



# Making fear switch sides?

Accountability for human rights in the context of Kenyan Elections

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# Abstract

Human Rights Accountability is a property of the relationship between rulers and citizens. When it exists, it prevents violations of Human Rights by enabling citizens to influence decision-making. The concept needs clarification in order to reach its full potential as a tool for planning and analysis. Misunderstanding can have dangerous consequences in the failure to prevent political violence, electoral fraud and more.

Through a Grounded Theory Analysis of efforts to strengthen accountability mechanisms after the 2008 Post-Election Violence in Kenya and their positive and negative effects on the electoral situation in 2013, a new theoretical framework is developed. It concludes that achieving Human Rights Accountability depends on claims being actively made, being supported with enough power, by channeling the struggle to achieve right-objects through the processes of accountability, with enough efficiency that they actually make a difference in the power relationship.

Right-objects should not be delivered by reversing the accountability relationship by suppressing other rights. Then the fight for Human Rights Accountability is not over and the struggle for justice must continue.

Key words: Human Rights Accountability, Enforceability, Answerability, ICT4D, Crowd sourcing, Social Accountability, Political Accountability, Responsibility to prevent, Grounded theory

# Abstrakt

Human Rights Accountability är en egenskap i relationen mellan styrande och medborgare. När egenskapen existerar förhindrar den människorättskränkningar genom att medborgarna får inflytande över beslutfattande. Begreppet behöver klargöras för att nå sitt fulla potential som verktyg för planering och analys eftersom missförståelse kan ha farliga konsekvenser i misslyckandet att förebygga politiskt våld, valfusk mm.

Genom en grounded theory analys av insatser för stärkande av ansvarsmekanismer efter valvåldet i Kenya 2008 och dess positiva och negativa effekter på valsituationen 2013 skapas ett nytt teoretiskt ramverk. Slutsatsen är att Human Rights Accountability endast kan uppnås med tillräcklig makt bakom hotet av sanktion, genom att kampen för uppnående av rättighetsobjekten måste kanaliseras genom processerna för ansvarsutkrävande och att dessa är så effektiva att de gör en verklig skillnad i maktrelation.

Ett rättighetsobjekt bör inte uppnås på bekostnad av andra rättigheter. Om det uppnås genom att medborgarna hålls ansvariga för dess uppfyllande i en omvänd ansvarsmekanism blir resultatet ytligt och kortsiktigt. Då är kampen för Human Rights Accountability inte över och man måste fortsätta kämpa för rättvisa.

Nyckelord: Human Rights Accountability, Enforceability, Answerability, ICT4D, Crowd sourcing, Social Accountability, Political Accountability, Responsibility to prevent, Grounded theory

# Contents

<b>1</b>	<b>Introduction</b>	<b>1</b>
1.1	Research Problem	3
1.2	Purpose and research Question	4
1.3	Limitations	5
<b>2</b>	<b>Method</b>	<b>6</b>
2.1	Material and criticism of sources	8
<b>3</b>	<b>Combining Human Rights with Accountability</b>	<b>9</b>
<b>4</b>	<b>Background on Case Study of initiatives aiming to strengthen Accountability</b>	<b>20</b>
4.1	Initiative of the International Criminal Court	20
4.2	Ushahidi and Uchaguzi	22
4.3	Constitutional Reform	24
4.4	Peace Movement and Media Self-censorship	25
<b>5</b>	<b>Grounded theory analysis</b>	<b>27</b>
<b>6</b>	<b>Concluding Discussion</b>	<b>32</b>
	<b>Literature</b>	<b>34</b>

# List of abbreviations

CSO	Civil Society Organization
ICC	International Criminal Court
ICT	Interactive Communication Technology
IEBC	Independent Electoral and Boundaries Commission
KNDR	Kenya National Dialogue for Reconciliation
NGO	Non-Governmental Organization
PEV	Post Election Violence
WTO	World Trade Organization

# 1 Introduction

## *In the absence of accountability*

The system of Human Rights can be seen as a system of accountability mechanisms. By assigning responsibility, creating opportunity for people to make demands, monitoring and providing sanctions, the aim is to help citizens hold their rulers to account to make policies that are beneficial to the people.<sup>1</sup>

Perhaps the value of Human Rights Accountability is best understood by seeing what happens in its absence. Without mechanisms for demanding accountability, the poor or disempowered cannot claim their entitlements; they can only stand back and watch as their countries are mismanaged while power and money make the rulers immune to restrictions on how they should act and behave. The ones who wield power can adapt policies to suit their own interests while not working in the benefits of the people. Resources intended for legitimate ends will be used for private gains of the rulers while the substandard policies that come from such corrupt decision-making worsens the poverty and disempowerment of the people.

All though most of the world's countries call themselves democracies and hold elections, these elections often fall short of their real purpose. Ideally, the election process should be a mechanism to put the power of the rule of a country in the hands of the citizen if the people have the power to sanction the politicians for misconduct by deposing them through voting them off. Sadly, many elections fail to live up to the promise of being a way for the people to express their needs and wishes. They are lined with violations of Human Rights, violence, vote buying and other corrupt acts. In several dark chapters of the history of the world, elections are affected by politicians who manipulate sentiments of ethnicity to create violence in order to cement their rule or gain more power.

## *Violent elections*

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<sup>1</sup> ICHRP Integrating Human Rights in the Anti-Corruption Agenda, Challenges, Possibilities and Opportunities, International Council on Human Rights Policy, Geneva, 2010, s 46

One such dark chapter was the election that was held in Kenya in the last days of December 2007. Despite being predicted to be a peaceful and fair election, the following months became the most violent period in Kenya's history after independence. The period is referred to as ThePost-Election Violence, (PEV). More specifically this refers to a period of acts of ethnic and political violence, forced evictions of nearly 600 000 people, arsons and the murders of at least 1300 people that went on between the contested nightly swearing in of the president until a peace agreement was reached with the help of a team of international negotiators.<sup>2</sup> Until then, the violence was on the verge of becoming genocidal, but was halted before it reached such extent. It is commonly being labeled Crimes against Humanity, by for example The Kenya Human Rights Commission. They motivate the use of the term "because of including conduct such as the multiple commissions [by politicians] of acts of inhumanity against civilian populations, pursuant to or in furtherance of an organizational policy to commit such attacks in the theatres of violence."<sup>3</sup>

### *Initiatives for Change*

Faced with the horror of the Post-Election Violence and the notion that there was a very high risk of the same situation reoccurring the next time Kenya would go to the ballots, many different actors, who were interested in making future elections free from Human Rights violations, started to work on changing the conditions for elections. Active efforts were initiated from all corners of Kenyan society, from government officials and political and religious leaders to political parties, civil society organizations, to embrace a discourse of peace and reject violence.

In the years between the two elections, several initiatives were made with the goal of changing the conditions for accountability in Kenya. Different initiatives interpreted and used the various aspects of accountability to try to bring about the change that they desired in securing the rights of the people. They had different ideas of what it would take to overpower the powerful to make them respect and protect the rights of the ones over whom they wield power. The efficiency of their efforts was going to be put to the test the next time Kenyans would go to the ballots.

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<sup>2</sup>Cheeseman, N. *The Kenyan Elections of 2007: An Introduction*, University of Oxford, Journal of Eastern African Studies Vol. 2, No. 2, 166-184, July 2008 p. 166 -184

<sup>3</sup> Commission of Inquiry into Post-Election Violence, *CIPEV Report of the Commission of Inquiry into Post-Election Violence* s 303

### *Moment of Truth*

Fast-forward to the 2013 election. If the measure of success for the election is that the elections transpired peacefully, then this election was a major success. Only very few instances of violence occurred. This time around, electoral results were being contested through the courts and not through violence in the streets.

On a more somber note, the election was tainted by irregularities and incompetence. The system of counting votes was malfunctioning and votes had to be counted manually, while widespread rumors went around saying that the tallying technology had been hacked. By the narrowest margin possible, a run-off election was averted, 50 percent was needed to secure the election in the first round, and Kenyatta got 50.07 %, winning by 8000 votes out of 12.4 million. Many people were unhappy with the way the election had been handled and the defeated candidate Odinga unsuccessfully took his case to the Supreme Court.

