

SECURITY IN TRANSITION:
AN INTERDISCIPLINARY
INVESTIGATION INTO THE
SECURITY GAP



Working Paper

Civil Society and Transitional Justice in Kenya

Chandra Lekha Sriram

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Abstract

In late 2007, Kenya held presidential elections, whose results were hotly contested, with allegations of fraud. Serious violence followed, some spontaneous, some pre-planned, and some retaliatory. An internationally-brokered agreement followed, creating a power-sharing arrangement between the presidential contestants and a commission of inquiry into the violence. Throughout the violence, civil society actors played a critical role, first monitoring the election, then recording the violence, and pressing for accountability measures. Numerous options for accountability were put on the table, including a hybrid tribunal. While a Truth, Justice and Reconciliation Commission was created, its operations were flawed, though its report documents a significant range of abuses in the country dating to independence. Ultimately, as the prospects for a hybrid tribunal faded, the International Criminal Court (ICC) opened an investigation, and civil society actors turned to it in the context of increasing governmental resistance to criminal accountability. As this resistance has increased, two of the original ICC accused were elected president and vice-president, space for civil society actors to push justice concerns has decreased. Those seeking to promote various forms of accountability have sought to adapt to not only government strategies, but also waning interests and shifting agendas of international actors.

Contact details

Chandra Lekha Sriram
Professor of International Law and International Relations
Director, Centre on Human Rights in Conflict (www.uel.ac.uk/chrc)
University of East London
University Square
1 Salway Street
London E15 1NF
C.Sriram@uel.ac.uk

Introduction

In many countries, civil society actors are essential in demanding and in some cases implementing calls for accountability, both judicial and non-judicial. Civil society actors are often treated as recipients of international or transnational norms, sometimes termed the “justice cascade” (Lutz and Sikkink 2001; Sikkink 2011). However, in many cases they are not merely the recipients of norms from outside, but also transform them, to serve their own broader agendas or to leverage national governments and international actors (Obel Hansen and Sriram, 2015; Haslam 2011; Merry 2006; Brysk 2013; Acharya 2004).

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The current paper also builds upon related research funded by the British Academy, International Partnership and Mobility Scheme, in collaboration with Thomas Obel-Hansen, conducted in 2014, and from the Nuffield Foundation (UK) and the Social Sciences and Humanities Research Council of Canada with Stephen Brown conducted in 2010-2012, resulting in several journal articles (Sriram and Brown 2012; Brown and Sriram 2012; Obel Hansen and Sriram, 2015).

The paper offers several key findings which may be useful not only for Kenya, but also in comparative perspective.

First, while civil society actors are often expected to be, and are, recipients of internationally- and transnationally- promoted norms of accountability, they also use these processes creatively, particularly when dealing with resistant or restrictive governments.

Second, civil society actors often must respond creatively to restrictive governments and international actors with either reduced interest in accountability or limited capacity to support civil society.

Third, as civil society actors adapt, they may recognise that certain strategies are less effective, particularly those which are highly legalised, visibly reliant on international support, or not embedded in local preferences and politics. This may particularly be the case where local politics are fragmented along ethnic or other lines.

Background

Post-election violence

Since moving to multiparty democracy, Kenya has experienced regular bouts of political violence, usually preceding elections. Following contested elections in December 2007, Kenya experienced a short period of violent clashes between supporters of the two rival candidates Raila Odinga and Mwai Kibaki, retaliatory attacks, and abuses and killings by the police. Over 1300 people were killed and at least 900 women raped, with at least 250,000 people displaced from their homes during the violence, which continued until February 2008, when a national accord was reached. While many officials have sought to portray the violence as spontaneous, rather than organized, analysis shows that there were several types of violence during this period. First, there was spontaneous rioting in Nyanza province, apparently in response to perceived electoral fraud. Second, there were premeditated attacks in the Rift Valley and elsewhere. Third, there were revenge attacks, largely in Nairobi, Central Province, and the Rift Valley. Finally there were police shootings of unarmed demonstrators, largely in Nairobi. While the spontaneous violence wasn't organized, the other categories were considerably more organized, or carried out by groups such as militias, specifically the *mungiki*, or the police.

National accord

A political settlement was reached in February 2008, brokered by an eminent persons group convened by the African Union (AU), and led by former United Nations Secretary-General Kofi Annan. The national accord included a range of provisions both for dealing with past abuses including the creation of a commission of inquiry into the violence, a national Truth, Justice and Reconciliation Commission (TJRC), and a constitutional review commission which would support the proposal of a new constitutional draft. The accord also provided for the temporary creation of the post of prime minister (and of deputy prime minister), creating a power-sharing arrangement between incumbent Odinga as President and challenger Kibaki as Prime Minister.

