

**Human Rights Council****Seventeenth session**

Agenda item 3

**Promotion and protection of all human rights,  
civil, political, economic, social and cultural rights,  
including the right to development****Report of the Special Rapporteur on extrajudicial, summary  
or arbitrary executions, Christof Heyns****Addendum****Follow-up country recommendations - Kenya\* \*\****Summary*

This report analyses progress made by Kenya in implementing the recommendations made by the former Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, following his visit to the country from 16 to 25 January 2009 (A/HRC/11/2/Add.6). During his visit the Special Rapporteur documented widespread extrajudicial killings by the police, lack of accountability for killings that occurred during the 2007 post-election violence, killings that occurred at Mt. Elgon and intimidation of human rights defenders who cooperated with the Special Rapporteur.

The Government has implemented a number of reforms at the constitutional, legislative and institutional levels. The Constitution adopted in 2010 instituted several reforms, including appointments procedures for public officers, entrenched institutional independence, and guaranteed the principle of checks and balances. The Government has also undertaken comprehensive police reforms. It is hoped that these reforms will help inter alia to transform the law enforcement institutions, to make them transparent and accountable.

However, no concrete actions have been taken to implement many of the recommendations made by the Special Rapporteur. Much remains to be done to address and overcome extrajudicial killings. Police killings as a result of excessive use of force

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\* Late submission.

\*\* The summary of the present report is being circulated in all official languages. The report itself is contained in the annex to the summary and is being circulated in the language of submission only.

continue to be reported. There has been little or nothing done to ensure that perpetrators are held accountable for the 2007-2008 post-electoral violence or for the killings at Mt. Elgon. Investigations into the killing of two human rights defenders, who had cooperated with the Special Rapporteur, remain inconclusive. The Government's commitment to address grave human rights abuses appears to be very minimal. The rate of investigations and prosecution of police killing remains unacceptably low.

## Annex

### Follow-up report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Kenya (16-25 January 2009)

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## I. Methodology

1. In paragraph 8 of its resolution 8/3, the Human Rights Council urged States, *inter alia*, to cooperate with and assist the Special Rapporteur on extrajudicial, summary or arbitrary executions in the performance of his or her task, and to supply all necessary information requested by him or her and to ensure appropriate follow-up to his/her recommendations and conclusions. This could include by providing information to the Special Rapporteur on the actions taken on those recommendations.

2. The Special Rapporteur concurs with his predecessor on the importance of follow-up reports, as a critical component of country visits to investigate allegations of violations of the right to life, which is one of its principal working methods. Country visits are an essential means to obtain direct and first-hand information on human rights violations. They allow for direct observation of the human rights situation and facilitate an intensive dialogue with all relevant interlocutors in the country concerned. The main purpose of country visits is to assess the actual situation in the country concerned, including an examination of the relevant institutional, legal, judicial, and administrative aspects and to make recommendations thereon in relation to issues that arise under the relevant mandate. Country visits by mandate-holders provide an opportunity to enhance awareness at the country, regional and international levels of the specific problems under consideration. This is done, *inter alia*, through meetings, briefings, press coverage of the visit and dissemination of the report.

3. In accordance with established practice,<sup>1</sup> the present follow-up report concerns the recommendations made by the Special Rapporteur's predecessor, Philip Alston, on his visit to Kenya. The present report accompanies follow-up reports on Albania (A/HRC/17/28/Add.3) and the United States of America (A/HRC/17/28/Add.5).

4. This follow-up report was prepared on the basis of all available information. The Special Rapporteur requested information from the Government and from other actors on the steps that had been taken to implement the recommendations made by his predecessor. Information on the non-implementation of recommendations was also sought. In addition, information was sought on the current situation concerning extrajudicial executions in the country, and particularly on whether and how the situation has improved, deteriorated or remained static since his predecessor's visit. Consultations were also undertaken with domestic and international civil society groups.

## II. Introduction

5. The present report analyses progress made by Kenya in implementing recommendations made by the former Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, following his visit to the country from 16 to 25 January 2009 (A/HRC/11/2/Add.6). The final report was presented at the Human Rights

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<sup>1</sup> In order to assess the extent to which States had implemented recommendations, in 2006, the Special Rapporteur's predecessor initiated follow-up reports on country visits. The first follow-up report (E/CN.4/2006/53/Add.2) concerned the recommendations made by a prior mandate-holder, Asma Jahangir, on her visits to Brazil, Honduras, Jamaica and the Sudan. Subsequent follow-up reports were issued by the Special Rapporteur's predecessor, Philip Alston, in 2008 on missions conducted to Sri Lanka and Nigeria (A/HRC/8/3/Add.3); in 2009, on visits to Guatemala (A/HRC/11/2/Add.7), and the Philippines (A/HRC/11/2/Add.8) and in 2010, on visits to Central African Republic (A/HRC/14/24/Add.5), and Brazil (A/HRC/14/24/Add.4).

