

**CRIME AND HUMAN RIGHTS WORK IN KENYA:
TOWARDS A STRATEGY**

*Report of the Kenya Convening on Crime and Human Rights: Do We
Need a New Kind of Activism*

*Hosted by:
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ABBREVIATIONS

CoG	Centre of Gravity
CSOs	Civil Society Organisations
HROs	Human Rights Organisations
HRs	Human Rights
KNCHR	Kenya National Commission on Human Rights
SLDF	Sabaot Land Defence Force

ACKNOWLEDGEMENT

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TABLE OF CONTENTS

1.0 BACKGROUND

2.0 THE BASIS: THE STYLIZED FACTS

3.0 THE SPACE MAP

3.1 State-Centric Hypotheses of the Militia Phenomenon

3.1.1 The Gap Hypothesis

3.1.2 The CoG Hypothesis

3.1.3 The Oligopoly Hypothesis

3.2 Society-Centric Hypothesis of Militia Phenomenon

4.0 THE FRAMEWORK AND STRATEGIES

4.1 Pillar 1: The Shifts

4.2 Pillar 2: New Spaces

4.3 Pillar 3: Interactions

4.4 Pillar 4: The Dilemmas

5.0 CONCLUSION

1.0 BACKGROUND

The rise of violent crime in Kenya over the past few years has raised the sense of insecurity among citizens to levels unknown just a decade ago. Reports indicate that in 2007, the country had around 100,000 illegal firearms (approximately one illegal gun to every 300 Kenyans)¹ and rising. This huge number of arms available in private hands/militias/armies – or even possibly illegally in the hands of state agents – has increased the incidents of gun-related crime in the recent past. For instance, in the month of March 2009 alone, 52 gun-related killings and crimes were reported in one of the country's major dailies.²

The events of January 2008 following the disputed election results in which violence was used to claim the democratic freedoms of assembly and desired electoral outcomes began to cast violence as acceptable if unleashed for 'democratic' purposes.

Following the killings of civilian populations in Mt Elgon initially by the Saboot Liberation Defense Force (SDLF) and later by state security forces, the responses given by human rights groups appeared in the eyes of ordinary Kenyans as an expression of preference for militia perpetrated violence as opposed to state violence.

The rise of criminality by Mungiki and other unlawful organized criminal groups and the strong-arm response by the state security forces has sometimes pitted human rights groups against citizens who claim that the message they hear from such groups amounts to protection of criminals as opposed to themselves as victims of crime.

The all time high cases of extra-judicial executions, happening alongside the rise of criminality has become worryingly systematic as to suggest the existence of a policy of shoot-to-kill. The report by the UN Special Rapporteur on Extra-Judicial Executions and those of the Kenya National Commission on Human Rights (KNCHR) and other human rights groups capture the grisly killings that the country has been going through. Even more worrying has been the tacit support that some citizens have expressed for this state violence reportedly aimed at defeating crime.

¹Daily Nation(Nairobi), March 11, 2007

²Figures derived from content analysis of the Daily Nation, (Nairobi)in the month of March 2009

In March 2009, two human rights advocates³ were shot dead amid an official government statement threatening them with dire consequence for alleged association with and funding of Mungiki. Some reports indicated that the Police and some influential people in government were uncomfortable with the Oscar Foundation because of the information they had collected on extra-judicial executions in Kenya, which information they had also shared with UN Special Rapporteur Prof. Phillip Alston. The rapporteur at the time had released a strong statement implicating the state in extra-judicial executions and forced disappearances of young people suspected to be Mungiki. Since then more than 30 other individuals – mostly human rights activists, students and other individuals – linked to the investigations into extra-judicial executions have fled the country or gone into hiding following threats on their lives. Early this year, up to six other Kenyans who reportedly gave information during the Waki Commission hearings went under again following threats by unknown people.

Given this background, the human rights movement has found itself on unfamiliar ground where increasingly the public makes unsupportive comments about human rights work in what has sometimes been described as the gradual ‘delegitimization’ of human rights.

