



SPECIAL BRIEF

Clarifying Human Rights Violations in the Kenyan Post-Election Crisis

About the Brief

This brief incorporates expert presentations and discussions that took place at a forum titled “Clarifying Human Rights Violations in the Kenyan Post-Election Crisis”. The March 5, 2008 forum was convened by the Kenya Human Rights Institute under its Peace and Security Program.

Bringing together 20 human rights and governance specialists, the forum was a follow-up to the previous forum on “Civil Society Responses to the

Kenyan Post-Election Crisis” (See Special Brief 01/2008, KHRI).

The roundtable discussion was co-chaired by Muthoni Wanyeki, Executive Director of the Kenya Human Rights Commission and Mutuma Ruteere, Dean of the Institute.

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Introduction

The violence and disorder that followed the announcement of flawed presidential election results on December 30, 2007 precipitated the most severe human rights crisis in Kenya's independent history. Communal riots and militia-driven violence broke out in various parts of the country resulting in killings, rape, mob violence, forced evictions, looting, arson and the destruction of property. By mid-February 2008, the official death toll from the violence stood at about 1, 200 people and about 600, 000 more displaced from their homes.

While there is no doubt of the widespread nature of human rights violations, their characterization has been the subject of disputation even among human rights actors. Local and international human rights groups have accused the Kenyan security agencies of serious human rights violations including extra judicial executions. Some have characterized the violence in parts of the country as "ethnic cleansing", "crimes against humanity" and even "genocide". Getting it right with regard to the nature of human rights violations is fundamental as it has implications for accountability, social healing and reforms.

Even though there are still gaps in knowledge about the precise nature and extent of human rights violations that may have taken place, the current human rights crisis nonetheless demands that human rights actors develop a nuanced and analytical perspective on the alleged human rights violations. Moreover, there is need for human rights actors to contextualize the human rights violations and problems within a human rights framework which takes into account national and international legal standards and practices.

The Institute invited presentations from five human rights practitioners and scholars to shed some light and perspective to this discussion. Section one of this brief presents a summary of these presentations. The first presentation analyzes the effects of different international law

frameworks on human rights campaigning, while the second one examines whether international crimes might have taken place in the Kenyan post-election crisis.

The third presentation explores the extent to which Kenyan politicians may have propagated hate speeches that constitute crimes against humanity. The fourth one examines whether killings carried out by police constituted extra judicial executions and raises questions on what qualifies as proportionate use of force by the police. The fifth presentation discusses what Kenya may learn from the strategies Latin American countries used to confront impunity for the gross human rights violations they experienced in the 1970s and 1980s.

The second section of this brief is a synthesis of the comments, views and questions that arose in the group discussion which critiqued each presentation.

The Effects of Different Legal Frameworks on Human Rights Campaigning

On March 4, 2008, Colombian officials announced that they would go to the International Criminal Court (ICC) to seek the indictment of President Hugo Chavez of Venezuela for genocide. However, it is unclear if they have any factual basis for alleging genocide. So why are the Colombians invoking genocide and why is it probably one of the most frequently invoked terms by human rights groups? There is no doubt that there is a very strong stigma attached to the term. Its use easily captures people's attention but the term begins to lose its meaning and impact when it is invoked repeatedly without substantiation. This is one of the dangers of casually throwing around a word in the course of human rights work without caring to qualify it in legal terms.

Human rights groups stand the risk of undermining their own credibility when they make allegations of atrocities such as genocide without corroborating their claims. People may not listen

to such groups any more if they are not prepared to back their claims with evidence.

Human rights campaigning under single and multiple legal frameworks

So why do human rights groups seek to classify the most serious forms of violence? Each individual group must determine what its goals are when it tries to classify violence. These will more often than not dictate the framework to be employed in identifying and analyzing the violent conduct in question. In other words, human rights groups have to think about what they want to achieve by classifying violence and the outcome of this reflection will influence the choice of the framework under which they carry out their campaigns. Human rights groups may choose from a variety of frameworks: they may rely on a legal, moral or political framework or even a philosophical one.

It is also possible that a group wants to use several frameworks simultaneously. However, the group must understand that the methods and results of analyzing a given situation will change as it traverses the landscape of available frameworks. As frameworks change, the facts that are relevant in the analysis tend to change as well and different remedies also become available under different frameworks. For example, it may become necessary to undertake a particular human rights action within the framework of domestic criminal law. In this case, the set of crimes in question will be of a certain, precise nature and a similarly specific set of facts will be relevant in establishing them so that certain modes of responsibility will also be particular to them.

International legal frameworks such as those of international human rights law, international humanitarian law and international criminal law may also appeal to human rights groups. To make things more complicated, these bodies of international law overlap to a certain degree while human rights groups tend also to use these terminologies interchangeably or inconsistently. In

some cases, groups use the words 'human rights' to refer to international human rights law, in the strict sense of the term, in addition to international humanitarian law and international criminal law.

In other cases, groups use the term international humanitarian law to refer to the branch itself as well as international criminal law. It gets even more complicated. For instance, when international human rights law is chosen as a framework, one finds that there are dozens of human rights treaties, each establishing a different legal framework with different rules, modes of responsibility and remedies. Some treaties establish courts, others commissions or committees, while some exercise judicial functions and others do not.

Whether they choose to work within a domestic or international legal framework, there is a complex array of frameworks that human rights groups can rely on. Nevertheless, their choice of a framework ought to be guided by what they expect to achieve. For instance, do they seek to hold the State or a non-state, organized armed group responsible? Or is it an individual? Do they seek judicial remedy or are they interested only in achieving a specific advocacy goal?

Evidently, these sorts of issues must be clarified when a human rights action is initiated because some legal frameworks provide only for state responsibility while others provide for individual responsibility. Yet, other frameworks envision criminal prosecutions as a remedy while there are those that enable victims of human rights violations to seek reparations, civil compensation or declaratory relief by merely stating whether or not a violation occurred. Undeniably, all these factors will influence a human rights group's choice of framework.

Changing obligations, rules and remedies

In its strict sense, international human rights law refers to that body of international law that

expressly confers rights upon individual human beings and is formulated in terms of the rights of individuals. Kenya is a State party to many international human rights treaties including the International Bill of Human Rights, the African Charter on Human and People's Rights (ACHPR), the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) and its optional protocol.

While each of these treaties establishes a specific legal framework, all of them are concerned with State responsibility and it cannot be claimed that an individual is in breach of any one of them. Human rights groups that are interested in questions of State responsibility will find that they have to work within different frameworks derived from this wide variety of human rights treaties.