Council's eleventh session in June 2009. The report highlighted killings by the police, violence in the Mt. Elgon District, killings during the post-election period and intimidation of human rights defenders who cooperated with the Special Rapporteur.

6. The Government of Kenya was requested to provide comments on measures it has taken to implement the recommendation made by the former Special Rapporteur. Regrettably the Government indicated that it had rejected the original report and would not provide the requested comments for the follow-up report.

7. In the original report, the Special Rapporteur documented widespread extrajudicial killings by the police, the existence of death squads, and lack of internal and external police accountability mechanisms. The Special Rapporteur also found that the country had institutional deficiencies which contributed towards impunity and allowed extrajudicial executions to go unchecked, such as weak criminal justice system, lack of prosecution and investigation into abuses committed by security officials and unwillingness by the Attorney-General's office to prosecute senior officers implicated in extrajudicial executions. The report also addressed human rights abuses and killings which occurred at Mount Elgon from 2006 and 2008 and lack of substantive follow up regarding accountability. The Special Rapporteur also examined extrajudicial killings during the post-election violence highlighting the lack of prosecutions despite availability of evidence. The Special Rapporteur proposed several recommendations to address the issues.

8. Following the visit by the Special Rapporteur, two human rights defenders, Oscar Kamau King'ara and John Paul Oulu, who met with him during his mission, were killed. During and after the visit by the Special Rapporteur, human rights defenders were systematically intimidated by the police, military and Government officials.

9. Since the visit by the Special Rapporteur, certain measures have been undertaken to implement the recommendations made. There has been reform at the legislative level. The Constitution adopted in 2010, instituted several reforms including appointments procedures for public officers, entrenched institutional independence, and guaranteed the principle of checks and balances. The Government has also undertaken comprehensive police reforms and several bills are pending before Parliament. It is hoped that these reforms will aid in inter alia transforming public institutions making them transparent and accountable.

10. However a lot remains to be done to address and overcome extrajudicial killings. Police killings as a result of excessive use of force continue to be reported, although the rate of such killings has been reduced. Impunity for extrajudicial killings continues to prevail. There has been little or nothing done to ensure that perpetrators are held accountable for the 2007 -2008 post-electoral violence and the killings at Mt. Elgon. The Government's commitment to address grave human rights abuses appears to be minimal.

11. The International Criminal Court has issued summons to appear for six individuals, who include high-ranking public officials, for their suspected role in the post election violence. Disappointingly, the individuals continue to hold public office, with one exception.

### **III. Extrajudicial executions by police**

12. In the 2009 report, the Special Rapporteur concluded that there were widespread and high levels of police killings. The killings were opportunistic, reckless, personal and planned. The report identified six factors that contributed toward the killings (a) officially sanctioned targeted killings of suspected criminals; (b) a dysfunctional criminal justice system which incentivized the police to counter crime by killing suspected criminals, rather than arresting them; (c) internal and external police accountability mechanisms were

virtually non-existent, in that there was little check on, and virtually no independent investigations of, alleged police abuses; (d) use of force laws were contradictory and overly permissive; (e) witnesses to human rights abuses were often intimidated, and feared reporting or testifying; and (f) the police force lacked sufficient training, discipline and professionalism.

13. Information received in the preparation of this report reveals that the number of extrajudicial executions perpetrated by the police has been reduced but not eliminated. Police personnel continue to use excessive force when arresting suspected criminals. The attacks are often unprovoked and force is used disproportionately. The police also continue to be accused of abductions and killings. Information made available to the Special Rapporteur indicates that, from January 2010 to April 2011, there have been 63 cases of alleged extrajudicial killings by the police although these figures may be high as some cases are not reported.

14. There have been several reports of police killings as a result of excessive use of force. On 19 January 2011, police shot dead three men on the Nairobi highway allegedly without provocation. On 14 January 2011, police officers from Gigiri Police, in Kiambu County Station, opened fire on a vehicle, killing Mr. Gichuhi Njoroge and seriously injuring three others.<sup>2</sup> On 30 December 2010, the bodies of Mr. Kamuri and Mr. Irungu were found in Ruiru, a few kilometres from where they were arrested, with gunshot wounds. The autopsies undertaken revealed that the victims had died as a result of multiple gunshot wounds to the head and chest. A witness to the killing, Kenneth Irungu, was abducted in Nairobi on 10 March 2011, his body was later found with gunshot wounds. On 11 March 2010, Harry Thuku, Joseph Ngugi, Mugweri Mwangi, Gedion Mbogo, William Gitonga, Joseph Nganga and Mr. Maina were shot dead by Administration Police. According to reports, the police initially claimed that the men were members of the Mungiki sect, and that they had been terrorizing local residents. The Prime Minister stated that there would be a thorough investigation into the case, and that those found responsible will be prosecuted. Media reports indicate that a police officer was charged with the killings and denied bail on 8 November 2010, and ordered to remain in custody until the conclusion of the case<sup>3</sup>. On 19 July 2010, the police shot dead Jackson Kihato, during a peaceful protest against evictions in Kabete Native Industrial Training Department.<sup>4</sup> On 24 March 2010, two boys from Kirich Village were abducted, tortured, and stabbed, allegedly by the Administrative Police. One of the boys was killed.

