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人权理事会  
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增进和保护所有人权、公民、政治、经济、  
社会和文化权利，包括发展权

法外处决、即审即决或任意处决问题特别报告员  
菲利普·奥尔斯顿的报告\*

增 编

对肯尼亚的访问\*\*

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\* 迟交。

\*\* 本文件的内容提要以所有正式语文分发。报告本身载于内容提要之后的附件，仅以提交语文原文照发。

## 内 容 提 要

特别报告员于 2009 年 2 月 16 日至 25 日访问了肯尼亚，以便确定法外杀人的种类和起因；调查对这种杀人负有责任的人是否受到追究；并建议减少杀人和有罪不罚事件的建设性措施。报告的主要重点是警察杀人的事件，埃尔冈山地区的暴力事件，及选举后阶段的杀人事件。

报告员在肯尼亚八个省或地区中的五个省区与政府官员、民间社会代表、受害者和证人进行了访谈，并与联合国机构的官员和外交界人员进行了访谈。与证人进行了 100 多次长时间约谈。特别报告员在访问前查阅了来自政府和民间社会的详尽报告，在访问期间也作出很大努力听取各种不同的观点并考虑相互矛盾的信息，以便对问题取得公正和平衡的理解。

特别报告员得出的结论是，肯尼亚的警察经常实行处决，有罪不罚的气氛甚嚣尘上。最令人不安的是存在受令于高级警官、负责铲除犯罪组织的嫌疑首领和成员的行刑队。这种帮派确实骚扰并处决肯尼亚人，消除这一威胁也确需要警方严格的监督。但是警察放任自由地杀人根本无法铲除这类罪行；相反，那种情况给人的感觉就是警察善于杀人却不懂得执法。警察的行动要导致真正的安全，就必须以尊重所有人的人权，包括嫌疑犯和受害者的人权的方式来进行。警方对杀人不必负责是由于没有有效的内外调查或监督机制。

特别报告员的结论是，在埃尔冈山，Sabaot 土地防卫军游击队和政府的国防军双方都普遍施暴虐待埃尔冈山居民，包括酷刑和法外处决。记录这种侵权行为的很多各种来源的详细报告没有得到警察和军队的认真调查。双方依然否认有这种侵权行为，他们对民间社会完整系统的报告所作的反应一直是按部就班地威吓人权维护者和证人。

2007 年 12 月举行大选后发生了广泛的暴力事件。以 Waki 法官为主席的全国调查委员会详细阐述了当时 1,113 人被杀的背景和起因。该国政府对于建立这一卓有成效的独立调查机制是有功的。但是，尽管迫切需要采取措施、解决暴力的体制性根源并追究侵权行为的责任，但是 Waki 委员会所作的建议迄今仍没有执行。将近 18 个月过去后，那些对选举后暴力负有责任的人，包括对法外处决负有责任的警员以及那些组织和煽动暴力的警员，依然没有受到法律追究。这些杀人事件的证人不敢讲话。已经耗去大量资源的证人保护方案还没有保护过一个证人。

在特别报告员访问期间对他作证的许多人权维护者受到了国防军人员及其他政府官员的威胁和骚扰。访问结束刚 2 个星期，就有两名特别积极报告警察行刑队的活动分子被杀。有人企图系统地制止批评肯尼亚国防军的声音。

尽管目前的情况很糟，但还远远不是无可救药。如果肯尼亚愿意的话，它可以大幅度减少法外杀人事件的程度。推进改革进程的多数体制和法律结构是存在的。国际社会很乐于支持肯尼亚公民在政治上参与的那些真正的改革方案，而民间社会很专业也很认真，并通过监督侵权行为和提议改革而对保护人权作出大量贡献。

许多法外处决事件的起因很明确，要改善局面，也可以采取比较简单的步骤。肯尼亚政府可以在杀人和有罪不罚行为继续存在的条件下选择否认问题的存在或坚称问题得到了控制；这条路会在比较短的时间里毫不留情地导致混乱和大规模的暴力。不然，它也可以选择承认问题的严重性，并执行结束法外处决的改革方案，从而发出有罪不罚现象不会得到容忍的信息。

**Annex**

**REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL,  
SUMMARY OR ARBITRARY EXECUTIONS, PHILIP ALSTON,  
ON HIS MISSION TO KENYA (16-25 February 2009)**

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## I. INTRODUCTION AND APPLICABLE INTERNATIONAL LAW

1. I visited Kenya from 16-25 February 2009. My principal focus was on allegations of unlawful killings by the police in their day to day work, by the military (especially in relation to the conflict in Mt Elgon), and by diverse actors in the violence that followed the December 2007 general elections. Of particular concern was the impunity enjoyed by those responsible for the vast majority of these killings.

2. A briefing on the contents of my preliminary findings was provided in person to the Minister of Justice and a copy of the conclusions and recommendations presented at the press conference was provided well in advance to both the principal liaison officer for the mission, at the Ministry of Justice, as well as to the Ministry of Foreign Affairs.

3. Kenya is a party to both the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights. International law prohibits the "arbitrary deprivation of life",<sup>1</sup> and obligates governments to both "respect and ensure" the right to life.<sup>2</sup> Thus, governments themselves must desist from unlawful killings, and must protect their people from killings by others.<sup>3</sup> In order to save lives, lethal force may be used by law enforcement officers, as long as it satisfies the twin safeguards of necessity and proportionality.<sup>4</sup> Thus, police officers may shoot to kill only when it is clear that an individual is about to kill someone (making lethal force proportionate) and there is no other available means of detaining him or her (making lethal force necessary).<sup>5</sup>

4. Kenya's international obligations also require it to effectively investigate, prosecute, and punish all those responsible for unlawful killings.

## II. EXTRAJUDICIAL EXECUTIONS BY POLICE

5. Killings by the police are widespread. Some killings are opportunistic, reckless or personal. Many others are carefully planned. It is impossible to estimate reliably how many killings occur, because the police do not keep a centralized database. But police shootings are

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<sup>1</sup> ICCPR, Art 6(1); ACHPR, Art 4.

<sup>2</sup> ICCPR, Art 2(1).

<sup>3</sup> The obligation to protect is also mandated in Kenyan domestic law: Police Act, s 14; Criminal Procedure Code, s 62.

<sup>4</sup> I have discussed the principles of necessity and proportionality, including on their elaboration in the UN Code of Conduct for Law Enforcement Officials and in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials in a report to the General Assembly, A/61/311, paras. 33-45.

<sup>5</sup> A/61/311, paras. 33-45; see also Basic Principles, Principle 9; Code of Conduct, art. 3.

reported nearly every day of the week by the press and the total number is certainly unacceptably high. In just a five month period in 2007, the Kenya National Commission on Human Rights (KNCHR) documented approximately 500 people killed or disappeared.<sup>6</sup>

6. There are six primary factors which account for the frequency with which police can kill at will in Kenya: (i) official sanctioned targeted killings of suspected criminals; (ii) a dysfunctional criminal justice system incentivizes police to counter crime by killing suspected criminals, rather than arresting them; (iii) internal and external police accountability mechanisms are virtually non-existent; there is little check on, and virtually no independent investigations of, alleged police abuses; (iv) use of force laws are contradictory and overly permissive; (v) witnesses to abuse are often intimidated, and fear reporting or testifying; and (vi) the police force lacks sufficient training, discipline and professionalism.

### A. Context

7. Kenyans are subjected to significant levels of both indiscriminate and organized violent criminality. Armed robbery, carjacking, and violent street crime are all common.<sup>7</sup> In addition, criminal organizations exercise vicious control over significant geographical areas and infrastructure in slums in Nairobi and Central Province.

