, the naming of the ICC suspects in December 2010 altered the political landscape, notably through the formation of a coalition between former adversaries Kenyatta and Ruto. This further politicized the accountability process, creating challenges for civil society organizations that relied on legal strategies.<sup>28</sup>

The justice group's interactions with the OtP commenced prior to the opening of an official investigation. Already during the PEV, the OtP was in contact with some Kenyan civil society organizations, though according to respondents there was no indication that the ICC would eventually be involved. As a preliminary examination was opened, human rights NGOs provided the OtP with reports and unofficial meetings were held during the OtP's visits to Kenya.<sup>29</sup> In March 2009, Annan organized a conference to discuss possible ICC involvement in the country, in which these civil society organizations were represented. The first formal meeting between Kenyan civil society organizations and the OtP took place in The Hague in September 2009, during a workshop sponsored by the International Center for Transitional Justice.<sup>30</sup> However, interactions between members of the justice group and ICC Prosecutor Luis Moreno Ocampo intensified following the opening of an investigation. In particular, civil society organizations: (1) provided clarification to the Prosecutor on the

27 As one of the experts consulted for this article noted, 'yes, justice organizations were important at the outset but I don't think they ever drove or captured the agenda.' Participant, workshop with experts, London, UK, 6 May 2014.

28 See, Stephen Brown with Chandra Lekha Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya,' *African Affairs* 111(443) (2012): 244-260; Thomas Obel Hansen, 'Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns,' *California Western International Law Journal* 42(1) (2011): 1-35.

29 Participant, workshop with experts, London, UK, 6 May 2014.

30 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014.

'Kenyan context,' including the status of domestic accountability efforts, and advised him on how best to make public statements with respect to the Kenyan investigation; (2) following his requests, helped the Prosecutor develop 'contacts on the ground,' including providing access to victims and witnesses; (3) conducted advocacy and outreach work, including facilitating ICC meetings in the country and 'going to hotspots to show ICC documentaries'; (4) trained Kenyan journalists on ICC-related matters on behalf of the ICC; and (5) provided the Prosecutor with various materials and analyses, such as reports on sexual and gender-based violence committed in the context of the PEV.<sup>31</sup>

Although the OtP was the most visible organ of the ICC, the justice group also interacted with other organs of the Court, including the Victims and Witnesses Unit (VWU) and the Registry. Some members of the group took up the task of initiating registration of victims, which some respondents later reflected was problematic as it created 'a rush' to get as many victims as possible registered (with many victims misunderstanding the implications of being registered).<sup>32</sup> Further, the Registry helped train Kenyan lawyers working with civil society organizations on 'Court processes and what the ICC is all about,' with the purpose of having specific civil society organizations carrying out outreach work.<sup>33</sup>

According to one respondent, the justice group's engagement with the Court was at that point based on two main concerns: to make the Prosecutor (and the Court more broadly) understand the Kenyan context, especially the 'inability of the Kenyan justice system' to deal with the PEV, and to 'make victims have realistic expectations of the ICC.'<sup>34</sup>

While the ICC was at the forefront of civil society accountability strategies in this phase, the justice group also had to consider how to approach other avenues for accountability. Notably, civil society actors who had earlier advocated for the creation of the TJRC had to decide whether to engage with a Commission that suffered from serious flaws, including being headed by Kiplagat, himself alleged to have committed human rights violations under the Moi regime. While many organizations openly criticized the TJRC process and saw it as 'marred by controversy,'<sup>35</sup> KPTJ and some individual organizations decided to remain involved in the process, for example by mobilizing people to give statements and providing support to witnesses.<sup>36</sup> Later on, the justice group, again headed by KPTJ, 'stepped in to try to beef up the report,' although some subsequently regretted that they may have lent legitimacy to an undeserving institution.<sup>37</sup>

Additionally, justice group members had to address the proposal for an International Crimes Division (ICD) of the Kenyan High Court, which was first announced by the government in January 2011 amid efforts to gather support for a

31 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014; personal interviews, NGO and government officials, Nairobi, Kenya (Nos. 2, 6, 8 and 9), NFA, 20, 25, 26 and 27 February 2014.

32 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014.