The KNCHR and Akiba Uhaki convened a forum to enable human rights organizations to reflect about human rights work in an environment that is getting increasingly hostile, where impunity has become the norm, where society is increasingly militarized and general breakdown of law and order has become an ever present possibility. The objectives of the forum were:

- (a) To provide CEOs and senior officers in the various human rights organizations with space for reflection and exchange of ideas on crime and human rights;
- (b) To think-tank around insights into the patterns, trends and shifts of/in crime evident in Kenya today;
- (c) To collectively examine the complexity, dilemmas and ‘trilemmas’ of the issues at hand using case study methodology; and

³ Oscar King'ara, the Executive Director of Oscar Foundation and his Programs Co-ordinator, GPO Oulu

- (d) To generate broad brush strategies that the sector can use in responding more effectively to human rights violations emanating from the state and citizens alike.

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2.0 THE BASIS: THE STYLIZED FACTS

Crime creates an environment that is not conducive to the maintenance of human rights standards and practices given that they create a 'state of exception' i.e. space(s) without law, a judicial void in which violence in the name of either national defence, self or community defence becomes possible ostensibly to maintain a semblance of public order and security.

The state no longer possesses a monopoly of violence. Therefore the state is not the only actor capable of violating the rights of citizens on a large scale and therefore focus must also be similarly given to the duty other bearers have in HR protection.

That the human rights 'foundational' notion of a violent state and a virtuous civil society ceases to be tenable when horizontal violence becomes the way citizens deal with crime and conflicts among them.

That because human rights discourses often express a profound mistrust of the state while at the same time predicating the realization of human rights on the effectiveness of the state, human rights practitioners have the burden of determining the kind of relationship to forge with the protector and villain components of the state in ways that are meaningful. Thus supporting the capacitating of the security forces to enable the state to maintain order, prevent crime and punish offenders under conditions of accountability by the state is a question that human rights organizations must address creatively.

That the 'newer' type of crimes we are witnessing are perpetrated by groups that seem organized, have political objectives, have forged connections with influential institu-

tions, appear to enjoy proximity to political actors (hence the impunity), and are rooted in communities hence the challenge for both state and human rights groups

Citizens may find human rights organizations working not in their interest because the focus on the crimes committed by the state have left most human rights organizations protesting not against the lack of protection of the majority of citizens from crime but on crimes committed by the state in the course of crime-fighting. There may be need to shift from human rights initiatives wholly defined in opposition to the state to ones working in intersection between state and society than in opposition of either.

3.0 THE SPACE MAP

The militias⁴ operate in three spaces: (a) **traditional sphere** which is regulated through customary or traditional law which is in turn revised depending on impending interests. This sphere is also regulated by a normative dialogue, which comprises norms that are independent of formal law and based on reciprocity, trust and goodwill; (b) **civic sphere** which is the formal sphere of authority governed by ‘civil law’. Activities in the civic sphere are regulated through formal institutions of government charged with the responsibility of rule application, and adjudication; and, (c) **predatory sphere** which is regulated by ‘bandit law’ and has a selective application of civic and traditional law. The ‘bandit economy’ is the bedrock of this sphere. Its context derives from a mutation of historical and cultural practices⁵. It is simply about a predator, a prey and a parallel market system. Carjacking, and ‘marketised’ cattle rustling are some types of predatory conflicts.

3.1 State-centric Hypotheses of the Militia Phenomenon and Implications for Human Rights

3.1.1 The ‘Gap’ Hypothesis

Militarization of society is a function of hegemonic retreat by the monolithic state, particularly where there is lack of economic opportunities; elites are highly fragmented and factionalized; and political competition is highly intense. Crime, predominantly a creation of lack of opportunities, sometimes presages militarisation. Whereas it is true that the retreat caused by liberalization created a gap whose natural occupants were the militia groups, some of the militia groups predated liberalization⁶.

⁴ In Kenya, these include the Mungiki, Chinkororo, Amachuma, Jeshi la Mzee, Baghdad Boys, Republican Army etc.

⁵ For instance, traditional cattle rustling for bridal price.

⁶ Such as Angola Musumbiji in Western Province; Amachuma and Chinkororo in Gusiiland.

There were two results from liberalization one, an increase in ‘patronage inflation’ corresponding with ‘resource deflation’ through economic restructuring. Two, political liberalization saw the collapse of KANU youth wing and the predatory infrastructure of the provincial administration. This left a security vacuum that has over time attracted organised ‘militia’. The ‘bourgeoisie/elite gaps’ were filled by foreign security firms; the ‘lumpen’ and ‘peasant’ gaps were occupied by vigilantes who later translated themselves into militia.

