

PRESS STATEMENT BY PROF. PHILIP ALSTON
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I conducted a fact-finding mission to Kenya from 16-25 February 2009. The aim of my visit was to investigate allegations of unlawful killings, and I focused on three issues of critical importance to the people of Kenya: killings by the police; violence in the Mt Elgon district; and killings in the context of the post-election violence.

Let me begin by expressing my gratitude to the Kenyan Government for having invited me to the country. This willingness to cooperate with the international community in its human rights endeavours is admirable and Kenya deserves full credit.

The biggest challenge for me has been to ascertain the facts in relation to each issue. In terms of post-election violence, the Waki Commission report has made my task much easier. In relation to police killings and Mt Elgon I have engaged in a painstaking and careful process of gathering information. There are, of course, competing accounts of what happened, along with various official denials that any human rights violations have occurred. My work began several months ago as I analysed all of the available government, parliamentary, police, and civil society reports on issues related to unlawful killings. Upon arrival in Kenya I held meetings in Nairobi, Rift Valley Province (Nakuru, Eldoret, and Kiambaa), Western Province (Bungoma and Mt Elgon), Nyanza Province (Kisumu), and Central Province (Nyeri). I met with Government officials at all levels, including the Prime Minister, various Ministers and Assistant Ministers, several Permanent Secretaries, the Chief Justice, the Chief of General Staff, the Police Commissioner and the heads of the Administration Police (AP), the General Service Unit (GSU) and the Criminal Investigations Department (CID), as well as Provincial and District Commissioners, police and NSIS officers in the various provinces and districts. I also met with a wide range of Members of Parliament, members of the diplomatic and donor communities, and the UN country team. In addition, my team and I interviewed well over 100 witnesses and victims on an individual basis. They included victims of militia and gang violence, criminal violence, and police and military violence.

Before announcing my preliminary findings I wish to address several important preliminary issues relating to my mission.

It has already been suggested by some officials that I have been unduly influenced by human rights groups and other civil society organizations. But the breadth and diversity of my information sources belie this allegation. I would add that the quality of reporting and analysis by the leading human rights groups in this country is extremely high by international standards and I have benefited from the comprehensiveness and professionalism of their work.

Undoubtedly the greatest obstacle to my efforts to obtain detailed information from all sources and perspectives has been the failure by the police in particular to provide me with virtually any of the information I have assiduously sought. I will return to this problem below.

Closely linked to this refusal to provide information is the argument, put to me by the Police Commissioner in particular, that allegations of human rights abuses by the police or the military should only be investigated if the relevant information meets the standards that would be required to secure a conviction in a court of law. This is a fundamental misconception of the nature of human rights reporting. It is also a convenient one since it would render

it all but impossible for anyone without the resources of Government at their disposal to meet such an artificial threshold and thus trigger the responsibility of government to investigate. In fact, the task of a human rights investigation is to obtain credible and well-founded information which is sufficient to give rise to an obligation on the part of the Government to undertake its own comprehensive, impartial, and effective investigation of all such allegations. Human rights reports are not required to demonstrate as a prosecutor must, or judge as a court would. But that does not mean that their contents can be ignored by the police or other relevant Government agencies.

Another important preliminary issue concerns the atrocities committed by militias, armed criminals and organized crime gangs in Kenya. There is no doubt in my mind that such criminal groups have committed the gravest of offences, and have terrorized the citizens of Kenya. This knowledge was reinforced in my many meetings with the victims of such criminal groups. But the existence of criminality does not explain or excuse killings by Government forces. All Governments have to deal with criminals, and it is one of the central duties of a Government to protect its citizens from such persons. But a democratic Government operating under the rule of law does not respond to terror with more terror. Surely we have moved beyond the point where it needs to be stated that the proper response to criminality is not to shoot a suspect in the back of the head and dump the body in a forest, but to investigate, arrest, and try the suspect in accordance with law.