33 Personal interview, NGO official, Nairobi, Kenya (No. 9), NFA, 27 February 2014.

34 Personal interview, NGO official, Nairobi, Kenya (No. 8), NFA, 26 February 2014.

35 Personal interview, NGO official, Nairobi, Kenya (No. 6), NFA, 25 February 2014.

36 Personal interview, NGO official, Nairobi, Kenya (No. 9), NFA, 27 February 2014.

37 Personal interview, NGO official, Nairobi, Kenya (No. 6), NFA, 25 February 2014.

UN Security Council deferral of the Kenyan ICC cases. As with the TJRC, civil society actors were divided and sometimes unclear on whether, or to what extent, to become involved in the process of setting up an ICD. Respondents generally felt that while a complementary accountability process is needed, the ICD proposal was seriously flawed, noting that it is intended as a way for the government to challenge the ICC. In light of these perceived challenges and a feeling that the government had failed sufficiently to consult civil society actors on the proposal, several organizations decided that they would not be ‘coming on board.’<sup>38</sup> In part out of the expectation that concerns ‘they deem relevant’ (such as poaching, dumping, terrorism, corruption and transnational crimes) would be addressed, other organizations however decided to join the process.<sup>39</sup> Accordingly, the justice group, which formerly stood (almost) united in terms of accountability strategies, was, as one interviewee noted, ‘split on the ICD issue.’<sup>40</sup>

Finally, civil society groups focused on the reform agenda, as had been agreed within the KNDR framework. Some carried out work related to the judicial reforms, while others worked with the National Police Service Commission to create a legitimate framework for vetting and to ensure that police officers involved in the PEV would be investigated.<sup>41</sup> With reference to political interference in the work of the courts, some organizations felt that the judiciary remained in a ‘mess,’ making substantial involvement in these processes difficult.<sup>42</sup>

### Phase 3: The 2013 Elections to February 2014

This phase was characterized by a sense of shock within the justice group that Kenyatta and Ruto were elected president and deputy president, respectively, or, in the words of some respondents, that the Supreme Court ignored the ‘evidence submitted as to the supposed legitimacy of the presidential result.’<sup>43</sup> With two of the ICC suspects in power, the justice group no longer felt it could push as actively for accountability, in particular for international justice. Kenyan human rights NGOs thus perceived themselves as being on the defensive in response to government action.<sup>44</sup> Additionally, coherence among human rights and democracy groups further reduced in this period, in part as a consequence of the government’s targeting of civil society and the partial loss of important partners, including an effective political opposition, the media and international donors.<sup>45</sup> Some organizations started questioning whether they had already ‘tried all possibilities’ in terms of promoting

38 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014; personal interviews, NGO officials, Nairobi, Kenya (Nos. 1 and 6), NFA, 18 and 25 February 2014.

39 Personal interviews, NGO and government officials, Nairobi, Kenya (Nos. 1, 2, 7 and 9), NFA, 18, 20 and 27 February 2014.

40 Personal interview, NGO official, Nairobi, Kenya (No. 9), NFA, 27 February 2014. A donor representative consulted felt that it was ‘pretty boneheaded’ that civil society actors have disassociated themselves from the ICD proposal because they could have made ‘the clear case that any ICD should deal with PEV’ crimes. Personal interview, diplomat, Nairobi, Kenya (No. 10), NFA, 29 February 2014.

41 Personal interviews, NGO officials, Nairobi, Kenya (Nos. 7 and 9), NFA, 25 and 27 February 2014.

42 Personal interview, donor official, Nairobi, Kenya (No. 3), 20 February 2014.

43 Participant, workshop with experts, London, UK, 6 May 2014.

44 Personal interview, NGO official, Nairobi, Kenya (No. 1), NFA, 18 February 2014.

45 Participant, workshop with experts, London, UK, 6 May 2014.

accountability, and some indicated that they would shift their focus from criminal accountability to restorative justice at the community level.<sup>46</sup> This illuminates how claims about the ‘justice cascade’ may not fully appreciate political actors’ ability to undermine accountability processes and therefore limit civil society’s ability to advance accountability through normative suasion. Nonetheless, these civil society actors attempted to devise alternative strategies for pursuing accountability, including bringing civil suits against the government for failing to fulfil its obligations.

As discussed in detail below, following Kenyatta’s and Ruto’s election victories, the Kenyan government used significant resources to combat the ICC and actors it perceived to support the Court, including developing a narrative of the accountability process as being driven by imperialist powers in the West and a local civil society that works on behalf of these powers. The justice group struggled to come up with a narrative that could counter the government’s version of the story – that civil society actors in Kenya are ‘unpatriotic’ as they ‘took Kenya to the ICC.’<sup>47</sup>