This essay suggests that the key to preventing Human Rights violations can be found in creating strong mechanisms for Human Rights Accountability. It shows that accountability mechanisms can change the dynamics between citizen and ruler that make it possible for marginalized to affect the decision-making of the ruler, but only if a certain set of ingredients are present.

If properly understood, these mechanisms can be powerful tools both for planning actions and for analyzing situations, but they need clarification for its full potential to be realized and utilized. If they are misunderstood, the analytical fallacies and conceptual misunderstandings can have grave consequences in the failures to achieve sustainable peace and democracy.

By investigating how a selection of four efforts intended to create accountability in Kenya operationalized the concept and examining the effects of these initiatives this study hopes to bring valuable lessons about the concept of Human Rights accountability for its full potential to be reached. The International Criminal Courts involvement in the prosecution of individuals for Crimes against Humanity of the 2008 Election Violence period is contrasted with the “Peace movement”, together with the conditional changes drawn from the new Kenyan constitution of 2010, and ICT crowd-sourcing election monitoring platforms. These will be further defined in chapter 4.

## 1.1 Research problem

The current use of the broad term accountability is confusing because it is very broad and has many divergent uses. It is being used in many fields such as law, politics, personal ethics, accounting, business management etc. Each field has several understandings and holds different meanings, and each adds and subtracts characteristics to the terms. When the meanings and characteristics that each field gives the concept are mixed up, the result is that the possible benefits that can come from using accountability as a relevant tool for analysis and policymaking are no longer communicated. Taking to account that the discourse on Human Rights itself is a multidisciplinary field that uses a mix of law, ethics, theology and political philosophy, the mixing and borrowing of theories and intellectual baggage gets even more complicated.

Various unclear understandings of the concept could lead to different interpretations that can directly harmful for those who want to take action. The issue is very serious, given the importance of the mechanisms. If they are the key to preventing and conquering oppression, inequality and political violence, then the consequences of misunderstanding its mechanisms is the failure of the struggle against these evils.

## 1.2 Purpose and Research Questions

The purpose of this essay is to bring clarity to the concept of Human Rights Accountability, and to find out which ways the concept should properly be used in the Human Rightsfield to make it an effective tool for the prevention of violations. Instead of centering the research on questions that are decided in the beginning of the essay, the methodology chosen for this thesisallows the questions to evolve throughout the study. By including specific tangible contributions that have the aim of increasing Human Rights accountability, and placing them inside a theoretical framework for accountability, lessons are learned of both the efficiency of the methods and on the dynamics of the concept.

For the study to be true to the question of finding a better understanding of the concept and its operationalization, it would be wrong to answer the problem solely by blending different researcher's perspectives. It would run the risk of adding to the confusion of the subtypes of accountability. Therefore, the important aspects of the accountability concept will be further developed through building a theoretical framework based on data from a case study. The case study will be the prevention efforts of

strengthening conditions for accountability between the 2007/2008 and 2013 elections in Kenya.

The Kenya Post Election Violence prevention case provides the essay with a current case where several strategies to avoid Human Rights violations were employed with a very specific deadline. Whatever needed to be done had to be done before a certain date when next election would arrive. The knowledge that there was a day where the strategies used over the past five years would be tested is an interesting feature that is rare in the field of Human Rights, where results are often less dichotomous and usually allow a longer time frame for expected results to take place.

### 1.3 Limitations

The report aims to further the understanding of the effects and effectiveness of the concept of accountability initiatives. It uses the Kenyan examples as an environment from which insights can be drawn, not as the object of the study. The object of study is the inner and outer functioning of Human Rights Accountability.

It does not intend to make judgment on whether it was “a price worth paying” when the initiatives sacrifice democracy when pursuing peace or when they have sacrificed peace when pursuing justice. Neither will it speculate about which of the four initiatives had the highest impact on the absence of violence. The issues of contribution and attributions are far more complicated for the format of the study. It is presumed that the initiatives all aimed to contribute to the outcome, but does not aspire to make any verdict on whether they actually did.

Focus lies primarily on the time in the period between the elections and deliberately avoids details about the election violence period. For more details on this interesting period, please refer to this root cause analysis of the situation.<sup>4</sup>

Since the study is based on a variety of written material created for other purposes it cannot claim to find out the actual intentions behind the initiatives, it has assumed that the theories of change behind the initiatives can be found in the rationale behind the design of the campaigns.

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<sup>4</sup> For further reference see Felix, M. *Att lära av från misstagen från Kenyas Post Election Violence-förmodade orsaker och ansvar för förebyggande*. Lund Human Rights Studies, 2012

## 2 Method

Through the combined use of ameliorative conceptual analysis and grounded theory of a case study, a fresh theoretical understanding can emerge from the data. The two methods complement each other well as they both strive to create an improved understanding of the concept or phenomena that they are exploring.

The first part of the report is a conceptual analysis with an ameliorative aim. It uses a method for conceptual analysis that was drawn from Sally Haslangers article “What are we talking about? The semantics and politics of social kinds”. In the article, Haslanger suggests categories for how research questions on concepts can be answered, depending on which methodological assumptions the researcher makes. With this approach to conceptual analysis, the researcher tries to find the point in using the concept, how should it fit in society. The approach gives a progressive function and seeks to find a use for the term where it changes the world for the better.<sup>5</sup>

With an ameliorative approach, suggestions of improvements can be made for in the use and understanding of Accountability, as it should be interpreted when combined with a Human Rights perspective. Given that the issue to be dealt with in the essay is that of insufficient knowledge of how a term should best be used, the essay will not dwell extensively on other methods of conceptual analysis that describe the current use or the current idea. These are assumed less than ideal and therefore more part of the problem of the conceptual understanding than the analytical solution.

Here, the goal is to construct a theory that is true to finding out as much about the actual studied phenomena, without putting excessive emphasis on maintaining a preset setting for the study.<sup>6</sup> Therefore, the conclusions drawn from the case study will be merged into the conceptual analysis. The reason for choosing to use the method Grounded theory, is that it does not start with preconceived ideas to be confirmed by studying a situation. It allows the researcher to work with an open mind while systematically and simultaneously collecting, coding and analyzing qualitative data to build a

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<sup>5</sup> Haslanger, p. *What Are We Talking About? The Semantics and Politics of Social Kinds* Hypatia, 2005, vol. 20, no. 4, p. 10-12. 2005 p. 10-12

<sup>6</sup> Charmaz, K. *Constructing Grounded Theory- a practical guide through qualitative analysis* London: SAGE, 2006, p. 22

theoretical perspective that is well anchored in the studied data. The original method was first introduced by Glaser & Strauss in 1967 in their book *Discovering Grounded Theory*<sup>7</sup>. In their perspective, the method allows the researcher to discover a theory that emerges from the data, separately from the observer. However, this essay will assume the interpretation and guidance from Kathy Charmaz in her book *Constructing Grounded theory*, in which the theory is seen as being constructed through the interpretation of the researcher.<sup>8</sup>

According to Charmaz, the interests of the researcher should serve as a guide for the initial points for departure when starting to select data and interpreting it. The research question formulates itself after adapting to the findings in the gathered qualitative data through the research process. The method acknowledges and embraces that research cannot be separate from the researcher's interpretation; instead, it highlights the researcher's personal and professional impact in choosing which data to collect, how it should be interpreted and analyzed.

In the array of tools available within the method, the study will use simultaneous analysis and data collection, memo writing and line by line coding. By applying the grounded theory methodology to the case setting, a wide variety of sources could be scoped for valuable data. The use of this method made it possible to adjust the data collection throughout the process as the theory develops and the data that should be considered valuable, changes. The flexibility makes it possible to stay closely aligned with the findings and letting the findings lead the research process forward. The process of selecting which data that should be deemed as noteworthy derived from my own first hand observations of the 2008 Post Election Violence, as well as previous research that I have undertaken on the supposed causality mechanisms and the preventative measures undertaken by the Kenyan government.<sup>9</sup>

Four striking and interesting initiatives were chosen to be analyzed in the Case Study. What they have in common is that they aim to strengthen chosen areas in the dynamics of accountability to achieve higher accountability for securing the rights of the Kenyan people to be protected from political violence. In other words, for these strate-

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<sup>7</sup> Ibid, p. 7

<sup>8</sup> Ibid, p.10

<sup>9</sup> For further reference see Felix, M. *Att lära av från misstagen från Kenyas Post Election Violence – förmodade orsaker och ansvar för förebyggande*. Lund Human Rights Studies

gies, the accountability for human rights serves both as the outcome of their work as well as the tool that they use according to how they assume that change can be created. But as we shall see, the presence of a mechanism does not mean that it was correctly used or that its effects were desirable in the long run.