Killings by police

Perhaps the most surprising outcome of my visit was the extent to which I received overwhelming testimony of the existence of systematic, widespread, and carefully planned extrajudicial executions undertaken on a regular basis by the Kenyan police. The Police Commissioner in particular, along with various other senior officials, assured me that no such killings take place. But he and his colleagues appear to be the only people in the entire country who believe this claim.

I have received detailed and convincing reports of countless individual killings. It is clear from the many interviews that I conducted that the police are free to kill at will. Sometimes they do so for reasons of a private or personal nature. Sometimes they kill in the context of extortion, or of a ransom demand. Often they kill in the name of crime control, but in circumstances where they could readily make an arrest. My final report will review the evidence in some detail. One example will suffice here. I met with the father and brother of Dr. James Ng'ang'a Kariuki Muiruri, a 29 year old man with three law degrees from the United Kingdom and who had been teaching there. He was killed by police on 24 January 2009 in Nairobi. After a disagreement at a hotel, a police officer stopped the car James and his brother were in, and ordered James to handcuff himself. When he asked why he was being arrested, James was shot three times. The only exceptional things about the case were that James was the son of a former Member of Parliament, and the incident had been witnessed. Otherwise it followed a common pattern. The police officer responsible for the shooting filed a report that a bank robber and Mungiki member had been killed, thus invoking the magic formula designed to ensure that no one would question the need to shoot the suspect dead.

One only has to read the Kenyan newspapers to know that alleged robbers are shot and killed every day of the week by the police in Nairobi alone. Standard operating practice for police around the world would require comprehensive reporting of every such killing and a mechanism designed to ensure that an impartial investigation is undertaken whenever there is reason to suspect that the lethal use of force might have been unlawful. When I attempted to obtain from the Police Commissioner comprehensive data on how many such killings – whether justified or not – occur each year in Kenya, I was told that there was no central database for recording this

information. Similarly, at the provincial level, my efforts to obtain such figures were largely stymied by flat denials of police killings, by the offering of partial or inconclusive data, or by referring me back to Nairobi. It is no exaggeration to say that I was stonewalled at each step by the Police Commissioner and those under his command. Even the answer to a basic and non-controversial question as to the numbers of police currently in Kenya was: “Comment: not immediately available”. The answer to a question as to how many inquiries have been opened by police in response to complaints received against the police was simply to cite the legal provision requiring the opening of such inquiries.

Whenever a person is killed by the police it is essential that an inquiry be undertaken to ensure that the use of lethal force was justified in the circumstances. Under international law applicable in Kenya lethal force is *only* permissible as an act of self-defence or in defence of the life of another. Insofar as s 71 of the Constitution of Kenya permits lethal force beyond this limited scope by allowing such force “for the defense of property” or “for the purpose of suppressing a riot”, it violates clear international standards and should be amended.

Police death squads

In addition to these everyday police killings, there is compelling and detailed evidence that police death squads operate, primarily in Nairobi and Central Province, with an explicit mandate to exterminate suspected Mungiki members. These are not “rogue” squads, but are police who are acting on the explicit orders of their superiors.

The Kenyan National Commission on Human Rights (KNCHR) has carried out extensive investigations into police killings in 2007, and especially into those killings connected to the police death squads. Between June and October 2007, KNCHR documented approximately 500 people killed or disappeared by police. The response of the police – that the claims are “infantile” – is typical of the failure of the police to engage with the substance of the serious and well grounded allegations by human rights groups such as the KNCHR. Instead, they attack the qualifications, mandate, or expertise of their critics.

Yesterday, the KNCHR published extraordinarily detailed and precise testimony by a police whistleblower who acted as a driver for one of the death squads. The whistleblower was murdered in October 2008. His testimony describes in lurid detail 24 separate occasions on which the police extrajudicially executed some 58 suspects whom they had arrested. The testimony clearly implicates a host of senior police officials, including the Police Commissioner. It is imperative that an independent investigation be opened immediately and that prosecutions be launched.

Zero accountability for police killings

There is no doubt that a number of killings by police would have occurred in circumstances where the use of force was lawful by international standards. But there is currently no way in Kenya for such an assessment to be accurately and impartially made.

