Removing the Shield of Impunity

KNCHR Progress Report
on Investigating and Documenting Post-Election Violence
27 March 2008

1. Introduction

As announced on 25 January 2008, the Kenya National Commission on Human Rights (KNCHR) has been investigating and documenting the post-election violence to ensure that there is as comprehensive as possible a record of the violations committed during that period, from the harassment of one person to the killings of hundreds of people. We fully expect the perpetrators of these acts, which are astonishing not only in their brutality but also in their repeating patterns, will be held to account.

This progress report is intended to fulfil the promise made to the people of Kenya on 25 January to keep them informed of our investigative and documentation work, which is being conducted on their behalf, and to provide information about where we are going from here and what we aim to achieve. As Kenya's national human rights institution, we are committed to living up to the higher responsibilities we bear in meeting the expectations of the people of Kenya to report fully on what happened and who may be responsible, both individuals and State institutions, based on as much credible and reliable information as we can gather.

While some work remains, KNCHR would like to take this opportunity to thank everyone who has provided support to this process over the past two months: first and foremost, the people of Kenya who have generously given us invaluable information and insights about what happened during those very dark moments. We would also like to thank those who have given financial support, namely the Governments of Finland, Germany (through GTZ), Norway and the United Kingdom (through DFID); and who have given programmatic support and cooperation, including our friends and partners in civil society and others in Kenya and elsewhere, particularly to No Peace Without Justice, which has been with KNCHR since the commencement of this work. In completing what is left of this work, we look forward to welcoming every Kenyan who may still have valuable information and who wishes to share their story and insights with us.
2. Progress on the investigations

a. Goal of the work

KNCHR is fulfilling its mandate to promote and enhance the protection of human rights in Kenya through a process of documentation and analysis of the recent violence. From the information that has been collected in the field and elsewhere, KNCHR is building a foundation for analysing the responsibility of the Kenyan State under international human rights law and the responsibility of individual perpetrators under domestic criminal law and international law. On the basis of these analyses, the KNCHR is pulling together the voice of Kenya, both victims and alleged perpetrators, about what happened during the post-election violence and will make recommendations on how there might be redress for the violations suffered, with a view to bringing those responsible to justice, be they individuals or State actors, in order to contribute to the fight against impunity and help prevent future violations.

b. Methodology

i. Overview

Over the past two months, KNCHR teams comprised of Commissioners and staff have undertaken 18 missions to more than 70 locations across the country and to Uganda, with an average duration of eight days per mission. Nearly 1,000 statements recounting over 4,500 episodes of violence or incitement to violence have been gathered from individuals with whom we spoke during these missions, which have been complemented by hundreds of open source materials that have been gathered from a variety of credible sources in Kenya and abroad. These numbers continue to grow on a daily basis.

ii. With whom has KNCHR spoken?

KNCHR teams have talked to victims and witnesses of the post-election violence, to those who may have been involved in the violence and to people who have a good understanding of what happened in their areas, including community and opinion leaders. Information has been gathered from the men and women of Kenya of all ethnicities and all walks of life, including farmers, pastoralists, fishermen, public officials, security personnel, the provincial administration, religious and political leaders, elders, shop keepers, students and many other people. A key element in identifying the people with whom we speak has been to ensure diversity of experiences, opinions and backgrounds, in order to enhance the participatory nature and impact of this work. This in itself is an important step towards accountability for the post-election violence through engagement of the people of Kenya in establishing a record of what happened and recommending how it might be prevented in the future.

iii. Looking after the people of Kenya

As a national human rights body, the KNCHR’s statutory mandate is very specific: the protection and promotion of human rights. As we have travelled the country to speak with people who have suffered during the post-election violence, we have witnessed first-hand the enormous humanitarian crisis wreaked by the violence. KNCHR is therefore working with organisations that have the mandate to provide for humanitarian needs, to ensure that the plight of people with whom we speak is not overlooked and to help move Kenya as quickly as possible towards a better future for all of her people. For example, KNCHR has been able to help orphaned children obtain placement in schools; provided a link between people with
psychological harm and institutions who can provide specialised and expert assistance; and ensured that the humanitarian needs of people in IDP camps have been brought to the attention of those organisations who specialise in meeting those needs.