The field of international humanitarian law, or the law of war or armed conflict, may also apply to the work of human rights groups. Elements of international humanitarian law that are relevant to Kenya include the four Geneva Conventions of 1949 and the two protocols of the 1977. All of these treaties apply during times of armed conflict or occupation, while human rights law applies all the time. The State is not the exclusive subject of obligation under the terms of international humanitarian law because this body of law binds both the State and non-state, organized armed groups. Over time, certain rules of international humanitarian law have evolved into international criminal law. Normally, international criminal law is used to describe the rules of international law, the breach of which gives rise to individual criminal responsibility.

Another human rights concern that falls under several international law frameworks is the crime or problem of hate speech. Under international human rights law, there is an obligation to protect the freedom of expression, but also to prohibit certain types of expression. Under international criminal law, there are obligations, not only to

prohibit, but also to criminalize certain forms of expression. For example, if the form of expression at issue amounts to the incitement of genocide, then there is an obligation to criminalize it and to bring those who propound such expressions to justice.

In this respect, States have an obligation to prosecute people who incite genocide and the conduct itself implicates various fields of international law. If a human rights group chooses to address a hate speech problem from an international criminal law framework, it has to remember that different frameworks in this field of international law may apply and may include the ICC or customary international law frameworks. Even though there may be many similarities between these frameworks, human rights groups ought to be careful and realize that the two are not identical.

Why do the distinctions between these two frameworks matter? The ICC and customary international law frameworks have varying provisions. For example, when using the ICC framework to argue that crimes against humanity have occurred, one must show the existence of a plan or policy on the part of a State or a non-state, organized armed group. However, under customary international law as elaborated by the ICTR and the ICTY, there is no such requirement.

With respect to genocide, both the ICC statute and customary international law require a high level of *mens rea*, or intent threshold. It must be demonstrated that there was specific intent to destroy a group or community of individuals. Under the ICC statute, there is the additional evidentiary requirement of demonstrating the contextual element of a multiple commission of acts that formed a pattern of conduct. There is no such requirement to prove genocide under customary international law.

International Crimes and the Kenyan Post-Election Crisis

The Party of National Unity (PNU) and the Orange Democratic Movement (ODM), Kenya's main political groupings, have accused each other of perpetrating human rights atrocities and moved to the International Criminal Court (ICC) to seek justice for what they perceive as international crimes that fall within the court's jurisdiction.

This presentation addresses the prevailing uncertainty over the nature of atrocities that have occurred by clarifying the relationship between international criminal law and the criminal acts that were committed during the period of time when serious post-election violence persisted.

Kenya and international criminal law

In the 1960s, Kenya enacted a law domesticating the Geneva Conventions. Kenya is a signatory to the Genocide Convention and the Convention on the Non-Applicability of Statutory of Limitations on War Crimes and Crimes against Humanity. On March 15, 2005 Kenya became a State party to the ICC.

The ICC's jurisdiction

The ICC statute authorizes the court to exercise its jurisdiction in situations¹ referred to it by State parties. In fact, it has exercised its jurisdiction in cases of human rights atrocities referred to it by State parties with respect to the conflicts in Northern Uganda, the eastern region of the Democratic Republic of Congo (DRC) and the Central African Republic (CAR).² Allegations of war crimes and crimes against humanity in these three situations are currently being investigated by the Office of the Prosecutor at the ICC. Indictments have been issued in relation to each of these situations and trials have begun with respect to

¹ The ICC employs the term "situation" in reference to geographic sites, many still gripped by armed conflict, that are under investigation.

² The Uganda government referred the Northern Uganda situation to the ICC in December 2003. The DRC and CAR situations were referred to the court in March 2004 and December 2004 respectively.

the DRC situation. The United Nations (UN) Security Council may also refer situations to the ICC as it demonstrated in the case of Darfur, Sudan in March 2005.

At any rate, the ICC may exercise its jurisdiction on its own terms by way of the prosecutor initiating an investigation *proprio motu*—on his or her own accord. In such instances, the prosecutor may receive information relevant to a situation from individuals, civil society organizations and even political parties. Kenya's ODM sought such an intervention when it filed a complaint to the ICC prosecutor in mid-January 2008. In its complaint, ODM requested an investigation into the "Kenyan situation" on the basis of its belief and/or opinion that serious crimes of an international nature were being committed within the territory of Kenya.

The ICC statute also provides that the UN Security Council may, by resolution, defer an investigation already sent to the court for up to 12 months. To continue beyond this period of time, the Security Council must renew the resolution. Currently, a deferral of the Northern Uganda situation is being proposed to enable the two parties in conflict, the Uganda government and the Lord's Resistance Army (LRA), to conclude a peace agreement. Specifically, the Ugandan government has been requested to make a submission to the ICC that it defers the investigation of the Northern Uganda situation so that the LRA may sign the peace agreement.

Admissibility issues in the ICC

The ICC is intended as a court of last resort, intervening only in cases where State parties are unwilling or unable to genuinely carry out investigations or prosecutions. Consequently, it was perplexing to see Kenyan government officials announce that they were going to refer Kenya's "situation" to the ICC. In effect, the Kenyan government was conceding that it had no faith in the country's legal mechanisms and it was "unwilling or unable to genuinely carry out investigations or prosecutions" into the human

rights atrocities that occurred during the post-election crisis.

Governments, Kenya's included, should be clear that the ICC assumes the principle of complementarity and does not exist to transplant national judicial systems. It is assumed that State parties would themselves be trying individuals for international crimes committed within their own territory, hence the principle of complementarity, which provides that States will themselves exercise the jurisdiction bestowed upon them by signing on to and ratifying the ICC statute.

Most states have put in place implementing legislation to enable them to exercise the same kind of jurisdiction that is available to the ICC. Kenya is yet to enact the necessary implementing legislation. However, since 2005 the Kenya National Commission on Human Rights (KNCHR) has struggled to pressurize the Kenyan National Assembly to pass the implementing legislation, known as the International Crimes Bill. Even so, the lack of such legislation should not be taken to mean that Kenya may not try individuals who commit serious crimes of an international nature on Kenyan territory. The principle of universal jurisdiction still applies and provides Kenya with the basis to investigate and prosecute such crimes.

International crimes and the "Kenyan situation"

The international legal framework regulating international crimes has evolved into a complex system. For instance, the ICC's jurisdiction, structure, functions and rules are set out under an array of legal instruments including the Rome Statute of the ICC and various legal texts such as the Rules of Procedure, Elements of Crimes and Regulations of the Court. At the same time, the Geneva Conventions, the Genocide Convention, principles of international law and general principles of criminal law all combine to form the ICC's legal basis.