## 2.1 Material and criticism of the sources

In order to gain insight on the strategies and their effects, there was a need to collect information from a wide variety of places. Information on the initiatives has been extracted from extant data<sup>10</sup> deriving from observations of the election process, reports of the major news media networks in the newspapers and in video coverage, policy documents as well as reports from the Uchaguzi platform for crowd sourced election monitoring. The texts and reports are treated as data to be interpreted and analyzed. Since they were created for other purposes, the contexts of its origins were taken in to consideration.

The work on the study was undertaken before, during and after the 2013 election. Over the weeks leading up to the election, during the voting process, announcement of the winner, and subsequent Supreme Court trial, there were significant opportunities for the collection of data of events and effects of the different strategies.

Information from the various sources was then coded into Memos. In Grounded theory, coding means investigating the data to see what processes and phenomena can be seen through the data, and then using the codes to label the data. The codes are then written down into memos in narrative form. The memo writing is an essential middle-step where the data is turned into pieces of material that can be compared.<sup>11</sup> Comparing the data, allows new levels of codes to arise and be further categorized. When the process is repeated the research results are generated.

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<sup>10</sup> Charmaz, 2006, 35

<sup>11</sup> Ibid 2006, 72

### 3 Combining Human Rights with Accountability

In the field of Human Rights, the concept of accountability is a core component, all though it is not mentioned in any of the main Human Rights treaties and convention documents, working towards accountability is a necessary condition for making the rights a reality. The reason is that accountability is a necessary condition for the dynamics of the power relations between rulers and citizens so that the citizen is able to make a claim and have it implemented.

Various rights-based approaches used for programming contributions for Human Rights, often present accountability as a main goal, but the specific meaning of the term in the Human Rights context is often missing. When the concept is commonly called forward as a universal solution to almost all problems without sufficient specification of what the concept means inside the Human Rights context, the term is robbed of the value that the concept can have in strengthening Human Rights.<sup>12</sup> In order to make it a practical tool there is a need to specify *what* exactly is meant by the term. It should be understood what the semantic boundaries and the inner structures of the concept are as well as what it means in the specific situation, otherwise it is unclear what the recommendation holds in terms of real action.

Without specification, the term refers to the broad and basic understanding of the core concept of accountability, which simply means the ability to hold someone to account.<sup>13</sup> A broad definition gives the term a wide variety of uses in many fields such as law, politics, personal ethics, accounting, business management etc. Each field has several understandings and hold different meanings. Adding to the confusion, the term has a dualistic nature where it refers both to an abstract and clinically norm free phenomena, the way it is used in bookkeeping and accounting, and at the same time value-ridden

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<sup>12</sup> Blind 2011, Goetz 2002, Schedler 1999, Lindberg 2009, Menochal 2013.

<sup>13</sup> Ackerman J. Social Accountability in the Public Sector: A Conceptual Discussion, Social Development Papers No. 82, Washington DC: World Bank, 2005, s11

because of being associated with the notions of responsibility, integrity, democracy, fairness and justice.<sup>14</sup>

Because of the variety of meanings in the different fields that use the concept and it is important that meanings are not mixed up for the concept to communicate any content of value. When the meanings and characteristics that each field gives the concept are mixed up, the result is that the possible benefits that can come from using accountability as a relevant tool for analysis and policymaking are no longer communicated. Taking to account that the discourse on Human Rights itself is a multidisciplinary field that uses a mix of law, ethics, theology and political philosophy, the mixing and borrowing of theories gets even more complicated. Persons who have their background in each respective field might not reflect on the differences between the subtypes and assume that the term holds the same meaning even in other disciplines.

### *Basic Definitions*

Before exploring the concept further, it will be helpful to start with some more specific definitions. Lindberg claims that the current use of the term accountability has been conceptually stretched through characteristics being added and subtracted so that hundreds of conceptual subtypes have emerged. It averts the potential benefits from using accountability as a relevant tool for analysis and policymaking from being communicated. The various unclear understandings of the concept may lead to different interpretations and different results that are directly harmful for quality of research and analysis thereby causing false conclusions and faulty decisions. Using classical concept formation, Lindberg suggests the following basic understanding of the core concept of accountability: Accountability is a means to control power. It is not the only way to control power; others examples are for instance violence and financial sanctions. The quality that makes accountability special is that it is a relationship that restrains the decision-making of those who wield power over others. For something to count as accountability there are five key characteristics that must be present.<sup>15</sup>

1. An agent or institution who is to give an account(Accountee)
2. An area, responsibilities, or domain subject to accountability. (Domain)

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<sup>14</sup> Blind K, *Accountability in Public Service Delivery: A Multidisciplinary Review of the Concept* 2011, p. 2

<sup>15</sup> Lindberg, p. *Accountability: Core concept and its subtypes*, ODI Africa Power and Politics Programme, Working Paper. 2009 p. 4

3. A person, group or institution to whom the first agent is to give account (Accountor)
4. The right and ability of the Accountor to require A to inform and justify decisions with regard to Domain; (Call to Accountability)
5. The right of Accountor to sanction Accountee if the Accountee fails to inform or justify decisions with regard to the Domain. (Sanction)<sup>16</sup>

According to Lindberg all five characteristics have to be present, otherwise we would be describing other phenomena. Different subtypes of accountability will all have these characteristics, but depending on how the roles are cast the dynamics become very different. For instance, a very simplified outline could show that in Legal Accountability the Accountor is the state, the Accountee is the citizen and the domain is the laws that the state has made, and they may not necessarily be just. The ways to call someone to account is highly specified and can only be done in pre-set ways with wide array of sanctions. In Democratic Accountability the persons who hold political power are the Accountees, held to account by the people, and the sanction is that they do not get re-elected or through being publicly criticized and therefore loose influence.

Assigning the role of the Accountee and Accountor can be done intentionally, by official delegation of power, but sometimes they roles are simply facts of the power relations.

#### *Applying the Accountability outline on the Human right framework*

When combined with a Human Rights framework, there is a clear casting of the roles in the accountability dynamics.<sup>17</sup> The legal framework of Human Rights puts governments in the role of the Accountee because they are the ones who have the responsibility and duty to protect Human Rights and prevent violations. In the Human Rights discourse, this is the role of the Duty-bearer.<sup>18</sup> Many promoters of Human Rights argue that sometimes persons, media, companies or institutions are de facto wielding so much power that should be held to account for how they manage the power that is actually in their hands, but, if there is no right (Lindbergs fourth point) to hold them to account they

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<sup>16</sup> Adapted from Lindberg, 2009, p. 8

<sup>17</sup> See Felix, 2012 for further reference

<sup>18</sup> This section borrows the concepts presented by Brian Orend in Human Rights Concept and Context (2002) and combines it with the suggested outline. However, Orend does not combine the two frameworks.

cannot have the role of an Accountee. Given that the governments are the ones who have signed the human right treaties, they are the ones that can be held to account for the delivery of the right objects. However, the International Criminal Court has opened up for jurisdiction for individuals to be held to account for their role in severe violations of human rights. Inside their exceptional context, individuals are directly subject to human rights law. Elsewhere, citizens of ratifying countries are held accountable to obedience to the laws and policies that the governments create (which are supposed to be in keeping with the human rights).

The Accountor is equivalent with a Rights holder. In the Human Rights field, all human beings are considered Rights-holders.<sup>19</sup> At the same time, only citizens of countries have the actual abilities to claim accountability for their human rights because they are the only ones having corresponding Duty bearers for the delivery. Civil society organizations, Ombudsmen or media can be the ones representing the citizens in making the actual claim.

