
The justice vanguard

The role of civil society in seeking accountability for Kenya's post-election violence

NJONJO MUE AND JUDY GITAU

Introduction

A key feature of the International Criminal Court's (ICC) intervention in Kenya has been the critical role played by civil society organisations (CSOs) in promoting accountability following the election violence of 2007–2008.¹ Kenyan civil society has been historically known for enabling political, legislative and institutional reform.² By way of trade unions, religious bodies and non-governmental and human rights organisations, civil society in post-independence Kenya has actively checked the excesses of the national government and provided an alternative voice where the government constrained the opposition, both in law and in practice.³

Accountability for these violations has been particularly important in light of the continued history of electoral violence in Kenya.⁴ This history owes to many factors, including a raft of amendments to Kenya's Independence Constitution, which had effectively created an imperial presidency.⁵ Politicians therefore increasingly campaigned on an ethnic

¹ C. Bjork and J. Goebertus, 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya', *Yale Human Rights and Development Journal*, 14 (2011), 205.

² See, e.g., M. Mutua (ed.), *Human Rights NGOs in East Africa: Political and Normative Tensions* (Philadelphia: University of Pennsylvania Press, 2009).

³ D. Throup and C. Hornby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Election* (Oxford: James Currey Publishers, 1998).

⁴ Kenya had previously experienced electoral violence in 1992, as well as in 1997. See M.S. Kimenyi and N. Ndungu, 'Sporadic Ethnic Violence Why Has Kenya Not Experienced a Full-Blown Civil War?' in P. Collier and N. Gambanis (eds.), *Understanding Civil War: Africa* (Washington, DC: The World Bank, 2005).

⁵ Commission of Inquiry into Post-Election Violence, 'Report of the Commission of Inquiry into the Post-Election Violence' (October 2008) ('CIPEV Report').

platform, rallying supporters into ethnic blocs for their community's 'turn' at the helm and access to resources. Those who attained power maintained the status quo using state agencies to suppress dissenting voices,⁶ or through outsourcing violence to militia gangs of unemployed youth to terrorise the opposition.⁷ Those who had not attained power turned to communal mobilisation of violence. A culture of impunity was thus entrenched, as 'the beneficiaries of the violence had no incentive to give it up and every incentive to avoid the consequences of past violence by holding onto power'.⁸

The post-election violence of 2007–2008 was a culmination of this political culture in Kenya. With the election results incredibly close, the violence was the worst on record: 1,133 persons were recorded killed, over 900 sexually violated, 650,000 physically displaced from their homes and countless others suffered grievous physical harm. Scholarly accounts have attributed the underlying causes to multiple factors, such as privatised, diffused extra-state violence; ethnic clientelist parties; and the high-stakes prize of an imperial presidency.⁹ An uneasy calm was restored in the country following the intervention of the international community. The visit of President John Kufuor, the then Chair of the African Union, to Kenya in January 2008 resulted in the creation of a Panel of Eminent African Personalities to assist Kenyans in finding a peaceful solution to the crisis. Under the auspices of the panel, President Mwai Kibaki's Party of National Unity (PNU) and Raila Odinga's Orange Democratic Movement (ODM) started negotiations on 29 January 2008 through the Kenya National Dialogue and Reconciliation Committee (the KNDR or 'National Dialogue').¹⁰

Owing to the international alarm caused by the nature and the magnitude of the violence, there was political will to facilitate reform for institutions and put in place transitional justice measures. However, there was little likelihood of the government establishing an accountability mechanism for the violations, and efforts to establish such a

⁶ D. Waweru, 'DIY Violence is Corrosive for Nationhood', Oxford Transitional Justice Research: Debating International Justice in Africa (OTJR Collected Essays, 2008–2010), 92 (Waweru, 'DIY Violence').

⁷ D. Branch, 'The Normalisation of Violence', Oxford Transitional Justice Research: Debating International Justice in Africa (OTJR Collected Essays, 2008–2010), 90; CIPEV Report.

⁸ Waweru, 'DIY Violence'.

⁹ See generally S.D. Mueller, 'The Political Economy of Kenya's Crisis', *Journal of Eastern African Studies*, 2 (2008), 185; Waweru, 'DIY Violence'.

¹⁰ 'National Accord Agenda', National Dialogue & Reconciliation.

measure were strongly opposed. Human rights organisations therefore took on the multifaceted role of collecting and collating information regarding the violence for possible future legal action, generating social discourse concerning options for justice for the victims, providing civic education to the public concerning this role and even leading the accountability process once the investigation and prosecution of the violations commenced at the ICC. These actions resulted in a backlash from the Kenyan state, the latest wave of which has included legislation attempting to limit the finances of these organisations.¹¹ The troubled history of the ICC's intervention in Kenya is thus also one of domestic contestation between the state and CSOs.

Written from our perspective as two human rights practitioners who have been deeply engaged in the response of national-level CSOs to the ICC's intervention, this chapter examines the different roles played by civil society leading up to and including the trial phase of the Kenyan cases before the ICC. As the chapter will illustrate, Kenyan civil society has played a vital role in the context of the ICC's intervention, beginning with the establishment of Kenyans for Peace with Truth and Justice (KPTJ), a coalition of over thirty Kenyan and East African legal, human rights and governance organisations, that was convened in the immediate aftermath of the election debacle.¹² Drawing upon direct experience of civil society advocacy and interviews with partner organisations, it illustrates the diverse practices of the Court's in-country partners, as well as their political implications.