The Waki commission and initiation of ICC involvement

Pursuant to the accord, a commission of inquiry was set up, which was chaired by former Chief Justice Philip Waki, a respected Kenyan jurist. The commission reviewed the causes and nature of the post-election violence, and concluded that the Kenyan judiciary was not capable of managing cases arising from such politicized violence. It ultimately recommended the creation of a hybrid tribunal with international

and national participation, in recognition of the weakness and potential biases of the domestic judiciary. In the alternative, the commission proposed that the International Criminal Court (ICC) pursue cases should the hybrid tribunal not be created. It set up a 'self-enforcing mechanism' with a deadline, after which if no tribunal were created within Kenya, Annan would hand over 'the envelope': a list of names of possible perpetrators and attendant boxes of files (Commission of Inquiry into Post-Election Violence, 2008).

The hybrid tribunal was never created—several proposals were defeated or never reached a vote. While the government delayed in creating the tribunal, and offered myriad, largely unconvincing, alternatives to ICC involvement, Kenyan civil society organizations which had first behind a hybrid tribunal within Kenya came to support bringing charges arising from post-election violence (PEV) to the ICC. Following the failure to create a domestic tribunal or otherwise investigate or prosecute individuals for PEV, the 'envelope' was handed over to the Prosecutor of the ICC, who sought permission to open an investigation into the crimes committed during post-election violence, which the judges of the court approved in March 2010. This was the first situation in which the prosecutor of the ICC exercised his *proprio motu* powers, meaning he proceeded with the request for the opening of an investigation in the absence of a referral by a state or the UN Security Council. This was possible because Kenya is a state party to the ICC Statute.

2010 Constitution

Constitutional reform has proven contentious in Kenya. In 2005, a constitution which would have reformed institutions significantly was rejected following an acrimonious referendum process. In 2010, a new constitutional proposal, arising out of the commission set up by the national accord, came on the heels of Waki Commission criticism of the national judiciary, the failure of the government to pursue accountability for PEV, and the intervention of the ICC. The referendum was passed by a significant majority in August 2010, with strong backing by civil society organizations, and arguably debates about and advocacy of accountability helped support the measure. The constitution included provisions to create a new Supreme Court, for reform of institutions such as the police and the judiciary, and notably included, in chapter 6, an integrity provision for those holding high public office. This provision gave rise to speculation that William Ruto and Uhuru Kenyatta, who would subsequently be charged by the ICC, could be excluded from public office, on the grounds that anyone charged with crimes against humanity could not meet the integrity requirement.

Proceedings at the ICC

In late 2010, the ICC issued a list of six persons against whom charges were sought for crimes against humanity: three were attributed to the party of Odinga and three of

Kibaki, broadly speaking, in an attempt to have a 'balanced' list of accused and avoid the perception of political or ethnic bias. One of the accused was the Inspector General of the police at the time of the PEV; the list also included a radio broadcaster, Joshua Arap Sang, accused of inciting the violence, and two leaders in the parties of Odinga and Kibaki, Uhuru Kenyatta and William Ruto. The accused received summonses to appear in early 2011 (rather than arrest warrants), and travelled to The Hague for hearings, free to return to Kenya. Charges were confirmed against some of the accused but not all: at this time Sang, Kenyatta, and Ruto continue to face charges before the ICC for crimes related to the original PEV, while a new defendant was issued an arrest warrant, Walter Osapiri Barasa in 2013, for allegedly influencing or attempting to influence 3 ICC witnesses. The cases before the court have faced significant difficulties due to alleged witness tampering, through threats and deaths, and the challenge of obtaining documentary evidence. Further, the election of Kenyatta and Ruto (see below) and government resistance to ICC involvement have made proceeding more difficult; at the moment the prosecution of Kenyatta has been dropped due to insufficient evidence; the trial of Ruto began in 2013, but he has been excused from attending proceedings in person.

Elections

Although they were each previously leaders within competing parties, Kenyatta and Ruto ran on a joint ticket in the March 2013 elections, under the banner of the Jubilee Alliance. This alliance of convenience between political adversaries may have been bolstered by the fact that both faced charges at the ICC; certainly their union ensured a broad base of support across ethnic groups and regions. They were elected as president and deputy-president, respectively. This was despite court cases challenging their capacity to run while facing charges of crimes against humanity before the ICC, in light of the integrity provision of the 2010 constitution. These cases, brought by the NGO International Centre for Policy and Conflict, were dismissed by the High Court. Following the election, the declaration of Kenyatta as president was challenged by presidential contender Odinga, but the petition was dismissed by the Supreme Court.