Domain that is subject to accountability translates to the right-object. The right object is the content of each specific right that the Accountor has the right to hold the Accountee to account for securing. They must be specified and agreed on for there to be a right to require justification on its fulfillment and give out sanction.<sup>20</sup>

The fourth point of this study's adaptation of Lindbergs list is the right and ability to hold somebody to account. In the human rights framework, the right to hold somebody to account is seen as universal for all people, and it is assumed that the ability to do so *should* be there. Still, the mechanisms that will make this a reality are often missing, and a lot of the actual work that is done in the human rights field strives to build these mechanisms through capacity building, helping with monitoring, awareness-building initiatives etc.

Calling to account is necessary because of the justification for sanction. Having a right means having a justified claim.<sup>21</sup> The claim to hold someone to account can only be justified if the Accountee has a chance to explain her actions or show that whether they had actual influence over the situation. It has to be within his/her ability to coordinate and allocate resources. Puppets or scapegoats who have acted according to the in-

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<sup>19</sup> Orend, 2002, s 15

<sup>20</sup> Ibid p. 29

<sup>21</sup> Ibid p. 2002, s 65

struction of somebody else or according to what has been agreed on are not legitimately objects of accountability.<sup>22</sup>

Finally, the ability to sanction is central to the accountability dynamics. We give an account of our wrongdoing only when it is requested, and only when that request is backed up by power. If the right and ability to sanction is not there, the concept that is described is similar to having responsibility to someone. The difference is clear when we talk of Corporate Social Responsibility, CSR, where the Accountee has the option to provide information and justify their actions but they cannot be forced to present information that they do not want to share and therefore cheating or misconduct is not exposed.<sup>23</sup>

Sanctions have to be powerful enough to change the incentive structure for the decision maker. The sanction can be a legal punishment, a financial fine or using name and shame destruction of a reputation and the sanctions must be strong to have any real effect on the conduct.<sup>24</sup>

#### *The issue of Superior Authority*

One should remember that accountability does not come automatically; its process demands activities by the Accountor or their representatives. Richard Mulgan's definition of accountability includes three central elements. First, he sets the condition that accountability must be external, that the account is given to some other person or body outside the person or body being held accountable. For him, this is a necessary condition for the objectivity of information and efficiency of sanction. Secondly, he stresses the involvement of social interaction and exchange. The side that is calling for the account (Accountor) seeks answers and rectification while the other side, that is being held accountable (Accountee), responds and accepts the sanctions. Therefore, accountability structures have to be accompanied by mechanisms for monitoring that will prevent eventual violations of rules from going unnoticed. The Accountor must also choose to use that information to claim the accountability and actually make the effort to do so.

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<sup>22</sup>Christiano, Thomas *The Rule of the Many*. Boulder CO: Westview, 1996

<sup>23</sup> Schedler, Andreas, *Conceptualizing Accountability*, from the anthology (Diamond, L. et al (eds.) *The self-restraining state: Power and accountability in new democracies*, Lynne Rienner:1999 London. p. 14

<sup>24</sup> ICHRP, 2010, p. 34

Thirdly, it implies rights of authority, in that those calling for an account are asserting rights of superior authority over those who are accountable.<sup>25</sup>

Mulgan's third element introduces a crucial new component in our discussion, which is *superior authority*. If accountability necessarily implies power then we can only speak of accountability when the Accountor stands above the Accountee. Much of the challenge in achieving accountability lies here. The Accountor need to have more power than the Accountee to be able to extract information and in order to be able to back the claim with a sanction. Yet- it is exactly *those who are disempowered that are the ones who are in need of holding others to account!*

Being unable to demand accountability is part of what it means to be poor and disempowered. It's an important reason why people remain stuck in poverty and disempowerment, because in the absence of accountability, it is likely that power is affected by corruption and capture. Capture can be understood as the process by which elites skim resources intended for legitimate ends and define policies in a way that protects their own interests.<sup>26</sup> The ones who are misusing their power are the ones in position to block accountability claims and make them inaccessible for those who have less power.<sup>27</sup>

#### *No Accountability without Voice*

For this vicious catch 22 to be solved, increased "voice" and/or "empowerment" of the affected persons would be required. These terms are almost as vague as the term accountability and are inconsistently used by different actors in politics or development, who differ in the rhetoric and what activities they ascribe to each term, in use and understanding. Comparing them in detail becomes complicated since each term is similar but carries its own intellectual baggage. Broadly defined, though, they include capacity-strengthening activities for non-discrimination, inclusion and transparency. For instance, Dfid calls the balancing of accountability and increased capacity for the marginalized to make claims CV&A, Citizens Voice and Accountability.<sup>28</sup> Sida divides the

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<sup>25</sup> Ibid p. 555

<sup>26</sup> Darrow, M. *Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation*, Human Rights Quarterly, Volume 27, Number 2, May 2005 p. 475

<sup>27</sup> Newell, P. and Wheeler, J., *Taking Accountability into Account*, in Rights, Resources and the Politics of Accountability, Zed Books: London. 2006, p. 9

<sup>28</sup> Rocha Menocal, A. and Sharma, B. 'Joint evaluation of Citizens' Voice and Accountability: Synthesis Report', London: DFID 2008, s 5

concepts further in the Human Rights based approach with its four pillars; Non-discrimination, transparency, accountability and participation.<sup>29</sup>

Neither of these principles is sufficient on their own. Without accountability the calls for inclusion and increasing the voice and participation leads nowhere: if the powerful can choose not to listen, the powerless can scream as much as they want, no change will come. While voice and accountability are conceptually very different, they are nonetheless inseparable in practice. For there to be answerability, someone has to be asking the questions. To ask questions you must have voice, and you must have the insight and information to know what to ask.<sup>30</sup>

### *Building the ability of accountability*

When governments of the world commit to the protection of Human Rights, the commitment implies construction of systems for securing the satisfaction of Human Rights. This means that violations must actively be prevented. This includes the development of adequate laws, policies, institutions, administrative procedures and practices, so that mechanisms will be there for the access of the entitlement. Under a rights-based approach, governments have a core obligation to monitor the realization of Human Rights and must put in place information and data collection systems. In this context, accountability will have both an intrinsic value in its own right but can as well be a tool for realizing all other Human Rights.<sup>31</sup>

Thus, building real capabilities for accountability will involve generating and spreading information on the background for the decisions. It is important to build paths for those less empowered to have ways to claim their accountability. This can be done through institutional capacity building enterprises that create structures that make accountability claims easier. Here is a very strong connection to the system of Human Rights.

In the research field on accountability, the checks and balances between institutions within states is called *horizontal* accountability. There are normally very complex systems that put public officials under restraint and oversight. The oversight mechanisms

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<sup>29</sup>Fredriksson, L *Tankepapper om de två perspektiven*, POM Working Paper 2006:4 s 9

<sup>30</sup> Goetz, A.M. and Jenkins, R. *Voice, Accountability and Human Development: The Emergence of a New Agenda*, UNDP, Geneva, 2012 p. 45

<sup>31</sup> Darrow, M. *Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation*, Human Rights Quarterly, Volume 27, Number 2, May 2005 s 511

can be courts, ombudsman's offices, auditing agencies, central banks and can call into question, and eventually punish, an official for improper conduct. A distinction is made with this type of equal level peer relationship and *vertical* forms of accountability, in which citizens and their associations play direct roles in holding the powerful to account. Elections are often mentioned as classic form of vertical accountability (although it is not always de facto the case because of mismanaged electoral systems). In the category of vertical accountability, there are also the processes through which citizens organize themselves into associations capable of lobbying governments, demanding explanations and threatening less formal sanctions like negative publicity. We can therefore say that vertical accountability is the state being held to account by non-state agents.<sup>32</sup>

### *Horizontal and Vertical*

Putting focus on the reform of institutional structures will be necessary for claiming the rights to accountability. The laws must be in place for the domain of accountability to be clear and for the sanctions to be enforced. Nevertheless, over-reliance of horizontal accountability between state institutions as enforcer of accountability clashes when the state institutions are the ones who are supposed to be held account. When the law and institutional rule is both made and enforced only internally by and within the state, this can misdirect and handicap the real access to rights.<sup>33</sup> Consequently, there is a need to couple the internal accountability mechanisms with external mechanisms in order to avoid the very common trap where the only critique that is possible to follow up on and hold someone to account for, is focused on acting according to the correct procedures, rather than the effect of the actions. That is when procedures can be challenged and the structures of power and resource distribution can be improved.