Our fieldwork points to various explanations for the difficulties associated with creating a strategy that could counter the government’s narrative, and thus the decline in the efficacy of a proactive civil society effectively pushing the accountability agenda. Human rights NGOs were shocked by the 2013 election results, which generated apparent state capture by ICC accused, and these NGOs found it difficult to respond to heightened government harassment.<sup>48</sup> The election of two ICC suspects also made some members of the justice group question the primarily legal and fact-oriented strategies utilized in earlier phases. Yet, no new overall strategy was devised. One interviewee explained: ‘We haven’t been very effective because our approach has been: were crimes committed?’ The justice group thus felt unable to counter the political, ethnic and historical narrative developed by the Kenyatta administration.<sup>49</sup> However, one tactic it developed in this phase to counter claims that human rights NGOs are working on behalf of foreign governments and attempt to undermine the sovereignty of Kenya was ‘to work openly and say openly, this is what motivates us,’ and to point out that the Kenyan government was to a large extent funded by western countries.<sup>50</sup> Yet, as discussed in more detail below, the justice group faced challenges communicating this point, including difficulties accessing the media. Furthermore, as also discussed below, developments at the ICC limited the strategic options and created reluctance among the organizations to be seen as active supporters of the Court.<sup>51</sup> The perception of a loss of a common agenda – the ICC cases – meant that the justice group lacked something to ‘mobilize around.’<sup>52</sup>

Given the limited space for challenging the government within Kenya, in phase 3 the justice group increasingly sought to use international forums to further the

46 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014; personal interviews, NGO and government officials, Nairobi, Kenya (Nos. 2 and 5), NFA, 20 and 25 February 2014.

47 Participants, expert workshop convened by authors, Nairobi, Kenya, 21 February 2014.

48 Personal interview, donor official, Nairobi, Kenya (No. 11), NFA, 29 February 2014.

49 Personal interviews, NGO and donor officials, Nairobi, Kenya (Nos. 4 and 8), NFA, 24 and 26 February 2014.

50 Personal interview, NGO official, Nairobi, Kenya (No. 8), NFA, 26 February 2014.

51 Personal interview, NGO official, Nairobi, Kenya (No. 6), NFA, 25 February 2014.

52 Participant, workshop with experts, London, UK, 6 May 2014.

accountability agenda, or at least contest the government's narrative. In particular, many respondents emphasized how effectively these organizations utilized the 2013 Assembly of States Parties (ASP) to the Rome Statute to promote awareness of the situation in Kenya, including inaccuracies in the government's campaign. Interviewees felt that the justice group was effective challenging the Kenyan government's narrative at the ASP, seemingly catching the government by surprise with a well-organized campaign.<sup>53</sup> Specifically, the organizations, in their own words, 'did a lot' to counter the government's efforts at amending various rules relating to immunity of heads of state, presence at trial and other rules directly relevant to the Kenyan ICC cases.<sup>54</sup> They did so by speaking in plenary and at side events and by producing a position paper (which government officials attempted to remove from tables) responding to the government's information concerning issues such as the existence of a domestic accountability process.<sup>55</sup> Again, as with the earlier international mediation process, these domestic actors demonstrated their capacity to shape discourse regarding accountability. Nonetheless, as discussed below, some respondents expressed criticism of states parties' willingness to amend the rules on presence at trial, implying that even if civil society groups managed to counter some of the claims made by the Kenyan government, the ultimate outcome of the ASP was not necessarily a success.<sup>56</sup>

Further, given the challenges associated with pursuing criminal accountability, members of the justice group started considering alternative avenues, including bringing cases before regional courts or international human rights bodies, universal jurisdiction, private prosecutions, bringing civil suits against the government for failing to fulfil its obligations under international and national law, documenting violations and preserving evidence, and conducting so-called public inquests. The first three options were not deemed feasible by most of these organizations,<sup>57</sup> but they were relatively optimistic about bringing civil suits against the government. Several cases have already been brought against government agencies concerning their failure to uphold the law during the PEV crisis, including cases relating to sexual and gender-based violence, police shootings and internal displacement. Some respondents saw this as a way of 'testing' the judicial structures put in place with the 2010 constitution.<sup>58</sup> Finally, some human rights NGOs have contemplated public inquests, where the police, as part of a coroner process, launch an inquest into suspicious deaths that is open-ended in nature but may lead to a recommendation of prosecution.<sup>59</sup>

Members of the justice group also had to decide how to deal with the TJRC, which in this phase made public its report. Several respondents expressed