8. There are many such criminal groups, but the Mungiki have become particularly prominent.<sup>8</sup> In many slums in and around Nairobi, there have historically been high levels of insecurity, and few state services. In the early 1990s, the Mungiki, initially a cultural-religious movement, began providing security and basic services in slums.<sup>9</sup> While many of these activities

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<sup>6</sup> KNCHR, *The Cry of Blood: Report on Extra-Judicial Killings and Disappearances* (September 2008).

<sup>7</sup> According to information provided by the police, robbery rates were as follows: 2004 (2251), 2005 (2511), 2006 (1257), 2007 (759). Robbery with violence: 2004 (5018), 2005 (4010), 2006 (3594), 2007 (2643); murder: 2004 (1595); 2005 (1260); 2006 (1286), 2007 (1261).

<sup>8</sup> Other criminal organizations operating in Kenya include: the Sungu Sungu, the Kisungu Sungu, and the Taliban (a predominantly ethnic Luo vigilante group, operating in slums in eastern Nairobi). For academic analysis of the Mungiki, see: Mutuma Ruteere, "Dilemmas of Crime, Human Rights and the Politics of Mungiki Violence in Kenya" (2008); David M Anderson, "Vigilantes, Violence and the Politics of Public Order in Kenya", *African Affairs* (2002) 101, 531; Grace Nyatugah Wamue, "Revisiting our Indigenous Shrines through *Mungiki*", *African Affairs* (2001) 100, 453; Peter Mwangi Kagwanja, "Facing Mount Kenya or Facing Mecca? The Mungiki, ethnic violence and the political of the Moi succession in Kenya, 1987-2002", *African Affairs* (2003) 102, 25.

<sup>9</sup> Most accounts of the origins of the Mungiki date them to the late 1980s. They started in the Rift Valley, drawing members from the Kikuyu tribe. Early organizers drew upon the Mau Mau struggle, and articulated their aims in terms of liberation from oppression, and a return to indigenous traditions. Membership grew in the Rift Valley in the early 1990s, as the Kikuyu increasingly became victims of ethnic violence. Membership then spread to the slums of

were originally appreciated by slum residents, as the Mungiki grew, so did its level of control, and ruthless tactics were employed to preserve it. Today, the Mungiki are responsible for a large number of crimes, including murder. I spoke with many people who live and work in areas now controlled by the Mungiki.<sup>10</sup> Residents and business owners are extorted for “protection” fees.<sup>11</sup> Matatu (bus) drivers are harassed on a daily basis. Those who resist organized criminal organizations are threatened, beaten or killed, often in an especially brutal manner, and residents are increasingly terrified of the progressively more violent criminal control of their neighborhoods.<sup>12</sup>

### **B. Evidence of widespread killings by police**

9. The Government has a clear obligation to protect citizens from Mungiki and other criminal violence, while respecting human rights, including the right to life. Suspects should be arrested, charged, tried and punished accordingly. In a context of violent criminality, police will inevitably be required to use force on occasion, and sometimes lethal force in order to protect life. The police, including the Police Commissioner, assured me that there have been no unlawful police killings. However, as I detail below, the evidence is compelling that the police respond - frequently - with unlawful force: murdering, rather than arresting suspects. Further, investigations by police are so deficient and compromised that claims by the police that all killings are lawful are inherently unreliable and unsustainable.

10. During my mission, I received compelling evidence that death squads - including one called *Kwekwe* - exist within the police force in Kenya, and that these squads were set-up to eliminate the Mungiki and other high-profile suspected criminals, upon the orders of senior

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Nairobi. In the slums, the Mungiki initially cleaned the sewerage and toilet systems and connected water supplies, and began campaigns against alcohol/drug abuse and rent hikes and conducted HIV/AIDS awareness.

<sup>10</sup> Mungiki activities primarily affect those living in Nairobi and Central Province. According to information provided to me by provincial officials in Central Province, the areas most affected by Mungiki activities in Central Province are the districts of: Thika, Kiambu, Murang’a South, Nyandarua, and Murang’a North.

<sup>11</sup> Fees depend on location and “service”. For example, each matatu is generally required to pay a daily fee of between 100-200 KSH.

<sup>12</sup> At various times, Mungiki-matatu violence has flared. For example, in March 2007, some 600 matatu owners and drivers held a demonstration against Mungiki activities along bus routes from Kiambu, Banana, and Githurai to Nairobi. According to Government accounts of the incident, matatu drivers burned the homes of suspected Mungiki members. Two matatu drivers were subsequently murdered. In April 2009, violence erupted between the Mungiki and a vigilante group (“the Hague”), apparently formed by residents to counter Mungiki control. Some 30 people were killed.

police officials. Detailed evidence was provided by civil society investigations,<sup>13</sup> witnesses to the squad's activities, survivors of attempted killings, family members of deceased or disappeared victims, and victim autopsy reports indicating shots at close range and back entry wounds. A further key component of this evidence is the now public testimony of a police whistleblower, who recorded his statement in July 2008, before he was murdered while in hiding in October 2008. His account provides, in precise and often excruciating, detail the composition and operations of the death squad in which he was a part, and the circumstances of the murder of 67 persons between February 2007 and July 2008. Together, this evidence implicates the Commissioner of Police, and senior police officials from the Criminal Investigation Division, Special Crime Unit, and the Criminal Intelligence Unit. From this large amount of testimony, it is possible to set-out in detail the operations of the death squads:

- The suspected Mungiki or other criminal suspects appear to nearly always be known and individually targeted by police in advance. The police carrying out the operations (those driving the vehicles and committing the murders) are generally ordered by senior police to pick up a specified individual at a particular location (often his home, workplace, or a road on which he is believed to be traveling).<sup>14</sup>
- While most suspects are individually targeted, police will generally also detain others who may be accompanying the target at the time of arrest.
- Very often, the initial detention is witnessed by family members, co-workers, or bystanders.<sup>15</sup> In one well-known case, a man was actually photographed by a member of the press while being arrested.<sup>16</sup>
- Some suspects are murdered at the location of arrest. They are generally ordered by the police to lie down on the ground and are then shot. Police then attempt to set the crime scene to look like a "shoot out" occurred between criminals and police - weapons will be placed next to the bodies of the suspect, and fired into the air to give the appearance of an exchange of fire. Such victims are often taken to the mortuary by the police.<sup>17</sup>

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<sup>13</sup> E.g., KNCHR, *The Cry of Blood: Report on Extra-Judicial Killings and Disappearances* (September 2008).

<sup>14</sup> E.g. Appendix II: Case 6, Case 7, Case 8, Case 9.

<sup>15</sup> Appendix II: Case 4, Case 7, Case 8, Case 11, Case 13.

<sup>16</sup> Appendix II: Case 3.

<sup>17</sup> Appendix II: Case 3.

- In other cases, the suspects are not immediately murdered, but are taken from the site of initial detention in generally unmarked police vehicles or private vehicles.<sup>18</sup> The squads frequently work in convoys of 2-5 vehicles.
- Once detained, the suspect is most often held irregularly, and no record of the detention is made in the police Occurrence Book. Some suspects will be taken to police stations, or moved between multiple stations. Others are held in vehicles for a number of hours. Once family members realize that their relative was arrested or is missing, they generally embark on a search of police stations.<sup>19</sup> Family members usually report obstruction or intimidation from officials in this process.
- In some cases, the police demand a ransom from the detainee, or call the relatives and demand a ransom upon threat of death to the detainee. In many cases, payment of the ransom is sufficient to obtain the detainee's release. Some victims have been detained and forced to pay ransoms on multiple occasions. Others have paid the ransom, but were then followed by police and subsequently murdered.<sup>20</sup>
- Those suspects who are murdered in locations other than the site of initial detention are generally eventually taken in vehicles to a remote area, such a forest or farmland. Many of these individuals are interrogated and tortured for a number of hours. Those who are suspected Mungiki are asked about their role in the Mungiki sect, and for the names and details of other Mungiki members or leaders.<sup>21</sup>
- During the detention or interrogation period, there is often communication via mobile phone between the interrogating officers, and senior officers at headquarters or police stations. In at least one case, the interrogations were tape-recorded, and played back via phone to senior police.<sup>22</sup>
- Those suspects taken to remote areas are typically killed through strangulation, or by being beaten to death by pangas (machetes), rungus (sticks), or other means. Their bodies are generally left in the forest or farm area, and found by local residents.<sup>23</sup>

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<sup>18</sup> Appendix II: Case 6, Case 7, Case 9.