War Crimes: These are grave breaches of the Geneva Conventions, which are described therein, and in the case of international armed conflict, are serious violations of the laws and customs applicable in international armed conflict. Common Article 3 of all four Geneva Conventions is essential for the purposes of evaluating whether or not war crimes have occurred in the context of an *internal* armed conflict. Today, some of the deadliest wars are fought within the territory of a single State, and the post-election violence in Kenya occurred exclusively within Kenyan territory. However, one cannot convincingly argue that war crimes were committed in Kenya in the context of the post-election crisis because it is difficult to conclude that an internal armed conflict, in the strict sense of the term, was taking place in Kenya.

Crimes against humanity: These include forcible transfer, deportation of a population, murder, extermination, enslavement, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law. In order to argue successfully that crimes against humanity have taken place a few threshold requirements must be met. First, the criminal acts alleged to be crimes against humanity must be widespread, systematic and the outcome of a plan or policy conceived by an organized group such as a government, political party or rebel army.

Therefore, if a police officer shoots and kills someone, that action does not necessarily constitute a crime against humanity. Similarly, if arson takes place and it cannot be shown that it was widespread and systematic, the crime does not necessarily constitute a crime against humanity. Second, the people committing these crimes must have knowledge of the plan or policy as well as knowledge that they are carrying out crimes. In summary, crimes against humanity can only be said to have occurred where there was multiple commission of certain acts, which are outlawed under international criminal law, in furtherance of a plan or policy. This final point is

especially important for the evaluation of alleged crimes against humanity.

In the midst of Kenya's post-election crisis, members of the Kikuyu community in some parts of the Rift Valley Province were certainly subjected to a non-physical form of forcible transfer on account of the violence meted out against them in places such as Eldoret, which they left voluntarily for fear of their lives and property. However, it is still premature to classify these acts as crimes against humanity because there is insufficient evidence to meet the threshold requirements.³

Significantly, sexual crimes have been codified as crimes against humanity and war crimes in the most detailed manner under the ICC statute. New crimes such as forced pregnancy, enforced sterilization and other forms of sexual violence of comparable gravity are now incorporated into the international law corpus for the first time. In Kenya, it appears that the crime of enforced sterilization occurred as there were reports of women being raped with instruments such as machetes, gun-butts and sticks, resulting in the destruction of their reproductive organs.

'Ethnic cleansing': There is no universal or legal definition for this term which is derived from the Serb Croat language. However, there is a strong consensus that 'ethnic cleansing' is the attempt to create ethnically homogenous geographic areas through the deportation or forcible displacement of persons belonging to particular ethnic groups.⁴

³ A recent report by Human Rights Watch, *Ballots to Bullets: Organized Violence and Kenya's Crisis of Governance* (New York: March 2008), suggests that some of the violence targeting members of the Kikuyu community in the Rift Valley was planned, financed and coordinated by civic-level politicians and prominent local entrepreneurs. Indeed, one prominent civic leader, Jackson Kibor, has been arraigned before a court on charges of incitement to violence (pages 38-39). While the report provides evidence to demonstrate that some of the crimes in the Rift Valley were widespread, systematic and possibly an outcome of a plan or policy conceived by local leaders and entrepreneurs, the existing evidence and new forms of evidence must be found and evaluated systematically from an international criminal law framework before any final conclusions about crimes against humanity are reached.

⁴ The crime of persecution of any identifiable groups, for example, ethnic and religious communities has been

'Ethnic cleansing' may sometimes involve the removal of all physical vestiges of the targeted group through the destruction of monuments and houses of worship. In the former Yugoslavia, cemeteries were targeted and houses of worship destroyed as happened in Eldoret.⁵ Using the definition provided above, one may try to evaluate where 'ethnic cleansing' might have taken place in Kenya and whether or not the term was used correctly by Kenyan government officials and political leaders.

So far, on the basis of the available evidence, it has not been established that crimes against humanity occurred in Kenya in the context of the post-election crisis because it still cannot be shown effectively that the acts of violence were in furtherance of a certain plan or policy. In contrast, the ICTR established that the Rwandese genocide was planned four years before the actual crimes against humanity were committed. In Kenya however, the threshold requirements for these crimes appears not to have been met in relation to the violence which occurred in places such as the Rift Valley, Western, Nairobi and Central provinces. Until these requirements are met, it is premature to conclude that crimes against humanity, within the understanding of international criminal law and the ICC statute, actually took place in Kenya. There were certainly aspects of 'ethnic cleansing', within the meaning of the term as explained in this discussion.⁶

It is almost certain that genocide did *not* take place in Kenya during the post-election violence. Genocide is a specific-intent crime and refers to

recognized as a crime against humanity in tribunal statutes and has been charged as such in the ICTR and ICTY. The persecution of the Tutsi people during the Rwandese genocide was charged in the 'Media Trial' which dealt with the problem of hate speech as a crime against humanity. See the presentation, "Hate Speech in Kenya".

⁵ Some churches attended by members of the Kikuyu community in the Rift Valley were burnt down.

⁶ It is important to point out that 'ethnic cleansing' did in fact take place in the Rift Valley Province and other parts of Kenya in the period 1992 to 1997. See *Killing the Vote: State-sponsored Violence and Flawed Elections in Kenya* (Kenya Human Rights Commission, 1998).

the full or partial destruction of an identifiable group such as a national, ethnic, racial or religious group. Genocide involves killing members of a group or causing them serious bodily or mental harm in addition to deliberately inflicting on the group conditions of life that are calculated to bring about its physical destruction in whole or in part. Clearly, there is no evidence that any genocidal acts were committed in Kenya. What is not in doubt, however, is the fact that human rights violations, particularly in the form of extra judicial executions committed by security personnel, did occur in Kenya. There were also serious criminal acts including murders and countless cases of assault, arson, theft and looting of property.

Hate Speech as a Crime against Humanity in Kenya

The label “hate speech” tends to be applied imprecisely in Kenya and other parts of the world. At any rate, hate speech should be understood to include three fairly distinct but interrelated free speech issues on which there is a broad international consensus.⁷ First is the issue of outlawing racial, ethnic, religious or other identity-based epithets whose use is calculated to result in discriminatory treatment, marginalization and resentment of the members of particular group or community.