Laws are not always just. They can be challenged and changed through social mobilization. Rights claims can provide better access to justice, that goes beyond the regulations and law and become a force that mobilizes social forces<sup>34</sup>. Not all Human Rights are *de facto* accountability tools. They become accountability tools in the process of

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<sup>32</sup> O'Donnell, G. "*Horizontal Accountability in New Democracies.*" In *The Self-Restraining State: Power and Accountability in New Democracies*. Edited by Andreas Schedler, Larry Diamond and Marc F. Plattner. Boulder: Lynne Rienner, 1999., s 35

<sup>33</sup> Newell, P. and Wheeler, J., *Taking Accountability into Account*, in *Rights, Resources and the Politics of Accountability*, Zed Books: London. 2006 p. 7

<sup>34</sup> *Ibid*, p. 27

claiming, mobilizing and struggle for the specific right. It is when the tools for accountability are at the hands of those who have a justified Human Rights claim that the rights that someone has in theory can become rights in practice.

### *Social and Political*

The division between Social Accountability and Political Accountability clarifies the need for both legal, institutionalized accountability mechanisms as well as the ones driven, implemented and sanctioned by non-state actors of the civil society. While Political accountability mechanisms are limited to specific and time bound formal procedures, the social accountability methods are a continuous reflection of the demands of the citizens by street protests and demonstrations, public naming and shaming, petitions etc. The Social Accountability mechanisms provide opportunity for directly influencing government officials for more effective government action in the short run. Rather than imposing formal sanctions on politicians, they can impose a heavy reputational cost on government officials if they fail to answer to the citizens' demands. The answerability that they can force from the public official does not last long unless it is formalized into procedural change and incorporated with the political accountability mechanisms.<sup>35</sup>

Both the political and social accountabilities can be part of relationships that go beyond the local or domestic issues. The Civil Society Organizations (CSO's) and Non-Governmental Organizations (NGO's) have the ability to mobilize support for accountability globally and have movements for issues that stretch into all the continents. Politically there are many dimensions of accountabilities for cooperation in the international relations. The fact that the CSO's, NGO's and multilateral organizations like World Trade Organization (WTO), the World bank and others wield power, should mean that they must be held accountable for how they use this power. Grant and Keohane argues for the recognition that all forms of power can be misused and that there is a need for building other paths for checking this power that are not necessarily democratic or pure like the ones that can regulate the citizen/state relationship. Perhaps the powers that come from voice should be checked by other voices. In addition, the powers held by for

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<sup>35</sup>Mejía Acosta, A. Democratic Accountability and Service Delivery, International IDEA 2013s. 10

instance the WTO should be by creating pathways inside the organization itself for the critique of its policies.<sup>36</sup>

In the development sector the concept of Mutual Accountability are highlighted as a priority of the Paris agenda. This concept divides accountability into domestic and mutual. The aim for the development donors to help constructing stronger domestic accountability by strengthening parliament, developing stronger CSO's, while at the same time take responsibility for which incentives they create with their involvement. For instance, the donors may want to use direct financing of projects to avoid the threat of corruption in the domestic financial sectors. However, by doing so they could be undermining and weakening the developing countries systems for Public financial management further.<sup>37</sup> Another example is that the donors have pressure from their own citizens to provide results for the money given to other countries. While chasing such results the aid risks becoming short term and overly focused only on projects that are measurable quantifiably, or else the funding will be withdrawn. Such effects on incentive structures can affect decision-making and weaken the capacity for accountability.

#### *For good or for evil?*

While accountability can be a tool to achieve social justice, it is important to remember that it is often used as a tool for the opposite. In the political reality in which accountabilities exist, there is competition for resources and an ongoing struggle of which right claims should be prioritized. Under the banner of accountability, the powerful might implement misguided reforms that cause even more injustice. Being clear about the beneficiaries and goals of the accountability initiatives is important. Who is being held account, and for what? At times it can falsely seem clear who is Accountee and who is Accountor. Someone who is elected as a political representative will be supposed to provide justification for their action to the public, because in principle, politicians are answerable to citizens. In practice the politicians are often more immediately concerned with the sanctions wielded by corporate interests, such as the withdrawal of campaign finance or with dynamics within their political party, if the electoral system is

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<sup>36</sup> Grant, R. and Keohane, R. "Accountability and Abuses of Power in World Politics", American Political Science Review 99 (2005), pp. 29–43, 2005s. 41

<sup>37</sup> Domingo, P 'Domestic and Mutual Accountability: Building stronger synergies, Literature review and conceptual framework'. London: ODI,2009, 31

arranged in such a way that there is actually no real threat of sanction from the citizens.<sup>38</sup>

A Human Rights perspective gives a clear idea of roles in the accountability relationship, especially from the “pro poor” perspective in its discourse. The state should be held to account for the benefit of each citizen in the domain of each specified right. The object is often the service delivery implied by each right. For instance, the right to education implies training and hiring teachers for the schools, and the right to free and fair elections implies building a just electoral system. According to the *New Accountability Agenda* conceptualized by Goetz & Jenkins the accountability mechanisms should always be analyzed and approached with questions of by who, for what, when and where, to specify the directions internally in the accountability relationship. The above question of who should be the Accountee can result in normatively highlighting the need for more direct roles for ordinary people and their civil society organizations to demand accountability. The answer to the question “for what” is that they should be doing this on a more exacting standard of social justice. They should have an expanding repertoire of methods using horizontal, vertical, social and political accountability methods such as ombudsmen, anti-corruption boards, treaty monitoring councils etc. When necessary they should have the chance to bring their claim to a more diverse set of jurisdictions both locally and internationally.<sup>39</sup>

Specifying the use of the concept can prevent the misuse of the accountability tool and protect it from the capture of the powerful. The tool can then be put in the hands of those who need it to stop the oppression that they are living under in societies affected by inequality, corruption, capture, and poor service delivery. The threat of sanction will then switch hands from politicians using it to cement their power by punishing those who do not obey the unjustified laws and procedures created to solidify the oppression. The use of fear of sanctions such as state sponsored violence, imprisonment of activists and discriminatory laws can then be challenged by the change in incentive structure for the decision-making while creating the policies and procedures. With a genuine capacity for justified Human Rights accountability, the rulers will be the ones fearing the power of the people rather than the people fearing the power of the rulers.

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<sup>38</sup>Przeworski, A. *Democracy, accountability, and representation* ed, Susan C. Stokes, Bernard Manin . 40

<sup>39</sup> Goetz & Jenkins, 2002 s 5

## 4 Background on the Case Study of Initiatives aiming to strengthen Accountability

It is widely believed that the violence in the 2008 election was instigated by the powerful, but only affected the marginalized. The violence was ended through a Peace Agreement that was negotiated by an international team of mediators, resulted in a coalition government where everyone who had taken part in the election was given part of the government. The ones who created the violence, from both sides, were rewarded when they should have been sanctioned. As they were made part of the governing bodies that had the power to block petitions and initiatives for investigating, and trying the cases, impunity was almost total. The ability for the victims, and other people, to hold the leaders to account for their actions were almost completely absent. As a result, the decision of using violence to manipulate the outcome of an election is beneficial when they should have been detrimental. If this is the case, the willingness to make such a decision can be seen as part of the selection process of who actually rises to the top in the political hierarchy.

Fearing that this would be a factor even for the following election, several initiatives were made to change the balance between rewards and sanctions in the decision to risk citizen's security and rights to gain power. This was seen as necessary for the same situation not to repeat itself in the following election. Four such initiatives have been selected for investigation with the aim of finding out how the initiatives relate to using accountability to strengthen human rights.