<sup>19</sup> Appendix II: Case 3, Case 7, Case 11, Case 13.

<sup>20</sup> Appendix II: Case 4, Case 5, Case 6.

<sup>21</sup> Appendix II: Case 7.

<sup>22</sup> Appendix II: Case 7.

<sup>23</sup> Appendix II: Case 6, Case 7, Case 9.

- Many victims are last seen by witnesses or family members being arrested by police, but are never found.<sup>24</sup>

11. Evidence presented to me indicates that these targeted and planned death squad killings are only the tip of the iceberg of police killings in Kenya. In addition to the death squad killings described above, I received detailed information on a wide range of circumstances in which unlawful killings have taken place. Sometimes, the police kill in the context of a bribery or extortion attempt. Some incidents appear to be motivated by purely private reasons (such as a personal dispute).<sup>25</sup> In others, the evidence suggests that the police were shooting indiscriminately or recklessly.<sup>26</sup>

12. Lethal force is also commonly used in legitimate law enforcement operations in which the police could have readily made an arrest. Some of these killings would be prevented through the provision of unambiguous guidelines on when police may use lethal force. The use of force by police is regulated by the Constitution of Kenya, the Police Act, and the Force Standing Orders.<sup>27</sup> In addition to being unclear and contradictory, these laws do not meet the requirements of international law which requires the use of force to be both necessary and proportionate, and permits intentional lethal force only where it is required to protect life.<sup>28</sup> The Constitution of Kenya, for example, states that there is no violation of the right to life if, *inter alia*, the death occurred as a result of reasonably justifiable force used to protect a person from violence, to defend property, to effect a lawful arrest, to prevent an escape, to suppress a riot, or to prevent the commission of a criminal offence.

### C. Official response to allegations

13. Some Government officials stated that if killings occurred, they were committed infrequently and by “rogue” officers. To their credit, a small number of Government officials did acknowledge the magnitude of the killings. But senior police officials were unwilling to acknowledge the problem at all: in essence, their response was one of denial, stone-walling, and obfuscation. In the provinces, my efforts were stymied by blanket denials by police, the provision of partial or inconclusive data, or by referring me back to police headquarters in Nairobi. The official police account of any killing is generally predictable: the suspect was an armed criminal, there was a “shoot-out”, and the police reacted with appropriate force. Senior

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<sup>24</sup> Appendix II: Case 4, Case 8, Case 13.

<sup>25</sup> Appendix II: Case 1.

<sup>26</sup> Appendix II: Case 2.

<sup>27</sup> Constitution of Kenya, s 71; Police Act, s 28; Criminal Procedure Code, s 21; Police Force Standing Orders, Appendix 51A.

<sup>28</sup> See: A/61/311, pages 12-16.

police flatly denied to me any knowledge of the *Kwekwe* death squad. And yet its existence was confirmed in Parliament by the Minister of State for Provincial Administration and Internal Security, Professor George Saitoti.<sup>29</sup>

14. On the first day of my mission I provided the Police Commissioner with a short list of issues on which I sought information. At the end of the mission, I received a written response. It largely refused to provide even basic information. For instance, the initial response to my request for the numbers of police employed in Kenya was, “not immediately available”. A subsequent response also declined to provide the information for national security reasons, but suggested a population to police ratio of 1:800.

15. During my mission, the police stated that they could not tell me how many people were killed by the police (whether in self-defence or otherwise), because there was no centralized data-keeping or monitoring; rather, records were kept in the inquest file register maintained at each police station. My press statement at the conclusion of my mission noted that this was simply unacceptable. Following my mission, I have been informed by the Government that the committee reviewing police standing operation procedures has been directed to draft a regulation establishing an updated database at police headquarters on all killings by police. I welcome this positive development.

16. In other respects, however, the police response to my visit has consisted of continued denials of all wrongdoing, ad hominem attacks against me, and apparent police involvement in the broad daylight assassination of two human rights defenders with whom I met. Rather than in any way addressing the substance of the allegations contained in my initial statement, some police officials have sought to structure public debate so that criticisms of police actions are equated with condoning criminal activity. In this way, the police have tried to position civil society - and also my own reporting - as aligned with the interests of criminal organizations. This in turn sets up the police to launch further attacks against the Mungiki and others, while failing to take any steps to address the real issues. Efforts to monitor and reform policing so that it is carried out with respect for human rights do not mean being “soft” on crime. Security policies only truly provide security if the rights of all - victims, the general public, police, and criminals - are respected. The violent police response to crime has done nothing to promote security. Innocent bystanders have been shot by police, the public has lost faith that the police force can protect them, and the police have undertaken few if any measures to investigate and prosecute those Mungiki and other criminals who continue to terrorize and extort private citizens.

17. Criminals should be arrested, not taken to a forest and tortured to death. In Kenya, members of criminal organisations - because of their regular intimidation of residents - are easily identifiable. This was repeatedly noted by witnesses to Mungiki violence and matatu drivers. If the police were serious about crime control, they would be able to locate and arrest suspects.

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<sup>29</sup> National Assembly of Kenya, Official Report, 12 February 2009, p 27: The Minister of State for Provincial Administration and Internal Security (Prof. Saitoti): “Mr. Speaker, Sir, I would also like to say that there is a body called *Kwekwe* Squad that has been talked about here. We had that body and I would like to inform this House that, instructions were given out for its disbanding.”

Unfortunately, in many Mungiki controlled areas, police profit from criminal control by accepting bribes to permit continued Mungiki control. And in cases reported directly to me in the presence of the police, when called to respond to Mungiki extortion police officers have taken no action against the criminals, but instead exploited for themselves the opportunity to extort the public.

#### **D. Removal of the Police Commissioner**

18. The regular police force is under the command and direction of the Commissioner of Police, who is appointed directly by the President.<sup>30</sup> There is no mandated consultation, no recruiting guidelines, and no formal vetting for the appointment.

19. While the current Police Commissioner was originally seen as a potential reformer, and rapidly established a highly centralized leadership style, he has since become the major single obstacle to police reform. As section II. B above indicates, there is abundant evidence linking him to a central role in devising and overseeing the policy of extrajudicially executing large numbers of “suspected criminals”. He flatly refuses to acknowledge that any unlawful killings are taking place, derides detailed and compelling reports to the contrary, blocks investigations, and prevents all transparency.

20. Most importantly in terms of the interests of the Kenyan population, he has utterly failed to devise any law enforcement strategy worthy of the name for dealing with Mungiki and other forms of criminality. Widespread killings of suspects and innocents alike, combined with a failure to reign in rampant corruption on the part of key officials, do not add up to a strategy for policing.

21. The President of Kenya should remove the current Police Commissioner, and formal guidelines, consultation, and vetting should be institutionalised for future appointments. Ideally, this would take place through a newly created Police Service Commission, as recommended by the Waki Commission.

#### **E. Accountability and the criminal justice system**

22. Failures in the criminal justice system, and in internal and external police accountability mechanisms, encourage the commission of unlawful killings by police.