According to the US First Amendment⁸ expert, Fredrick Schauer, hate speech issues also arise with respect to laws prohibiting the advocacy of or incitement to racial, ethnic or religious intolerance, hatred or violence. Usually, this set of laws criminalizes explicit calls to race-based, ethnic-based and sectarian violence, explicit appeals for racial, ethnic or religious exclusion and explicit calls for the repatriation of members of

minorities groups to their perceived ancestral homelands.

Third, in Schauer’s analysis, hate speech involves the issue of restrictions on propounding certain falsities about various racial, ethnic, religious or other identity-based groups. The denial of the experience of Jews in the Holocaust is the most common example while a recently published revisionist history of the 1994 Rwandese genocide is another important case.

Hate speech in Kenyan law

Kenyan law does not define or expressly criminalize hate speech by incorporating the elements of the growing international consensus on the legal definition of the term. Perhaps this is because of the broad nature of what “hate speech” constitutes. However a purposive construction of the Penal Code outlaws it. Section 96 of the Penal Code outlaws incitement to violence and disobedience of the law, providing criminal sanctions for the utterance or publication of statements that incite violence, physical harm, death or destruction of property with respect to individuals and groups.

Other provisions that can be used include Section 95 of the Penal Code which prohibits acts that amount to a “breach of peace” and Section 77 which deals with offences of subversion. The Election Code of Conduct at paragraph 6(a) further prohibits the use of inflammatory language that can be used to incite people to violence.

Hate speech in international law

Hate speech is prohibited under international human rights law and international criminal law. Most notably, Article 20 of the ICCPR obligates State parties to prohibit in law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Article 4 of the ICERD also requires State parties to prohibit in law similar forms of advocacy and propaganda with respect to racial and ethnic groups.

⁷ See Schauer, F. (2005), “The Exceptional First Amendment” in *American Exceptionalism and Human Rights* ed. Michael Ignatieff. p. 32-33.

⁸ This is a reference to the first article of the United States Bill of Rights which enshrines the rights to freedom of assembly, association, press and speech.

In the same way, Article 3(c) of the Convention on the Prevention and Punishment of the Crime of Genocide requires that State parties take steps to prohibit in law “direct and public incitement to commit genocide”. The rulings of the tribunals established to prosecute the perpetrators of international crimes committed by genocidal regimes in Nazi-era Germany, Yugoslavia and Rwanda also provide important international legal standards for the control and prohibition of hate speech.

Both the International Military Tribunal at Nuremberg and the ICTR addressed the problem of press complicity in the propagation of hate speech, acts of complicity which partly contributed to the dehumanization of particular groups of victims, and subsequently, genocide. In the case of Julius Streicher, the publisher of *Der Sturmer*, a weekly anti-Semitic newspaper, the Nuremberg Tribunal ruled that the anti-Semitic propaganda contained in the newspaper and the acts of violence it explicitly called for, and which ultimately took place, or were already taking place, amounted to crimes against humanity.

The Tribunal however acquitted Hans Fritzsche, the director of the Reich Ministry of Propaganda.⁹ In its ruling, the tribunal drew a dividing line between propaganda such as Fritzsche's, which was violently anti-Semitic but did not call directly for extermination, and the direct calls for extermination that Streicher was publishing at the time that European Jewry was being exterminated. Only the latter were deemed to meet the definition of crimes against humanity. Taking this seminal judgment as its precedent, the United Nations (UN) gave this distinction the force of international law in 1948 when it adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which established the

international crime of 'direct and public incitement to commit genocide'.

In December 2003, judges at the ICTR set a new but controversial standard on when hate speech can be understood to constitute a crime against humanity. In their ruling at the end of the ‘Media Trial’, the judges extended the definition of crimes against humanity through the press to include all bellicose speeches targeting civilian populations on the basis of 'ethnic stereotyping', regardless of the actual consequences of these statements.¹⁰

Some human rights scholars have argued that this standard lies outside of the international consensus that has been formed on the legal definition of hate speech as an international crime. Moreover, others argue that this new standard restricts the freedom of speech by criminalizing opinions or views which may very well injure the dignity of individuals or groups but do not explicitly call for acts of violence or other kinds of harmful actions. Indeed, when the ICTY dealt with the issue of hate speech, it clearly affirmed that speech inciting hatred cannot, in itself, constitute a crime against humanity. The tribunal's analysis, which is faithful to the Nuremberg criteria, is also embraced in the ICC statute which criminalizes 'incitement' only to the extent that someone directly and publicly incites others to commit the crime of genocide.

Hate speech as a crime against humanity in Kenya

An examination of some 73¹¹ instances of alleged hate speeches uttered by Kenyan politicians reveals that only six of these statements could actually qualify as hate speech. Political leaders made the majority of these alleged hate speeches at meetings and campaign rallies, most of which were captured in the print and electronic media,

¹⁰ Ibid.,

¹¹ These instances of alleged hate speech did not occur in the post-2007 election crisis but were documented by two human rights groups, the Kenya National Commission on Human Rights (KNCHR) and the Kenya Human Rights Commission (KHRC) during the campaigns that led to the 2005 constitutional referendum and the 2007 General Elections.

⁹ See article by Jean-Marie Biju-Duval, “Hate media” – Crimes against humanity and genocide: Opportunities missed by the International Criminal Tribunal for Rwanda. http://www.idrc.ca/fr/ev-108294-201-1-DO_TOPIC.html

while a smaller number of the alleged hate speeches were circulated via short text messages, fliers and pamphlets.

Of these documented cases of alleged hate speech, only six statements could be said to qualify as forms of speech that explicitly call for exclusion, repatriation and violence against ethnic communities, and consequently, approximate the definition of hate speech as an international crime. Two of these six statements explicitly called for the repatriation of the Kikuyu from the Rift Valley in the event that the government succeeded in getting a majority vote for the draft constitution at the 2005 referendum.

The third statement explicitly called upon Samburu people to kill those within their community who voted for the Orange Democratic Movement at the 2007 General Elections, while the fourth statement called for the exclusion and separation of white Kenyans from their farms in response to the alleged murder of two Africans by a white farmer, Tom Cholmondeley. There is little doubt that some of these utterances can be prosecuted successfully under existing Kenyan criminal law.

With respect to the post-election period, there is some evidence of instances where hate speeches amounting to crimes against humanity were uttered or published. Evidence first produced by the British Broadcasting Corporation (BBC) in the ongoing incitement case of Jackson Kibor, a civic leader from Rift Valley who advocated the right of the Kalenjin to kill Kikuyu, attests strongly to the probability that this particular individual may have uttered hate speeches that constituted a crime against humanity.¹² Similarly, one of the many alarming short message texts, which circulated in the period immediately after the announcement of the disputed presidential election results, explicitly called for the extermination of the Kikuyu. This particular statement may also amount to a crime against humanity since it essentially

calls out to its targets to prepare to commit acts of genocide.