53 Personal interview, NGO official, Nairobi, Kenya (No. 8), NFA, 26 February 2014.

54 Personal interview, donor official, Nairobi, Kenya (No. 11), NFA, 29 February 2014.

55 Personal interview, NGO official, Nairobi, Kenya (No. 8), NFA, 26 February 2014.

56 Personal interviews, NGO and donor officials, Nairobi, Kenya (Nos. 6 and 11), NFA, 25 and 29 February 2014.

57 Personal interviews, NGO officials, Nairobi, Kenya (Nos. 1, 6, 8 and 9), NFA, 18, 25, 26 and 27 February 2014.

58 Personal interview, NGO official, Nairobi, Kenya (No. 9), NFA, 27 February 2014.

59 Personal interview, NGO official, Nairobi, Kenya (No. 8), NFA, 26 February 2014.

reservations about the report. One interviewee felt that the whole process seemed 'like [a] backwater thing being pursued by bureaucrats, for which [the] government had open and patent contempt . . . and we [civil society] also had open and patent contempt.'<sup>60</sup> For these reasons, and also, in the words of one respondent, due to the 'demoralization of civil society,' there was only a limited push among the organizations for the TJRC report to be released.<sup>61</sup> Despite these frustrations and lack of a clear strategy on how to address the shortcomings of the process, some organizations decided to be involved in the final stages of the TJRC process. Notably, KPTJ disseminated a 'condensed' version of the report.<sup>62</sup>

## TARGETS OF KENYAN CIVIL SOCIETY STRATEGIES AND THEIR RESPONSES

While Kenyan civil society is diverse, and often competitive and indeed fractious, it is also sophisticated and significant in scale. It was critical in promoting democracy and human rights in the Moi era, and many activists joined subsequent governments. These attributes may have helped it to promote an end to the violence, to push demands within Kenya for both peace and justice and to place pressure on the government via the domestic media and by providing data and briefings to representatives of the UN, the AU and the European Union.<sup>63</sup> Despite strong and sustained advocacy for accountability, which facilitated significant support among citizens for accountability and particularly for the ICC, the influence of civil society actors in this regard has waned for several reasons: government propaganda and intimidation, failures of external actors and weaknesses in civil society strategies themselves.

### Targeting a Resistant Government

The justice group promoted an end to the violence and advocated a shifting array of measures for accountability.<sup>64</sup> However, in the face of resistance to or indifference about accountability from the executive, legislative and judicial branches of government, these civil society actors found their options limited and altered their strategies as circumstances changed. Thus, while the justice group broadly favoured the TJRC, that support waned once the executive named the commissioners, including Kiplagat as chairperson.<sup>65</sup> Similarly, support for the Special Tribunal declined when it became clear that the legislature would not pass any bill supporting one, and that it was only invoked when there appeared to be a risk of ICC involvement becoming real.<sup>66</sup> The

60 Personal interview, NGO official, Nairobi, Kenya (No. 8), NFA, 26 February 2014.

61 Personal interview, NGO official, Nairobi, Kenya (No. 5), NFA, 25 February 2014.

62 Donor representatives lauded the effort because it is 'important to get the narrative out there since there is a history of forgetting about these reports.' Personal interview, European diplomat, Nairobi, Kenya (No. 4), NFA, 24 February 2014

63 L. Muthoni Wanyeki, 'Kenyan Civil Society and the 2007/8 Political Crisis: Towards and Following the Kenya National Dialogue and Reconciliation,' in *Civil Society and Governance in Kenya since 2002: Between Transition and Crisis*, ed. Okoth Okombo (Nairobi: African Research and Resource Forum, 2010).

64 Karuti Kanyinga, 'Stopping a Conflagration: The Response of Kenyan Civil Society to the Post-2007 Election Violence,' *Politikon: South African Journal of Political Studies* 38(1) (2011): 85–109.

65 Lydiah Kemunto Bosire and Gabrielle Lynch, 'Kenya's Search for Truth and Justice: The Role of Civil Society,' *International Journal of Transitional Justice* 8(2) (2014): 256–276.

66 Brown with Sriram, *supra* n 28.

ICC would, as many interviewees put it, become ‘the only game in town,’ even as the legislature passed a resolution to withdraw from the Rome Statute and as government rhetoric against the ICC as imperialist increased following the 2013 elections. Further, despite judicial reform following constitutional reform, and the creation of a new Supreme Court with former human rights advocate Willy Mutunga as chief justice, the judiciary has evinced relatively little enthusiasm for the ICC proposal, which combined with lack of consultation has meant that most members of the justice group do not support this proposal.