Pre-investigation period

Mapping

On 28 February 2008, then-president Mwai Kibaki and opposition leader Raila Odinga signed a power-sharing agreement to attempt to bring an end to the post-election violence.¹³ The agreement, which was christened the 'Kenya National Dialogue and Reconciliation Process', contained terms for a 'Grand Coalition' government incorporating Kibaki's PNU

¹¹ Public Benefits Organisations Act of 2013, Miscellaneous Bill No. 18 of 2003, requires CSOs to declare their financial sources above 15 per cent. See R. Rajab, 'Kenyan NGOs Threaten More Protests Over Controversial Bill', *Sabahi*, 25 November 2013.

¹² 'Who is KPTJ?', Kenyans for Peace with Truth & Justice, available at <http://kptj.africog.org/who-is-kptj>.

¹³ See 'The Crisis in Kenya', International Coalition for the Responsibility to Protect, available at www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya.

and Odinga's ODM. It also contained an agreement to immediately stop the violence and laid out a road map for humanitarian response, as well as institutional and legislative reforms aimed at preventing future atrocities.¹⁴ This was to be accomplished through institutional and legislative reform, as well as the establishment of several commissions of inquiry to investigate and address issues of justice, accountability, governance and the rule of law.¹⁵

It was apparent, however, that there was a lack of goodwill in judicial state organs in pursuing accountability for the electoral violence. In the aftermath, the office of the attorney general investigated and prosecuted a few cases before the law courts.¹⁶ However, these cases were not only of low-level perpetrators of the violence but were also limited to minor offences. The investigations and prosecutions eventually stalled altogether, supposedly for lack of evidence and/or in anticipation of the ICC or the establishment of a special tribunal.¹⁷

Prior to any national or international bodies being mandated to investigate the post-election violence, and before the degradation and adulteration of evidence and information, human rights organisations were on the ground collecting and collating data in the most affected regions. This 'mapping' exercise was intended to assist in preparing prosecutorial initiatives. It provided a sense of the nature of the crimes perpetrated, the geographical location of the crimes, who the victims were and the suspected identity of the perpetrators. The Kenya National Human Rights Commission (KNHCR) conducted one of the key mapping exercises, deploying teams of trained investigators to collect information from eight regions of Kenya that had been worst hit by the violence.¹⁸ These

¹⁴ 'Kenya National Dialogue and Reconciliation Platform', www.dialoguekenya.org/agreements.aspx.

¹⁵ N. Mue, 'Advocating Justice: Civil Society and Transitional Justice in Africa', Kenya Case Study: African Transitional Justice Research Network Workshop (Johannesburg, South Africa, 30–31 August 2010).

¹⁶ 'Turning Pebbles: Evading Accountability for Post-Election Violence in Kenya', Human Rights Watch Report (December 2011) (HRW, 'Turning Pebbles'); 'Report to the Attorney-General by the Team on the Review of Post-election related violence in Western Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi provinces' (February 2009) ('Report to the Attorney-General'), also cited in Request for Authorisation of an Investigation Pursuant to Article 15, *Situation in the Republic of Kenya*, ICC-01/09, Pre-Trial Chamber II, ICC, 26 November 2009 ('Prosecutor's Article 15 Request').

¹⁷ HRW, 'Turning Pebbles'.

¹⁸ 'On the Brink of the Precipice: A Human Rights Account Of Kenya's Post 2007 Election Violence', Kenyan National Commission on Human Rights (August 2008) (KNCHR, 'On the Brink of the Precipice').

teams sought to identify the specific human rights violations perpetrated and the responsibility of the state in response. The team also sought to analyse the criminal responsibility of the alleged perpetrators within the framework of Kenyan domestic law, as well as the state's international law obligations. This would later formulate the recommendations made to the national and international authorities for further action.

The information gathered only met a *prima facie* standard; however, the process gave a sense of the scale and pattern of the violations, and also identified potential leads and sources of evidence. It demonstrated the magnitude of the violence through introducing terminologies such as 'crimes against humanity'. Upon the establishment of the Commission of Inquiry into the Post-Election Violence (CIPEV), popularly referred to as the 'Waki Commission' after its chairperson, human rights organisations presented their findings before the commission. Part of these presentations included legal opinions and international best practices drawn from analogous situations and international human rights networks in order to accord the Waki Commission all options available towards ensuring accountability.¹⁹ The analysis of the raw data collected had indicated that the violations amounted to international crimes, and specifically, crimes against humanity.²⁰ Presenting the results of the mapping therefore included a presentation of possible options for accountability within Kenya's legal framework, including international obligations drawn from international treaties like the ICC Rome Statute.

CSOs were concerned about the limited time available to the Waki Commission, whose mandate was only for three months, between May and August of 2008.²¹ They were further concerned about the non-enforcement of the outcome of previous commissions that had also investigated incidents of electoral violence.²² These presentations and recommendations to the Waki Commission included a recommendation for an ICC intervention, as Kenya had ratified the Rome Statute and bore an international obligation to domestically prosecute the international crimes committed on its territory.

These presentations bore fruit, as a key recommendation of the Waki Report was the establishment of a domestic special tribunal to try those responsible for the worst abuses. Failing that, the commission would submit its findings to the ICC prosecutor through the chief mediator of Kenya's

¹⁹ *Ibid.* ²⁰ *Ibid.* ²¹ CIPEV Report.