23. The criminal justice system as a whole was widely described as “terrible”. Investigation, prosecution, and judicial processes are slow and corrupt. Predictably, this leads to widespread distrust of the system, and impunity for criminals (particularly for those with power and money). It also acts as an incentive for police to kill, rather than arrest suspects: because of the low probability of securing convictions, many police think it is easier and more effective to take “justice” into their own hands. And, significantly, police themselves also benefit from the systemic faults - they are rarely held to account for the abuses they commit.

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<sup>30</sup> Constitution of Kenya, Art 108.

24. In theory, if a killing occurs, the police provide the relevant information to a magistrate, so that an inquest can be opened.<sup>31</sup> Where investigations disclose evidence that a private individual or a police officer is criminally responsible for a death, a murder case file is opened, and the case is prosecuted in Kenya's High Court by state counsel from the Attorney-General's office. The reality is very different.

### 1. Police investigations

25. Police investigations of murders are generally inadequate, due in large part to resource, training, and capacity constraints. But investigations are especially poor when the police themselves are implicated in a death. The cause of this is in part institutional: there is no independent internal affairs unit within the police force. Such cases are generally investigated by the Criminal Investigations Division (CID) - the division responsible for all complex or serious investigations. But the problem is also one of will: those at the top of the force lack the determination to investigate themselves, or the will to institute the reforms that would improve transparency and accountability.

26. The police response to the KNCHR's report on extrajudicial executions is a typical example of police unwillingness to conduct serious investigations. The police report on the KNCHR investigations challenges the investigative capacity and skill of the KNCHR, criticizes the KNCHR for reporting the allegations to the President of Kenya and the UN, and concludes that there was "no" evidence of police complicity in the killings.<sup>32</sup> A similar response was given in response to the KNCHR's public release of the whistleblower testimony in February 2009. The police issued a statement challenging the reputation of the whistleblower, questioning why the KNCHR released the statement when it did, questioning the KNCHR's commitment to human rights, and intimating that KNCHR officers receive payments from the Mungiki.<sup>33</sup>

27. During my visit, police officials throughout the country blocked my attempts to find detailed information on investigations and inquests. For instance, the response to my written request for the number of inquiries opened by the police in response to complaints received against the police, was simply to state that every "action against a police officer is preceded by an inquiry file which is guided by the following regulations", and then to quote the law. Nevertheless, particularly damning evidence of the quality of police investigations is revealed in communications between the police and the Attorney-General. The Attorney-General provided me a significant volume of correspondence between his office and police headquarters with respect to various cases in which police were alleged to have killed. The correspondence consisted of repeated letters from the Attorney-General directing the police to charge certain

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<sup>31</sup> Criminal Procedure Code, s 386.

<sup>32</sup> "Kenya Police Preliminary Report by a Board of Inquiry to Investigate the Alleged Execution and Disappearance of Persons", sent to the KNCHR by the Permanent Secretary, Secretary to the Cabinet and the Head of the Public Service on 17 March 2008.

<sup>33</sup> "Allegations by KNHRC", Statement by Kiraithe E.K., For Commissioner of Police, 24 February 2009.

individuals or to conduct further investigations. In one matter, two police officers opened fire at a group of youths on 31 December 2001. One person was killed, and three were seriously wounded. In March 2002, the police forwarded the investigation file to the Attorney-General. In May 2002, the Attorney-General directed the police to charge two police officers with murder and unlawful wounding, once certain gaps in investigations were remedied. After a number of months and reminder letters from the Attorney-General, the two policemen were eventually charged. However, a Magistrate dismissed the murder case because of a lack of evidence. The police had failed to conduct the additional investigations requested. In another murder case, the Attorney-General, through the DPP, sent letters to no avail in April, June, August, and September 2008, and January 2009 requesting the police to conduct further investigations so that a trial could proceed.

## 2. Prosecutions

28. The Attorney-General is a constitutional office-holder, a member of the National Assembly, a member of the Judicial Service Commission, the principal legal advisor to the Government, and has the constitutional power to conduct or stop prosecutions.<sup>34</sup> For offences which can be heard in Magistrate's Courts (including, for example, robbery), prosecutorial functions are delegated by the Attorney-General to the police. For offences over which only the High Court has jurisdiction (such as murder), prosecutorial functions are delegated to the Director of Public Prosecutions (DPP). The DPP has no security of tenure. His is a department of the office of the Attorney-General, not an independent office.

29. The Attorney-General has security of tenure, for life, and has been in office since 1991. He has overseen, for nearly two decades, a system that clearly does not work. The Attorney-General has the constitutional power to "require" the Police Commissioner to investigate any matter relating to an alleged offence.<sup>35</sup> As documents provided by the Attorney-General clearly indicate, he is all too aware of the grave deficiencies in police investigations. But instead of using his constitutional powers to force individual investigations, and to promote essential institutional reforms, letters simply go back and forth for years, with cases neither investigated sufficiently, nor prosecuted. In addition, the repeated failure to prosecute *any* senior officials for their role in large-scale election violence over a period of many years (discussed below in section IV on post-election violence) has led to a complete loss of faith in the commitment of his office to prosecute those in Government with responsibility for crimes.

30. The Attorney-General and successive police commissioners have engaged in a game in which each insists the ball is in the court of the other, while both know that it has in fact been hidden so that no outcome can ever be declared. The Attorney-General then presents himself as the helpless victim of the intransigence or malfeasance of others. But this is a complete misrepresentation of the situation of an individual who has wielded immense power through a succession of government. In fact, his unrelenting failure to prosecute any senior officials implicated in extrajudicial executions renders him not just complicit in, but absolutely

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<sup>34</sup> Constitution of Kenya, Arts 26, 36, 68.

<sup>35</sup> Constitution of Kenya, Art 26.

indispensable to, a system which has institutionalized impunity in Kenya. In order to restore the integrity of the office, the current Attorney-General should resign or be required to leave office. In future, prosecutions should be undertaken by a constitutionally entrenched and independent Department of Public Prosecutions. The powers to prosecute and to intervene in prosecutions should not be held by a political office-holder.

### 3. The judiciary

31. The judiciary in Kenya is an obstacle in the path to a well-functioning criminal justice system.<sup>36</sup> Its central problems are crony opaque appointments, and extraordinary levels of corruption. I received considerable evidence of judges and magistrates being paid to slow the progress of cases, to “lose” files, or to decide a case in a particular manner. Many reports over the last decade have documented this, and significant structural reforms have repeatedly been proposed to increase the transparency and accountability of the judiciary.<sup>37</sup> The Kibaki Government botched its 2003 “radical surgery” strategy,<sup>38</sup> and has done little since, despite the strongly proclaimed views of the Prime Minister and the former Minister of Justice that drastic reforms are required. The Chief Justice is of the view that the courts generally function well, and that corruption and discipline are being adequately dealt with by the Judicial Service Commission (JSC). In fact the JSC has done precious little to improve the functioning of the courts. , and they are in need of radical reform.

32. It is essential that the judicial appointments procedure, and oversight of discipline of judges and magistrates is reformed. To this end, the JSC should be transformed so that its membership is representative; judicial officials are transparently vetted before appointment; merit-based criteria are met by appointees; and the Commission should have a more significant and transparent role in monitoring and removing judges. It should also establish an independent complaints procedure in relation to judicial behaviour.

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<sup>36</sup> The structure and powers are set out in the Constitution of Kenya, Chapter IV; the Judicature Act; the Magistrates Courts Act.

<sup>37</sup> See, “Report of the Committee on the Administration of Justice” (1998) (the Kwach report) (detailing allegations that there was “actual payment of money to judges and magistrates to influence their decisions.”); Constitution of Kenya Review Commission, “Report of the Advisory Panel of Eminent Commonwealth Judicial Experts” (2002) (concluding that “the Kenyan judicial system suffers from a serious lack of public confidence and is generally perceived as being in need of fundamental structural reform.”). Also see yearly reports on Kenya by Transparency International (reporting the judiciary as one of the most corrupt institutions in Kenya).