### 4.1 Initiative of the International Criminal Court

The International Criminal Court was created to have a complementary role to national courts when they are unable to prosecute offenders of the most severe crimes. It acknowledges that the crimes of genocide, crimes against humanity and gross human rights violations have historically remained unpunished. This can be because its perpetrators have too much influence and resources to be able to be genuinely prosecuted

in their own countries or when the political situation that prevails after a country is affected by this type of crime may be too sensitive for domestic trials.<sup>40</sup>

The team of international negotiators that were sent in to negotiate the peace agreement that ended the 2008 election violence ordered an investigative report called the CIPEV Report. The report contained some recommendations. Among these, the government was told to set up a special tribunal with Kenyan and International Judges to investigate and prosecute the persons who had financed and coordinated the Post-Election Violence. It was made clear that if the tribunal were not initiated in a certain period, the investigation with names, witnesses and other evidence would be handed over to the International Criminal Court, ICC.<sup>41</sup>

Since the crimes are so severe that they can be classified as Crimes against Humanity, they fall within the ICC jurisdiction if the individual state is unwilling or unable to prosecute. The right to circumnavigate the national sovereignty is called *proprio motu* and is supported by Article 15§3 in the Rome Statute and gives the prosecutor of the ICC the right to start his own investigation even without the consent of the state.<sup>42</sup>

When the Kenyan Parliament voted against the proposition that would create a local tribunal in February 2009 and then nothing else was done in the matter, the ICC prosecutor Luis Moreno Ocampo received the case in July of the next year. Ocampo considered the evidence so strong that he decided to use the *proprio motu* for the first time in the history of the Court. A case against six persons was opened and later confirmed.

Two of the suspects, William Ruto and Uhuru Kenyatta, are very influential politicians from the opposite sides of the ethnic-political conflict that exists between the Kalenjin and the Kikuyu ethnic groups. Both Ruto and Kenyatta gained a lot from the power division of the 2007 election. Kenyatta became vice Premier Minister as well as minister of finance and Ruto became minister of education. Despite, or perhaps because of, the ICC involvement, the two suspects eventually joined forces and campaigned for the presidency together. The pair eventually won the 2013 election. Kenyatta became president and Ruto became his Deputy.

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<sup>40</sup>International Criminal Court, *Understanding the international criminal court*, ICC Publication, 2012 p. 5

<sup>41</sup> CIPEV, 2008, s 018

<sup>42</sup> Rome Statute Of The International Criminal Court U.N. Doc. 2187 U.N. T. p. 90, Article 15

ICC suspects are required by the Kenyan constitution to cooperate with the process, but it cannot prevent suspects from campaigning for presidency. Since the suspects should be seen as innocent until proven guilty, the trials were postponed until after the campaigns. After the election, Ruto has managed to postpone his trial, and Kenyatta has petitioned to do the same. Their new positions give them increased opportunity to avoid conviction, as witnesses are unlikely to testify against the president, several of the witnesses dropping out citing safety concerns.<sup>43</sup> As this is written in May 2013, the outcome of the trials is still to be seen. However, it should be noted that the Kenyatta/Ruto election victory is an immense setback both for the ICC and for the struggle against impunity in Kenya.

## 4.2 Constitutional Reform

Perhaps the most significant change initiative that took place in Kenya between the two elections is that a new constitution was drafted and passed in a peaceful and well-run referendum in August 2010. It was the first time the constitution was changed since independence in 1963 and it provides for an extensive restructuring of the government and state. It gives hope to the potential end of the concentration of power on the presidency, which is seen as strong contributing factor to the inequality between ethnic groups and the rivalry between them. The campaigns for the new constitution were led by Raila Odinga while Kenyatta led the campaign against it.

The constitution makes room for several reforms that are intended to deal with the causes of the 2008 election violence. A new Independent Electoral and Boundaries Commission (IEBC) was created to gain new public trust in the electoral body. They were to install biometric identification systems, which are devices that record fingerprints when a person registers as a voter, which is meant to prevent casting false and multiple votes. A system for electronically counting votes was supposed to transmit results immediately over a secure network to avoid manipulating in the tallying of votes and enable the complicated tallying of votes.<sup>44</sup> Manual counting would be very extensive because of the introduction of voting for senator, governor and local assembly, six public officers per voter. New voting rules require the president to win more than half

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<sup>43</sup> Kiplang'at, J. *ICC's Bensouda allays fears over witness protection*, Daily Nation April 6, 2013

<sup>44</sup> Shah, p. *The irony of Kenya's election reforms*, Foreign Policy online edition March 7<sup>th</sup> 2013

the votes and have wider geographic support, or else a run-off election would follow automatically a few weeks later.<sup>45</sup> A judicial reform that includes the appointment of a respected new chief justice has taken place. This is very important because in 2008, the courts were appointed by the president and were loyal to him and therefore, it was impossible to dispute the electoral fraud and dispute in court.

It would seem that with these changes, the country was well prepared for the election; however, fundamental changes take time. What eventually played out in the election of 2013 was very problematic.

Voters shown strong commitment to peace and transparency, but several technical problems and manipulation of results occurred. A remarkable voter turnout of 86 % had many Kenyans standing in line to vote for as much as eight hours in the burning sun to cast their vote. There were delays because of malfunctioning biometric identification systems that led to IEBC ordering the use manual identification, despite the high risks of fraud and manipulation that could come from this. The electronic tallying of votes was supposed to be transparent and was therefore shown on screens in the IEBC and aired live on TV. Showing the tallying live meant that problems became apparent. The electronic transmission system was multiplying rejected ballots by a factor of eight, and so the IEBC stopped the electronic tallying and had to start counting the votes manually, a process that took five days. In the final tallying errors were evident, some constituencies showed a more than a hundred percent voter turnout, and some 300 000 votes that could not be counted because of being “spoilt”.<sup>46</sup>

Kenyatta had won, with 50.07 % of the votes. Odinga filed a petition to the Supreme Court, demanding a re-run of the election, saying that the technical problems enabled rigging and could not be credible. The campaign supporting the petition went under the banner “Democracy on Trial” and assured that they would respect the Courts verdict. The court decided to confirm Kenyatta as the winner. Consequently, Kenyatta will be responsible for implementing the constitution that he opposed, and make changes that will limit his own power.

### 4.3 Ushahidi/ Uchaguzi

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<sup>45</sup> International Crisis Group, 2013, *Kenya's 2013 elections*, Africa Report N°197

<sup>46</sup> Jorgic, D. *Kenya's Odinga challenges election defeat in top court*, Reuter's online ed. March 16 2013

Monitoring to find out what is happening during an election is required to get the information needed to give the election credibility and legitimacy, and to find out if something is going wrong. It has traditionally been the job of media, official election observers and police to obtain the information from the people through surveys, interviews and for the police to monitor through collecting and following up on complaints reported to them.

In the Kenyan setting, these methods have serious limitations. Infrastructural limitations make it hard to reach many people in remote areas to survey, thus limiting the range of the information and the ability for people outside of the major cities to make their voice heard. It also takes long time to collect the information, which can result in that the momentum for the information to reach may be too late for it to be of value to the election process.<sup>47</sup> The Kenya Police has very low credibility because of being highly affected by corruption and inefficiency of bureaucracy and therefore does not seem as to give a real chance for someone to report what is going on and how they have been affected.<sup>48</sup>

Ensuring that there are pathways for people to inform others what has been done to them is indispensable for human rights accountability. For the poor and marginalized, this ability does not come naturally and they might need representatives to speak out on their behalf, but these representatives need to receive information on what is going on.

Some initiatives seek to fill this gap in monitoring. Ushahidi is the name of a crowdsourcing monitoring tool that allows anyone with a mobile telephone to report crimes that are committed on their location. The reports are then published in real-time on a webpage that pinpoints the report on a map. It uses a combination of citizen journalism, social activism and geospatial information towards increasing accountability with the aim to democratize access to tools for filtering and making sense of real-time information.<sup>49</sup>

This type of initiative can make use of the rapid spread of mobile technology in Kenya to provide people with an opportunity to let their experiences be known. Over the time period between the 2008 and 2013 elections, the increased use and spread of mo-

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47 Bardall, G. *Election Violence Monitoring and the Use of New Communication Technologies*, 2010 p. 6

48 Transparency international, 2013

49 Omenya, *Uchaguzi Monitoring and Evaluation Research Summary Report 2013*, s 4

mobile phones has opened up a previously non-existent communications infrastructure and thereby contributing to giving new opportunity for Voice to the Kenyan people in remote locations.