iv. Preparations for investigations and analysis
KNCHR has been working since January on the investigation and documentation of serious violations allegedly committed during the post-election violence in Kenya since the end of 2007. This involved a great deal of planning and preparatory work, particularly given that violence was ongoing at the time the investigations began. In its initial stages, KNCHR staff undertook in-depth training on all aspects of investigations and analysis, with the assistance of No Peace Without Justice, an international non-profit organisation with expertise in the documentation of mass violations of international law, including in places like Kosovo, Sierra Leone and Afghanistan. This training and support is ongoing as teams gain more and more field experience and as we move to the crucial next phase of strengthening our information regarding persons who may be responsible for the violations and analysing the information gathered to date, to create a comprehensive record of what happened and, to the extent possible, why.

v. The investigative set-up at the KNCHR
KNCHR is fully committed to providing this accountability service for the people of Kenya. We have therefore prioritised these investigations within our general workplan and rearranged our offices to create a focus on the documentation work. The investigations are supported by an operations centre that provides 24-hour support and assistance to investigative teams in the field, ensuring their logistical and other needs are met, to allow the teams to focus on the investigative work and to ensure their safety. As teams return from the field, the information they have gathered is fed into the data collation and preservation system, which also stores open source and other types of information and includes a fully-searchable and fully secure database that will enable analysts to piece together the full story of what happened during the post-election violence.

Dealing with the sheer amount of information gathered in the field and through open and other sources has been a major challenge faced by KNCHR in this work. Managing the information required the design and implementation of an entirely new system to allow for its easy storage and retrieval in as timely a manner as possible, to support the investigations process and the analysis work. KNCHR is committed to ensuring as much credible and reliable information as possible forms the basis of the analysis work, particularly in identifying those who may be responsible for violations, and continues to welcome partnerships with other organisations and individuals committed to the same aims.

vi. Protection of people and information
The primary principle underlying KNCHR's work on investigating and documenting the post-election violence is to protect the people who are giving information to us and to protect the information itself. For this reason, basic protocols have been developed and implemented to ensure the safety, security and, where appropriate, the confidentiality of the people with whom we speak and to ensure the safety and security of the information they are giving us.
c Geographic spread (areas visited)
In our press briefing of 25 January 2008, KNCHR mentioned some specific areas in Kenya on which we intended to focus the investigations, as areas where serious violations were alleged to have occurred, namely Eldoret, Kericho, Molo-Kuresoi, Nyanza/Kisumu, Mombasa and other parts of the Coast province. The KNCHR is fully aware that the post-election violence was not limited to these areas; therefore, as promised, KNCHR teams have also visited several other areas in Kenya that suffered violence, as illustrated in the map above.

vii. The criteria for selection of which areas to visit
KNCHR employed objective criteria to determine which areas to visit during this initial stage, including the degree to which information gathered indicated a high level of violations had occurred; visiting people with information (for example in IDP camps), as well as visiting the sites of violations themselves; ensuring a representative geographic spread across those areas of the country that were affected by the post-election violence; ensuring a representative spread of alleged victims and perpetrators, including both individuals and State institutions; and considerations related to access and security.

viii. Overcoming challenges
KNCHR faced several challenges undertaking investigations in a situation of ongoing violence of different levels of intensity in different parts of the country, in an environment of general fear. We overcame these challenges through ensuring strict yet flexible security protocols were in place, to protect both the people with whom we spoke and KNCHR staff, and through the development of a set of “frequently asked questions”, which facilitated KNCHR answering the many questions that people had about our work and its purpose.

d Progress towards identification of those who may bear the greatest responsibility for the violations

![Diagram showing the levels of perpetrators]

- The Apex: those who bear the greatest responsibility – overall planners, financiers, instigators and organisers
- Mid-level perpetrators – give and receive instructions or orders, lead local implementation of plans
- Direct perpetrators, directly committing acts of violence
The main goal of KNCHR's work is to ensure that violence is not rewarded: if we allow the use of violence as a political tool in this generation, we doom future generations to repetition of the same suffering that we have undergone during and after the last elections. There are many levels of responsibility, from direct perpetrators through to those who planned, instigated, financed and directed violations, as illustrated in the “violations triangle” above. KNCHR is gathering information about those who may be responsible for violations at all levels of the triangle and we are collecting credible and solid information that is moving us up the chain towards the apex of responsibility. KNCHR, as a human rights institution, is committed to protecting the human rights of all people, including those accused of the most serious violations of human rights, Kenyan criminal law and international law. As such, in addition to identifying violations committed in Kenya during the post-election phase, our final report on the results of these investigations will name only those individuals and institutions about whom there is a threshold of credible and reliable information pointing to their potential responsibility.