²² See 'Report of the Judicial Commission Appointed to inquire into Tribal Clashes in Kenya' (Akiwumi Report, 1999); 'Report of the Parliamentary Select Committee to investigate Ethnic Clashes in Western and other parts of Kenya' (Kiliku Report, 2006).

peace process, former UN secretary-general Kofi Annan.²³ The commission forwarded Annan a sealed envelope containing the names of the top alleged perpetrators of post-election violence, largely believed to be high-level politicians, along with numerous boxes of evidence.²⁴ If the government did not follow the commission's recommendation to set up a hybrid 'Special Tribunal for Kenya' by 30 January 2009, Annan was requested to forward the envelope and the evidence to the ICC, which he eventually did.²⁵

Options for accountability

By the time of the ICC's involvement, a culture of impunity had become entrenched in Kenyan society. There was very little faith in the justice sector and many presumed the 2007–2008 violence could be swept under the carpet once the political power-sharing agreement had been signed. Part of the trigger to the violence was the refusal by the opposition leadership to seek resolution of electoral disputes in court, which resulted in its supporters seeking justice in the streets.²⁶ The executive controlled the judiciary, determining appointments to and dismissal from this institution.²⁷ The CIPEV findings also adversely implicated the police as having been part of the violence, even as they were mandated to carry out investigations for violations.²⁸ The case of Edward Kirui is illustrative.²⁹ In this case, a police officer was recorded on a national television camera shooting down two unarmed civilians in the course of the post-election violence.³⁰ The case was dismissed, however, due to what has since been referred to as a 'mix up' in evidence.³¹

²³ C.L. Sriram and S. Brown, 'Kenya in the Shadow of the International Criminal Court: Complementarity, Gravity and Impact', *International Criminal Law Review*, 12 (2012), 219, 224 (Sriram and Brown, 'Kenya in the Shadow of the ICC').

²⁴ *Ibid.*; CIPEV Report, 18.

²⁵ Sriram and Brown, 'Kenya in the Shadow of the ICC', 224. ²⁶ CIPEV Report.

²⁷ Government of Kenya, 'Final Report of the Task Force on Judicial Reform' (Government Printer, 2010).

²⁸ CIPEV Report.

²⁹ *Republic v. Edward Kirui*, [2010] eKLR, High Court Criminal Case Number 9 of 2008.

³⁰ C. Gitari, 'The Search for a Domestic Justice Process in Kenya', Rule of Law Report, The International Commission of Jurists – Kenya Section (2011).

³¹ Proposed *Amicus Curiae* Observations by the Kenyan Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (The Prosecutor v. Ruto et al.)*, ICC-01/09-01/11, and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (The Prosecutor v. Muthaura et al.)*, ICC-01/09-02/11, ICC, 27 April 2011 ('Proposed *Amicus Curiae* Observations by ICJ-Kenya in *Ruto et al.* and *Muthaura et al.*').

The threat of an ICC intervention raised in the Waki Report resulted in the government publishing a bill to initiate a constitutional amendment that sought to entrench a special tribunal within the Kenyan Constitution.³² Parliamentarians quickly (if narrowly) thwarted this effort, defeating the bill on the floor of the National Assembly.³³ Subsequent attempts to develop a legislative framework for a special tribunal were defeated at the deliberation stage within the national cabinet.³⁴ Ministers rejected the proposed laws because the president would not be immune to the prosecutorial process, he would not have the prerogative to pardon accused persons, and the attorney general could not terminate proceedings within the proposed special tribunal. The Ministry of Justice, National Cohesion and Constitutional Affairs lobbied members of parliament to establish the tribunal, this time proposing it as a division within the High Court.³⁵ This initiative also failed, as did a final attempt at establishing a special tribunal through a private member's motion. When one parliamentarian, MP Gitobu Imanyara, tabled a bill to establish a special tribunal for Kenya through a constitutional amendment, members of parliament walked out, ensuring an artificial lack of quorum. This happened on two occasions, after which the bill was never reintroduced in parliament.³⁶

On the surface, it was presumed that the Waki Report would be shelved and the country would move on, as had been the case with previous reports. However, this time proved different: following the state's unwillingness to establish its own accountability mechanism, the ICC intervened. Even though Kofi Annan had granted two more extensions before submitting CIPEV's list of suspects and evidence to the ICC, the government did not, as noted, reintroduce legislation. The Office of the Prosecutor (OTP) also engaged in discussions with the government, in an attempt to convince the officials to initiate domestic proceedings with a carrot-and-stick approach.³⁷ In the end, this proved unsuccessful:

³² The Special Tribunal for Kenya Bill, 2009.

³³ J. Ngirachu, 'How MP's Frustrated All Efforts to Set Up Local Special Tribunal', *Daily Nation*, 13 February 2013.

³⁴ 'How Kenya Handled Local Tribunal Process', *Daily Nation*, 17 September 2013.

³⁵ 'Securing Justice: Establishing a Domestic Mechanism for the 2007/08 Post Election Violence in Kenya', Kenyans for Peace with Truth & Justice and Kenya Human Rights Commission (May 2013).

³⁶ 'A Road Less Travelled: Parliamentary approaches to conflict prevention, reconciliation and peace building', Annual Parliamentary Hearing (United Nations Headquarters, 6–7 December 2012), available at www.ipu.org/splz-e/unga12/kenya.pdf.

³⁷ Sriram and Brown, 'Kenya in the Shadow of the ICC', 224.

Annan handed over the Waki envelope and evidence to the OTP in July 2009. Later that month, after the cabinet still failed to agree on a new legislation, the government announced it would dispense with plans for a hybrid tribunal and instead seek justice through the ordinary court system.

In large measure, then, civil society introduced the international criminal justice option into public discourse concerning accountability for the post-election violence. Indeed, human rights organisations responded to the violence by convening stakeholder forums in which options for justice were interrogated, including international options. A jurist colloquium brought together Kenyan jurists and international legal experts to generate possible road maps to justice.³⁸ Furthermore, an emphasis on the large numbers of victims of sexual and gender-based violence drew female advocates to apply to be counsel before the ICC.³⁹

Witness protection

Before 2010, the witness protection programme in Kenya was a minor department within the office of the attorney general.⁴⁰ Potential witnesses to the violations in 2007–2008 therefore could not be safely protected under this regime. Several state officials and high-ranking political figures had been adversely mentioned both under the Waki Commission report as well as in the KNHRC report on the post-election violence.⁴¹ The latter also contained a list of suspected perpetrators and called on the state to follow through with the investigation and prosecution of perpetrators in line with its domestic and international obligations.⁴² Given the weaknesses of the Witness Protection Unit (WPU) as constituted, however, it was highly doubtful that it could offer any protection to persons under threat due to information they may have held against high-ranking officials.