The rest of these statements revolved around the denigration of individual political actors, their affiliate political parties and media institutions, not necessarily ethnic communities, religious or racial groups. For instance, in the 2007 election campaigns human rights groups documented numerous instances where the political opponents of ODM leader, Raila Odinga, referred to him as a “devil...murderer...and fish-eater” while the Minister of Energy Kiraitu Murungi was accused of having “crooked lips”. Other statements termed certain ethnic communities as “greedy”, “lazy” or “violent” while some of them called for violence against media institutions.

Still, other statements made during the 2007 election campaigns violated the dignity of women, presenting them as sex objects while others accused individual politicians of sexual impropriety. A particularly common variant of the statements included utterances that were intended to instill fear in certain communities. For example, some Central Province politicians warned their supporters that, “If Luos took over the government of the country, the Kikuyu would be forced to wear colonial-era kaptulas [shorts], eat omena fish...while Dholuo would be proclaimed the national language.”

Besides the six, the rest of these statements do not amount to hate speeches that constitute crimes against humanity since they do not explicitly call for violence against or exclusion or reparation of an identifiable group. However, there is little doubt that these kinds of statements act to stoke inter-ethnic resentment, gender insensitivity and create a tense political environment that is not conducive for democratic politics.

Moreover, in law, most of these statements appear to fall into the realm of libel and defamation while the rest may simply be acts of

¹² See footnote #5.

political “stupidity” even though they may have lasting, negative effects on community relations. Finally, there is the difficulty of attributing some of them to specific individuals or groups, particularly those statements that have been circulated via short message text, fliers or pamphlets.

Extra Judicial Executions in the Context of the Post-Election Crisis

Between 1, 200 and 1, 500 lives may have been lost during the post-election crisis. However, it is unclear how many of these individuals died at the hands of security officials. It is possible that some of the dead were either lawfully killed by security officials or simply executed in cold blood. Therefore, when can it be said that a killing committed by a security official amounts to an extra judicial execution?

Under international human rights law, extra judicial executions are defined as arbitrary deprivations of life by individuals in authority or the condoning of such deprivations of life by government agents. Extra judicial executions have to be ordered and there ought to be an element of complicity or acquiescence of government authorities in the way they are carried out.

Killings committed by security officials, either accidentally, or in self-defense, will not usually amount to extra judicial executions. For example, where there is a demonstration, a riot or some other form of civil unrest, and people are shot and killed by the riot police officers as happened on several occasions during the post-election crisis, human rights groups are advised to exercise great caution in applying the label extra judicial executions in their characterization of killings. It may very well be that an individual security official used the minimum force mandated in law which however resulted in the accidental death of an individual. Therefore, would such an act necessarily qualify as an extra judicial execution?

In the past, human rights groups have been challenged by the Kenyan government to be careful about terming each and every killing committed by security officials as an extra judicial execution. For example, what happens in the event that a security official kills in his or her own individual capacity? Should this kind of a killing attract the label “extra judicial execution”?

Moreover, human rights groups also have to grapple with the problem of killings carried out by non-state armed groups and vigilantes. In this respect, debates continue to rage on whether governments and non-state armed groups alike may be held accountable for violating human rights. Indeed, there are human rights actors who have tried to distinguish human rights abuses as acts carried out by armed non-state groups, while human rights violations may only be committed by government agents.

Ending Impunity in Latin America: Lessons for Kenya

Latin America has a history of gross human rights violations, particularly in the decades of the 70s and 80s. Even today a civil war persists in Colombia and another has just ended in Peru. Like those before them, both conflicts have been characterized by gross human rights violations. Obviously, the easiest option for many transition governments across the world is *not* to hold any individual to account for human rights violations and other atrocities committed by authoritarian regimes. A case in point is the return of Argentina to democratic governance in 1983. After decades of harsh military rule the new Argentine government attempted, with great difficulty, to hold former senior military officials to account for past atrocities including crimes against humanity.

While some trials were commenced, many perpetrators were tried for ordinary crimes such as murder and abduction *and not* international crimes which clearly would have carried stiffer sentences. In Peru and Guatemala among other

states, amnesties were issued to the perpetrators of human rights violations, effectively shielding them from accountability for their crimes. Former Chilean military officials involved in organizing and coordinating human rights atrocities also continue to enjoy impunity, having been pardoned for their crimes.

The contribution of “truth processes”

In Latin America, the “right to truth” about human rights atrocities has been won through a variety of strategies. Perhaps Kenyans may consider these approaches as they think about how best they might address their country’s history of gross human rights violations.

In Argentina, a truth commission concerned exclusively with the disappearance of persons was established while in Peru and elsewhere in the region there have been truth commissions that examined a wider range of human rights violations. The important distinction between Latin American “truth processes” and others established elsewhere in the world is that the former were primarily initiated to gather accurate and credible legal information about past atrocities. Other “truth processes” have focused more on reconciling polarized, post-conflict societies. The South African Truth and Reconciliation Commission (TRC) is the best known of these.

Even as amnesties were issued for past crimes in Argentina, “trials for truth”—essentially judicial investigations into atrocities committed by the former military junta—were also instituted. The military and other members of society were requested to come forward to provide their testimony. Where they failed, they risked arrest for non-compliance with court orders. These trials have been incredibly important in generating the large body of information that is being applied today in criminal proceedings brought against former officials of the previous military regime.

The contribution of the American Court

In the late 1980s, and into the 1990s, human rights groups organized themselves to confront the wave of impunity for past atrocities that swept through the region by struggling to achieve accountability through regional and international human rights mechanisms. Anchoring their demands on Article 1 of the American Convention on Human Rights (ACHR) and Article 2 of the International Covenant on Civil and Political Rights (ICCPR), these groups launched actions in both the Inter-American Court for Human Rights and the UN Human Rights Committee.

These institutions ruled and recommended that the State had an obligation to do everything in its power to promote human rights. In one of its most important rulings, the American Court asserted that State parties to the ACHR were bound by the treaty to investigate, prosecute and mete out punishment in response to serious human rights violations.

To that extent, the Court also ruled that amnesties are illegal because of their incompatibility with State obligations as outlined in Article 1 of the ACHR. Moreover, the Court declared that the crimes in question—crimes against humanity and other gross human rights violations—were of a nature that is outlawed under customary international law, and therefore, States are obligated to ensure accountability.