Overall, the privatization of public violence animates the retreat of the state and by inference the emergence of security gaps. This process creates security seams that facilitate both supply and demand of small arms and light weapons; drugs; a weak ‘Force to Space’ Ratio; and the twin logic that draws members of the force towards corruption at one level and the youth towards the militia logic at another.

Implications for Human Rights: *When spaces previously occupied by the state are taken over by non-state actors, the violation of rights cannot be a vice associated with the state only. In strategy terms, therefore, HROs must place a burden of duty on these new violators and condemn them with as much vigour and candour as they do the state.*

3.1.2 The ‘CoG’ Hypothesis

That the militia groups have a Centre of Gravity (CoG). If you disable the CoG, you will disable the militia. Yet what appears like a shifting CoG within the militia is ultimately located within the state itself. The apparent inability or unwillingness to identify, locate and neutralize the militia economic, political and sociological nodes implies that these groups can hardly be contained.

The assumptions here are that there are strong links between militia groups and actors within the state’s own CoG. The paralysis on security organs in dealing with militia groups is a function of a dilemma rooted in the fact that not only is there a symbiotic relationship but also penetration that mutates into parasitism

Implications for Human Rights: *The situation presupposes the existence of a fragile state. And that this is a function of decay as opposed to a deliberate act of mutation. Is the state still the violator of rights, but in a different guise? Will strengthening its institutions lead to counter-productive or progressive returns? And can the HRs sector locate the actual CoG with a view to tracing the root causes of violations? Once located, if located, what will the sector do with it beyond ‘activism’ and exposure? If indeed the militia have a CoG that is centred in the state, how do you enforce the rights they violate? What are the ‘conventions’, the ‘rights instruments’ that bind them to rights entitlements? **Part of the strategy here is to focus on reconstructing the state itself to make it accountable. This is because these violations are a natural out-growth of the present architecture of the state and, change of guard, however well meaning, will not lead to elimination of the CoG.***

3.1.3 The ‘Oligopoly’ Hypothesis

State sub-optimal, half hearted and ineffective response to the militia is a function of its embedded interest in the enterprise. And that this interest is not located at one place: a monopoly. Our assumption is that at some undefined moment, the state degenerated into a 'chaotic aggregate'. It became a collection of actors without a lowest common denominator beyond power sharing. But to augment their position within the state structure, they each had to acquire an 'ability to brandish force'. As a result, state actors migrated to the predatory sphere to activate their militia and returned to the civic sphere to collect the results of militia pressure.

The result of this 'chaotic aggregate' is a shift from a state monopoly of violence, to an oligopoly of violence. Under a monopoly, power is centralised and the 'product' is one. Under an Oligopoly, there are many products, all contributing to the same source. In the case of power Oligopoly, we have many militia as products and 'the revenue' denominated as power, accrues to one 'company'. And this 'company' is the state, defined as the many players and their interests.

Implication for Human Rights: *If indeed the state and its actors are the owners of the militia, whom will the sector pin down on violations? Similarly, how do you engage a dismembered state? The strategy here combines the strategy in 'Gap' and 'CoG' Hypotheses – equal placing of duties and a redesign of the state. The former will ensure that responsibility or duty travels with mutation, straddling, or shuffling of identities between the state and the militia groups.*

3.2 Society-centric Hypotheses of the Militia Phenomenon and Implications for Human Rights

3.2.1 The 'Symbiosis' Hypothesis

The relationship between militia services and the citizen is symbiotic. The existence of one depends on the survival of the other. As such, it is not possible to clear one, without affecting the other. And that this symbiosis is a function of state retreat and fragility.

Testimonies from militia-infested areas reveal a demand for their services in areas of dispute resolution, debt collection, security and protection. This relationship is 'socially incestuous'. The returns accruing to the militia are ploughed back to the same society they exploit through the 'economy of affection'⁷. As a result, there is a tendency for identities to shift: One moment a member of the militia is a provider, next moment he is a plunderer.

The symbiosis is not only with society; it exists also with the state and its actors. The argument is that the degree of violence and level of fire power deployed is a function of value derived. In other words, to the extent that the value is highly priced, the cost of acquisition increases and by inference violence.

⁷ This is how the young men support their mothers for instance.

The assumption is that there are underwriters of militia violence, which may include ordinary business people or private citizens who demand services on an episodic basis. That there is value derived in these actions. And that the nexus between the militia and underwriters is symbiotic, determined by time and the dynamics in space. While militias earn a living and prestige, the underwriters are able to protect their interests mostly private commercial or social but sometimes ultimately political.