Civil society groups adopted a dual approach to this challenge. First, the better-equipped organisations provided temporary protection to

³⁸ ICJ-Kenya conference series on options for justice culminated in the launch of a publication: G. Musila and W. Kaguongo (eds.), *Judiciary Watch Report: Options for Justice in Kenya: Addressing Impunity and Options for Justice in Kenya – Mechanisms Issues and Debates* (Nairobi: The Kenyan Section of the International Commission of Jurists, 2008), vol. III.

³⁹ *Ibid.*

⁴⁰ Witness Protection Act, 2006, No. 16 of 2006; ‘Critique of the Witness Protection Act and Amendment Bill’, The Kenyan Section of the International Commission of Jurists (ICJ-Kenya) (2008).

⁴¹ CIPEV Report; KNCHR, ‘On the Brink of the Precipice’.

⁴² KNCHR, ‘On the Brink of the Precipice’.

victims and potential witnesses pending comprehensive investigation and verification. Although such an action proved dangerous to members of staff of these institutions – in effect, they served as an informal network of protection providers – and some of the victims and witnesses proved unreliable, this action was a temporary measure aimed at providing safety for genuine victims and witnesses, some of whom were severely injured and required medical attention. As with the mapping exercise, the legal threshold used was one of *prima facie*, with the understanding that subsequent investigation by the ICC would establish the veracity of the evidence if it chose to proceed with those witnesses and secure them through their own witness support systems. Second, civil society engaged with the state by offering both technical and material support towards legislative reform to accord structural and financial independence to the national WPU.⁴³ Through the establishment of a technical team drawing on expertise from the United Nations Office on Drugs and Crime, these organisations sought to implement international best practices and equip state officials who could potentially oversee such an agency.

The culmination of this effort was the Witness Protection Amendment Act 2010, which created a largely independent agency to oversee the protection of witnesses to the post-election violence, in addition to other grave crimes. The shortcomings of the legislation are still the subject of much advocacy among Kenyan civil society. The key drawback is the establishment of a board comprising key government officials to oversee the running of the agency.⁴⁴ Such a structure risks compromising the security of the witnesses protected under this regime and has led to suspicions concerning the agency's viability.

Pre-trial period

Intermediaries

Human rights organisations played a key role as intermediaries in the pre-trial stage of the Kenyan cases before the ICC.⁴⁵ Although the ICC only issued guidelines on intermediaries in 2014,⁴⁶ the Rome Statute makes no reference to third parties and their interaction with the ICC. Likewise, the Rules of Procedure and Evidence provide for non-

⁴³ 'Critique of the Witness Protection Act and Amendment Bill', ICJ-Kenya. ⁴⁴ *Ibid.*

⁴⁵ On this point, see further the discussion of intermediaries by Clancy in this volume.

⁴⁶ 'Guidelines governing the Relations between the Court and Intermediaries: for the Organs and Units of the Court and Counsel working with intermediaries', ICC (March 2014).

governmental organisations to facilitate the registration of victims for participation in Court process, as well as providing protection to third parties at risk as a result of Court activities.

The work of civil society intermediaries has also guided the OTP, which relied heavily on the reports of human rights organisations in its application to the ICC to open investigations into Kenya.⁴⁷ Once the OTP was authorised to investigate, human rights organisations continued to work as intermediaries, often providing social and political context for the investigations. To this end, a majority of human rights-oriented CSOs met annually with the panel of eminent persons, chaired by Kofi Annan, which had obtained an extension in its mandate. They also met regularly with stakeholders, including the government, media, citizen representatives and CSOs, in order to gauge the pace of implementing the relevant agenda items that had been agreed upon in the national accord.

These meetings provided an opportunity for Kenyan CSOs to update Court representatives on developments concerning the national accord agreements. The caucuses also included an assessment of accountability for perpetrators and protection of witnesses and victims of the post-election violence. It became apparent that, as the cases progressed, witnesses felt intimidated, having confided information to provincial administrators as well as grassroots civil society groups. These platforms allowed ongoing communication through the framework of KNDR and, from time to time, directly through the outreach wing of the ICC, which helped to provide the Court with social and political context.⁴⁸ These communication channels proved particularly important where victims and witnesses could not access the ICC directly.

Kenyan CSOs have also worked as intermediaries between victim communities and relevant divisions of the Court. When the ICC prosecutor announced the list of individuals against whom charges would be brought in December 2010, Kenyan civil society groups such as Kituo cha Sheria and the International Center for Policy and Conflict embarked on the registration of victims for purposes of victim participation.⁴⁹ The engagement of local civil society ensured the registration of most victims, who ordinarily would not be aware of the process. As a result, the number

⁴⁷ Prosecutor's Article 15 Request, 3.

⁴⁸ See Kenya National Dialogue and Reconciliation Platform, available at www.dialoguekenya.org/index.php/reports/monitoring-reports.html.

⁴⁹ 'Victims' Rights to participate and seek reparations before the ICC', REDRESS, *Information for Victims of Violence* (10 June 2013).

of victims registered in the Kenyan cases is relatively high in comparison to other cases before the ICC.