15. Impunity for police killings continues to prevail. Despite the recommendations made in the original report, that extrajudicial killings by the police should be investigated and punished, no concrete measures have been taken in this regard. Past police killings documented in reports such as the Kenya National Commission on Human Rights have been ignored. From late 2010 to 2011, there has been an escalation in the number of alleged extrajudicial killings being committed by the police. There is a lack of investigations into killings being perpetrated by the police; this seems to be part of an endemic pattern as noted in the 2009 report.

16. The 2009 report noted the existence of death squads set up to eliminate the Mungiki and other high-profile suspected criminals. The operations of the death squads were highlighted. Information made available in the preparation of this report indicates that death squads were not disbanded, although they currently play a less visible role. The Government has adopted the Prevention of Organized Crime Act (2010) to provide for the

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<sup>2</sup> *Daily Nation*, Kenya, Op-ed by Angira Zaddock, 26 January 2010.

<sup>3</sup> *Daily Nation*, Kenya, reported on 8 November 2010.

<sup>4</sup> Amnesty International UA: 160/10 Index: AFR 32/010/2010 Kenya, issued on 21 July 2010.

prevention and punishment of organized crime. The Internal Security Minister in accordance with the Act, proscribed 33 groups, including the Mungiki, by Government notice. It is anticipated that the Act will aid in combating the operations of the Mungiki and other criminal groups.

#### IV. Accountability and the criminal justice system

17. The 2009 report noted institutional weaknesses, such as lack of a centralized database to record statistics of police killings, inaction by the former Police Commissioner to address extrajudicial killings, lack of external and internal oversight mechanisms, and lack of enabling legislation.

18. There has been extensive reform of the legislative framework governing the police. In the original report it was recommended that the Police Commissioner should be replaced; in September 2009 he was transferred to the Postal Corporation of Kenya. The 2010 Constitution reviewed the appointment procedure of the Police Commissioner. The Police Commissioner will now be appointed by the President with the approval of Parliament.

19. On 8 May 2009, the Government established the National Task Force on Police Reform,<sup>5</sup> with a wide mandate to examine the existing policy, institutional, legislative, administrative, operational structures, systems and strategies, and to recommend comprehensive reforms. The Task Force reviewed previously commissioned reports, including the 2009 mission report by the Special Rapporteur on extrajudicial executions and the report of the Commission of Inquiry into the Post-Election Violence Experienced in Kenya after the General Elections held on 27 December 2007 (Waki Commission of Inquiry report).

20. In January 2010,<sup>6</sup> the President established the Police Reforms Implementation Committee with a mandate inter alia to coordinate, supervise and provide technical guidance and facilitation for the implementation of the police reforms and to sustain, monitor, and evaluate the progress and momentum of the police reforms as recommended in the report of the National Task Force on Police Reform. The Committee was given powers for mandatory cooperation from the police, State officials and civil servants and power to enforce implementation of its decisions.

21. Currently a number of bills are pending for approval before Parliament including the National Police Service Bill, the National Police Service Commission Bill, the Independent Police Oversight Authority Bill, the Private Security Providers Bill, and the National Coroners Service Bill. It is hoped that when passed into law, these Acts will aid in reforming the law enforcement sector to ensure respect and protection of human rights as well as promote accountability and transparency.

22. Regulations relating to use of force have been slightly amended to explicitly recognize the principle of necessity under the proposed National Police Service Bill (2010). The Bill introduces into the current reading of the provisions on use of force the wording that “a Police officer may use force and firearms, if and to such extent only as is necessary.”. The Court of Appeal has recently interpreted the provision on the use of force under section 28 of the Police Act in the case of *Charles Munyeke Kimiti v Joel Mwenda & 3 Others*<sup>7</sup> to mean that “the law only allows the police to use all means necessary to effect

<sup>5</sup> Gazette Notice No.4790, *Kenya Gazette*.

<sup>6</sup> Gazette Notice No.169, *Kenya Gazette*.

<sup>7</sup> Court of Appeal at Nyeri, Civil appeal 129 of 2004.

arrest and even then, they are not allowed to use greater force than reasonable or necessary in the particular circumstances". The Criminal Procedure Act under section 21 also provides that, when making an arrest, the use of greater force is not justified than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.<sup>8</sup>

23. The reforms undertaken by the Government are to be commended. The Special Rapporteur is cognizant that realizing the reforms will not be instant; there has to be commitment to translate the laws into practice. The institutions will not change overnight, there has to be continued evaluation to assess progress being made.

## **A. Investigations**

24. In the 2009 report it was observed that police investigations of murder cases were inadequate due to resource and capacity constraints. The investigation of cases in which the police were implicated in extrajudicial executions was particularly poor, due to lack of an independent internal affairs unit within the police and lack of will by police authorities to institute reforms aimed at improving transparency and accountability. During the mission, efforts by the Special Rapporteur to obtain detailed information on investigations and inquests proved futile.