Kenyan activists first developed the tool ad-hoc during the Post-Election Violence 2008 when they built a platform to map incidents of violence occurring in the country. Since 2008, Ushahidi has grown from a volunteer initiative into a not-for-profit organization that builds tools for democratizing information and increasing transparency, and has been used in 159 countries. For the election in Kenya 2013, a platform was now developed and prepared in advance. It is called Uchaguzi, meaning election in Kiswahili. During the election period, it contributed to spreading information on the unfolding events. It received and handled over 5000 reports on irregularities many of them indicating rigging of the election.

#### 4.4 Peace movement and Media self-censorship

Unlike the initiatives that are explored above, the fourth initiative that will be problematized is not one coherent initiative by one agent or organization to achieve accountability. It is rather a collective initiative of many organizations, newspapers and politicians that have in common that they intensely propagated abstaining from violence and from doing or saying things that might have led to violence erupting.

Kenyan media has long had a reputation for being free and outspoken, true to their function as the monitoring watchdogs of democracy.<sup>50</sup> This changed during and after the election violence in 2008. Many of the respected media outlets, like KTN, Daily Nation and The Standard, seemed unaware of the consequences of spreading biased reporting and lending their airspace and pages to be platforms for politicians and militias to spread hatespeech. Showing killings by the police and airing political speeches live added to the tension even if the intention was to spread information of what was going on. However, at the outbreak of violence the Ministry of Information was asked by the Ministry of Internal Defence to shut down live broadcasting and news reporting and instead.<sup>51</sup> At the outbreak of violence, the media started to fill their pages with

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<sup>50</sup> Wrong, M. *To be prudent is to be partial*. International Herald Tribune, March 17 2003

<sup>51</sup> CIPEV, 2008, 308

peace messages and arrange peace rallies, while deliberately downplaying issues that would cause political anger to stir up.<sup>52</sup>

After the 2008 crisis was over, the journalists and media houses were well aware of the impact their reports could have in triggering ethnic violence, and determined not to risk playing such a role again. An agreement was made by Kenya's Media Owners Association that there would be no live coverage of announcements or press conferences by political parties, so that they would be able to avoid being an avenue for politicians to instigate violence and tensions.<sup>53</sup> The journalists underwent courses and training in media ethics and had clear intentions not to risk indirectly fueling other conflicts by making sensationalist reports about political issues that could be translated by the audience as ethnic issues.<sup>54</sup>

Foreign media did not have the same agenda, as they were naturally looking for stories that were newsworthy to their home audience. They were more interested in finding truth than to pretend as if it is normal to have two suspects of crimes against humanity on the ballot for presidency. The international journalists who were in Kenya to report on the election received a lot of criticism when they were asking uncomfortable questions.<sup>55</sup>

The anti-western mood created to discredit the ICC could also be noted in the suspiciousness of the western media. It was said that the westerners were there to confirm their misconception that Africans are naturally prone to violence and that western media exaggerate African conflict while overlooking their own violence.

What the Kenyan media was portraying was that the new institutions of the new constitution should be trusted and obeyed, even if they were failing. People were asked to accept the way the cases were handled. Nothing other than following the process outlined in the constitution would be accepted in the media. This closed doors on the ability to question the obvious flaws of these institutions and the questionable handling of elections, and thereby holding the politicians to account for acting according to the will of the people.

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<sup>52</sup>CIPEV, 2008, 74

<sup>53</sup>Straziuso, I. *Kenya media self-censoring to reduce vote tension*, Associated Press, March 7, 2013

<sup>54</sup>International Crisis Group, s

<sup>55</sup>Wrong, 2013

## 5 Grounded theory analysis

### *Good intentions- no results*

In the following section, the findings from the analysis of the four initiatives are analyzed, compared and investigated. One of the most significant similarities of the three first initiatives is that they all seemed very promising before the election. If they would work, they would contribute to major steps forward for the accountability mechanisms that they set out to improve. The cases in ICC could have contributed through ending impunity; the problematic reports given to Uchaguzi could have counted in the judgment on whether the election was free and fair, and the transparency provided by the new electoral body IEBC provided for by the new constitution would make rigging impossible.

Unfortunately, the existence of mechanisms are not enough, they also have to work efficiently to be a determining factor in creating accountability. As the outline in chapter shows the ICC was not able to prevent the suspects from gaining more power, and the tools for accountability that the IEBC was using failed one by one. The Uchaguzi initiative did not fail in their work, they were able to handle thousands of reports of irregularities in the election, however, in spite of the reports, the election was still considered free and fair, which indicates that there are missing contributing factors for the Uchaguzi initiative to be a real factor in Human Rights Accountability.

In the Conceptual analysis in chapter 3, Human Rights Accountability was identified as a quality that may or may not be present in the relationship between rulers and citizens. It marks the existence of restraints that anchor the behaviors of the decision makers so that the power of decision-making lies in the hand of the citizen. When this relationship is present, the ruler is simply someone whom the people have delegated the decision-making to, on their behalf. The rulers will have the discretion to act as they think will be best for the people, but they are not at liberty to make decisions that does not have the people's interest at heart. With this in mind, it is clear that the absence of violence should not be attributed increased Human Right Accountability for the politicians, as the restraints were not actually in place.

### *Reversed accountability*

While the peace campaigns probably had a very significant impact on the absence of violence, this is not a call for Human Rights Accountability, quite the reverse. It asks the people to be held to account for keeping the calm, when they should have been holding the leaders to account to make sure that there is *no reason* for protest. This dynamic takes away the possibility of the election to be an opportunity for reflection, renewal and to set out new directions. Pretending that nothing is wrong becomes a strategy to survive the elections, thereby taking away the chance that the people would have had to change the underlying tensions that are the root causes of the problems. If the vast inequalities in resource distribution along ethnic lines are not addressed properly, it can spark violence at any time if there is a trigger for it.

Levels of impunity from the last election have made rulers assume that they would be free to use violence as a method to gain political power. Legal accountability for the instigators of the 2008 violence has been swallowed by elite capture and other forces of impunity that are present in Kenya. Unfortunately, the international back-up mechanism for accountability for crimes against humanity also failed to install the assumption that crime does not pay. This is very evident by the fact that the ones considered in the investigations of the 2008 election violence, were able to win the following election.

### *Failure of the ICC*

Failing to make a difference for Human Right Accountability can be traced to the ICC being unable to provide a sanction that is timely, backed with enough power and internally relevant. Due process in the ICC cases takes time. For correct Legal Accountability to be achieved the priority is on the legality of the process, not to reach a convicting sentence. Truth only matters if it can be proven with sufficient evidence and correct procedure. If witnesses take back their testimonies because of fear, their story can no longer be taken into account. Since Human Rights Accountability is only strengthened if the incentive structure is changed, it can only be affected if suspects are convicted in a correctly accomplished manner. An acquittal will instead contribute to the notion that there are no negative consequences for using violence to gain power. Actual results of the process are vulnerable to the regulations of assuming innocence until proven guilty, and providing sufficient evidence. The regulations are necessary for the legitimacy of the court, but also mean that reaching a verdict in the Kenyatta and Ruto cases will be a challenging task.

ICC's contribution to Accountability also through providing a name and shame sanction. Being identified as a suspect in their investigations should be a deterring factor, however, Ruto and Kenyatta used the ICC involvement to their advantage, citing the intrusion of sovereignty as being an expression of Western colonialism, only interfering in Africa. Given that half a century ago, Uhuru Kenyatta's father, Jomo Kenyatta, led the country to independence from the British Colonial rule, this argument was very intriguing for the Kenyan voters. A name and shame sanction has to be from a trusted and credible source, relevant to the target audience, those whom are supposed to make the judgments on the person's character. In this case, the external nature of the sanctioning body made it possible for those who were on the internal side of the issue to discredit the name and shame sanction until it simply did not matter to their disadvantage anymore.