Outreach programme

Although the ICC invests in an outreach unit in Kenya, its impact is small in comparison to the size of the country, the target audience and the domestic appetite for information about the Court. This also provided an avenue for correcting misunderstandings about the role of the ICC. CSOs under the umbrella of KPTJ, as well as in their own individual capacities, undertook to educate the general population on the process and procedure of the ICC, as well as on the nature of the cases before the Court.⁵⁰

After Prosecutor Moreno-Ocampo announced the investigation into the situation in Kenya, Kenyans largely believed that the ICC had the capacity to, and indeed would, investigate and prosecute all perpetrators of the 2007–2008 post-election violence. Civil society explained the statutory and financial constraints of the ICC, and the OTP's decision to prosecute only those bearing the greatest alleged responsibility for the post-election violence. Civil society thus had a role not only to 'manage' public expectations, but also to explain the enduring need for a domestic judicial mechanism to prosecute the mid-level and lower-level perpetrators. This role in civic education included partnerships with the media in order to have the widest reach possible, as well as to encourage a national debate on the intervention of the ICC, its possible impact and the function of its processes.

Guardians of the ICC process

After the prosecutor revealed the names of the six original accused, the Kenyan government began a concerted effort to prevent a trial from taking place. Four of the Kenyan government's larger efforts to thwart the ICC process were as follows. First, members of parliament passed a unanimous motion to withdraw Kenya from the Rome Statute.⁵¹ Although the motion was non-binding, it set the tone for the government's subsequent actions. Second, the government tried to rally countries within the African Union (AU) to request the ICC to defer the cases or to refer them back to Kenya. Part of the narrative before the AU was

⁵⁰ See, e.g., 'ICC and Kenya – Understanding the Confirmation of Charges Hearing', KPTJ Report, *Africa Centre for Open Governance* (September 2011).

⁵¹ 'Lawmakers vote to withdraw from Rome Statute', Coalition for the International Criminal Court.

that, although Kenya had the ability to address the violations that had been perpetrated, the ICC was imposing its regime upon Kenya. The AU Summit first endorsed Kenya's deferral request on 14 January 2011 and subsequently made its own deferral request to the UN Security Council in July 2011, but its efforts were unsuccessful.⁵²

The government also invoked Article 16 of the Rome Statute, directly requesting the Security Council to defer the cases based on the claim that they posed a threat to international peace and security. Prior to the filing of this application, the then vice president engaged in 'shuttle diplomacy', particularly in African countries that were members of the Security Council at the time, seeking to garner support for this application. Finally, in March 2011, the Kenyan government challenged the admissibility of the cases before the Court pursuant to Article 19 of the Rome Statute, requesting that the cases be declared inadmissible, and arguing that the adoption of the new constitution and associated legal reforms had opened the way for Kenya to conduct its own prosecutions for the post-election violence.⁵³

In acting as the vanguard to the accountability process, civil society responded to each of these advances. Using its platform in the media, KPTJ member organisations explained that withdrawal from the ICC would not change the situation: a formal withdrawal would only take effect after a year and any case already within the ICC's ambit could not be withdrawn.⁵⁴ The alternative for Kenyans would be impunity, not only concerning the immediate violations perpetrated in the post-election violence but also with any other equivalent violation. As a result, the larger public remained supportive of the ICC.⁵⁵

Civil society used several platforms to respond to the government's efforts to obtain a deferral at the AU. In addition to the non-governmental

⁵² Despite the deferral request, the AU refrained from issuing a non-cooperation instruction to member states. Decision On The Implementation of the Assembly Decisions on the International Criminal Court – Doc. Ex.Cl/670(XIX)', AU Assembly: Assembly/Au/Dec.366 (XVII) (Malabo, July 2011).

⁵³ Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11, and *The Prosecutor v. Muthaura et al.*, ICC-01/09-02/11, ICC, 31 March 2011 ('Article 19 Application').

⁵⁴ Under Article 127 of the Rome Statute, withdrawal can only take effect one year after the receipt of notification of withdrawal by the UN Secretary-General and withdrawal does not discharge a state's obligations undertaken while a state was party to the Statute, including its duty of cooperation, in regard to criminal investigations and prosecutions begun prior to the withdrawal taking effect.

⁵⁵ T. Maliti, 'Polls: Support for ICC remains high, but fear of violence has increased', *International Justice Monitor* (19 January 2012); T. Maliti, 'Two opinion Polls show support for ICC drops in Kenya', *International Justice Monitor* (31 July 2013).

forum held prior to the AU's seventeenth summit,⁵⁶ NGOs used their regional networks to circulate a memorandum/resolution explaining in detail the violations that had actually occurred in Kenya and the government's lethargic reaction to addressing any of the violations. Observations and recommendations were then sent to the governments under which the various CSOs were based. Using civil society in different countries, this network brought the circumstances in Kenya to the attention of various governments and called upon them to comply with their international obligations.

The request for a deferral required the prosecution of the cases to represent a threat to international peace and security under the UN Charter.⁵⁷ CSOs embarked upon a diplomacy campaign of their own, specifically targeting members of the Security Council to inform them of the violations that had been perpetrated in Kenya and the impunity that had prevailed as a result of the high stature of the alleged perpetrators. In the end, the Security Council did not grant the deferral. A subsequent attempt, brought in November 2013, also failed.⁵⁸

The fourth challenge by the Kenyan government to the ICC trial process was its admissibility challenge. This application broadly argued that, since Kenya had promulgated a new constitution in 2010, any effort to remedy the institutional failures that had led to the violence, the judiciary would be (and indeed was being) reformed.⁵⁹ Police reform would also be undertaken along with the entire justice sector; as a result, Kenya was willing and capable to prosecute perpetrators of the post-election violence. In a bid to participate in this process and shed light on the factual position on the ground, the Kenyan section of the International Commission of Jurists (ICJ-Kenya) sought to be enjoined as *amicus curiae* to the admissibility challenge hearing.⁶⁰ ICJ-Kenya's application was denied, although the ICC also ruled against the

⁵⁶ Observations and Recommendations on the International Criminal Court and the African Union in advance of the 17th African Union Summit (30 June-1 July); 'Advancing International Criminal Justice in Africa: State Responsibility, the African Union and the International Criminal Court Conference Report', Towards an Effective Advocacy Response, Centre for Citizens' Participation on the African Union, Trust Africa and MacArthur Foundation (Nairobi, 14-16 November 2011).