With each passing day, we are getting closer to identifying those individuals and State actors alleged to have committed human rights violations, particularly at the highest levels, and therefore getting closer to discharging our statutory mandate of investigating human rights violations. We encourage all Kenyans to work with us in fulfilling this responsibility to Kenya, to future generations and to ourselves, by helping to fill in the triangle.

**Next steps**

The main goal during the first phase was to gather as much credible and reliable information as possible, reflecting the diverse make-up of Kenyan society, to ensure that our final findings and recommendations are based on a sufficient amount of information to enable us to discharge our higher responsibility to the people of Kenya, as their national human rights institution.

Having completed this first phase, KNCHR has moved into the second phase of our investigation and documentation work: analysis of the information we have gathered, by comparing incidents of violence across time and across space, and undertaking any follow-up investigations that may be necessary. This will enable KNCHR to establish, on a preliminary basis, to what extent the violence may have been committed pursuant to a policy to commit systematic attacks against a civilian population, and to what extent they were ordered, directed or coordinated by persons or groups of persons acting with a common purpose. The end product of this process is a comprehensive report detailing what happened during the post-election violence and determining, on a preliminary basis, those who may be responsible for the commission of serious violations of human rights, Kenyan penal law and international criminal law.

As part of this work and as part of our mandate to protect and promote human rights, we are continuing to monitor the ongoing violence in different parts of Kenya, to ascertain whether it forms part of the post-election violence or not. Whatever the motivation for human rights violations, KNCHR is committed to ensuring accountability for all Kenyan people, just as it is committed to ensuring accountability for the violations committed directly during the post-election phase.
3. **KNCHR positions on key policy debates as Kenya moves forward**

a. **No reward for violence**: Rewarding violence simply begets more violence. As a country, we witnessed politically-instigated clashes in 1992, 1997 and 2002 for which key actors were not held to account. We have allowed violence to become institutionalized as a political/electoral tactic, for which we will continue paying dearly until we make it costly for perpetrators of violence. As part of the reconciliation process, we must decide as a people never to allow political/electoral bargains to be defined on the back of impunity. At this historical moment, the current generation must say no to impunity; our leadership must bold enough to “follow truth wherever it may lead” unless we want to go through the same again or worse in 2012 and beyond. We should not allow private actors or State-sponsored actors convicted of violations, including in particular hate speech or incitement, to hold or run for public office or otherwise to hold positions of public trust, including positions in the government or as members of the security forces. Whatever conflict resolution mechanisms we employ, they must not buy peace for now, while in essence they may unintentionally simply result in preparing the ground for future civil strife. The same considerations apply equally to State-sponsored or State-ignored violations: the State must accept responsibility for these types of violations, where they are proven to have been committed, and take appropriate steps to redress those wrongs and ensure they do not happen again.

b. **No amnesties for serious violations of human rights and international law**: Inter-ethnic co-existence can and has been a challenge in forming nationhood for different countries of the world. This challenge is not insurmountable and the power-sharing agreement that has recently become constitutionalised is an important lever in managing inter-group anxieties. Other supporting pillars in growing lasting co-existence must be reflected in our body politic. One such pillar is accountability for those suspected of having committed serious violations. This is both a fundamental component of the victims’ rights to redress and to justice and a duty under international law. Kenya must not be a land defined by impunity; we must be vigilant to ensure the political agreement is implemented successfully, particularly those parts relating to accountability for serious violations of human rights and international law. Kenya as a whole has been the victim of the post-election violence: let us now not also be the victim of impunity.