Implications for Human Rights: The above symbiosis and multiplication of identities poses a number of questions for the human rights sector. Given the switching of identities, how do you distinguish between the criminal from the violated? And where is the line between advancing crime and protecting the violated?

4.0 THE FRAMEWORK AND STRATEGIES

Below is the framework and strategies that should guide human rights organizations (HROs) in their engagement with the crime-human rights problematique. This framework is built around four interlocking pillars, identified as characterizing the emerging crime-HRs dynamic. These pillars are environmental in character and it is in their consideration, that the strategies highlighted at the end of each are proposed:

PILLAR 1: THE SHIFTS

Clearly, there are major shifts that have, or are increasingly taking place in Kenya's polity which must inform the repositioning of HRs work. These shifts have redefined political and sociological reality, and must therefore constitute the new compass for HROs operations. The *first shift* is the decay or fragility of the state, and the accelerated loss of its monopoly of violence. State fragility and retreat has witnessed the mushrooming of bandit formations. The relationship between these and the state runs through a continuum of repression, accommodation, and agent - depending on the political patron of a particular militia group as well as the state's own self assessment of its capacity to overwhelm. Thus, when criminal justice becomes ineffective, when an environment of fear is left to escalate, a situation of 'self help' inevitably arise.

The *second shift* is the emergence of new duty bearers. Because of the first shift, the state, both in space and time, is no longer completely in control throughout. The raw power (physical force) or soft power (ability to provide community services) of militia groups have enabled them to create authority and control territory, however episodic and temporary this sometimes is.

The *third shift* is the decline of popular support for HROs. Whereas in the first decade of the plural politics (1990 – 2002) CSOs/HROs enjoyed nearly uncritical public support and solidarity, in the second decade, a considerable erosion of this support has occurred for a number of reasons. First, the conduct of ex-civil society aristocrat that joined government in 2002 has been found by the public to be disappointing, and, sec-

ond, the CSOs/HROs handling of the crime-HRs problem has been read by the public as being too sympathetic to the criminal groups. The human rights ‘foundational’ notion of a villain state and a virtuous civil society is no longer tenable. Victims’ rights are hardly seen as being in their purview of understanding the problem.

The *fourth shift* is demographic in character. Kenya’s demographic structure exhibits a large youth bulge, with nearly 40% of the population found between the ages of 15 – 35 years.⁸ A staggering 53% of the population is between the age of 0 – 19 – that is to say, over half of our population are teenagers and children! Given declining opportunities and high unemployment levels at about 14%,⁹ this population structure is a natural dispose to crime. In its extreme form, these combinations of factors tend to generate political instability of the violent form. Evidence from history shows that societies with youth bulges only escape from political instability either if this labour finds opportunities internally, or, if it is exported.

STRATEGIES:

The prevailing wisdom has been that the nature of the state determines the nature of the struggle. Whereas this remains true, the nature of the society must also determine the nature of the struggle. For HROs to be effective in this new environment of *Pillar I* it must fashion the struggle in a manner that takes into account both the evolving character of the state and that of the society. Thus the elements of HROs’ strategies in view of *Pillar I* are:

(a) Agitation for the creation of an accountable state, which should take the form of a new constitutional dispensation and a judicial system that is equitable, dependable, and efficient. HROs’ demand for the state to respect HRs should be preceded by creating of a state that is capable. The creation of a new state is a necessary precondition for the realization of rights. Or, on balance, the decibel for state reconstruction should be higher than that of demand for respect of rights. This is because state character is inherently anti-rights. Thus supporting the capacitating of the state security forces to enable the state to maintain order, prevent crime and punish offenders under conditions of unaccountability by the state is a question that human rights organizations must address directly.

(b) Investing in creating local accountability of CSOs. CSOs are seen as artificial constructs; they need organic construction. They need not cede the space for first generation rights but must also aggressively deal with second generation rights. Class suits on economic issues such as consumer rights; property rights of the peasantry among others are potentially legitimacy-enhancing initiatives worthy of attention without necessarily taking this as a substitute to the political-civil rights agenda.

⁸ Further, 46% of the population is to be found in the economically inactive age groups – under 14 years and those over 65 thus making the country a high dependency country.