### The Government Counternarrative

Many interviewees said that the initial momentum of civil society’s pro-accountability narrative was hampered by the government’s counternarrative. As the government managed to depict both the ICC and Kenyan human rights NGOs as tools of imperial powers, the pro-accountability message lost its force. This was exacerbated by a narrative suggesting that the ICC’s prosecutions would target certain ethnic communities but not others, an effective strategy in a country where ethnic divisions shape political alliances. As one interviewee suggested, we can ‘give credit to the current government for its ability to undermine the ICC’ by tampering with and facilitating the killing of witnesses (see below), as well as by changing the narrative from one of accountability to one of imperialism.<sup>67</sup> The government has successfully combined its demonization of civil society and of the ICC by asserting that civil society actors took Kenya to the ICC, a claim which the organizations often vigorously protest, pointing out earlier support for a truth commission and a special tribunal, and emphasizing that the ICC ended up being the only accountability instrument still available.<sup>68</sup>

Why did the justice group have difficulty in countering the narratives put forward by the government? Respondents offered several overlapping explanations. Many were shocked, and still ‘licking their wounds,’ in the wake of the 2013 elections that brought Kenyatta and Ruto to power. Further, developing and delivering a coherent strategy has been hampered by lack of sufficient funds for advocacy, particularly in contrast to the government’s resources. Many actors have acknowledged their own limitations, specifically that they were insufficiently organized and coherent, had failed to engage citizens more broadly (see below) and were seen as Nairobi-focused elites. This may have combined with ICC fatigue, as people’s positive views and high expectations of the Court were disappointed (see below). Interviewees also suggested that their own legalistic narrative was simply less effective in the face of the government’s political and historical narrative highlighting ethnic allegiances.

The government’s narrative was also enabled by its increasing control over major media outlets, either through direct ownership, ability to outspend civil society or intimidation of traditional journalists, as well as use of social media. Further, civil society actors found that the cost of running advertisements was prohibitive, and that while government representatives had easy access to newspapers and television, this access was increasingly constricted for others. The result has been that the

67 Personal interview, donor official, Nairobi, Kenya (No. 11), NFA, 29 February 2014.

68 Personal interviews, NGO officials, Nairobi, Kenya (Nos. 5 and 6), NFA, 25 February 2014.

government has therefore been able to portray witnesses as being treated to luxury by the ICC and being coached by civil society. This depiction has contributed to the intimidation of witnesses and their withdrawal.<sup>69</sup> The government has also taken advantage of social media, for example through a blogging and Twitter campaign allegedly carried out by an official in the State House depicting civil society as 'evil society.'<sup>70</sup>

The justice group may also have been hampered by its own apparent success. With the approval of the new constitution in 2010, many of the reforms it advocated for were mandated, if not yet delivered, such as police and judicial reform. This, according to some experts, allowed the government to claim the mantle of reform, blunting the rhetoric of civil society activists that accountability and reform were necessary in the wake of the PEV.<sup>71</sup> Even the civil cases discussed above faced government resistance through its 'playing the contempt card' by refusing to appear in court or 'treating the cases as non-events,' which was thought to impact on judges' willingness to rule against the state.<sup>72</sup>

Perhaps the biggest advocacy challenge for the justice group has been its inability to counter not just the government's anti-civil society rhetoric but also the fact that this rhetoric has been expertly combined with invocations of ethnic and anticolonial rhetoric. This multitrack approach saw the government insisting that the US Agency for International Development is seeking to overthrow it in part by providing support to civil society, and claiming that civil society groups that provide support and advice to witnesses or potential witnesses for the ICC were paying them for false testimony. Further, the government has claimed that any critique of the state is ethnically motivated, specifically targeting Kikuyu and Kalenjin communities. Finally, support for the ICC has proven to be less robust than it initially appeared, because it can be fragmented along ethnic lines. While a significant proportion of the population continues to support the Court, many do so only for accused or potential accused from rival communities. As one interviewee put it, 'half the population agrees with us, but for the wrong reasons.'<sup>73</sup>

The one area in which Kenyan human rights NGOs consider themselves to have been more effective has been in targeting external actors, not only in briefing them during the crisis and negotiations but also more recently in countering the government's anti-ICC rhetoric at the ASP meeting in the fall of 2013. As discussed above, this meeting saw a small but concerted civil society effort to counter government rhetoric, with activists providing evidence to a number of African governments that sought them out for information, including South Africa and Tanzania. One activist argued that they had brought balance to what could have been a one-sided debate.<sup>74</sup> While the Kenyan government succeeded in promoting a debate on official

69 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014; personal interviews, NGO officials, Nairobi, Kenya (Nos. 6 and 7), NFA, 25 February 2014.

70 Personal interview, NGO official, Nairobi, Kenya (No. 6), NFA, 25 February 2014.

71 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014.

72 According to one interviewee, these government practices make 'judges nervous.' Personal interview, NGO official, Nairobi, Kenya (No. 8), NFA, 26 February 2014.