c. **Credible accountability mechanisms**: Availability of accessible and credible complaints and redress mechanisms is a hallmark of a democratic and human rights respecting state. Kenya performs unsatisfactorily on this score. The twin ills of impunity and ineffective judicial and public accountability systems have severely eroded the levels of trust citizens have in public institutions. We can overcome this. As a public body mandated to carry out investigations on human rights violations, we expect that the investigations work and in particular the report, which will identify those individuals and State institutions who may bear the greatest responsibility for the violations, will feed into the work of whatever credible accountability mechanism is set up to address the post-election violence, be it local, national, international, or internationalised. We also expect that this work will result in identifying specific areas where accountability can be in-built into our institutions, for example through mechanisms designed to ensure oversight of the security forces or other types of reform mechanisms for State institutions and others holding public trust.
d. Truth, Justice and Reconciliation Commission: Truth and justice are two sides of the same coin: both are critical for national healing and reconciliation and for Kenya's long-term peace, stability and prosperity. KNCHR supports the establishment of a Truth, Justice and Reconciliation Commission that addresses Kenya's accountability needs in a holistic manner and is responsive to the needs of the Kenyan people. KNCHR is also committed to ensuring that the TJRC can fulfil its mandate of providing truth and justice for the Kenyan people and looks forward to working with others on the design and implementation of the TJRC.

e. Protection of the human rights of all, especially vulnerable people: Human rights protections are primarily designed to protect those who may be unable to protect themselves from harm or from being exploited by the stronger and more powerful in society. As the body charged with the mandate of human rights in Kenya, we bear responsibility to act as a public guardian by advising and advocating against practices and policies that may create new groups of vulnerable people, exposing those who would exploit such people and target them in times of trouble. The post-election crisis has created new vulnerabilities for hundreds of thousands of Kenyans: children have been orphaned, women raped, the lifetime investments of the poor razed and destroyed. People have been permanently disabled, mentally destabilized, their confidence shaken and have been exposed to all manner of indignities and harm. The political agreement arrived at must move forward, in light of the obligations government has in ensuring that social spending is targeted appropriately to restore hope and dignity amongst such groups. Such programs would be necessary to address a broader problem that must be dealt with and that we as a National Human Rights Institution are committed to addressing.

f. Enhancing commitments to economic and social justice: Widespread poverty and inequality are inextricably linked to perceived and/or real official discrimination and, therefore, to state failure. This relationship provides an opportunity for political competitors to market their control and access to state resources as the most potent means through which their ‘excluded’ communities can benefit from public expenditure. Where community identity therefore overlaps with social economic differences, and control of the state, the seeds of communal discord are sown and nurtured; and the State therefore becomes an object of elite competition which must be captured at whatever cost. Public policies that exhibit sensitivity to regional, group, gender, generational and other inequalities are critical to enhancing social justice and significantly reducing elite competition over state control in the name of ‘my community’. The KNCHR will continue auditing policies and legislation for compliance to this obligation of the State under the International Covenant on Economic, Social and Cultural Rights (ICESR) while also advocating for re-discovery of the role of social and cultural institutions in mediating conflict and enhancing social justice.

4. Conclusion
There cannot be true or lasting peace without justice and there cannot be justice without accountability. We now have a political settlement that includes truth, justice and reconciliation as central tenets of the lasting peace that we hope Kenya will reach soon. One feature that has been sorely lacking to date is consultation: Kenyans deserve credible and fair processes that tell the truth about the cycles of election violence; that provide oversight for our state institutions;
that help reform those organisations, institutions and processes in Kenya that contributed to the violence; that address our governance needs; and that build an inclusive nation. As we move towards achieving these goals, we aim to work hand-in-hand with the people of Kenya, who must also take part in the design and operation of these processes that, in the end, are being built for their benefit. All Kenyans have a responsibility to help re-build our shattered society.

As part of this rebuilding, we need to begin turning our minds to the pillars on which we can place a new Kenya: pillars of the rule of law, democracy and human rights. Already at this preliminary stage, we are asking ourselves why Kenya has been lax in adopting legislation prohibiting hate speech and crimes under international law, particularly when (for the latter) we have an obligation to do so as a member of the International Criminal Court? Is it right that those who may eventually be charged with serious violations are able to hold or run for public office: is this not the highest form of reward for violence? How will we provide redress for the many victims of the post-election violence, whose dearest wish is to regain their livelihoods and return home? One way in which the KNCHR intends to answer these questions is through interacting with all Kenyans; through identifying those who directed, planned, instigated and coordinated the violence; and through developing recommendations to put Kenya back on the path towards success and developing strategies for ensuring those recommendations are implemented.

Based on the work undertaken to date, the KNCHR is confident that this investigation will help remove the shield of impunity for the planners and perpetrators of the predatory enterprises inflicted during the post-election violence and that the final report of this work will put in Kenya’s national collective memory the plight not only of the hundreds killed but also of those who lost everything.