⁹ The country releases about 500,000 young people into the job market every year.

(c) Embracing the philosophy of development as freedom, which treats development both as a means and an end for freedom. This may entail moving from the neo-liberal notions of democracy to that of social democracy (*See Strategies discussed under Pillar 4*). HROs also need to widely ‘socialize rights’ to enhance their popular appeal. Rights are seen as privileges by a majority of Kenyans whose rights are regularly violated without support. To many of these HROs, visibility on militia rights are seen as self-serving and insensitive.

(d) Helping the state and society to re-read the crime problem in its structural and sociological sense rather than purely criminal or political sense to help illustrate the limitations of muscular approaches to dealing with criminals and militias.

PILLAR 2: NEW SPACES

Traditionally, HROs have held the state as the primary if not the only violator of HRs. Whereas the political history of HRs makes this understandable, it is no longer tenable. The architecture of society has radically changed; new actors have emerged, significantly reordering the power relations and greatly expanding the magnetic field of power and influence.

Consequently, both new violators (both legal and illegal entities) and new violations have emerged, and this has implications on the way HRs work needs to be carried out presently. Illegal groups are extracting rents, levying tax without representation, thus undermining one of the cardinal foundational principles of the modern state. Similarly, there is the emergence of rogue capital, both local and international (also from militia groups) which, sometimes, violates both the political and economic rights of citizens at the same time. Globalization has granted private capital considerable power without creating an economic bill of rights or a competent regulatory framework for capital movements.

Then there is the emergence of ‘bifurcated citizenship’ that has put the local in tension with the national thus leading to contestation of rights especially with respect to property, movement. The centre is no longer one to which one rights narrative applies but multiple and contradictory.

STRATEGIES:

(a) HROs must impose duty on the new type of violators. Both the state and non-state actors must be held accountable for rights violations. In situations where new violators control territory, the burden of duty and care, must be made even heavier. There may be need to shift from human rights initiatives wholly defined in opposition to the state to ones working in intersection between state and society than in opposition of either

(b) HROs need to acknowledge the multiple identities of actors and retool their strategies accordingly. This reality require further reflection within the HROs, owing to its complexity. Precisely because these multiple identities are neither fully

unpacked or discussed as yet. And neither are they that clear, subsisting as they do within the penumbra of various state and non-state canopies but with enormous and diffused political and social “panoply”.

(c) HROs must communicate clearly and directly that citizens bear some specific responsibilities in respecting rights. The language of Bill of Obligations needs to be introduced alongside that of Bill of Rights.

PILLAR 3: INTERACTIONS

As was discussed above, the militias operate in three spaces: the traditional, civil and predatory. How do we avoid HROs capture by the militias; by the state; and also by the international capital? It is important the HROs protect their integrity and remain virtuous both in rhetoric and action. The moment HROs are seen as handmaid of certain interests their credibility gets a beating. The challenge is on how to forge solidarities and still maintain distance. This will not be easy but a few ideas are germane:

STRATEGIES:

(a) The ideological compass must remain steady, consistent, and pure and especially when under attack or temptation. HROs must be seen to be able to make certain sacrifices for the ideals they believe in. This may entail holding steady to a point of intellectual conviction even where there is considerable pressure to say or behave otherwise. In the long run, it helps solidify credibility.

(b) Explore opportunities for access to justice in the traditional sphere, which is an acknowledgment, and rightly so, of the limits of the liberal democratic ideology.

(b) Total disclosure of partnerships through a peer mechanism. This will help shield HROs from being invaded by clandestinely funded groups that end up undermining credibility of the genuine HROs. One way of doing this may be ‘notice board sessions’ where HROs present their audited accounts, or HROs becoming members of other HROs whereupon this information will be availed as a matter of right.

PILLAR 4: THE DILEMMAS

The HROs face several dilemmas, and the responses to these, while not easy, are however necessary. The *first dilemma* is the ideology-popularity contest. The issue is whether HROs work should be premised on the attractiveness of HRs as an important and necessary idea/value regardless of its popular support, or whether popular legitimacy must constitute a condition precedent. The danger of the first option is that it risks turning HROs into heretics; while the risk in the latter is the problem of mass hysteria. This dilemma arises partly because in some areas militia services are demanded and procured by the public such as in areas of dispute resolution, debt

collection, security and protection and a hard-nosed approach in dealing with them is frowned upon and viewed as obstructionist.