First, there is zero internal accountability – the police who kill are the very same police who investigate police killings. There is no independent police internal affairs unit which could reliably assess the legality of the use of force. In some cases, “inquiries” are opened which drag on interminably and usually to no effect. In other cases, police refuse to permit families of the deceased or witnesses to the killings to register complaints. Those who

persevere are often threatened with violence and there are reports of whole families “disappearing” after vigorously pressing for police investigations.

Second, external accountability exists on paper only: the Police Oversight Board gazetted in September 2008 has yet to start work, no money has been allocated for its operations, and it has no secretariat. In any event, it is set up in a manner that makes it little more than an extension of the police. It lacks the independence, powers, funding or staffing that would afford it credibility with the public. The Public Complaints Standing Committee receives complaints of killings by police, but police cooperation with the Committee on these issues has been entirely unsatisfactory. Victims are thus left with only one option, which is to turn to civil society and especially to the KNCHR. This explains why the latter’s reports are so detailed and perhaps why the police are so contemptuous of those reports.

In short, the Kenyan police are a law unto themselves and they kill often and with impunity, except in those rare instances where their actions are caught on film or otherwise recorded by outsiders in ways that cannot be dismissed.

The broader context

The justification is often given, either by the police themselves or by others, that the failures of the justice system leave the police with no alternative but to administer “justice” directly by executing those who they “know” to be guilty and who, if arrested, would either never be prosecuted or, if charged, would be acquitted. It is equally true, however, that the police themselves are major beneficiaries of the stunning inadequacies of the Kenyan legal system.

In my final report I will explain in detail the shortcomings of the two key component parts of the criminal justice system apart from the police. They are the Office of the Attorney-General and the judiciary. While I was unable to meet with the Attorney-General I did meet with the Director of Public Prosecutions. The exchange, reproduced in full in the Waki Commission report, between Justice Waki and Attorney-General Amos Wako, provides a vivid illustration of the latter’s role as the chief obstacle to prosecuting anyone in authority for extrajudicial executions. He has presided for a great many years over a system that is clearly bankrupt in relation to dealing with police killings and has done nothing to ensure that the system is reformed. Public statements lamenting the system’s shortcomings have been utterly unsupported by any real action. In brief, Mr Wako is the embodiment in Kenya of the phenomenon of impunity.

The judiciary is the other stumbling block in achieving justice both in relation to accused criminals and to police accused of killing unlawfully. While the Chief Justice was of the view that the courts are fundamentally sound and that any problems of corruption are being adequately dealt with, this view was not shared by the vast majority of Kenyans with whom I spoke. I was told on innumerable occasions that “justice” can be bought by approaching a magistrate’s or judge’s “broker”, and paying a sum to fix the case. The current Judicial Service Commission has done little to improve the judiciary. The broad concerns, embodied in the Waki Commission’s approach and shared by almost all observers, that the existing court system could not conceivably bring justice in relation to post-election violence matters stands as an extraordinary indictment of the bankruptcy of the judicial system as it currently stands. In the medium term there appears to be no alternative but to institute a root and branch reform of the judiciary, perhaps through the establishment of a Constitutional Court which would seek to lead and constrain the rest of the system.

The residents of Mt Elgon district were terrorized by the Sabaot Land Defence Force (SLDF) militia for approximately two years (2006-2008). The Government did very little to protect civilians during this period, despite the fact that the SLDF was engaging in widespread sexual violence, beatings, torture, and murder. Over 700 killings and 120 disappearances by the SLDF have to date been documented. Residents were killed by the SLDF for a range of reasons, including for refusing to pay the SLDF's forced levy, or if they were believed to be "collaborating" with the Government. The Mt Elgon District Security Committee informed me that they sent monthly minutes to the Provincial Security Committee, asking for security reinforcements to counter the SLDF. Their requests were largely ignored. Local and international civil society and humanitarian organisations called for action against the SLDF. They were also ignored. Within Mt Elgon, police all too often looked the other way in exchange for payments from the SLDF. I have also obtained credible evidence from local residents and a range of other sources that politicians and other officials were directly involved in supporting and funding the SLDF.