In keeping with the American Court’s position, Argentine judicial authorities have since ruled that amnesties for crimes of an international nature are illegal. These crimes must be punished. In late 2007, the American Court found that the same principle applies to pardons decreed for international crimes. In its view, pardoning such grave crimes would violate State obligations under the ACHR by effectively shielding perpetrators from justice.

Specialists' Discussion

The ensuing discussions focused on six cross-cutting themes pertaining to the nature of the human rights violations that reportedly occurred during the post-election crisis. In the first set of responses, participants grappled with the complex dynamics of the violence, in particular the underlying causes and the multifaceted forms and dimensions it assumed in changing contexts. Next, the roundtable examined specific provisions, principles and rules of international criminal law and their applicability in addressing the different manifestations of violence that were witnessed in Kenya.

Third, the specialists shared perspectives on the Kenyan criminal justice system's capacity to address serious human rights violations. Fourth, there was a discussion on the choice of advocacy frameworks by human rights groups and their impact on the analysis of the ongoing human rights crisis. Fifth, participants briefly discussed the difficulties encountered in categorizing hate speech. In the final set of responses, participants made observations on the complex politics of transitional justice programs and the serious challenges in the way of the truth commission envisioned for post-conflict Kenya.

The dynamics of post-election violence

Human rights groups have tended to emphasize the initial organized violence in the North Rift over the other parts of the country which were also seriously affected in the post-election crisis. It is imperative that every affected part of the country is examined in addition to all the dimensions of human rights violations and the forms of violence therein. This broader examination is particularly important for seeking comprehensive accountability for the violence.

Many human rights groups are grappling with what is often termed "spontaneous violence" by civil society groups and even the media. What does this mean and can one credibly argue that

the violence in the Rift Valley was more spontaneous and less premeditated? Several participants stressed that the answer lies in the capacity of human rights groups to undertake high quality documentation and analysis of the violence.

While some agreed that certain acts of violence were probably spontaneous or opportunistic, one participant disagreed noting, "It is likely that some of the violence was the outcome of careful planning because there is a discernible logic in the approach of the perpetrators." If attacks against Kikuyu people in Rift Valley are explained as impulsive retaliation for their perceived historical exploitation of the region's "natives", then surely another factor must be responsible for the widespread violence meted out on Kisii, Asian and other non-Kikuyu people.

This particular viewpoint highlights the nuanced dynamics of the violence in contrast to what appear to be exaggerated and simplistic claims of "highly spontaneous violence" that were made by some political leaders.

While sexual violence was undoubtedly widespread, a participant noted that it is debatable whether or not it was opportunistic or instrumental to the organized violence. Research conducted by Human Rights Watch and the UN Office of the High Commissioner for Human Rights suggest that sexual violence in Rift Valley was largely opportunistic. However, some local women's rights groups disagree, arguing that the second wave of sexual crime, particularly in the South Rift, was instrumental to the violence.

Participants broadly agreed that the violence across the country was highly differentiated and human rights groups run the risk of making invalid generalizations about its dimensions if they do not base their conclusions on high quality field research and analysis. In Western Kenya and the Coastal region, homes and property were systematically burned or destroyed but there was

little evidence of the targeted killing of their owners. In contrast, at Kuresoi, Molo and the upper parts of Rift Valley, hundreds of people were reportedly killed before their homes were either set ablaze or destroyed or looted. In other areas attackers focused mainly on killing.

Other participants who had interacted directly with perpetrators of violence and their victims compared and contrasted evidence that demonstrated the changing nature of violence in the Nyanza, Western, Rift Valley and Nairobi provinces. One participant reported that young men in Kitutu Masaba, Nyanza, voluntarily joined gangs as a means of achieving social recognition. Basically these individuals felt that involving themselves in violence would be socially rewarding. In most instances, they were plied with potent alcoholic brews before they were set on their targets. In other cases, violence broke out when political organizers failed to pay or keep promises to the gangs they had formed. Deep frustrations over the outcome of the presidential election also drove many unemployed young men to violence.

Another participant reported that in Bungoma, Western Kenya, elderly people perceived to have voted for the PNU were attacked by younger men. In the Kibera informal settlement in Nairobi, Kikuyu people were overwhelmingly targeted by violent gangs. However, these gangs spared landlords of Kikuyu origin who were perceived to be flexible on rent deadlines. Those who were judged to be less accommodating were among the first targets of the attacks.

The group discussion also raised the controversial possibility that the situation in parts of Kenya such as Mount Elgon, which had been effectively controlled by the Saboat Land Defense Force (SLDF) militia, may have already deteriorated into civil war. One of the questions posed was if there were objective elements on which to determine whether the operations of the SLDF and Kenyan military amounted to a civil war situation which

would necessitate the application of an international humanitarian law framework.

In a rejoinder, another participant cautioned that it would not be easy to subject armed groups to the jurisdiction of international humanitarian law since no single group has declared its authority over a clearly demarcated territory.¹³ A third participant observed that it would be difficult to answer the question without the benefit of a professional study on the magnitude of mobilization for the violence.

International crimes and post-election violence

One participant pointed out that Kenyan law recognizes various elements of international crimes in different types of crimes. If these are properly investigated, they may be prosecuted successfully in Kenyan courts. In any event, the ICC cannot comprehensively address each situation referred to it because it will usually prosecute less than six people in any one situation as the Northern Uganda and Darfur cases attest.

The ICC will only try those individuals alleged to bear the highest levels of responsibility for human rights atrocities. It is expected that every other perpetrator will be tried under national legal systems. For that reason, the human rights movement ought to evaluate Kenya's legal system to understand whether it can end impunity for international crimes.

Most participants agreed that key actors in the post-election crisis used international law terms in casual ways that may have de-contextualized some of the violence that took place in Kenya. Noting the group's concern, one participant advised that it was critical for all reputable human rights groups to exercise caution in their use of terms which have precise legal definitions.

¹³ This of course is only required under Additional Protocol II of the Geneva Conventions. Common Article II would still apply even where no group has effective control over a territory.

One term that is not known to have a precise legal meaning is “ethnic cleansing”, which was omitted from the list of international crimes incorporated into the ICC statute. Explaining this omission, another participant argued that “ethnic cleansing” comprises a very broad spectrum of conduct which is difficult to classify in legal terms. However, a third participant argued that deportation or forcible transfer of populations, which are recognized in the ICC statute as crimes against humanity, tend to approximate the idea of “ethnic cleansing”. Even people who voluntarily leave a specific place out of fear of violence, detention or psychological oppression can be said to have been forcibly transferred.