25. No significant improvements have been undertaken to ensure the effectiveness of police investigations, especially in cases where the police are suspected of alleged killings. Currently the modus operandi is that when the media highlights a case of extrajudicial killing by the police, the suspected perpetrators are suspended, a public announcement is made that the case will be investigated, and no further action is taken on the matter. Only in a few cases will the matter be taken to court for prosecution.

26. The prosecution and conviction rate for perpetrators of extrajudicial executions and other gross human rights violations that have occurred in Kenya remains alarmingly low. Information made available to the Special Rapporteur in the preparation of the follow-up report indicates that there is a fear among public authorities that investigating gross human rights violations is likely to open a Pandora's box. Public officials are likely to be implicated, hence the state of paralysis of the Government in conducting investigations.

## **B. Prosecutions**

27. The 2009 report of the Special Rapporteur highlighted several weakness of the prosecution system. The system was dysfunctional; cases were either insufficiently investigated or not prosecuted. The structure and personalities within it had institutionalized impunity, characterized by failure to prosecute any senior figures for human rights abuses. Further the Attorney General, who had security of tenure for life, was vested with powers to conduct or stop prosecutions and powers to delegate prosecutorial functions depending on the nature of the charge, to the Magistrate's Courts or the department of the Director of Public Prosecutions.

28. The 2009 report recommended that the Attorney General should resign in order to restore integrity to the office. It was also recommended that an independent Department of Public Prosecutions should be created. The Attorney General was not removed and continues to hold office. In January 2011, the President nominated a new Attorney General,

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<sup>8</sup> Criminal Procedure Act; Chapter 75.



subject to approval by Parliament. The name was later withdrawn due to disagreements in the nomination procedure.

29. The Government has reformed the previous institutional framework on prosecutions. The 2010 Constitution revokes prosecutorial powers from the Attorney General and vests them in the newly created Office of Director for Public Prosecutions. The Director of Public Prosecution will be appointed by the President with the approval of the National Assembly. The office is not under the direction or control of any person or authority and is vested with powers to order investigation and initiate criminal proceedings and may not discontinue a prosecution without the permission of the Court. The office has not yet become operational. The post of the Director of Public Prosecutions was publicly advertised through the Ministry of State for Public Service with 31 March 2011, as the deadline for applications.

### **C. Police external oversight mechanisms**

30. In the 2009 report it was observed that the police lacked external oversight mechanisms. The existing institutions, the Public Complaints Standing Committee and the Police Oversight Board had limitations in the discharge of their functions as oversight bodies due to limited investigative and enforcement capacity.

31. The National Task Force on Police Reform<sup>9</sup> noted that complaints against police conduct, including the excessive use of force resulting in extrajudicial executions, were often ignored and it recommended the establishment of an Independent Policing Oversight Authority under the Constitution. Following from the proposal, the Government drafted the Independent Policing Oversight Authority Bill (2010). The proposed authority will have powers inter alia to investigate allegations of any unlawful action by any member of the police or by a police body itself or misconduct by the police or a member of the police, whether on its own motion or on receipt of complaints from the public, and make appropriate recommendations, including recommendations for prosecution, compensation, internal disciplinary proceedings or any other appropriate relief. Further it will have powers to request the Attorney-General or the Director of Public Prosecutions to provide a response to any recommendation made by the Authority to prosecute any person or body.<sup>10</sup> Under section 28 the police are required to notify the Authority of any death which occurs when a person is under police custody or under the control of the police; was the target of a police operation; or was a bystander during a police operation.

32. The Government is to be commended for the proposed establishment of an oversight body with powers to recommend prosecutions. The provision endowing citizens with capacity to submit complaints is an important milestone that will allow victims and members of their families to participate in ensuring accountability for crimes.

## **V. Extrajudicial executions in Mount Elgon**

33. The gross human rights violations which occurred in Mount Elgon from 2006 to 2008, have been extensively documented. The 2009 report noted that the Government had not done enough to ensure accountability for killings by members of the Security Forces and the Sabaot Land Defence Force (SLDF). It was recommended that the Mt. Elgon events

<sup>9</sup> Report of the National Task Force on Police Reforms (abridged version), p. 14.

<sup>10</sup> See section 8 (a) and (j).

must be investigated by an independent Commission as recommended in the Waki Commission of Inquiry report.

34. No one has as of yet been prosecuted for crimes committed during the Mt. Elgon conflict. The Truth, Justice and Reconciliation Commission has initiated hearings into violations which occurred in Mt. Elgon. The cases have been categorized under rape, extrajudicial killings, murder, defilement and torture. Crimes committed by the members of the Sabaot Land Defence Force have been clustered under torture, rape and socio-economic crimes.