<sup>38</sup> The Government set up an “Integrity and Anti-Corruption Committee of the Judiciary in Kenya”, which released its report (the Ringera Report) in 2003. The report implicated 5 (out of 9) Court of Appeal justices, and 18 (out of 36) High Court justices, and 82 (out of 254) magistrates in corruption. Many of the named justices and magistrates resigned, others challenged the report’s findings. See International Commission of Jurists, “Kenya: Judicial Independence, Corruption and Reform” (April 2005).

#### 4. External oversight of police

33. External oversight of the police - through ombudsmen, oversight boards, or other institutional models - is essential in any system designed to ensure police accountability. The Kenyan police have long lacked such oversight, and this is a key systemic flaw ensuring impunity and continued killings.

34. While the police have demonstrated little will to promote real accountability, they should in fact be the first to support improved oversight. It would permit them to demonstrate to the public that they are professional, transparent, and trustworthy.

##### *Public Complaints Standing Committee*

35. A Public Complaints Standing Committee (PCSC) was set up on 21 June 2007.<sup>39</sup> Its mandate is to receive complaints from the public against public servants, including the judiciary and police. I met with the PCSC, and its members are serious, and well-intentioned. However, the PCSC has no investigative capacity, and - short of the ability to receive complaints and channel them to the relevant Government department for response - no power. In fact, the PCSC often refers cases to the KNCHR because of the KNCHR's greater capacity to investigate and follow-up on cases. At the time of my visit to Kenya, the PCSC had three complaints of killings by police before it. The complainants conducted their own investigations. The PCSC brought the cases to the attention of the police, but no progress had been made. The PCSC clearly does not have the teeth necessary to bring to account police perpetrators of abuse.

##### *Police Oversight Board*

36. On 4 September 2008, the Minister of State for Provincial Administration and Internal Security established a Police Oversight Board (POB).<sup>40</sup> While the creation of such a board should have been a positive, it exists on paper only, devoid of offices, a secretariat, any full-time members, and the powers it would need to be effective.

37. It can "receive" complaints from the public and "evaluate" them, but its investigative powers are entirely inadequate. It can do no more than make recommendations to the Commissioner of Police, and has no authority to enforce its recommendations, make any binding decisions, or impose disciplinary measures on police officers. The board was set-up not by legislation, but by the Minister through a gazette notice. It can thus be dismantled by decision of the Minister. Its members are appointed and dismissed by the Minister, and no requisite qualifications are set out. In sum, the board lacks the independence and powers required to achieve even minimal accountability.

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<sup>39</sup> The Kenya Gazette, "Public Complaints Standing Committee Establishment", Gazette Notice No 5826, 29 June 2007.

<sup>40</sup> The Kenya Gazette, Vol CX-No.71, Gazette Notice No. 8144, "Police Oversight Board", Nairobi, 4 September 2008.

### III. EXTRAJUDICIAL EXECUTIONS IN MT. ELGON

#### A. Background

38. The general background to the Mt Elgon violence is well recorded elsewhere, and I will only outline its basic contours here.<sup>41</sup> From the mid-1960s, various phases of a settlement scheme (Chepyuk Settlement Scheme, Phases I, II and III) were initiated by the Government to resettle and provide land to the Ndorobo and Soy sub-clans of the Sabaot people.

39. The Sabaot Land Defence Force (SLDF) militia was born out of disputes over the fairness of allocations in Phase III.<sup>42</sup> The early membership of the SLDF appears to have primarily drawn its ranks from those who were unhappy with the results of Phase III and believed there was little alternative but to resist by force.<sup>43</sup> The SLDF also used varying degrees of intimidation and force to increase its ranks.<sup>44</sup> If members later became discontented with the activities of the SLDF, they were unable to leave without fear of fatal reprisals.<sup>45</sup>

#### B. Sabaot Land Defence Force operations and militia atrocities (2006-2008)

40. It is clear that the residents of Mt Elgon district were terrorized by the SLDF militia for approximately two years (2006-2008). I spoke with many victims of SLDF abuse, and also with former members of the SLDF. From their testimonies, and together with police, Government, and civil society accounts, I have been able to form a detailed picture of the SLDF's operations and abuses. Intimidation, physical abuse, and killings appear to have been carried out for three primary reasons.

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<sup>41</sup> See: Kenya Police, "Report into Violations of Human Rights in Mt Elgon Region" (2008); Kenya National Assembly, "Report of the Joint Visit to Mt Elgon Region by the Committees on Defence and Foreign Relations, and Administration, National Security and Local Authorities" (November 2008); Human Rights Watch, "All the Men Have Gone: War Crimes in Kenya's Mt Elgon Conflict" (2008); Kenya National Commission on Human Rights, "The Mountain of Terror: A Report on the Investigations of Torture by the Military at Mt Elgon" (May 2008).

<sup>42</sup> In Phase III, 1732 plots of 2.5 acres each were available for allocation. The plots were divided equally between the Ndorobo and Soy sub-clans, with each clan getting 866 plots. But some 7000 sought the 1732 plots.

<sup>43</sup> Appendix II: Case 15, Case 16.

<sup>44</sup> Appendix II: Case 14, Case 17.

<sup>45</sup> Appendix II: Case 16, Case 17.

41. First, those occupying land desired by the SLDF - especially members of the Ndorobo sub-clan, who most SLDF saw as their “enemy” in land allocations - were chased out or killed.<sup>46</sup> Soy and others who were seen to be benefiting from the land allocations, or who criticized the land reform aims of the SLDF, also became victims.<sup>47</sup>

42. Second, as the SLDF increased its control over villages in the Mt Elgon region, anyone living in those areas who failed to follow SLDF rules or orders was punished commonly through having an ear cut off. Residents who refused to “donate” food or pay levies were beaten or killed.<sup>48</sup> The SLDF used “informers” within the villages, and those who were believed to have divulged information to the police were killed.<sup>49</sup> Such SLDF killings could take place anywhere, but typically took place at designated areas in the forests, where the victims’ bodies were often just left on the ground surface, with previous victims.

43. Third, some killings were politically motivated. The members of the Mt Elgon District Security and Intelligence Committee (DSIC) acknowledged that the SLDF began and operated with political backing. The SLDF supported the candidacy of Fred Kapondi in the 2007 elections, and for each ward, the SLDF had its favoured candidate, based on that candidate’s support for the land reallocations that the SLDF wanted. Supporters of rival parties, and especially of John Serut, who was running against Kapondi, were targeted by the SLDF.

44. Over 700 killings and 120 disappearances by the SLDF have to date been individually documented by local organisations; although this is likely a fraction of the total number.

### **C. Two years of insufficient Government action**

45. The Government did far too little to protect civilians during what the District Commissioner for Mt Elgon district called this period of “total terror”. Inaction was not due to a lack of knowledge about the SLDF’s activities. The Mt Elgon DSIC informed me that they sent monthly minutes to the Provincial Security Committee, asking for security reinforcements to counter the SLDF, and stating that the security situation was “out of hand”.<sup>50</sup> Local and international civil society and humanitarian organisations repeatedly called for action against the SLDF. But their requests were largely ignored. Within Mt Elgon, local police all too often looked the other way in exchange for payments from the SLDF.

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<sup>46</sup> Appendix II: Case 14, Case 20.

<sup>47</sup> Appendix II: Case 16, Case 26.

<sup>48</sup> Appendix II: Case 18.

<sup>49</sup> Appendix II: Case 15, Case 19, Case 21.