One participant noted that there are indications that forcible transfer of people may have occurred in Laikipia in the Rift Valley, where members of the Kalenjin community left an ethnically heterogeneous village out of their own volition on the basis of fears that they would be attacked by their Kikuyu neighbors. Within the Mathare informal settlement in Nairobi, armed gangs declared and patrolled the boundaries of homogenous ethnic zones, warning residents not to cross them. In both the Laikipia and Mathare cases where people transferred themselves for fear of their lives, it can be said the cycle of forcible transfer was completed.

The discussions focused on the problematic use by various actors of the term genocide in the characterization of some of the acts of violence that occurred. One participant pointed out that ongoing debates about the possibility of a distinction between “genocide” and “genocidal acts” may have been responsible for the reckless use of the term in the Kenyan context. Consequently, the participant wondered if perhaps genocidal acts, but not genocide, took place in Kenya.

In response, another participant explained that the distinction is used in a political way when policymakers seek to avoid certain political

consequences that may be attached to calling it one way or the other. Legally, there is no clear distinction when these two terms are used in juxtaposition to each other.

At the end of the day, the crime of genocide is committed by individual human beings and it is up to the courts to determine if a particular individual had such intent—to destroy a particular group. In the case of Kenya, there is no evidence to show conclusively that genocide or genocidal acts occurred, or conversely, that they did not occur.

A third participant raised the issue of the “stages of genocide” and whether any of these could be discerned in the Kenyan post-election crisis. In exploring this problem, another participant explained that the threshold requirement for establishing that the stages of genocide are being implemented is particularly high.

With respect to Kenya, it is highly unlikely that plans have ever been conceived to deploy violence in such horrific proportions. However, there is evidence that people who were forcibly transferred from some parts of the Rift Valley were warned to “leave or die”. It seems the intent was not to kill them but to create ethnically homogenous zones. At any rate, the UN Special Rapporteur on Genocide ought to monitor the situation in Kenya to ensure that there is no planning of genocide at any of its stages taking place.

On the basis of existing national laws on attempted crimes, one participant suggested that it may be possible to contextualize this jurisprudence within the framework of international criminal law. In the participant’s opinion, what happened in some parts of the Rift Valley may have been a stage in the ultimate realization of a more extensive human rights atrocity. “Could there be criminal culpability on the basis of attempted international crimes? If political leaders and the international community did not take it upon themselves to act quickly,

weren't these crimes going to be widespread and systematic, passing the threshold required?"

In response, another participant explained that international law does indeed recognize inchoate crimes of attempt such as instigation, incitement and inducement, and in fact, the ICC statute contains these.

Effects of different frameworks on human rights campaigning

Participants broadly agreed that it is critically important for human rights groups to identify their operational frameworks, be they legal or political or a combination, before carrying out research and advocacy activities designed to respond to the post-election human rights crisis. One participant suggested that most acts of violence that occurred can be addressed adequately under Kenya's criminal law framework. However, Kenya's highly polarized political situation led some actors, civil society groups included, to exaggerate the nature of the violence, creating the impression that external solutions were absolutely necessary.

To ensure that appropriate remedies are sought for the serious human rights violations that have taken place, human rights groups ought to nuance their analyses much more to find the best fitting framework for their purposes. One participant explained that, "If the intention for our [human rights groups] own labels is not necessarily to end up at The Hague [ICC], or if they are for other purposes; then we must first clarify the use to which we want to put our research and investigations so that we can broaden the scope of campaigning frameworks at our disposal." People will use different labels to achieve their own goals and human rights groups must realize that different interests are built into the different frameworks which are invoked by the use of these labels.

The participant also argued that human rights groups ought to have determined the labels they wanted to use and then moved to the field to see

if they could prove or disprove their hypotheses. Once investigations into the causes, forms and effects of political violence had been completed, then they ought to have systematically analyzed their data using a mix of frameworks to make final determinations on the character of the violence. Since human rights groups failed to take this approach, they ended up characterizing what happened as genocide or "ethnic cleansing" without being able to back their claims within the terms of the frameworks they had chosen. However, participants conceded that it is still very important to have a label for advocacy purposes. For instance, the label of FGM¹⁴ turned out to have great advocacy value to the extent that it partly led to the ban of the practice under international human rights law.

In any case, human rights groups should avoid getting hemmed into any one particular framework. Instead, they should remain open-minded and be prepared to use a mix of frameworks when necessary. For example, it will be important to look at "intent" not simply in legal terms but also to imagine the possibility of "political intent". Why does violence flare up each time there is an election in Kenya? Doesn't it appear that there is a political logic to this violence? Perhaps the idea of political intent may mean little in legal terms. However, there is still good reason to evaluate the violence from a more nuanced perspective which incorporates non-legal frameworks of analysis.

In support of this viewpoint, one participant argued that, "Perhaps what we [human rights groups] are calling for is a framework that is responsive to and reflects the social context in which violence takes place within the African setting. This implies that the ICC is not anchored properly within our context." Therefore, human

¹⁴ The UN Convention on the Rights of the Child obligates State parties to outlaw and eradicate the practice of Female Genital Mutilation. Cultural relativists insist that the use of the term "mutilation" unfairly demonizes those who support the practice. They substitute it with the word "cutting", which is clearly less controversial.

rights groups need to ask how they understand the violence which has taken place, and in turn, the different frameworks they ought to integrate or develop to address the problem.

In trying to understand the violence, it may not be useful to uncritically apply frameworks that have been used elsewhere. In this respect, one participant observed that, “We [human rights groups] also have our own shortcomings in the sense that we have gone out there to look for something and now we are unsure how to explain what we saw. These nuances make it all the more necessary to have frameworks that respond to our situation and what we are looking at. Using a complex framework, we may find that we do not even have ethnic cleansing, or what we initially thought, but that what we are seeing is something else.”

Overall, participants were in agreement that once an organization has determined its framework of analysis, for example, international human rights law, it ought to make this clear from the outset. Equally important is the need to ensure that the frameworks that are finally adopted effectively address the plight of survivors and victims of human rights violations in addition to exposing the nature of the State’s initial response to the violations.

Post-election violence and Kenya’s legal system

Some participants agreed on the importance of using the framework of international criminal law to deal with the post-election violence while others questioned the rationale of applying international law to a situation that could be addressed by Kenya’s criminal law framework. One participant argued that, “We should remember Kenya’s legal system is inherently bound by international human rights law. So we should not spend too much energy referring these issues to international mechanisms, which is also an expensive and time consuming process.”