⁵⁷ Article 16, Rome Statute.

⁵⁸ Security Council: bid to defer International Criminal Court cases of Kenyan leaders fails', 15 November 2013, available at www.un.org/apps/news/story.asp?NewsID=46499#VF_Hl0vYTyB.

⁵⁹ Article 19 Application.

⁶⁰ Proposed *Amicus Curiae* Observations by ICJ-Kenya in *Ruto et al. and Muthaura et al.*

admissibility challenge. The Court found that whilst judicial reforms were indeed constitutionally mandated, a successful admissibility challenge requires the government to either have investigated or prosecuted, or be in the process of investigating or prosecuting, the same persons indicted before the ICC for 'substantially the same' conduct.⁶¹

In fact, the Kenyan government had only prosecuted a few cases of the mid-level and low-level perpetrators due to what it said was a 'lack of evidence'. While the Office of the Attorney General had investigated and prosecuted a few cases before the law courts immediately following the election violence, these cases were restricted to low-level perpetrators and the charges were also limited to simple offences. Subsequently, the investigations and prosecutions stalled altogether, supposedly for lack of evidence and in anticipation of the ICC or the establishment of a special tribunal.⁶² A broader picture is better given by an internal audit report conducted under the attorney general in 2009, which concluded that the office had shelved two-thirds of the cases under investigation.⁶³

Litigation as a civil society tool

While the Kenyan government has insisted that it has and will continue to cooperate with the ICC, the OTP has consistently complained about state non-cooperation.⁶⁴ The prosecutor has alluded to the fact that, while formally cooperating, the government has found sophisticated

⁶¹ Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *The Prosecutor v. Muthaura et al.*, ICC-01/09-02/11 OA, Appeals Chamber, ICC, 30 August 2011.

⁶² HRW, 'Turning Pebbles'.

⁶³ Report to the Attorney General; also cited in Prosecutor's Article 15 Request. The report showed that, 'in Rift Valley Province, the investigating team had forwarded 504 cases to the Attorney General who ordered 42 of them be tried to logical conclusion. There was no further information concerning the 42 cases proposed for prosecution. In Western Province, 23 files involving 51 accused persons were forwarded to the Attorney General who decided 16 should proceed to trial and seven files be closed for lack of evidence. In Nyanza, 21 files were forwarded to the Attorney General. 18 were closed for lack of evidence. In Central Province, only two files were made available to the team to peruse. The Attorney General ordered that the cases be investigated and submitted to him afresh. Eastern Province had no case of post-election violence reported. In Nairobi the Police and Criminal Investigation Department curiously failed to submit any files. In the Coast province 6 files were perused involving 79 people.'

⁶⁴ 'Kenyan Government Not Cooperating with ICC – Bensouda', *London Evening Times*, 26 October 2012.

ways of undermining the ICC's work.⁶⁵ Early during the investigation, the OTP was denied access to relevant security officers for interviews when an injunction was obtained to block the process. The Kenyan government was slow to appeal the decision of the local court, and at the time of writing, the matter remained unresolved.

Early signs of impending non-cooperation were also evident when Kenya invited and hosted Sudanese president Omar al-Bashir, despite the Court having issued an arrest warrant against him for genocide and crimes against humanity.⁶⁶ Having both ratified and domesticated the Rome Statute, Kenya had an international obligation to arrest Bashir, but the government failed to comply with its Rome Statute obligations by declining to enforce the standing arrest warrants. On a subsequent occasion, when President Bashir was expected in Nairobi for a meeting of a regional body, ICJ-Kenya filed an application before the Kenyan High Court, seeking the enforcement of the arrest warrant and was successful in this regard.⁶⁷ President Bashir was prevented from visiting and the venue of the meeting had to be changed at the last minute. In addition to the immediate deterrent effect of this decision, it also established an important precedent in the country regarding the enforcement of decisions of international judicial organs.

Trial phase

Advocacy

Following the confirmation of charges hearing in late 2011, charges were confirmed against William Ruto and Joshua Sang and, in a separate case, against Francis Muthaura and Uhuru Kenyatta.⁶⁸ Challenges were immediately apparent. At the time, Mr Muthaura (against whom the charges were later withdrawn) held the position of head of civil service, while Mr Kenyatta was deputy prime minister and finance minister. Other than sitting in cabinet, these two accused were also part of the government's organs determining national policy and responses on foreign relations, including cooperation with the ICC.⁶⁹ Furthermore, their positions within

⁶⁵ *Ibid.* ⁶⁶ 'Press Statement', KPTJ (2 December 2011).

⁶⁷ *Kenya Section of The International Commission of Jurists v. Attorney General & Another*, [2011] eKLR, Misc. Criminal Application No. 685 of 2010.

⁶⁸ Prosecutor's Article 15 Request. The charges against both Muthaura and Kenyatta were later withdrawn in March 2013 and December 2014, respectively.

⁶⁹ I. Ongiri, 'Pressure Piles on Kibaki to Let Go Muthaura Uhuru', *Standard Media*, 10 September 2011.

government allowed them access to potential victims and suspects. As a member of the Witness Protection Agency board, the finance minister, in particular, could potentially access witness material.