<sup>50</sup> *See also*: Office of the Government Spokesman, “President Kibaki Gives Directives on Mt Elgon” (4 April 2007) (stating that “President Mwai Kibaki has been concerned about the occurrences and continued insecurity in Mt. Elgon for a long time and has been closely monitoring the situation.”).

46. The Provincial Government did launch a small operation called *Tafuta Amani* (“Seeking Peace”). But it had little effect. As a result, during the 2006-2008 period, many civilians were effectively caught between the police and the SLDF, and villages would be attacked by both sides.<sup>51</sup>

47. The only explanation proffered by observers to explain the Government’s failure to send real security reinforcements before 2008 was that it did not want to intervene before the 2007 general elections.

#### **D. Joint military-police operation (2008)**

48. The Government finally launched a major joint military-police operation on 10 March 2008. The Mt Elgon DSIC informed me that Operation *Okoa Maisha* (Save Lives) was composed of a military detachment, Kenyan Police, the General Service Unit, the Administration Police, and the Anti-Stock Theft police. The DSIC stated that it was composed of about 400 security force members, including 120 from the military (the 20 Para Battalion). The Chief of General Staff and the Assistant Minister for Defence stated that they deployed approximately 300 soldiers from two companies (the Alpha Company of the First Kenya Rifles, and the Alpha Company of the 20 Para Battalion).

49. The police have consistently stated that the military were asked to “assist” the police operation, and were involved in “logistics” only. The Mt Elgon DSIC told me that the operation was directed by the Western Province Provincial Police Officer, and that he directed both the police and the military. They said that the police were responsible for arrests and interrogations. The military involvement was to provide vehicles (to transport suspects), and to help cordon areas in which the police carried out arrests. The DSIC stated that 13 people were killed during the operation, due to “cross-fire”, and that the operation netted over 100 assorted weapons.

50. My meeting with military officials in Nairobi provided a somewhat different account. The Chief of General Staff stated that they divided Mt Elgon into two operational areas. The upper area - the forested area where most of the SLDF were hiding - was where the military primarily operated, with minimal police input. Military officials stated that they mounted ground operations to find the SLDF forest camps, and arrest members. They said that they met little overall organized resistance, but that during fighting eight suspected SLDF members were killed. The lower area was the inhabited area, and, according to the military, operations there were primarily conducted by the police with minimal military presence.

51. Once suspects were detained, they were mostly taken to Kapkota - a temporary security force “base” that was used as a screening center. There, detained persons were interrogated as to their connections to, or knowledge about, the SLDF. Informants were extensively used at Kapkota to identify SLDF members. The Mt Elgon DSIC stated that 3,265 individuals were detained at Kapkota military camp: 2,187 were released after questioning, and 1,078 were arraigned in court. According to records provided to me by the military, 3,839 individuals were “screened” at Kapkota.

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<sup>51</sup> See appendix II: Case 26.

### **E. Abuses by security forces**

52. Detailed reports by a wide range of credible observers estimate that hundreds of men were tortured and killed in the 2008 operation by the Government's security forces. Before I visited Mt Elgon, I was able to study the comprehensive reporting on abuses by the Western Kenya Human Rights Watch (WKHRW), the KNCHR, the Independent Medico-Legal Unit (IMLU), Medecins sans frontieres (MSF), and Human Rights Watch (HRW).<sup>52</sup> The number of persons killed or disappeared by the security forces is conservatively estimated at over 200.

53. I received detailed and credible reports from witnesses and victims that abuses by the security forces happened throughout the various stages of the operation. A significant number of detained persons were beaten at the time of first contact with authorities - when they were detained either in the village cordoning process, or individually targeted for detention.<sup>53</sup> At this point, they were beaten in a comparatively unstructured or sporadic fashion. They would be repeatedly kicked or hit with implements by security forces. At Kapkota, witness testimony indicates that they were tortured in a significantly more planned and controlled manner. They were frequently stripped naked, kicked, beaten on the genitals, forced to repeatedly jump up and down, forced to lie in the sun for long periods, and detainees were forced to beat each other.<sup>54</sup> Unsurprisingly, these beatings led to a large number of deaths.<sup>55</sup>

54. The bodies were either taken to mortuaries, or dumped in the forests. There remain a large number of missing persons, last seen in security force custody, and presumed dead.<sup>56</sup> The only real assistance family members have received in finding their disappeared relatives have come from civil society and humanitarian organizations.

### **F. Official responses to allegations of abuse**

55. I asked Government officials, and police and military officials for their response to the various allegations of abuses by the police and the military. I received a range of wholly unsatisfactory denials.

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<sup>52</sup> Independent Medico-Legal Unit, "Preliminary Report of Medico-Legal Investigation of Torture by the Military at Mount Elgon, 'Operation Okoa Maisha'" (April 2008); Medecins sans frontieres, "Mount Elgon: Does Anybody Care?" (May 2008); Human Rights Watch, "All the Men Have Gone: War Crimes in Kenya's Mt Elgon Conflict" (2008); Kenya National Commission on Human Rights, "The Mountain of Terror: A Report on the Investigations of Torture by the Military at Mt Elgon" (May 2008).

<sup>53</sup> Appendix II: Case 22, Case 25, Case 26, Case 28.

<sup>54</sup> Appendix II: Case 22, Case 24.

<sup>55</sup> Appendix II: Case 22, Case 25.

<sup>56</sup> Appendix II: Case 22, Case 23, Case 26, Case 27, Case 28.

56. Some officials attempted to deny altogether knowledge of the allegations put by NGOs. When I asked the District Security Committee in Mt Elgon for their response to NGO reports of abuses, some members stated that they were not aware of their documentation of torture or unlawful killings. Some members then stated that they were aware of (but had not read) the reports. They also had not read the report prepared by the parliamentary committees on Administration and National Security, and Defence and Foreign Relations, which found that “there are cases of human rights abuses by the security forces”.<sup>57</sup> It recommended that such cases be further investigated. Unfortunately, no such action has been taken.

57. Other officials told me that the various NGOs were biased. I was told that they had only documented abuses by the security forces, and failed to acknowledge or properly document SLDF abuses. As a factual matter, this claim is simply untrue. The HRW report on Mt Elgon, for example, contains substantial sections on abuses by the SLDF and by the security forces, and addresses responsibility for both sets of abuses.<sup>58</sup> The WKHRW has extensively recorded individual human rights abuses by the SLDF. In any event, an NGO report about abuses by a Government operation are not irrelevant because it does not also extensively report on the prior violations of non-state actors. The primary responsibility for monitoring and responding to abuses by criminal gangs or militias rests with the Government. Insofar as a Government fails in these responsibilities, NGOs will often take up a monitoring role. This of course explains the extensive involvement of NGOs in monitoring SLDF abuses during the two-year period that the Government largely ignored the violence. But it is also the case that, by 2008 at least, the abuses by the SLDF were well-known and acknowledged by the Government. What was less clear, and in need of serious investigation in 2008 was the nature of the Government’s security operation. Allegations had been made of abuses by Government forces. The Government denied these allegations. This gave rise to a need to investigate in detail and report on the security force abuses.

58. Officials also responded by citing the results of a police inquiry into the Mt Elgon violence, which concluded that, “the alleged reports on torture were found to be unreliable, misleading, obnoxious, unsubstantiated and made in bad faith.”<sup>59</sup> I have studied this report very closely, and my team met extensively with the police responsible for its preparation. It is a whitewash. The investigation they conducted was superficial and misdirected. Insofar as witnesses were named in NGO reports, the police attempted to find them by going to their villages. Most of them could not be found, or refused to speak with the police. The police also asked NGOs to provide the names and locations of those who had alleged abuses by the security forces. Out of appropriate concern for the safety of witnesses and victims, NGOs refused to do this. The police were thus largely left without witnesses willing to speak with them. From this, the police simply concluded that the allegations of abuse were baseless. The police report fails to

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<sup>57</sup> Report of the Joint Visit, above note 38.