The Government finally launched a major joint military-police operation in March 2008. Detailed reports by a wide range of observers estimate that hundreds of men were tortured and killed in that operation by the Government's security forces. The number of persons killed or disappeared is conservatively estimated at over 200. According to these reports and the witnesses to whom I spoke these abuses were not carried out by undisciplined military/police units, acting outside of their command structures. Rather, they were systematic and organised. With the assistance of local informants, police and military cordoned villages, detained and frequently beat the male residents, and took them to one of several temporary military bases, the largest of which was Kapkota military camp. There, men were stripped, tortured and interrogated. They were screened before local informants. Those identified as SLDF were taken to the local police station and charged, the others were let go. Those who died as a result of being tortured were dumped in the forests or taken to local mortuaries. The security forces kept detailed records of this operation, and have records on all the 3,265 people detained, as well as extensive photographic evidence of the occurrences at Kapkota camp. My efforts to obtain these records have, not surprisingly, been unsuccessful to date.

These abuses were documented by various local, national and international organizations, including Western Kenya Human Rights Watch (WKHRW), the KNCHR, the Independent Medico-Legal Unit, Medecins sans frontières, and Human Rights Watch. When police officials were asked to respond to these allegations they asserted to me that these organizations were biased and their allegations unfounded because they only documented military/police abuses, and failed to document SLDF abuses. This claim is simply untrue. A further Government response was to cite the results of the police inquiry into the Mt Elgon violence, which purported that the civil society and humanitarian organisations, including the International Committee of the Red Cross, "lack investigation ability, mandate, expertise and capacity." The report fails to substantiate this claim, and actually noted that an ICRC report required "further thorough inquiry" because of its serious allegations of torture and extrajudicial executions. I have read the police inquiry report closely, and my team held an extensive meeting with its authors. The investigation they conducted was limited and superficial, and the resulting report is a whitewash.

In contrast to the police inquiry, a report prepared by the parliamentary committees on Administration and National Security, and Defence and Foreign Relations found that "there are cases of human rights abuses by the security forces". It recommended that such cases be further investigated. Unfortunately, no action has been taken.

The Chief of General Staff denied that the military had any involvement in any torture or unlawful killings at Kapkota camp or elsewhere. Military officials acknowledged that they lawfully killed 8 SLDF members in the course of operations conducted by the Alpha Companies of the First Kenya Rifles and of the 20 Para Battalion. In

response to my query about military involvement in abuses, I was informed, first, that most civilians are not able to tell the difference between police and military officers during such operations because their uniforms are so similar. This is likely true for many civilians. The inability of victims to identify perpetrators has also been hindered by the apparent practice, confirmed to me by many witnesses and also by the District Commissioner of Mt Elgon, of the security forces failing to wear or display any form of individual identification on their uniforms. Nevertheless, I was provided with credible information, including from citizen informants who worked directly with the military to capture the SLDF, that members of the army were involved in the torture.

The military also informed me of a case in which a person who made claims in the media and in court alleging torture by the military had subsequently retracted his allegation. If correct, this would be a vindication of the military in that particular case. There is, however, no basis upon which to extrapolate from a single case and draw the conclusion that all allegations against the military are unfounded. Military officials also suggested that witness accounts I have received of police/military abuses may be fabrications by SLDF sympathisers. Why so many people would fabricate such claims when the immediate likely outcome for them is intimidation by officials is unclear to me. In any event, I certainly spoke with those who had been SLDF members and sympathisers. From them, I obtained extensive information on the two years of abuses committed by the SLDF. But I also spoke with many people who were victims of SLDF violence, and who actually offered their services to the police and military to help track down the SLDF. These are not people with a pre-existing bias against the police or military. In fact, they wanted the security forces to come and protect them from the SLDF. But they did not want to be complicit in torture or have their relatives killed in the process.