35. The Truth, Justice and Reconciliation Commission<sup>11</sup> was established with a mandate to investigate human rights violations and historical injustices including economic crimes committed between 12 December 1963 and 28 February 2008. The Commission has powers to identify and recommend prosecutions of any person responsible or involved in serious violations of human rights. The Commission has since its establishment been surrounded by controversy concerning its functioning, credibility and public scepticism on its competence to deliver justice. The Commission will at the end of its tenure publish a report summarizing its findings, making recommendations for prosecution and recommendations for reparation.

36. The capability and ability of the Commission to address inter alia extrajudicial executions is yet to be ascertained. It is not clear whether the Commission will recommend that individuals should be prosecuted for gross human rights violations and, if so recommended, whether the Government will institute prosecutions against the perpetrators.

## **VI. Extrajudicial executions during the post-election violence**

37. In the 2009 report, it was noted that no concrete steps had been taken to prosecute perpetrators of the post-electoral violence. The atrocities that occurred during the post-electoral violence have been documented in the Waki Commission of Inquiry report. It was estimated that 1,113 people had died from the violence which was both spontaneous and organized. The State had failed to act on intelligence regarding potential violence, failed to respond adequately to the violence and used unjustified force to respond to post-election demonstrations. The Police had indiscriminately used live ammunition and over half of the gunshot victims had wounds on their backs. Limited progress had been made to investigate police killings which accounted for 35.7 per cent of the total deaths. Plans to establish a Special Tribunal to try suspects of the violence as recommended by the Waki Commission of Inquiry had been defeated. Case files were shifted back and forth between the office of the Attorney General and the department of the Director of Public Prosecutions.

38. Impunity continues to prevail for extrajudicial killing that occurred in the aftermath of the 27 December 2007 elections. History seems to be repeating itself: officials are yet to be brought to account for the 1992 and 1997 election-related violence despite reports which documented the violence and named perpetrators. There seems to be an established pattern of non-accountability for killings which occur during pre- and post-electoral violence.

39. Only one police officer has been convicted of murder in relation to the post-electoral violence. He was found guilty of the murder of Robert Onsarigo by lethal shooting during the post-election violence in Onsarigo at Kisumu Ndogo Estate, Kaptibor Trading Centre on 1 January 2008.

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<sup>11</sup> Act No.6 of 2008.

40. Another police officer was found not guilty for killings during the post electoral violence after the prosecution failed to prove the case.<sup>12</sup> He had been charged with the killing of Ismail Chacha and George Onyango at Kondele market in Kisumu, on 16 January 2008. The Court held that the prosecution had failed to prove that the fatal bullet was fired from the gun that had been issued to the accused. He was issued with an AK-47 rifle serial number 2008378; the serial number of the gun recovered from the accused was 3008378. The Court reasoned that although all other evidence placed the accused at the scene of the crime, it relied on the submission by the Firearms Examiner who had concluded that the bullet was discharged from a gun that was different from the one that had been recovered from the accused.

41. The Special Rapporteur is gravely concerned at the lack of mechanisms to ensure accountability for the post-electoral violence. The investigation of such crimes is not an option but obligatory under international law. The Government has an obligation and responsibility to investigate such killings; failure to do so is a clear violation of international human rights law.

### **Complementary measures: The International Criminal Court**

42. In the 2009 report it was recommended that in the absence of domestic mechanisms to address the post-election violence abuses, the Prosecutor of the International Criminal Court should undertake investigations.

43. In view of the unwillingness by the Government to prosecute grave abuses that occurred during post-electoral violence, the International Criminal Court initiated an investigation into the post-electoral violence. On 5 November 2009, the Prosecutor informed the President of the International Criminal Court that there was a reasonable basis to proceed with an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008.

44. The Pre-trial Chamber II in its decision of 30 March 2010, authorized investigations into the alleged commission of crimes against humanity in Kenya. It held that from the submissions of the Prosecutor, crimes of murder, rape and other forms of sexual violence, forcible transfer of population, and other inhumane acts had occurred in Kenya.<sup>13</sup> The Chamber was of the view that some violence may have been spontaneous and reactive to the election results. However there were a number of attacks that were planned, directed or organized by various groups including local leaders, business men, politicians and members of the police.

45. On 15 December 2010, the Prosecutor submitted a request to issue summons to appear for Messers' Uhuru Muigai Kenyatta William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Francis Kirimi Muthaura, and Mohamed Hussein Ali. The Special Rapporteur is concerned that some of the suspects continue to hold public office; Mr. Kenyatta is the Deputy Prime Minister and Minister for Finance; Mr. Kosgey is a member of the parliament; Mr Muthaura is the Head of the Public Service and Secretary to the Cabinet; and Mr. Ali is the Chief Executive of the Postal Corporation of Kenya. Mr. Ruto was suspended as Minister of Higher Education, Science and Technology on allegations of corruption.

46. On 22 December 2010, the Kenyan parliament passed a motion requesting the Government to withdraw from the Rome Statute of the International Criminal Court and to

<sup>12</sup> *The Republic versus Edward Kirui*, Criminal Case 9 of 2008.

<sup>13</sup> Decision of the Pre-Trial Chamber II, No. ICC-01/09.

repeal the International Crimes Act. So far the Government has not taken any formal measures toward withdrawal.