<sup>58</sup> See Human Rights Watch, “All the Men Have Gone: War Crimes in Kenya’s Mt Elgon Conflict” (2008) (pages 13-26 address the formation and command of the SLDF and other militias in Mt Elgon, and SLDF abuses; pages 27-38 address abuses by the security forces).

<sup>59</sup> Police Report 2008, p. 49.

acknowledge that a victim of police abuse would reasonably be fearful of reporting that abuse to the police. The report also claimed that civil society and humanitarian organisations, including the International Committee of the Red Cross, “lack investigation ability, mandate, expertise and capacity.” The report does not substantiate this claim, and in fact noted that an ICRC report required “further thorough inquiry” because of its serious allegations of torture and extrajudicial executions. Further, while senior officials sought to impugn the reputation of the WKHRW, police who had actually met and worked with WKHRW stated that their reporting was “very balanced”, “credible”, and “not biased”. These police did not want to be identified because they feared recriminations from police headquarters.

59. In response to my query about military involvement in abuses, I was informed by military officials 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. The inability of victims to identify perpetrators was hindered by the 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 abuses.<sup>60</sup>

60. The military also told me of one case in which a person who instituted a legal action against the military for torture had subsequently retracted his allegation, and asserted instead that he had been beaten by his neighbours and saved by members of the army. According to an undated affidavit allegedly prepared by this individual and provided to me by the military, the individual claims that NGO representatives paid him to allege that the abuses were committed by the military. In light of the campaign of reputation-smearing and intimidation that security officials have embarked on in response to NGO work, there are strong reasons to be skeptical about the authenticity and consensual nature of the individual’s alleged “retraction”. Nevertheless, if the retraction is true, this would vindicate the military in this particular case. But it is no basis upon which to extrapolate and draw the conclusion that all allegations are unfounded.

61. Finally, military officials suggested that witness accounts I received of abuses may be fabrications by SLDF sympathisers. Given the intimidation and threats that are meted out to those who speak out against security force abuses, it is unclear why so many individuals would put their personal and family safety on the line in this manner. 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. They wanted the security forces to come and restore order in Mt Elgon. They did not want to have their relatives and neighbors tortured and killed in the process.

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<sup>60</sup> Appendix II: Case 28.

### **G. Independent investigations and reform**

62. In light of the sheer quantity and quality of the evidence of serious wrongdoing, the Mt Elgon events must be independently investigated. Given the official responses to the allegations, it is clear that a credible investigation cannot be conducted either by the police or the military. Reports on tactics used in other security operations (in El Wak and Mandera) give cause for concern that the security force tactics employed in Mt Elgon have been employed elsewhere, and increase the need for independent investigations.<sup>61</sup> An independent commission, with powers and composition modeled on the Waki Commission, should be immediately established. Its mandate 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. Until such an investigation is undertaken, the military units deployed to Mt Elgon should be barred from participating in UN or African Union peace-keeping operations.

63. Independent forensic analysis of mass graves in Mt Elgon should also take place. 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 security forces are contained in those sites. Government authorities have made no systematic or transparent 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, and the Government should ensure that access is unimpeded.

64. Without a fair allocation of land in Mt Elgon, there is a strong likelihood of renewed violence. Many remain landless and homeless, and the underlying causes of the formation and growth of the SLDF have not been addressed. The Government should ensure that renewed re-allocation efforts are not accompanied by the same favouritism and corruption that defined previous allocations.

### **IV. EXTRAJUDICIAL EXECUTIONS DURING THE POST-ELECTION VIOLENCE**

65. Despite the exceedingly well-documented nature of the grave abuses that occurred in Kenya in the wake of the 27 December 2007 general election, no concrete steps have yet been taken to prosecute the perpetrators, and especially those perpetrators with the greatest responsibility for abuses. This is not because of a lack of available evidence. Significant amounts of investigative work have now been carried out.

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<sup>61</sup> See e.g. KNCHR, "Report on the fact finding mission of the security operation in Mandera Region", 30 October 2008.

### **A. The Waki Commission**

66. Key among these investigative efforts have been those of the Waki Commission, established by the Government of Kenya to investigate the post-election violence (PEV).<sup>62</sup> Kenya deserves much credit for establishing what was, in many respects, a model commission of inquiry.<sup>63</sup> The Waki Commission produced a comprehensive 518 page report. The Commission found that 1,113 people were killed during the PEV. Those provinces with the highest levels of violence were the Rift Valley, Nyanza, and Nairobi; with 744, 134 and 125 deaths, respectively.

67. The report records both spontaneous and organized violence. In terms of failures by state actors, the Waki Commission found that officials failed to act on intelligence regarding potential violence; failed to respond adequately to violence; and that police lacked discipline and impartiality, and used unjustified force in responding to post-election demonstrations and violence. Shockingly, police were responsible for 405 deaths (35.7% of the total). In Nyanza, 79.9% of the PEV deaths were caused by police. The report also identified specific individuals from political parties who should be prosecuted for crimes relating to the PEV. The Commission recommended that a Special Tribunal should be created to investigate and prosecute those persons. And it recommended that, if the Special Tribunal is not established, the Prosecutor for the International Criminal Court should be provided the list of names.

### **B. Failure of accountability**

68. At the time of this report, initial efforts to create the Special Tribunal had been defeated. It is unclear whether the will exists to establish it. Kenya cannot afford to let the Waki Commission report achieve little more than recording abuses. Election related violence also occurred in 1992 and 1997. Despite the Akiwumi Commission and the Kiliku Committee reports

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<sup>62</sup> The Kenya Gazette, "Commission of Inquiry into the Post-Election Violence Experienced in Kenya after the General Elections held on 27<sup>th</sup> December, 2007", Nairobi, 23 May 2008, Vol. CX-No. 41, Gazette Notice No. 4474. *See also*: KNCHR, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post 2007 Election Violence (August 2008); OHCHR, Fact-finding Mission to Kenya 6-28 February 2008; International Crisis Group, "Kenya in Crisis", African Report No 137 (February 2008); Independent Medico-Legal Institute, *Forensics Investigations into Post-Election Violence Related Deaths* (February 2008); Human Rights Watch, *From Ballots to Bullets: Organized Criminal Violence and Kenya's Crisis of Governance* (March 2008).

<sup>63</sup> The Waki Commission had a clearly defined but sufficiently wide mandate. Independent and expert commission members were appointed, and staff with specialized expertise were hired. International commissioners and staff were brought in to maximize impartiality, and no serving members of the state security forces were permitted to apply for Commission positions. The Commission had the power to summon any person to testify and to produce any documents. Despite these many positive aspects, the Commission did encounter obstacles. While it could hold private hearings to protect witness identity, it did not have a comprehensive witness protection program. And, some Government officials interviewed were slow in producing requested documents or did not produce the proper materials.

documenting in detail those periods of violence and naming the perpetrators, no officials were ever punished for their role in the violence. It is essential that prosecutions take place to provide justice to victims, and to address impunity before the next general elections.

69. Without the special mechanisms recommended by the Waki Commission, there is little prospect for accountability. This was made clear during my investigations into the post-election violence, which I focused on Eldoret (Rift Valley Province) and Kisumu (Nyanza Province).

70. The town of Eldoret in the Rift Valley was one of the first sites of post-election violence, with attacks initially directed at the Kikuyu population. Much of the anti-Kikuyu violence appears to have been intended to push them out of the province: many were threatened and told to leave the area, and their homes and businesses were destroyed. Attackers formed groups of fifteen plus individuals, and specifically targeted Kikuyu homes or villages.<sup>64</sup> Other groups patrolled public areas, and used ID cards to identify Kikuyu persons.<sup>65</sup> In some areas, significantly larger groups (of up to 2,000) formed - armed with machetes, bows and arrows, projectiles filled with petrol - and created road blocks and carried out large-scale attacks.