73 Personal interview, NGO official, Nairobi, Kenya (No. 8), NFA, 26 February 2014.

74 Personal interview, NGO official, Nairobi, Kenya (No. 8), NFA, 26 February 2014.



immunities, the Rome Statute provision remained intact. Activists see this as a success, and argue that even the changes in the rules of procedure and evidence were not significant because they effectively reinforced decisions already taken by judges at the ICC. According to some, the ASP was ‘basically a showdown between the Kenyan state and civil society and everyone else was a spectator.’ Civil society actors from other countries expressed their admiration for the Kenyan activists’ success, and the Kenyan delegation appeared surprised by the challenge and perceived lack of subservience. One reason for the relative efficacy may have been the location: unlike in the domestic context, where the government exercises increasing control over media outlets, it could not control what was said by civil society actors and what was heard by other states parties, putting them on a more ‘equal footing.’<sup>75</sup>

Kenyan civil society advocates of accountability face more than a war of words with the government, however. They also face government intimidation of themselves and of witnesses, which has generated a ‘poisonous atmosphere’ for groups working for accountability and/or with the ICC.<sup>76</sup> A KNCHR database that contains details about potential witnesses to which the commission had provided support was allegedly compromised by a former employee and passed to the government, resulting in some attrition of witnesses through intimidation.<sup>77</sup> The KNCHR has also been hampered in its operations by government delays in appointing new commissioners. At the same time, the government has promoted legislation that would directly affect civil society organizations by limiting the percentage of their budgets that could be derived from foreign support to 15, as well as tabling a bill that tightens visa restrictions for foreign employees. NGO representatives complain of illegal entry to their offices and electronic eavesdropping.<sup>78</sup> The result of this ‘scapegoating,’ particularly of KPTJ members, has been a ‘panic’ amongst some civil society actors that has resulted in a scaling back of ICC-related activities by some. Government threats to civil society arose not only because of active civil society support for the ICC but also because of broader activities such as the election petition.<sup>79</sup> Further, witnesses have been targeted directly, with Human Rights Watch alleging interference and threats to witnesses and that the government has not only failed to prevent such intimidation and in some cases killings but also encouraged it.<sup>80</sup> Many of the organizations that were active supporters of the ICC stopped working directly with the Court. In the words of one respondent, civil society groups were no longer at the ‘forefront’ on the ICC issue.<sup>81</sup>

75 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014.

76 Personal interview, NGO official, Nairobi, Kenya (No. 1), NFA, 18 February 2014.

77 Personal interview, government official, Nairobi, Kenya (No. 2), NFA, 20 February 2014.

78 CIVICUS and National Coalition of Human Rights Defenders-Kenya, *Attacks on Civil Society Undermining Democracy and Development in Kenya* (March 2015); participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014; participant, workshop with experts, London, UK, 6 May 2014.

79 Personal interview, NGO official, Nairobi, Kenya (No. 5), NFA, 25 February 2014.

80 ‘Kenya: Rights Defenders under Attack,’ Human Rights Watch, 4 October 2013, <http://www.hrw.org/news/2013/10/04/kenya-rights-defenders-under-attack> (accessed 20 May 2015).

81 Personal interview, government official, Nairobi, Kenya (No. 2), NFA, 20 February 2014. Other organizations, however, were reportedly ‘used to this type of intimidation’ and felt that there was ‘still space for manoeuvring,’ implying that it was possible to critique the government’s policies while engaging with it on justice-related matters. Additionally, some interviewees indicated a positive effect of working under

### 'Tainted Allies'

Civil society efforts to promote accountability have been further hampered by what may be characterized as 'tainted allies.' The ICC itself has had some high-profile failures, while bilateral donors that support accountability have been targeted by the government and maintained some distance from civil society actors. Notably, this dynamic suggests that in some cases, contrary to the predictions of some versions of the 'justice cascade,' international norm promotion may be detrimental for local actors. In fact, international norm promotion and the involvement of international institutions can be manipulated or deliberately reframed by opponents of accountability, particularly governments.

As discussed above, the OtP has been the most visible organ of the ICC in Kenya. Despite efforts by human rights NGOs to temper OtP expectations, many feel that the Office has been naive in its expectations of government cooperation and raised unrealistic expectations in Kenya. They have further been troubled by what they see as the OtP's misunderstanding of the realities of Kenyan politics and ethnic polarization in initially naming six men to be investigated and declaring the list to be balanced between 'two sides.' This left the investigation open to the accusation that Luo were being unfairly protected. NGOs were also troubled by the timing of the naming of the six suspects, prior to the provision of witness protection.<sup>82</sup>