Immediately after the charges were confirmed, CSOs began lobbying the government and garnering public support towards the resignations of both men. This process included writing open editorial articles in the national newspapers explaining the position to the public and elucidating the implications of the Kenyan state's activities. The momentum gained traction with some international institutions and foreign governments, indicating their reluctance to interact with government officials who were facing charges of crimes against humanity. Muthaura eventually resigned and while Uhuru Kenyatta retained his position as deputy prime minister, he relinquished his finance docket.⁷⁰

There was also substantial civil society advocacy during the electoral campaign period in 2012 and 2013. Kenyatta and William Ruto came together in a political coalition platform to campaign for Kenya's 2013 presidential race as running mates for president and deputy president. The ICC became a key issue in the 2013 election, with Kenyatta and Ruto's Jubilee Alliance casting the Court as a tool of imperialism, bent on illegitimately seeking to influence the outcome of the Kenyan election at the behest of Western powers. Although civil society groups sought to legally challenge the viability of accused persons running for high government positions, the High Court refused to rule on the matter, stating that only the Supreme Court could rule on presidential election matters.⁷¹ Since the Kenyan cases before the ICC had barely begun at this stage, it was therefore not possible to bar Kenyatta and Ruto from holding public office. There was insufficient time between the ruling of the High Court and the election itself to properly adjudicate the matter.

In March 2013, Kenya held elections in which Kenyatta and Ruto were elected as president and deputy president, respectively. A petition was filed in the Supreme Court of Kenya challenging the results of the elections, but it declared that the elections were free, fair and credible, and that both men had been validly elected.⁷² From this new position of power, both the president and deputy president launched a renewed onslaught against their cases. While appearing to abide by their

⁷⁰ 'Kenya: Uhuru, Muthaura Bow to Pressure, Step Aside', *allafrica*, 26 January 2012.

⁷¹ 'Uhuru Kenyatta Free to Run After Kenya Election Ruling', *BBC News Africa*, 15 February 2013.

⁷² Judgment of the Supreme Court of Kenya at Nairobi, Kenya Election Petition 2013, Petition No. 5 of 2013.

obligations to the ICC, they nevertheless engaged in a series of diplomatic and judicial activities that have had the effect of undermining the ultimate objective: justice for victims.

In addition, the government continued to seek international support for its deferral campaign. By continuing to present a narrative of the ICC as a hegemonic tool of Western powers,⁷³ the government succeeded in rallying African states gathered at the AU's Twelfth Extraordinary Summit in October 2012 to pass yet another resolution calling for sitting heads of state and senior government representatives to be exempt from criminal prosecution.⁷⁴ Citing the selectivity of cases before the ICC, which to date have only been brought against African nationals, the Kenyan government attempted to cast itself as a victim. Part of the resolution, which was the outcome of the extraordinary session, reads:

After reaffirming the principles deriving from national law and international customary law, by which sitting heads of state and government and other senior state officials are granted immunities during their tenure of office, the Assembly decided that, 'No charges shall be commenced or continued before any international court or tribunal against any serving head of state or Government or anybody acting in such capacity during his/ her term of office. To safeguard the constitutional order, stability and integrity of member states, no serving AU Head of State or Government or anybody acting or entitled to act in such a capacity, shall be required to appear before any international court or tribunal during their term of office.'⁷⁵

Once again, under a joint platform, CSOs lobbied against this position to their partners in different countries. Although Kenyan civil society was not granted an audience in the extraordinary session, it nonetheless developed a position paper arguing against the 'neo-colonial' narrative, and it shared this position throughout its networks for further advocacy with AU member states.⁷⁶ The paper further argued that the resolution's stance on the immunity of sitting heads of state and government would

⁷³ 'The African Union, the International Criminal Court, and the United Nations Security Council', Background Paper, University of California, Irvine School of Law ICC-UNSC Workshop (November 2012).

⁷⁴ Extraordinary Session of the Assembly of the African Union (Addis Ababa, 11–12 October 2013).

⁷⁵ *Ibid.*

⁷⁶ 'Kenyan Civil Society Letter and Memorandum to the UNSC on Deferral of ICC Cases', KPTJ (7 November 2013).

undermine the international human rights system, and in particular the core objectives of the Rome Statute.⁷⁷

In November 2013, the Kenyan government made an additional attempt to halt the cases before the ICC's governing body, the Assembly of States Parties (ASP), which was meeting in The Hague. The government sought to amend the rules of the ICC regarding prosecution of sitting heads of state, as well as their attendance at trial.⁷⁸ Civil society present at the ASP made strong arguments against these proposed amendments. A coalition of organisations argued that the Rome Statute system deliberately ensured that there would be no immunity for any individual on the basis of official capacity. They contended that equality before the law for grave crimes is a fundamental tenet that is not only enshrined in the Statute but also recognised by international practice and, increasingly, adopted by national jurisdictions. Kenya therefore could not be an exception. Furthermore, while Article 143 of Kenya's Constitution provides immunity for the president from criminal prosecutions, such immunity does not extend to a crime under any treaty that prohibits it and to which Kenya is party.⁷⁹ Kenyan representatives also argued that most victims and affected communities have supported the ICC because the Court is capable of dispensing justice even when the alleged perpetrators are the most powerful members of society. Alternative possibilities for accountability are often unavailable through the judiciaries of post-conflict states.

Domestic litigation and reparations efforts

Following the ICC's confirmation of the charges, Kenyan NGOs proceeded to file domestic cases to pursue justice for victims of post-election violence. Although these cases were not criminal in nature, they sought state responsibility for internal displacement, sexual violence and police shootings.⁸⁰ One of the cases dealt specifically with victims of sexual and gender-based violence. The case was filed in February 2013 by a

⁷⁷ The Kenyan government followed up the AU resolution with another deferral application to the UN Security Council. CSOs in turn wrote a letter to the Council conveying concerns regarding the deferral request, and the motion was again defeated. See 'Why the UN Security Council should Reject the Application for a Deferral of the Kenyan Cases before the International Criminal Court', A Memorandum from Kenyan Civil Society Organisations (23 October 2013).