47. The Prosecutor instituted two cases with summons to appear on 8 March 2011. The first case is against Mr. Ruto, Mr. Kosgey and Mr Sang. The counts indicate that the Pre-Trial Chamber II found reasonable grounds to believe that they are criminally responsible as indirect co-perpetrators. Mr. Sang was summoned on the count that the Pre-Trial Chamber II was satisfied that there were reasonable grounds to believe that he otherwise contributed to the commission of the crimes in accordance with article 25(3) (d) of the Rome Statute.<sup>14</sup> The second case against Mr. Muthaura, Mr Kenyatta, and Mr. Ali relates to the counts that the Pre-Trial Chamber II found reasonable grounds to believe that Mr. Muthaura and Mr. Kenyatta are criminally responsible as indirect co-perpetrators in accordance with article 25(3) (a) of the Rome Statute for the crimes against humanity of murder, forcible transfer, rape, persecution and other inhumane acts. The Chamber was satisfied that there were reasonable grounds to believe that Mr. Ali otherwise contributed to the commission of the crimes in accordance with article 25(3) (d) of the Rome Statute.<sup>15</sup>

48. The prosecution by the International Criminal Court is a welcome initiative but this does not exonerate the Government from pursuing domestic mechanisms. The remaining perpetrators have to be held accountable at the domestic level. The lack of domestic proceedings is a major *lacuna*, the Government should view the proceedings by the international Court as complementary to any mechanisms adopted domestically. A domestic tribunal is essential to address the large number of perpetrators and address other concerns such as reparation for victims.

## VII. Reprisals for cooperating with the Special Rapporteur

49. Two weeks after the visit of the Special Rapporteur two prominent human rights defenders who had met with the Special Rapporteur - Oscar Kamau King'ara and John Paul Oulu - were killed. On 13 March 2009, the Special Rapporteur wrote to the Government concerning the killings of Mr. King'ara, who was the founder and Chief Executive Officer of the Oscar Foundation Free Legal Aid Clinic, and Mr. Oulu, who was its Communications and Advocacy Director. The Special Rapporteur informed the Government that several human rights defenders in Kenya's Western Province who had meet with him were also receiving threats. The Government was requested to provide information on the steps taken to ensure that all forms of violence, intimidation and harassment against human rights defenders, particularly those who have cooperated with the Special Rapporteur, are brought to an end. The Government was also requested to provide information on the investigations and criminal proceedings regarding the killings of Mr. King'ara and Mr. Oulu. Two years later, the Government has yet to respond to the communication.

50. The status of the investigation into the killing of the two defenders remains inconclusive. Recently the Prime Minister made a public statement requesting that investigation into the killings should resume. It is important that the Government follows up on its public statements with action.

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<sup>14</sup> ICC-01/09-01/11, case *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*.

<sup>15</sup> ICC-01/09-02/11, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*.

51. On 30 April 2010, the Special Rapporteur sent a communication to the Government concerning the case of Keneth Kirimi, a human rights activist working with the non-governmental organization Release Political Prisoners, and member of Bunge la Mwananchi, a grassroots movement fighting social injustice and promoting accountable leadership. He was arrested by plain-clothed police officers and was allegedly interrogated about his organization, the work carried out by the executive coordinator of the organization, the organization's work on extrajudicial killings and the sharing of their report with the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. The Government is yet to respond to the communication.

52. Information made available to the Special Rapporteur in the preparation of the follow-up report indicates most defenders who demand accountability for extrajudicial executions have been threatened; others have been forced to seek protection within the country while many others have fled the country. The nature of the intimidation has become clandestine and the perpetrators are not easily identifiable. The Special Rapporteur is deeply concerned that acts of intimidation are continuing without investigations to hold the perpetrators criminally liable.

### VIII. Witness protection

53. The Government had taken steps to set up a witness protection programme through the adoption of the Witness Protection Act (2008). However, at the time of the visit by the Special Rapporteur it existed only on paper. The 2009 report highlighted the importance of witness protection programmes. The Special Rapporteur noted that many witnesses were afraid to testify out of fear of reprisal and concrete measures had not been put in place to actualize the witness protection unit within the office of the Attorney General as required under the Witness Protection Act.

54. In 2010, the Government enacted the Witness Protection (Amendment) Act and dissolved the witness-protection unit.<sup>16</sup> The Act establishes the Witness Protection Agency as an independent entity to be responsible for maintaining a witness protection programme. The Director of the Agency was vested with powers to admit or exclude persons from the programme, under the 2006 law this function was vested in the Attorney General. The agency is not yet operational.

55. The Special Rapporteur commends the Government for the measures taken to reform its protection programme. The Special Rapporteur stresses that it is crucial that the agency receives sufficient capital to fund its operations and that it be independent of external influence. The effectiveness of the protection programme will also depend on measures to address harassment of victims and potential witnesses so that they are not discouraged from taking advantage of protection when needed. The Special Rapporteur wishes to underline that public officials who are implicated in crimes, including those indicted by the International Criminal Court, should not discharge functions relating to witness protection and security affairs to avoid conflict of interest and perception of threat by potential witnesses<sup>17</sup>.