In light of the sheer quantity and quality of the evidence of serious wrongdoing, the Mt Elgon events must be independently investigated. An independent and credible investigation cannot be conducted either by the police or the military. An independent commission, with powers and composition modeled on the Waki Commission, should be immediately established. Its purview should include investigating Government officials' involvement in the SLDF, the reasons for the Government's delayed response to SLDF abuses, the conduct of the joint police/military operation including whether human rights abuses were committed and by whom, and an accounting of the remaining missing persons. Until such an investigation is undertaken, the involvement of Kenyan troops in international peacekeeping operations will remain under a cloud. Kenya's bilateral partners should also be pushing more for a review of the military's role in these events.

In the forests of Mt Elgon there are mass graves and sites where bodies were simply dumped on the forest floor. It is likely that both victims of the SLDF and the military/police are contained in those sites. Government authorities have made no systematic attempts to protect these sites or have them examined by independent forensic experts. NGOs who have attempted to study the sites have received veiled threats and been prevented from doing so. The District Commissioner for Mt Elgon assured me that future attempts to study those sites would not be obstructed.

Finally, before, during and after my visit to Western Province, witnesses and civil society representatives were intimidated, harassed and threatened by police, military, and Government officers. Individuals were told not to speak with me about police/military abuses, and only to mention abuses by the SLDF. To back up this injunction, residents at one IDP camp were threatened that the food aid upon which they depended would be jeopardized if they were critical of the military. A number of specifically targeted individuals (including Job Bwonya Wahdalia, Eric Wambasi, Eliud Siyoi Tendet, and Taiga Wanyanja, from the Western Kenya Human Rights Watch and Muratikho Torture Survivor's Organisation), have since had to flee the area. Their families and colleagues have been harassed as to their whereabouts. I sought written assurances from the Government that this conduct will cease. In return I

received an official letter which denies all of the allegations and gives rise to even graver concerns about reprisals than I had initially. This conduct constitutes a grave violation by the Government of the relevant rules and a formal diplomatic protest note will be lodged. The matter will also be drawn to the attention of the Human Rights Council and the situation will be kept under very careful review in the months ahead.

Post-election violence

The Waki Commission report demonstrates clearly the multiple levels at which the state bears responsibility for the over 1,100 killings that occurred in December 2007 and January 2008. First, Government agencies failed to prevent or adequately prepare for violence that ought to have been anticipated. Second, high ranking Government officials were directly involved in inciting, funding and organizing violence. Third, police were directly responsible for shooting demonstrators and others, especially in Nyanza Province.

The Waki Commission recommended the creation of a Special Tribunal to undertake trials at the national level, and failing that arrangements were made to involve the International Criminal Court (ICC). Debates to date have treated these approaches as mutually exclusive. In fact, they need not be. A Special Tribunal is absolutely indispensable if justice is to be done and if the appropriate lessons are to be learned before the next elections. An international tribunal cannot possibly achieve justice on a broad scale in this regard. Civil society and the international community have, however, been remarkably passive in response to opportunistic efforts by politicians with a clear vested interest in promoting impunity to undermine the steps required to create the Special Tribunal. The time has now come for these actors to take a much firmer line in affirming that impunity on such a scale cannot be tolerated.

By the same token, there are powerful reasons for the ICC also to become involved. The ICC would, appropriately, only try the “big fish”, but that too is an essential part of the follow-up to a series of incidents that came perilously close to seeing Kenya descend into the abyss of ethnic warfare. The ICC could move quickly. Comparisons to the time taken in Darfur are entirely misplaced. There is already an impressive array of evidence available, ICC investigators would be able to work effectively in Kenya, and if the Court is not able to deal effectively with a situation in which well over one thousand people were killed in partly planned violence, its standing will be undermined.

These conclusions were strongly underscored by my various meetings in the Rift Valley and Nyanza Provinces. I heard detailed evidence from those who had been the subject of police violence involving gratuitous or indiscriminate shooting, with little or no relevance to the exigencies of controlling rioters or looters. When I asked Rift Valley provincial level officials what investigations they had conducted into these events I was first told that no inquests into police conduct were opened because no complaints had been received. I was then told that some inquests had been opened, and that they would provide me the records. To date, I have not been provided this information. When I met with district level officials in Eldoret, I was again first told that there were no cases of police killings. Further questioning revealed that two officers have in fact been charged with murder.