Another participant cautioned that an issue may be pursued in the domestic courts but human rights groups should be aware that there will be consequences within the domestic legal system if crimes are classified as genocide, war crimes or crimes against humanity as provided in international law. For example, Kenya is a State party to the convention prohibiting statutory limitations for these crimes. International law also prohibits immunity for such crimes wherever they might be committed.

Most participants agreed that Kenya’s criminal investigations, intelligence-gathering and prosecutorial authorities had been unwilling or unable to prevent serious human rights violations during the pre-election and post-election periods.¹⁵ In these circumstances, one participant suggested that Kenya ought to take advantage of the available regional and international options to strengthen its capacity in these particular areas of criminal justice.

Another participant noted that while the Kenyan government has been implementing the National Policy on Small Arms and Light Weapons, it is doubtful whether it has the capacity to demobilize and disarm militia groups. Therefore, Kenya could consider taking advantage of the expertise in demobilization, demilitarization and reintegration (DDR) work which is available at institutions such as the African Union (AU) and the Economic Community of West African States (ECOWAS).

The problem of hate speech

Some participants pointed out that the presentation on hate speech was problematic to the extent that it did not apply the legal standards from the ICTR “Media Trial” in its analysis of data related to hate speech in Kenya. Consequently, numerous incidences of ethnic stereotyping by Kenyan politicians that were documented by human rights groups have not been categorized as forms of hate speech which could constitute

¹⁵ See *Violating the Vote* (KHRC, February 2008) for information on pre-election human rights violations.

crimes against humanity. In this respect, one participant argued that, “The ICTR ruled that where people say things ‘whose foreseeable consequence’ may cause ethnic hatred and violence then it becomes critical to criminalize these kinds of statements. There is need to work with a broadened legal definition of hate speech in order to avoid defining the term as narrowly as we [human rights groups] would sometimes like.”

Another participant suggested that human rights groups ought to be sensitive to the cumulative effect of the use of stereotypes and their contribution to the construction of ethnic ideologies that have been used in other countries as a basis for planning genocide. These same statements were used in the election campaigns and for the mobilization of violence. In agreement, a third participant noted that, “There were extremely high rates of ethnically-based hate speech in both the Rift Valley and Central provinces. Indeed, there seems to be a correlation between the utterance of hate speeches and the violence which occurred. This correlation needs to be examined more closely.”

Transitional justice in Kenya

Participants shared a wide range of views on the planned truth commission for Kenya. Some participants observed that unlike the South African Truth and Reconciliation Commission (TRC), the process envisioned for Kenya has the additional element of “justice”. However, it remains unclear what kind of “justice” the Kenyan truth commission will be concerned about. Will it be a legalistic notion of justice or a more expansive conception such as “social justice”? This distinction is important for much of the violence that characterized the post-election crisis has underlying causes, such as landlessness, which must be addressed.

One of the participants who subscribed to this viewpoint counseled that, “We must consider seriously what Latin American countries did to ensure they held perpetrators of human rights

violations accountable, instead of blindly following what happened in South Africa. It is doubtful if at all there was any kind of justice for the victims of apartheid-era South Africa because issues such as land and social justice were inadequately addressed under the TRC.”

In agreement, another participant observed that the Kenyan human rights movement ought to be aware of the limitations of the law in resolving complex social and political issues. The full range of solutions aimed at addressing violence cannot be understood and applied where the root causes of violence remain unexamined. Consequently, there may be need to run a parallel process to the truth commission that focuses on the structural causes of the violence since legal measures alone, including convictions, might not necessarily prevent violence in the years ahead.

A third participant elaborated this view further by proposing that human rights groups need to jointly develop and coordinate the realization of a comprehensive set of short-term and long-term strategies aimed at preventing human rights violations as well as responding to them if and when they occur.

Moreover, as one participant pointed out, the discourses of “truth” have changed repeatedly during the post-election crisis. Soon after the elections, the discussion centered about “truth and justice” in relation to the results of the flawed presidential election. In the weeks that followed, this shifted to the need for “truth and justice” with respect to the outbreak of serious violence. Then as time moved forward, people added the additional element of “reconciliation” in recognition of the deep inter-communal rivalries that had been fomented across the country. Today, Kenyans are talking about “historical injustices”.

Such changes in the discourses of “truth” demand that human rights groups play a critical role towards ensuring that the planned truth

commission does not result in any one discourse overshadowing the others. If not, Kenyans may end up dealing with issues that are of little consequence to their society.

Other participants were much more skeptical about the planned truth commission which they viewed as a political settlement involving bargains among “those who have things to hide and those who may be seeking genuine, positive change”. Seen from this perspective, there are valid concerns that Kenyans stand the risk of establishing a transitional justice process in which many sensitive human rights issues might simply be “swept under the carpet”.

In fact, as one participant confided, “Discussants at the Kenya National Dialogue and Reconciliation process have not bothered to think about the contribution human rights groups might make to the transitional justice process even though these groups have worked on these issues for a long period of time and developed significant expertise in the field.” In spite of their successes, the participant recommended that, “Human rights groups must ensure they do not lose themselves in their technical understanding of the post-election crisis if they are to contribute meaningfully to the political process being created to address the historical roots of the crisis.”

The human rights movement also needs to take a position on whether it is necessary to exclude the human rights violations that occurred during the post-election crisis from the mandate of the truth commission but to locate these within a complementary framework. In turn, one participant wondered, “Might that complementary framework involve requesting the ICC to investigate what may have been international crimes? Perhaps a specialized court within Kenya’s judicial system might be in order?” Here again, Kenya may learn from the transitional justice policies of some Latin American countries which successfully separated past historical injustices

from ‘fresh’ human rights violations during their respective “truth processes”.

One participant disagreed fundamentally with the human rights movement’s capacity to provide leadership in the transitional justice process. In the participant’s view, civil society institutions had failed in the past to offer innovative solutions to address previous episodes of political violence. Churches, for instance, disregarded the principle of political neutrality before, during and after the 2007 election.

Certainly, there were also indications that individuals and groupings within the human rights movement took sides in the electoral contest and its aftermath. Underscoring these points, the participant posed, “Are we [human rights groups] above the ethnic chauvinism that characterizes Kenyan society today? Do we really have the moral authority to discuss and make recommendations on issues of transitional justice, among others? Have we, as a human rights movement, been introspective enough to say that we are qualified to talk about these issues?”