⁷⁸ 'Kenya's "victory" at the Assembly States Parties meeting', *RNW Africa Desk*, 28 November 2013.

⁷⁹ Article 143, Constitution of Kenya. ⁸⁰ HRW, 'Turning Pebbles'.

consortium of civil society organisations comprising the Coalition on Violence against Women (COVAW), Independent Medico-Legal Unit (IMLU), ICJ-Kenya, Physicians for Human Rights (PHR) as well as eight victims of sexual and gender-based violence.⁸¹ There also has been litigation on behalf of internally displaced persons.⁸² In choosing to interpret the principle of complementarity as ‘positive complementarity’, where the ICC and the national government work jointly to ensure accountability for international crimes, CSOs have been using domestic legislation to push this agenda.

CSOs also developed a reparations framework to complement the ICC’s Trust Fund for Victims (TFV). The framework, which was presented to the Truth, Justice and Reconciliation Commission and incorporated into its report, presents an option for the government to map victims of past violations, including of the 2007–2008 post-election violence. This is particularly important as the TFV has yet to make an assessment of the Kenyan situation as of the time of writing.

Investigation and prosecution

The KNHCR report on the post-election violence claimed that there may have been nearly 220 possible perpetrators.⁸³ This could be a conservative estimate, and it demands developing either a prosecutorial strategy or judicial mechanism to prosecute these perpetrators and determine whether there may have been more. In tandem with the ICC’s intervention, civil society groups have been at the forefront of advocating for such a domestic mechanism, though such advocacy had to take place after the commencement of the Kenyan cases. Given the pervasive climate of impunity, many organisations feared that any domestic accountability process might be hijacked to justify an admissibility challenge before the ICC.

The two government initiatives towards accountability have included a multi-agency task force, established by the Director of Public Prosecutions in April 2012, and a proposal, advanced by the Judicial Service Commission (JSC), for a new division of the High Court of Kenya with jurisdiction over international crimes. The task force’s mandate was to review the 6,000 cases arising out of the violence that had been arbitrarily shelved by the Office of the Attorney General

⁸¹ ‘Hearing of the PEV Sexual Gender Based Violence case begins in Court’, ICJ Kenya (26 March 2014).

⁸² *Federation of Kenya Women Lawyers (FIDA Kenya) & 27 others v. Attorney General & 3 others*, [2011] eKLR, Petition No. 273 of 2011.

⁸³ KNCHR, ‘On the Brink of the Precipice’, 178–238.

in 2009.⁸⁴ The task force has reportedly reviewed all 6,000 cases and identified 1,716 suspects and 420 potential witnesses.⁸⁵ It was also said to be prosecuting four murder cases, as well as preparing 150 files on sexual and gender-based violence for possible prosecution. However, the state has since announced a closure of all files due to insufficient evidence.⁸⁶

Kenyan CSOs have engaged in the rudimentary stages of a proposal to establish an International Crimes Division (ICD) of the High Court. The JSC mandated a study into the viability of establishing such a division; however, the policy framework enlarges the scope of the ICD to encompass transnational crimes and fails to clearly address the question on retrospective application of the law.⁸⁷ The widening of the scope of the proposed ICD includes crimes ranging from terrorism to cybercrime. This undermines the intention for a concise temporary mechanism established to address the specific violations from the post-electoral violence period. This is particularly clear since Kenya already has a comprehensive legislative framework and institutions to address cybercrime.⁸⁸ The International Crimes Act 2008 can also address any international crime that may occur after its enactment. Although CSOs are sceptical of the proposed division, they are, at the time of writing, still engaging with the process.

Conclusion

Gross human rights violations have become increasingly normalised in Kenya, particularly during or near election periods. Typically, those who came into power have had no interest in apprehending the perpetrators because they use violence to facilitate their access to power. In seeking to destabilise this equation, and in providing essential support to the ICC's intervention, human rights organisations have become the vanguard for justice in the country. The Kenyan government's efforts to thwart the legitimacy and financing of these organisations are a measure of civil society's success in this regard.

⁸⁴ Report to the Attorney General; also cited in Prosecutor's Article 15 Request.

⁸⁵ 'Domestic Criminal Accountability Forum Report', ICJ-Kenya (12–13 June 2012).

⁸⁶ 'Kenya: Victims still seeking justice for post-election violence', Amnesty International (15 July 2014).

⁸⁷ See Judicial Service Commission, 'Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya', 30 October 2012. For further views on the proposed ICD, see 'A Real Option for Justice? The International Crimes Division of the High Court of Kenya', KPTJ Report (July 2014).

⁸⁸ 'New Court in Kenya to Focus on Maritime Piracy Cases', *CNN Wire*, 25 June 2010.

The relationship between Kenyan civil society and the ICC brings together the Court's expertise regarding international criminal matters with the contextual knowledge of domestic advocates and practitioners. However, the relationship between the Court and its civil society partners needs further definition and refinement in ICC policies and guidelines. Lack of clarity regarding the role of intermediaries, especially during the early stages of mapping evidence and in witness protection, can damage the investigatory process, as the OTP's cases have increasingly revealed. Indeed, Kenyan politicians have seized on this lack of clarity, suggesting that the entire investigation and witness selection processes were undertaken by CSOs. Such rhetoric produces political vulnerabilities for civil society advocates, who are now accused of acting as conduits of foreign interests. In Kenya, being the vanguard for justice has come at a price.