

U.S. HOUSE OF REPRESENTATIVES
HOUSE COMMITTEE ON FOREIGN AFFAIRS
SUBMMITTEE ON AFRICA AND GLOBAL HEALTH

DATE: WEDNESDAY, FEBRUARY 6, 2008

TIME: 10.00 A.M

SUBJECT: THE POLITICAL CRISIS IN KENYA; A CALL FOR JUSTICE &
PEACEFUL RESOLUTION

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BACKGROUND

1. Thank you for this opportunity to discuss the crisis in Kenya. My name is Maina Kiai and I am the Chairperson of the Kenya National Commission on Human Rights (KNCHR), an independent state body charged with protecting and promoting human rights in Kenya. Previously, I served as founding Executive

Director of the Kenya Human Rights Commission, a non-profit organization based in Kenya; Africa Director at Amnesty International in London; Africa Director at the International Human Rights Law Group (now Global Rights) based here in Washington DC; and Research Fellow at TransAfrica Forum also here in Washington DC. I speak on behalf of the KNCHR, as well as for Kenyans for Peace through Truth and Justice (KPTJ), a coalition bringing together more than 50 human rights, legal and governance groups in Kenya.

2. Kenya is at a cross-road that will mean either the complete disintegration of Kenya or the beginning of a new, more democratic, sustainable nation suited to the needs and aspirations of the Kenyan people in the 21st Century. In a deeply painful and costly manner--in terms of lives lost and destruction wrought—the crisis in Kenya has given the country a unique opportunity to move forward in a way that we have been advocating for the last 20 years. In a sense, Kenya is at its “civil war” moment that the US was at in 1861. Just as that war was pivotal in establishing and solidifying the democratic credentials of the US, this moment could lead Kenya to much greater heights if properly handled both domestically and internationally.
3. In this context, the mediation currently going on under the leadership of Kofi Annan, Graca Machel and Ben Mkapa is the last best chance for Kenya to move forward. Whatever can be done to keep the players at the table, and keep them there in good faith, is critical. And efforts that delay, or subvert the talks—whether through insensitive statements and actions or by trying to prolong the talks through acts of filibustering—must be condemned. Consistent regional and

- international pressure is necessary especially on the hardliners who think that the crisis will blow over. The consequences of the failure of the mediation efforts are too dire to imagine not just for Kenya but for the region.
4. What is going on in Kenya is a political crisis with ethnic manifestation because politics in Kenya is organized ethnically. Clearly there are cleavages and differences in Kenyan society that have erupted brutally to the surface. But these have erupted due to the failure of peaceful means of resolving and addressing these differences, including the failure of elections and political reforms promised to Kenya in the 2002 elections.
 5. The crisis in Kenya was foreseeable. In March 2007, the KNCHR submitted a memorandum to President Kibaki urging him to maintain the “gentleman’s agreement” that had been in place since 1997 whereby all parliamentary parties made nominations for appointment to the Electoral Commission of Kenya. We argued that unilateral abandonment of the agreement would likely invite chaos and instability were the elections disputed. Moreover, since January 2006 we witnessed consistent attempts by the state to reduce democratic space and instil fear in society.

THE EXTENT OF THE CRISIS

6. Some 1000 people have been killed in the one month since violence erupted on December 30, 2007. Note that 3000 people were killed between 1992 and 1998 in the state instigated clashes in the country. During that same period, more than

300,000 people were internally displaced, most of whom have not returned to their farms and homes. In the month since the elections, an additional 300,000 people have been internally displaced.

7. Part of the reason why militia—on both sides—have been so potent and dangerous is that they arose from the earlier violence of the 1990s and were never de-mobilized. Nor was there a process to deal with the root causes of that violence, with the Kibaki government choosing to sweep the matter under the carpet, despite campaign promises to the contrary. With grievances bubbling and fermenting close to the surface, it was relatively easy to reactivate the militia using methods similar to those of the 1990s. Most important, the paymasters and planners of the 1990s clashes were never held accountable.
8. It is estimated that in the month since the crisis started the Kenyan economy has lost about US \$3 billion and about 400,000 jobs. Moreover the crisis has severely affected the economies of Uganda, Rwanda, Eastern DR Congo, and Southern Sudan and could bring them to ruin if not checked. All these nations have a history of conflict and violence that could be reawakened by economic collapse.
9. We have observed 4 forms of violence:
 - i) Spontaneous uprisings of mobs protesting the flaws in the presidential elections. These mobs looted, raped and burnt down buildings in an anarchical manner.
 - ii) Violence organized by ODM-supporting militia in the Rift Valley that was aimed at perceived political opponents. The initial militia

action attracted organized counter-violence from PNU supporters especially in Nakuru, Naivasha areas of the Rift Valley, and Nairobi.

- iii) Excessive use of force by the police in ways suggesting “shoot to kill” orders against unarmed protesters mainly in ODM strongholds including Kisumu, Kakamega, Migori, and the Kibera slum of Nairobi. Policing has been uneven in its implementation. In some strong ODM areas, the police have been shooting to kill, while when confronted with pro-PNU militia, they have opted to negotiate with the groups. However, in the Eldoret area, the police largely stood by and watched as pro-PNU supporters were killed and their houses burnt.
- iv) Local militia in pro-PNU areas, on receiving internally displaced persons (IDPs) from the Rift Valley, have mobilized in sympathy and turned on perceived ODM supporters, killing them, and burning their houses.