Government strategies of resistance/rejection

Although Kenya is a state party to the ICC Statute and has consistently promised to fulfil its obligations under the statute to cooperate with the ICC, government and official behaviour has frequently appeared recalcitrant. While a hybrid tribunal was debated, it was never approved, and repeated delays and ultimate refusal of members of Parliament to even hear the third proposed bill read, triggered the involvement of the ICC. Governmental representatives however continued to insist in public forums and before the ICC specifically that the involvement of the international court was unnecessary. Proposals have included the possibility of using the TJRC

as a judicial forum, although this was not in its mandate; a suggestion that the ICC should not take up cases and allow Kenya to reform its police and proceed with cases domestically; a suggestion that cases might fall within either the remit of the East African Court of Justice or the African Court of Human and People's Rights, neither of which can hear criminal cases; and most recently, an assertion that an International Crimes Division had been/was being created, similar to that created in Uganda. The Kenyan government (as well as defense lawyers for Ruto) raised admissibility objections to cases before the ICC, insisting that investigations were underway domestically, but without producing material evidence of these.

At the same time, the Kenyan government has waged an active public battle against the ICC both at home and abroad. At home, it has increasingly painted the ICC as a tool of western neoimperialism, and civil society organizations supporting it as anti-Kenyan, tools of the west, and even as 'evil society' rather than civil society. A range of legislation has been introduced to curb the operation of civil society organizations and the media. The parliament passed a non-binding resolution 'withdrawing' from the ICC Statute. Abroad, the government has sought to convince the UN Security Council to suspend cases for 12 months; has sought to orchestrate a 'walkout' from the ICC Statute by members of the African Union; and has promoted anti-ICC sentiment within the AU more generally, again depicting the court as a tool of the west. At the Assembly of States Parties (ASP) of the ICC Statute, Kenya was able to compel a debate regarding the immunity of sitting heads of state despite the clear language of the Statute barring such immunities. It was also able to successfully push for a change in the rules and procedures and evidence of the ICC such that attendance of the accused at trial in person (rather than by video) was not compulsory, where the case could be made (as in the case of a state leader) (Brown and Sriram 2012; Obel Hansen and Sriram 2015).

Civil society strategies

Many Kenyan civil society organizations have long sought to fight impunity and corruption, with some limited success. Many were operational on the ground when violence broke out following the elections, as they had been engaged as election monitors. They were thus in a position both to mobilize swiftly for advocacy and in some cases to collect information about abuses which could serve as evidence or help to locate victims and witnesses subsequently. However, civil society was not united in its views regarding the appropriate response to the violence. Some civil society representatives have characterized the divide as one between the advocates of 'peace and development', highlighting the need to end the violence and return to normal, and those focused on 'justice and accountability', with the former exemplified by the Nairobi Peace Initiative, and the latter by Kenyans for Peace with Truth and

Justice. A member of the latter, the head of the Kenyan section of the International Commission of Jurists, worked for the Waki Commission. Whether international or domestic CSO pressure for accountability ensured that justice remained at the top of the agenda in Kenya is a matter for debate.

Many Kenyan CSOs also united in support of the referendum for the 2010 constitution, which sought to remedy many of the weaknesses identified in the Kenyan judicial and police systems which make accountability difficult. They have sought to maintain pressure on the government to implement key police and judicial reforms. Organizations focused on accountability have also played a critical role in identifying witnesses, and in many cases have offered protection where ICC witness protection was unavailable or had not yet arrived. They also often have played a virtual outreach role, given that the ICC has only one full-time outreach staff member in the country. Finally, they have acted as critical watchdogs, highlighting the court's failure to protect victims and witnesses or the prosecutor's failure to garner sufficient evidence to build strong cases.

However, government resistance to accountability and its increased pressure on civil society actors have both compelled the latter to change their tactics and hampered their work. This has come alongside changing international priorities. While originally, the United Nations, the African Union, and key donors such as the United States and the United Kingdom pushed strongly for a negotiated end to the violence and to a greater or lesser degree of accountability, their agendas changed for several reasons. In some cases, this was a question of refocusing attention on new crises, but in the case of the African Union, debates over accountability in Kenya unfolded alongside increasing resistance to the ICC within the regional organization. This bolstered Kenyan governmental resistance. At the same time, key donors continued to advocate accountability, but have had other political and security agendas, notably Kenya's assistance in combating terrorism in the region; some also seem to have realized that as the political climate shifted, vocal western support for accountability might be counterproductive for achieving their goals and undermine local partner NGOs (Obel Hansen and Sriram 2015).

While advocates for accountability initially supported the proposal for a hybrid tribunal, their support shifted to the ICC after it became clear that it was the only viable option for prosecutions. Similarly, many had supported the proposal for a TJRC, but when difficulties arose over its mandate, funding, and the selection of its chair, that support faded, although some have, since the completion of the TJRC report, advocated for the implementation of its recommendations. Accountability advocates have resisted the proposal for an international crimes division by the government, seeing it as another attempt to circumvent the ICC, and resenting the government's failure to properly consult with them. Representatives of such organizations have also sought to take their message outside of Kenya, to counter

the government's narrative internationally; notably at the ASP in fall 2013, they actively lobbied states to clarify the situation regarding accountability in Kenya, and to resist the government's push for immunity for state officials. Organizations have more recently begun to pursue alternative legal strategies, bringing cases in relation to internally displaced persons, sexual violence, and police shootings, but focusing on state responsibility and failure to protect rather than individual criminal responsibility.