In Kisumu, I attempted to obtain information from Nyanza provincial police officials on the progress of their investigations into the 82 cases they had recorded of those killed by bullet wounds during the PEV. They could tell me nothing, beyond the basic fact that they had conducted investigations, and sent 60 files to the Attorney-General for assessment. And yet when it came to evidence of the looting that occurred in Nyanza after the election results were announced, they were able to produce for me extensive documentation.

Witness protection

There is no real witness protection program in Kenya. This is a key cause of impunity. Witnesses to crimes by police, politicians and other powerful actors receive death threats. Some are forced to go into hiding in Kenya, or to seek safety in another country. Some are “disappeared”. Some are gunned down in the streets. Witnesses know that speaking out poses a very real threat to their safety. Even high profile members of civil society are not safe. An effective witness protection program, one that is trusted by witnesses and is independent from very the officials against whom the witness is testifying, is essential in the fight against impunity. In the absence of such a program, no accountability measures – whether they be with respect to investigations in Mt Elgon or the setting up of a Special Tribunal – will be effective.

Compensation

Much attention is paid to remedies in criminal law for the many killings that have taken place. These are essential. But it is also important that the Government fulfill its responsibility to provide full reparations, including compensation, to the families of deceased victims. Throughout Kenya, I met widows and children of victims. Many of them were unable to meet their basic needs in the absence of their husbands or fathers.

Preliminary recommendations

1. *Official acknowledgement:* The President of Kenya should publicly acknowledge the widespread problem of extrajudicial executions in Kenya and the need for sweeping reforms to the policing sector. His silence to date is both conspicuous and problematic. Any serious commitment to ending the impunity that currently reigns in relation to the widespread and systematic killings by the police should begin with the immediate dismissal of the Police Commissioner. In the absence of such a step it will be impossible to conclude that there is a strong commitment at the very top to deal with this problem.
2. *Orders:* Clear orders should be provided to all members of the security forces that under no circumstances will unlawful killings by the law enforcement or security forces be tolerated.
3. *External police oversight:* A truly independent civilian police oversight body with sufficient resources and power to investigate and institute prosecutions against police responsible for abuses should be established, in line with Waki Commission recommendation 2 for the police.
4. *Recording of police killings:* The records of police killings should be centralized at police headquarters in Nairobi. All police stations should be required to report such cases to headquarters as soon as they occur. 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.
5. *Office of the Attorney-General:* The resignation of the Attorney-General is an essential first step to restoring the integrity of the office and ending its role in promoting impunity in Kenya. In order to ensure independent prosecutions, the prosecutorial powers held by the Attorney-General should be removed, and an independent Department of Public Prosecutions created.

6. *ICC and Special Tribunal:* The Government of Kenya should establish a constitutionally entrenched Special Tribunal, as recommended by the Waki Commission. In the meantime, 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.
7. *Police vetting:* As part of an overall strategy to improve the police, across-the-board vetting of the current police force is necessary. This would need to be part of a comprehensive reform of the police, along the lines recommended by the Waki Commission and as reflected in Agenda 4. Those initiatives should not be held hostage to the debates over the Special Tribunal.
8. *Independent Commission for Mt Elgon:* The Government should immediately act to set up an independent commission for Mt Elgon, modeled on the Waki Commission, to investigate human rights abuses from 2005-2008.
9. *Witness protection:* The essential role of witness protection in countering impunity should be recognized. A well-funded witness protection program independent from the security forces and from the Attorney-General should be established as a matter of urgency.
10. *Kenya National Commission on Human Rights:* The reports of the KNCHR should be tabled in Parliament as soon as practicable after they are presented by the KNCHR to the Minister for Justice. The Government should provide an official and substantive response to all KNCHR reports.
11. *Compensation:* The Government of Kenya should ensure that compensation is provided to the families of the victims of those unlawfully killed by police and other security forces.