10. The violence is neither genocide nor ethnic cleansing: The root of the problem is not that different ethnic groups decided they could no longer live together. The root of the problem is the inability of peaceful means to address grievances. For this to be genocide there would have to be either state complicity or state collapse and the first obligation would be for the state to provide adequate security for those at risk. Instead we have uneven and selective policing with emphasis on preventing Raila Odinga from holding

protests in Nairobi rather than protecting IDPs and others at risk across the country. We therefore believe that the quickest and most effective way to reduce the violence is progress in the current talks.

THE ELECTION TRIGGER

11. It is clear that the flagrant effort to steal the presidential election was the immediate trigger for the violence. All independent observers have said that the tallying process was so flawed that it is impossible to tell who won the presidential election. Since 1992, Kenya's elections have been progressively better and fairer, culminating in the 2002 elections which were the best ever, and the 2005 constitutional referendum. The effect of this progression is that Kenyans finally believed in the power of the vote as a way of peacefully resolving differences, a fact confirmed by voting trends in the recent parliamentary elections that saw almost 70 percent of incumbents lose their seats. When this sense of empowerment was subverted, and peaceful legal spaces for protests were disallowed, it is not surprising that frustrations boiled over and violence ensued.

12. We have documented some of the facts and analysis that make clear that the flaws in the tallying of presidential votes rendered untenable the conclusion that Mwai Kibaki was validly elected.

13. With the benefit of hindsight, there were steps taken that paint a picture of a well orchestrated plan to ensure a pre-determined result. These include:

- i) President Kibaki's decision to abrogate the agreement of 1997 on the formula for appointments to the Electoral Commission ensuring that all the Commissioners were appointed by him alone;
- ii) An administrative decision within the ECK to give responsibility to Commissioners for their home regions, something that had never been done before, meaning that they appointed all the election officials in the constituencies in their home regions, in a manner that created conflicts of interest;
- iii) The rejection of an offer from IFES to install a computer program that would enable election officials in the constituencies to submit results electronically to Nairobi and then on to a giant screen available to the public making it virtually impossible to change results;
- iv) A decision to abandon the use of ECK staff in the Verification and Tallying Centre in favour of casual staff provided by the Commissioners directly; and
- v) A refusal to ensure that election officials in areas with large predictable majorities for any of the candidates came from different areas so as to reduce the likelihood of ballot stuffing.

WAY FORWARD AND ROLE OF US CONGRESS

AND GOVERNMENT

14. At this “constitutional moment” that Kenya has reached, we believe the way forward must be centred on truth and justice as the only sustainable road to peace and development. This is the time for Kenya to end the impunity that has been a feature of our history since independence, and also to end the “winner take all” “first past the post” system. Specifically, we call for:

- i) An international independent investigation into the 2007 presidential election process in order to come to closure on the elections, find out who did what and why; who ordered it; and promote accountability;
- ii) An international independent investigation into the post election violence—from citizens and police--so that there is accountability on all sides.
- iii) An interim transitional government to be formed with limited powers of governance and for a limited time--between 1 and 2 years—with Kibaki and Odinga exercising equal powers.
- iv) The primary duties of this interim government should be to undertake constitutional reform, and especially explore ways of reforming the current Imperial Presidency; motivate electoral

reforms, police reforms, judicial reforms, land reforms, civil service reforms, devolution of power; and conduct new elections at the end of its term.

v) The interim government should also be charged with cooling passions and starting the process of reconciliation through a Truth Justice and Reconciliation Commission that starts operations immediately after the new elections. It is important that presidential elections be held at the end of the interim government to inspire confidence in Kenya's electoral processes, and as a sign of the new Kenya.

vi) It is also important to note that significant work in all of these areas of reform has already been done in various constitutional drafts and also by Government Commissions and Task Forces so Kenya would not be starting from scratch.

15. To ensure that there is good faith in the mediation it is imperative that the U.S.

Government work with the rest of the international community to maintain pressure on Kenya's leaders to treat the mediation with utmost seriousness. To this end, we welcome U.S. leadership in raising the crisis in Kenya at the UN Security Council, and call for pressure at this level to be maintained and increased.

16. We also urge Congress to request the release of the exit poll conducted by International Republican Institute (IRI) without delay so as to maintain pressure on all sides to

negotiate in good faith. In addition, we urge Congress to work with the EU to have the EU Observation Mission Report released immediately.

17. In case of continued intransigence from any of the parties we call on Congress to impose travel bans on the hardliners on both sides and especially those implicated in instigating violence whether through militia or through the police. These travel bans should extend to hardliners in the civil service and to their immediate families.

18. Moreover, assets of the hardliners and those involved in violence should be traced and the assets frozen.

19. Finally, it is important that U.S. military and security assistance be frozen immediately. All US assistance to Kenya should be channelled through non-governmental sources.

Thank you for this opportunity to address these matters affecting democracy, peace and security, not just in Kenya but also in the East African region.