Analysis

As explained at the outset, there are at least three lessons that may be drawn from the Kenyan experience to date, which may be of relevance to civil society actors in other countries with similar accountability debates.

First, as more recent constructivist international relations literature has argued, local actors and civil society are not just recipients but also adapters and transformers of norms. This is true in relation to conflict resolution and peacebuilding (MacGinty and Richmond 2013), and so too in the context of transitional justice and international criminal accountability. Kenyan advocates of justice did not simply embrace the ICC's entry into the country; indeed they first sought a hybrid model and only supported the ICC when it became clear that it was "the only game in town" (interviews with civil society experts 2010-2014). They also sought to leverage the heightened support for accountability and findings of the Waki Commission report to press for the new 2010 constitution.

Second, civil society actors are confronted frequently with the need to adapt to government restrictions and/or changing international priorities. Clearly, the tactics of the Kenyan parliament, of diplomats before the UN and the AU, and heightened anti-civil society rhetoric at home narrowed the political space for civil society actors focused on accountability. This was particularly the case because these tactics sought to attack the ICC and civil society simultaneously, linking them as creatures of an anti-Kenyan conspiracy. This put civil society on the defensive; they further could not rely on allies whose attention had shifted away from Kenya or whose interests in Kenya were diverted to counterterrorism. Those who might want to support pro-justice actors domestically and internationally began to silence themselves, fearing that they would bolster the narrative of the Kenyan government. These constraints increased following the election of Kenyatta and Ruto.

Third, and this is a point that civil society actors themselves articulated in critical self-reflection: some of the types of strategies they relied upon were the wrong ones, or lost effectiveness. The main pro-justice organizations are concentrated in Nairobi, and they came to recognize that they were not sufficiently attuned to the concerns of ordinary citizens, or were not presenting the justice agenda in a way that appealed to

them. In particular, many raised the concern that their focus on the language of legality, and of criminal responsibility, was somewhat remote for many Kenyans. This is not unusual for human rights advocates, who are frequently legal professionals. One shift just underway is that of civil legal cases, which particularly target the responsibility of the government and have the potential to generate some awards for victims. Civil society actors also sought to rebut government attacks through engagement and lobbying at the ASP, at the AU, and the UN.

The experience of civil society actors promoting justice in Kenya is perhaps not unusual, but may be instructive for those in other countries. Actors may claim the initiative, but need to be aware of shifting local, national and international political dynamics. Should they lose their advantage (or fail to claim it in the first instance), a reflection of how best to engage various actors may be in order, although it may be no guarantee of success.

References

- Acharya, Amitav, 2004. "How ideas spread: Whose norms matter? Norm localization and institutional regionalism," *International Organization* 58(2): 239-275.
- Brown, Stephen, with Chandra Lekha Sriram, 2012. "The big fish won't fry themselves': Criminal accountability for post-election violence in Kenya," *African Affairs* 111(443): 244-260.
- Brysk, Alison, 2013. *Speaking rights to power: Constructing political will*. (Oxford: Oxford University Press).
- Commission of Inquiry into Post-Election Violence, 2008. *Report of the Commission of Inquiry into Post-Election Violence* at: http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf.
- Haslam, Emily, 2011. "Subjects and objects: International criminal law and the institutionalization of civil society," *International Journal of Transitional Justice* 5(2): 221-240.
- Lutz, Ellen, and Kathryn Sikkink, 2001. "The justice cascade: The evolution and impact of foreign human rights trials in Latin America," *Chicago Journal of International Law* 2(1): 1-34.
- Mac Ginty, Roger, and Oliver Richmond, 2013. "The local turn in peacebuilding: A critical agenda for peace," *Third World Quarterly* 34(5): 763-783.

Merry, Sally Engle, 2006. *Human rights and gender violence: Translating international law into local justice*. (Chicago: University of Chicago Press).

Obel Hansen, Thomas, and Chandra Lekha Sriram, 2015. "Fighting for justice (and survival): Kenyan civil society accountability strategies and their enemies," *International Journal of Transitional Justice* 9(3): 1-21.

Sikkink, Kathryn, 2011. *The justice cascade: How human rights trials are changing world politics*. New York: W.W. Norton.

Sriram, Chandra Lekha, and Stephen Brown, 2012. "Kenya in the shadow of the ICC: Gravity, complementarity and impact," *International Criminal Law Review* 12(2): 219-244.