<sup>16</sup> Section 30.

<sup>17</sup> The Special Rapporteur welcomes the resignation of Mr. Kenyatta as a member of the cabinet Sub-Committee on Security and Foreign Relations and the Witness Protection Advisory Board and Mr. Muthaura as Chair of the National Security Advisory Committee.

## **IX. Conclusion**

56. The Government of Kenya has taken several measures to reform the legal framework governing public institutions, reform nomination procedures of public officials, create oversight mechanisms, and create an office of the Director of Public Prosecutions. Police reforms have been extensive, and comprehensive resulting in the drafting of several bills currently pending before parliament. The Government has shown a willingness to sustain the reforms by the creation of a body mandated to oversee and manage the reforms.

57. The Special Rapporteur welcomes the cases instituted by the Prosecutor of the International Criminal Court to try individuals for their role in the post-election violence.

58. Impunity for killings has become entrenched. There is an obvious reluctance on the part of Government for meaningful mechanisms to ensure accountability for killings which occurred during the post-election violence and killings at Mount Elgon. Extrajudicial killings by the police remain pervasive, the excessive use of force by the police continues unaddressed; most of the killings are not investigated and prosecuted. Intimidation of human rights defenders, especially those working in the area of extrajudicial executions, remains unaddressed.

## Appendix

### Summary of follow-up to each recommendation<sup>18</sup>

#### A. Killing by police

**1. The President should publicly acknowledge his commitment to ending unlawful killings by the police. To this end:**

- (a) The Police Commissioner should be replaced immediately;

*This recommendation has been implemented.*

- (b) Unambiguous public orders should be issued that under no circumstances will unlawful killings by the security forces be tolerated;

*This recommendation has been implemented.*

**2. Police death squad killings should be prevented, investigated, and punished:**

- (a) The Minister for Internal Security should order the disbandment of all death squads, and report to Parliament on the measures he has taken to ensure that the squads no longer operate;

*This recommendation has not been implemented.*

- (b) The Government should establish an independent inquiry into the operation of police death squads. To secure the inquiry's integrity and independence, Kenya should invite foreign police investigators (such as the FBI, or Scotland Yard) to assist. The inquiry's work should begin by investigating the detailed allegations contained in reports of the KNCHR, and in the testimony of the police whistleblower. It should report its findings to Parliament, and be empowered to provide evidence and names for criminal prosecution to the Government;

*This recommendation has not been implemented.*

- (c) All individuals under investigation for their involvement in police death squads should be removed from active duty during that period.

*This recommendation has not been implemented.*

**3. A review of the use of force provisions in the Constitution of Kenya, the Police Act, and the Standing Force Orders should be undertaken to bring them into line with Kenya's obligations under international law.**

*This recommendation has been partially implemented.*

**4. Across-the-board vetting of the current police is necessary. This needs to be part of a comprehensive reform of the police, including the creation of a Police Service Commission, as recommended by the Waki Commission.**

*This recommendation has been implemented.*

**5. The Government should ensure that its expressed commitment to centralize the records of police killings at police headquarters in Nairobi is**

<sup>18</sup> As contained in document A/HRC/11/2/Add.6.

**implemented. All police stations should be required to report such cases to headquarters within 24 hours. The complete statistics of police killings should be made public by the police headquarters on a monthly basis, and the past records of police killings should be made publicly accessible.**

*This recommendation has not been implemented.*

## **B. Killing by the Mungiki**

**6. The Mungiki should immediately cease their harassment, abuse, and murder of Kenyans.**

*This recommendation has not been implemented.*

**7. The Mungiki political leadership should publicly condemn killings and other abuses by their members, and take action to prevent all such crimes.**

*This recommendation has not been implemented.*

## **C. Accountability for police killings**

**8. Internal and external accountability for police should be improved through the following institutional reforms:**

(a) An internal affairs division should be created within the police force, with an element of autonomy from senior management, composed of police who are specially tasked to investigate complaints against the police;

*This recommendation has not been implemented.*

(b) An independent civilian police oversight body with sufficient resources and power to investigate and institute prosecutions against police responsible for abuses should be established by Act of Parliament, in line with Waki Commission recommendation 2 for the police.