Kenyan human rights activists feel strongly that they have been let down by various other organs of the Court. While not a civil society organization, the KNCHR collected information from possible witnesses and from victims, and numerous civil society groups sought to facilitate the registration of victims with the ICC.<sup>83</sup> Outreach work was initially carried out from Kampala, Uganda, in an office managing both the Kenya and Uganda situations. As the office now in place in Kenya has limited capacity, with one official coordinator, Kenyan human rights NGOs still feel that they bear the burden of outreach work.<sup>84</sup> These organizations have also been disappointed by the Court's approach to witnesses and victims, and have led in helping victims to register and in identifying possible witnesses. They are particularly critical of the Court's failure to protect witnesses, which has resulted in intimidation, loss of witnesses and the deaths of several potential witnesses, weakening already problematic cases. Many respondents complained about the Court's failures in providing protection, explaining that civil society actors of necessity took over this role.

Human rights activists have been disappointed not only with the operation of the Court behind the scenes but also in moving cases forward. Many have objected to what they see as slow justice, given delays in trials, and are extremely concerned about the ability of the prosecution to present strong cases. This concern has been exacerbated by the OtP's failure to achieve confirmation of charges against several of

the KPTJ banner, which in their view leads to less intimidation of individual organizations. Personal interview, NGO official, Nairobi, Kenya (No. 9), NFA, 27 February 2014.

82 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014; personal interviews, NGO and government officials, Nairobi, Kenya (Nos. 2 and 5), NFA, 20 and 25 February 2014.

83 Personal interview, government official, Nairobi, Kenya (No. 2), NFA, 20 February 2014.

84 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014; personal interview, NGO official, Nairobi, Kenya (No. 1), NFA, 18 February 2014. There is consensus, however, that with the arrival of Maria Kamara in the outreach office the situation improved.

those investigated and the recent withdrawal of charges against Kenyatta, the loss of witnesses and the apparently limited documentary evidence. As one observer suggested, ‘once the ICC cases fail, it will confirm the culture of impunity.’<sup>85</sup> Finally, activists say that the approach of the Court has been toothless and overly reliant on the cooperation of the government and the accused, particularly in issuing summonses to appear rather than arrest warrants. However, they feel constrained in their ability to criticize the ICC publicly, given that it is the only operational mechanism for accountability in the country.

At the same time, many donor countries that support accountability in the country have felt the need to distance themselves from these civil society actors and accountability agendas. The caution is mutual. Given the government’s accusations that donors are threatening Kenya’s sovereignty and that civil society organizations are servants of the ICC, the donors and imperialism, civil society actors are also wary of being identified with foreign supporters. While the wariness may be understandable, some activists feel that donor distancing goes further, and that the latter have increasingly prioritized peace over justice, sidelining accountability and making the work of civil society more challenging. Some interviewees pointed specifically to the approval of the amendment to the rules of procedure and evidence of the ICC to allow some officials not to appear for all trial proceedings as proof that former friends of accountability had softened.<sup>86</sup>

### ‘Not with the Masses’

Some members of the justice group reflected upon their own limitations, which may have affected their ability to capitalize upon the initially high approval of Kenyans for accountability generally and the ICC specifically. There are several elements to this analysis. Civil society groups focused on accountability were arguably ‘not with the masses,’ focusing excessively on criminal accountability. Some interviewees said they failed to understand what victims or the wider population wanted. In particular, they may have overlooked victims’ desire for direct support such as health assistance or reparations, and in the process ignored alternative modes of accountability such as civil suits. This is not the whole story, however. The NGO Peacenet advocated for noncriminal transitional justice measures consistently, and civil society organizations such as FIDA have now supported campaigns of civil suits in three areas: responsibility for police shootings, responsibility for sexual and gender-based violence and state responsibility for failure to act.<sup>87</sup> In retrospect, some advocate a ‘multipronged’ approach to accountability.

Interviewees attributed their own perceived shortcomings to at least three sources. First, the organizations focused on accountability are heavily staffed by lawyers, and thus not surprisingly have focused on legalized responses to the PEV, specifically criminal accountability. Second, the bulk of such organizations are based in Nairobi,

85 Personal interview, NGO official, Nairobi, Kenya (No. 9), NFA, 27 February 2014.

86 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014.

87 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014; personal interviews, NGO official and European diplomat, Nairobi, Kenya (Nos. 2 and 4), NFA, 20 and 24 February 2014; personal interview, NGO official, Nairobi, Kenya (No. 12), NFA, 20 May 2014; personal interview, NGO officials, Nakuru, Kenya (Nos. 1 and 2), NFA, 21 May 2014.

and thus insufficiently in touch with the majority of the population, or at least perceived to be so.<sup>88</sup> Finally, a few respondents argued that civil society's dynamism stalled after 2002, when many leaders were integrated into the government, and that there has been a failure to mentor younger activists, resulting in overreliance on a few charismatic leaders. In this context, analysts argue, civil society actors had a difficult time countering the effects of ethnic loyalties and patronage and maintaining broad-based support for accountability once specific accused were named.