The *second dilemma* is one of parity of esteem. Recognising the militia as violators of rights in the same category as the state - if not by intention but by implication - elevates them to the position of duty bearers of sorts. It migrates them from the supply side to the demand side of rights. Whether HROs can be able to extract this demand with as much success as with the state cannot be guaranteed and when they fail, the state, in a self-serving manner, may point out this as an incurable weakness on the part of HROs to damage their credibility and weaken their own demand on the state.

The *third dilemma* is ideological. The present HRs discourse is founded and premised on notions of liberal democracy. Liberal democracy emphasizes the individual and not the collective; it focuses on property rights, especially of the bourgeois and the middle classes; privileges sovereignty of the law and not the people. Given Kenya's poverty levels and general development outlook, this ideological premise has its limitations and yet reforming the state in the manner that makes it accountable cannot ignore the liberalism language.

The *fourth dilemma*, which is related to the third, is one of language. Militia groups have themselves appropriated the language of rights to shield, defend, and prosecute their agenda and actions. Thus the language register of both HROs and militia groups remain uncannily similar, especially for the public. It evicts moral power from HROs pronouncements. The challenge is on how to rescue the language of rights from misappropriation while not retaining exclusivity of use, which is an impossibility nonetheless.

The *fifth dilemma* is one of civic versus native citizenships or the indigenous versus the universal. Popular struggles against 'the other', especially in historical claims/injustices contexts, use the language of rights. Thus local struggles, some of which are genuine but which nonetheless offend the universal precepts of HRs, enjoy considerable local level legitimacy. Indigenous discourse on rights has a greater hold than the universal one. Locating HROs work in this context is extremely difficult and casting lot either way undermines the HROs. It is the same dilemma of distinguishing crime from legitimate dissent.

The *sixth dilemma* is one of operational form/sphere. Actors in state and society, as mentioned above, operate in the three spheres: civic, traditional, and predatory. HROs are founded and constructed to operate only on the civic sphere. They cannot venture into the predatory realm without hurting their message and their image. Even in the civic realm, finding the appropriate 'arms length' while still remaining relevant and retaining credibility is a big challenge.

STRATEGIES:

(a) HROs need to premise their work on the inherent attraction of the idea of rights, its popular endorsement notwithstanding. However, HROs need to make cultivating

public support for HRs a key element of its work because it fortifies the struggle. Thus whenever popular support slips for HRs work, the HROs may sometimes shift discourse away from the pure HRs issues to one of contexts, histories of similar struggles that were right in and of themselves but which never enjoyed popular legitimacy at the time (e.g. abolition of slave trade). This dilemma can be partly managed through a better communication strategy rather than a content strategy.

(b) The HROs need to embrace social democracy as the ideological compass. Given the development outlook of the country social democracy may be the ideal as it embraces participatory democracy, promotes inclusiveness, and argues for establishment of safety nets for the vulnerable. It is the ideology that will allow HROs to begin to focus steadily on social and economic rights and, even in instances where property rights questions arise, these shall include assets and opportunities for the poor. A more enhanced pro-poor rights discourse is necessary.

(c) HROs need to begin to collate, systematize and analyze existing knowledge as this will help it find direction to some of the dilemmas for which no immediate answers exist.

5.0 CONCLUSION

The ‘Kenya Convening’ session on ‘Crime and Human Rights’ was very productive and, significantly, trail-blazing. It did not answer all questions and dilemmas that HROs face in this new environment. Participants did not even completely agree on the issues, such as the question of prioritizing or balancing economic and political rights. However, it marked a significant beginning in grappling with a clearly uneasy subject.

Whereas the discussions focused heavily on militias, there was recognition that crime is a big component of the problem and looking at militias alone does not do justice to the subject. Indeed the meeting took the view that continuous criminality constitutes a human rights violation. *Seriality* elevates crime beyond the ordinary regime of deviance to one of fundamental violation of rights.

The strategies that the meeting identified are evolving in character. They represent an ‘original think piece’ on this matter, rather than a *fait accompli*. It is for this reason that the session recommended that further deliberative forums be convened to further sharpen the discussions on the subject. Some of these sessions should be held by grassroots based HROs that are experiencing the crime-HRs interplay a lot more “intimately” on the ground. The finalization of the strategy should not conclude before this is done.

(Standardize font; Calibri looks great!)