*This recommendation has been implemented.*

## **D. Criminal justice system**

**9. The Attorney-General should resign. This is necessary to restore public trust in the office, and to end its role in promoting impunity.**

*This recommendation has not been implemented.*

**10. Political control over prosecutions should be eliminated and the prosecutorial powers currently held by the Attorney-General should be vested in an independent Department of Public Prosecutions.**

*This recommendation has been implemented.*

**11. To reduce corruption and incompetence in the judiciary:**

(a) Radical surgery needs to be undertaken to terminate the tenure of the majority of the existing judges and replace them with competent and non-corrupt appointees;

*This recommendation has not been implemented.*



(b) Judicial appointment procedures should be made more transparent, and all appointments made following a merits-based review of the appointee;

*This recommendation has been partially implemented.*

(c) The Judicial Service Commission should be reformed so that its membership is representative; and its role in appointments, discipline and dismissal of judicial officers be clarified and strengthened;

*This recommendation has been partially implemented.*

(d) The Judicial Service Commission should create a complaints procedure on judicial conduct;

*This recommendation has not been implemented.*

## **E. Accountability for post-election violence**

**12. Parliament should establish a constitutionally entrenched Special Tribunal, as recommended by the Waki Commission.**

*This recommendation has not been implemented.*

**13. The prosecutor of the ICC should immediately undertake, of his own volition, an investigation into the commission of crimes against humanity by certain individuals in the aftermath of the 2007 elections.**

*This recommendation has been implemented.*

**14. Investigations and prosecutions within the regular criminal justice system should also continue. The Office of Attorney-General should publicly report within one month following the publication of this report, and in six month intervals thereafter, on the progress of investigations and prosecutions of post-election related violence.**

*This recommendation has not been implemented.*

## **F. Killings in Mount Elgon**

**15. The Government should immediately set up an independent commission for Mount Elgon, modeled on the Waki Commission, to investigate human rights abuses during the period 2005-2008. The mandate of the commission should include abuses by the SLDF (including the role of officials in supporting the SLDF), abuses by the police and the military, and the reasons for the lengthy delay in Government intervention to stop the SLDF. Independent forensic analysis of the mass graves in Mount Elgon should also take place.**

*This recommendation has not been implemented.*

**16. The Government should make available to ICRC and KNHRC, with assurances of appropriate confidentiality, the names of all those detained at Kapkota military camp, along with photographic and other documentary evidence of the detention and screening regime. This would facilitate the quest to resolve disappearances and enable a thorough accounting to be undertaken.**

*This recommendation has not been implemented.*

**17. The Government should provide funding and other assistance to the families of those who remain disappeared following the police-military intervention.**

*This recommendation has not been implemented.*

**18. The Government should ensure that evidence of killings, and especially the mass graves in Mount Elgon, is not destroyed. Civil society should not be prevented from visiting these sites.**

*This recommendation has not been implemented.*

**19. In light of the seriousness of the allegations against the military, the units deployed to Mount Elgon should be barred from participating in United Nations or African Union peace-keeping operations until independent investigations have taken place. Those found to have committed abuses or to have command responsibility for abuses should be prosecuted and dismissed from the military.**

*This recommendation has not been implemented.*

**20. These measures should be encouraged and supported by the international community, and particularly those countries providing military aid to Kenya.**

*This recommendation has not been implemented.*

## **G. Witness protection**

**21. A well-funded witness protection program that is institutionally independent from the security forces and from the Office of the Attorney-General should be created as a matter of urgency.**

*This recommendation has been partially implemented.*

**22. The international community should continue to support Kenya's efforts to create an effective witness protection program.**

*This recommendation has been partially implemented.*

## **H. Compensation and civil redress**

**23. The Government should ensure that compensation is provided to the families of those victims unlawfully killed by the police or other security forces.**

*This recommendation has not been implemented.*

**24. For unlawful killings and other serious human rights abuses, the one-year statutory limitation period on suits in tort against public officials should be removed.**

*This recommendation has not been implemented.*

## **I. Kenya National Commission on Human Rights**

**25. Police officials should cease their frequent accusations that KNCHR staff are paid by or work with criminal organizations. If the police have evidence of criminal behavior by any person, such persons should be investigated, charged and prosecuted according to regular procedures.**

*This recommendation has been partially implemented.*

**26. Reports by the KNCHR should be tabled in Parliament as soon as practicable after they are presented to the Minister for Justice. The Government should provide a substantive response within a reasonable time period to all KNCHR reports.**

*This recommendation has not been implemented.*

## **J. Intimidation of human rights defenders**

**27. The Government of Kenya should immediately issue instructions to the police, the military, and district and provincial officials to cease and desist from acts of intimidation and harassment of human rights defenders. The text of these instructions should be made public.**

*This recommendation has not been implemented.*

**28. The Government should ensure that independent investigations take place to determine who was responsible for carrying out and ordering the intimidation.**

*This recommendation has not been implemented.*

**29. The Government should accept international offers to provide criminal investigation assistance to identify those responsible for the 5 March 2009 killings of two prominent human rights defenders from the Oscar Foundation Free Legal Aid Clinic, Oscar Kamau Kingara and John Paul Oulu.**

*This recommendation has not been implemented.*

**30. The Government should report, publicly and to the United Nations High Commissioner for Human Rights, within three months following the publication of this report, on the steps it is taking to prevent and prosecute intimidation of human rights defenders.**

*This recommendation has not been implemented.*

## **K. The death penalty**

**31. Kenya should amend its death penalty laws so that it only applies to the crime of intentional deprivation of life, and is not mandatory following conviction.**

*This recommendation has not been implemented.*

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