### CONCLUSIONS

The Kenyan experience with accountability for the PEV serves to complicate claims regarding norm promotion and adoption, illustrating not only the challenges faced by key agents of change, civil society, but also the modes of adaptation that they undertake in the face of resistance. Civil society groups played a significant role in ensuring a debate about accountability took place following the PEV. These groups effectively utilized a window of opportunity created through international pressure for PEV accountability, as well as support for accountability among segments of the political leadership, in particular ODM leaders.

Civil society groups in Kenya seeking to advance accountability have attempted to appear politically neutral by citing legal norms and by relying on courts, assuming that legal, not political, strategies are more effective. However, these groups' ability to advance accountability has been contingent on building alliances with political actors. Popular support for accountability processes appears to have been shaped by political actors' support for these processes, and the justice group's ability to build alliances with these political actors. Once civil society lost allies at the political level, they faced significant challenges in terms of advancing their legal strategies. Once the ICC actually intervened and in particular following Kenyatta and Ruto's election victories, political leaders consolidated their opposition to accountability. They created a narrative for domestic constituencies of civil society, the ICC and countries in the West undermining Kenya's sovereignty, while also using international diplomacy to seek to halt the ICC prosecutions, with notable receptiveness at the AU and among many African states. This enabled them to counter the projection of accountability norms, and even to turn the dissemination of such norms against civil society. It thus partly undermined the ability of civil society to advance the accountability agenda domestically. It also limited the ability of western donors to pressure the government in the face of political elites' anticolonial rhetoric and western powers' interest in maintaining stable relations with a key ally in East Africa.

To a certain extent, Kenyan civil society's own strategies have been self-limiting, particularly because they have been legalistic in ways dominated by international norms and were thus perhaps more vulnerable to the government's anticolonial rhetoric. Some activists say they have now learned that approaches dominated by legal

88 Participant, workshop with NGO officials, Nairobi, Kenya, 21 February 2014; personal interviews, NGO and government officials, Nairobi, Kenya (Nos. 2 and 7), NFA, 20 and 25 February 2014; personal interviews, NGO officials, Nairobi, Kenya, May 2014. In addition, personal interview, NGO official, Nairobi, Kenya (No. 12), NFA, 20 May 2014 personal interviews, NGO officials, Nakuru, Kenya (Nos. 1 and 2), NFA, 21 May 2014. These latter interviews were conducted by Sriram and funded by the MacArthur Foundation and the European Research Council via the Security in Transition Programme.

language and influenced by international norms may be flawed in facing a government that has significant economic and diplomatic resources and can draw upon a range of political, historical and ethnic language in a divided society to build counter-narratives. Further, though other accountability initiatives, including civil suits, were later pursued, Kenyan human rights organizations' focus has largely been on criminal accountability for high-level perpetrators at the international level, which may be problematic for more generally advancing accountability norms, especially in light of the collapse of ICC cases. Whereas viewing the PEV crisis and the subsequent mediation process as a window of opportunity to advance accountability norms may have seemed an obvious strategy, the strong focus on the PEV may also have reduced civil society's ability to advocate accountability for ongoing crimes, such as Kenya's treatment of Somalis in the context of the 'war on terrorism.'<sup>89</sup>

In some instances the ICC's flawed practices also made it more difficult for civil society to advance the accountability agenda. While the ICC has come to be seen as the only 'game in town' in terms of promoting criminal accountability, civil society strategies have evolved significantly over time: from initial support for a domestic tribunal to support for the ICC, to in some instances a move to civil suits. Civil society groups have also sought to find new ways to engage with external supporters of accountability, as occurred in the 2013 ASP meeting.

Our analysis illustrates a dynamic and creative set of civil society actors both transforming international norms for their use domestically and seeking to leverage the international community to pursue their goals. It also demonstrates the limits of reliance on international norms and support in the face of an intransigent government, and the need for flexibility in the language and processes invoked.

89 Participant, workshop with experts, London, UK, 6 May 2014. This is not specific to Kenya; in Chile, many human rights activists now reflect that their approach to crimes under the dictatorship limited their capacity to address contemporary human rights violations decades later. Personal interviews, human rights practitioners, Santiago, Chile (Nos. 1 and 2), 10 July 2014; personal interview, lawyer, Santiago, Chile (No. 3), 14 July 2014. These interviews were conducted by Sriram and funded by the Economic and Social Research Council.