The potential power behind the ICC sanction partly stems from a country's unwillingness to risk their position in international relations. This presumes that the sanction can only affect those who need favors from international relations. However, Kenya does not want to see themselves as to be in need of such favors. They are the strongest economy of the region. For western countries, Kenya is a necessary ally in relation to militant Islamist threats from neighboring countries. At the same time, they are being pursued by Asian investors that change the dependence on European and American aid and good will. Together, these factors undermine the ability to provide a sanction strong enough to be a factor in the incentive structure.

#### *Actions outside the sphere of influence*

The internal and external aspects of accountability are also reflected in the complications of how the reports from Uchaguzi can gain more importance. In trying to regulate how state institutions are behaving, civil society organizations are an external element. Collecting reports has a value on its own because it contributes to giving a balanced picture of what events played out. The horizontal monitoring between the governmental agencies channels complaints and information formally and internally in the organization, complicating the disclosure of sensitive information on irregularities and wrongdoings by the institutions. Since they are part of the same organization, they will also be affected by sanctions if they are exposed. Information must therefore also be collected and distributed by external actors that are able to reach those who are able to put exter-

nal pressure on the institutions to behave better and to follow up on what is wrong so that the institutions can change.

On its own, the information cannot cause strengthened accountability, it has to be used by somebody who is actually claiming the accountability and calling to account the responsible parties. For this to happen there must be a recipient on the inside that is willing to formalize the answerability claim into procedural change and incorporate it with the political accountability mechanisms. The force of the mobilization needs to become part of an institutional system for it to bring an element of prevention into the Human Right Accountability dynamics. The decision-making is only affected if it is assumed beforehand that transgression will be punished.

Here the issue of sanction reemerges. Without backing up the claim for accountability with the power and ability to sanction, it is unlikely that someone on the inside will think that it is a good decision to disclose incriminating information or to make changes that are not in the organizations interest. Therefore, the baton in the relay race must be handed over to an organization that is powerful enough to sanction. A small initiative like the Uchaguzi does not have this power. Nor do they have the mandate to follow up on the information, change policy, provide redress, and make arrests and so on. To create a sanction of name and shame, media must spread the information. To create legal sanctions and the police must take over the cases. The role that Uchaguzi can play is to be a complimentary source of information that has the potential to reach others that do have the power and mandate to create accountability.

### *Making the claim*

Opposition parties, NGOs and CSOs often take on the role to carry forward the accountability claim by protesting, demonstrating and submitting petitions. Many CSOs petitioned for the election to be nullified because of the low credibility caused by failing transparency system and discrepancies in the tallying of votes. However, they were not able to put full force behind their claims because at the same time, these organizations wanted to support the new independent Supreme Court, and respect its ruling. The same organizations had been working hard for the constitutional changes to take place and they knew the importance of respecting the court would have for the implementation of the constitution as well as for avoidance of violence. Similarly, Odinga petitioned for a re-election, but as he was also the one who had developed and campaigned for the new

constitution, he was also swearing to respect the courts verdict regardless of the outcome.

Ability to mobilize a social movement to demand accountability was severely impaired by the presence of military and police in the places where demonstrations were likely to occur. In the name of security, the National Security Advisory Committee had restricted the freedom of assembly and association to be able to control the situation and avoid demonstrations turning violent. Accountability must be actively claimed to be an existing factor, and the demonstrations that occurred in Kisumu, Mombasa, outside the parliament and Supreme Court did not reach enough strength to have an impact on the accountability claim.

## 6 Concluding discussion

While the conceptual analysis of the concept of Human Rights Accountability showed that it is a necessary condition for the realization of human rights, the grounded theory analysis of the Kenyan elections showed the complexity and the complications in achieving it. The existence of restraints that limit the behaviors of the ruler depends on the efficiency of the mechanisms that are in place to claim the accountability. Even when the best possible initiatives have been created, they mechanisms only add to accountability when they actually become a restraining factor for the exercise of power.

One of the obstacles for its attainment is that there is an important difference between working towards being able to claim the accountability and being able to achieve actual outcome of the human rights object. Human Rights Accountability initiatives seek certain outcomes, but the successes of those outcomes are not the same as the success of the accountability mechanism. The actual deliverance of right objects to the people can be determined by other factors such as availability of resources, infrastructural obstacles, and present inequalities in accessing the objects. These are arbitrary and do not guarantee that the deliverance of rights objects are going to continue to be delivered or to be delivered equally to all the rights holders. In order to secure the deliverance of the rights objects it must be upon the government to live up to their responsibility to deliver those objects.

Deliverance of the right objects may also be attributed to the people wanting to prioritize some Human Rights over others. The wide spectrum of rights that are included in the Human Rights framework sometimes comes into conflict and priorities have to be made. In Kenya the desire of the people, leaders, civil society and media to make sure that the rights of security and protection from violence would prevail, overshadowed the struggle to achieve free and fair elections. In the end, despite the efforts to create accountability that took place between the elections, Human Rights Accountability was not a factor in the relationship between ruler and citizen.

The absence of violence does not indicate that there was strong Human Right Accountability. The absence of protest can instead be interpreted as a sign of a nation that is terrified of its own capacity for violence, and for the consequences that the protest

would have for the nation, not for the ones instigating violence. Because of fear of what would happen if they held the politicians to account, the people and the media chose to downplay whatever wrong things went on in the election so that they would be accepted in the name of peace.

The people's fear of themselves gave the rulers a get-out-of-jail-free-card against acting accountably in creating policy that can address these concerns and handicaps the influence on politics that the electorate ought to have. It is not enough that systems are in place to ensure that expression of dissatisfaction are under control through limiting freedom of assembly and through military presence in places where dissatisfaction would have been expressed. Violence should be avoided, but not at the price of oppressing other rights such as right to victims redress, right to information and right to expression of free will.

Using Human Rights Accountability as an analytical tool makes it possible to look beyond the absence of violence and see the flaws in how the election was handled. It also helps to point out that all the problems that caused the 2008 election violence are still there. The same people are in power despite investigations showing their culpability in the election violence, the tallying of votes done in just as questionable manner even when the reforms were made for them to be counted electronically with biometric identification, since this did not become a reality. The root causes of inequality in land rights, discrimination in resource distribution are not yet addressed.

If there is an immediate assumption that the absence of violence in Kenya means that the mechanisms for accountability were functioning, this may lead to the false conclusion that the causes of violence have been solved. The unsolved issues will then receive less attention and can linger under the surface and lead to worsening of the situations that cause the tension that can potentially lead to violence.

Drawing a false conclusion that the work for reform is now finished will overshadow the need to continue the work that was started in those reforms. The new constitution is there, but not yet implemented, the prosecution in the ICC cases have not even started; the problems found in the Uchaguzi monitoring have not yet been addressed. The mobilization of efforts to create accountability was motivated by the notion that there was a risk of re-occurring violence. If the risk is no longer perceived to be there, the strength of the mobilization may lose its force.

On the contrary, it should be noted that mobilization for accountability has to increase its efforts to be able to balance out the power of the rulers. As the conceptual

analysis showed, accountability can only be claimed when the citizens have superior authority. For this to occur, the voice of the people must be coordinated to be strong enough to be heard. In Kenya, Civil society action was not successful because of being blocked by limitations in the freedom of assembly, controlling their ability to demonstrate and express their discontent. The media self-censorship also contributed to limiting the power to mobilize the public by choosing not to risk contributing to protests that could go wrong.

However, achieving peace by omission brings legitimacy to the election despite the errors that were made. Recognizing the election as a success by not wanting to put up a fight to protect the people's right to affect their governance allows for the building of a political system where someone can rise to power using violence, through mobilizing support from ethnic groups and by promising advantages for the clientelistic relationships. The system will favor the corrupt, which are willing to make personal profits out of the country's resources and then use the profit to keep a firm grip on the power.

The complexities and complications of achieving Human Rights Accountability shows that goals of achieving peace, democracy and justice can have competing agendas that complicate their mutual attainability. It is said that justice and democracy are needed for peace, but struggling for justice and democracy can destroy the peace if the peace is only upheld superficially, covering up the problems allowing unjust and undemocratic forces to thrive. In such a situation priorities have to be made. Sometimes temporarily choosing peace over justice and democracy may be the right choice. When that choice is made, it should be done with awareness of the sacrifice.

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