71. Provincial level officials in the Rift Valley were largely in denial about the findings of the Waki Commission. The Commission found that police planning was scant, and that they were “poorly prepared”. When I asked the officials for their response to this, they admitted that they could not handle the violence that erupted, but argued nevertheless that they were prepared. Worryingly, they stated that there had been no serious changes to policing or planning in response to the PEV. In terms of accountability, I was assured that many PEV complaints had been registered, and that they were at various stages of the criminal justice system. When I asked about police conduct, I was first told that no inquests into police misconduct had been opened, and that no complaints had been received. I was subsequently told that there had been some cases, and that the information would be provided to me. It never was.

72. In Nyanza, I attempted to find out what investigations had been conducted by police into the many reports of police killings committed during the PEV.<sup>66</sup> The Waki Commission found that the police indiscriminately used live ammunition, and that over half of the gunshot victims had wounds from the back (calling into question what threat to life they could have presented at the time of the shooting). Nyanza provincial police officials said to me that they had recorded 82 cases of individuals killed by bullet wounds during the PEV. When I asked them for information about the progress of these investigations, and for their assessment of the appropriateness of the use of force in each case, they were able to tell me nothing, beyond the basic fact that they had conducted investigations, and that 60 files had been sent to the Attorney-General for assessment. In comparison, they showed me extensive documentary

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<sup>64</sup> The well-known church massacre in Kiambaa (a small town near Eldoret) is one example of the egregious nature of these attacks. See Appendix II: Case 29, Case 31, Case 33, Case 36.

<sup>65</sup> Appendix II: Case 32.

<sup>66</sup> For individual cases of police shootings, see Appendix II: Case 37, Case 38, Case 39, Case 40. In none of these cases did the police follow-up with the complainants.

evidence of the looting that occurred in the PEV period. After my visit, I was provided additional materials by the Attorney-General, which indicated that *one* trial was currently on-going of a police officer who shot and killed two youths following riots in Kisumu.

73. At the direction of the Attorney-General, the Director of Public Prosecutions created a team of State Counsels to undertake a review of all 2007 post election violence cases, together with officers from the Criminal Investigations Division.<sup>67</sup> The team was to determine whether there was sufficient evidence in support of the charges, and recommend whether the case should proceed to trial or be withdrawn. The team found that inquest files in “all the affected provinces” were “far from complete”.<sup>68</sup> Their report notes that, across Kenya, “considering the high number of deaths reported there should have been more inquest files opened or murder files forwarded”.<sup>69</sup> Of 51 files of deaths in Nyanza received by the team, 44 files related to killings by police. Of those, 42 files were returned to the police for further investigations. The counsel review notes that the types of evidence missing from the files included such basic evidence as: eye witness statements, ballistics evidence, and statements from police officers involved in the operation. With respect to the Rift Valley, they found that “a very high number of cases” required further investigations. Most Rift Valley files only contained the statement of the complainant, with no further investigations whatsoever.<sup>70</sup> This report is clearly a damning indictment of investigations, and strongly suggests that serious prosecutions of police and officials are unlikely to take place within the criminal justice system.

### **C. Complementary measures: the Special Tribunal and the International Criminal Court**

74. Discussion, especially in Kenya’s Parliament, about how to achieve accountability in light of the failures in the current system has tended to be presented as a choice *between* the Special Tribunal and the ICC. This contributed to the defeat of the Special Tribunal proposal in January 2009. Some felt that only an international tribunal could provide the needed accountability and so voted against a local tribunal. But for those who genuinely want to end impunity, the approaches should not be treated as mutually exclusive. A domestic tribunal is essential to address a large number of perpetrators, and to promote national ownership of accountability. But until an effective Special Tribunal is established, the Prosecutor for the ICC should undertake investigations. Given the evidence already available, the ICC would be able to move quickly. While an international tribunal is clearly designed to try only a small number of the most serious offenders, the extent of abuses during the PEV, their recent occurrence, and the

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<sup>67</sup> “A Report to the Hon. Attorney-General by the Team on the Review of Post Election Violence Related Cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi Provinces” (February, 2009).

<sup>68</sup> Review team report, p. 40.

<sup>69</sup> Review team report, p. 40.

<sup>70</sup> Review team report, p. 40.

certainty of further violence at the next elections in the absence of accountability makes this a critical case for the Prosecutor to take up.

## V. KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

75. The KNCHR, Kenya's national statutory human rights institution has the authority to investigate complaints of human rights violations.<sup>71</sup> It is a highly professional organization of committed and skilled staff. In the absence of other well-functioning accountability mechanisms, it has played a critical role in bringing to light serious human rights issues. Yet its legitimacy is questioned by officials, and especially by the police, every time it issues a report. Its carefully researched reports rarely draw a substantive response. Instead, officials opt to attack its mandate, credibility or expertise, and the police accuse its members of being in the pay of the Mungiki.<sup>72</sup>

## VI. INTIMIDATION OF HUMAN RIGHTS DEFENDERS

76. Human rights defenders (HRDs) were intimidated, harassed and threatened in a systematic manner by Government and security force officials during and after my visit (see Appendix III). Intimidation was particularly severe in Mt Elgon, but took place in Nairobi and elsewhere. As a result, a large number of HRDs have been forced to go into hiding or exile. The intimidation was clearly designed to silence individual activists, prevent civil society investigations of abuses, and to instill widespread fear amongst civil society organizations.

77. Those who have control over the security forces - including the President, the Defence Minister, and the Internal Security Minister - have offered no substantive response to the complaints issued by myself and the United Nations about this intimidation. They have issued no public statements acknowledging harassment, and have taken no measures to hold to account those responsible or to protect threatened activists. The Human Rights Council ignores this contempt for its Special Procedures system at its peril.

## VII. WITNESS PROTECTION

78. In the Kenyan context - where many potential witnesses are justifiably afraid that testifying will lead to reprisals<sup>73</sup> - an effective and reliable witness protection program is a necessary component of efforts to fight impunity. It will be one of the most vital factors in the success or otherwise of attempts to prosecute those accused of offences during the PEV, in Mt Elgon, and in relation to police killings. Without a trusted and well-functioning witness protection program, many people will simply be unwilling to testify, and there will consequently

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<sup>71</sup> Kenya National Commission on Human Rights, Act No. 9 of 2002, s 16.

<sup>72</sup> See Press Statement, "Allegations by KNHRC", 24 February 2009 (EK Kiraithe, for Commissioner of Police). ("Our detectives started investigating information to the effect that some officers from the KNHRC have been regularly receiving payments from the outlawed Mungiki sect followers. Kenyans must ask themselves the services the Mungiki is paying for.")

<sup>73</sup> See Appendix II: Case 5, Case 9, Case 10, Case 13, Case 22, Case 25, Case 28.

be insufficient evidence to prosecute. And without protection, far too many of those who do testify will be putting their lives at risk.

79. A number of important steps have recently been taken to set up a witness protection program. In September 2008, a witness protection law came into effect.<sup>74</sup> The Attorney-General promulgated regulations pursuant to the Act in December 2008, and began the process of setting up a Witness Protection Unit in his office.<sup>75</sup> But to date, witness protection exists on paper only: the Director of Public Prosecutions informed me that the unit has not yet provided protection to any witness.

80. The current design of the program is also likely to lead to significant problems in the Kenyan context. The Attorney-General is provided the “sole responsibility” to decide whether to include a witness in the witness protection program.<sup>76</sup> The set-up of this program can be expected to work well where witnesses are testifying against private actors or criminal organizations. But this expectation is unlikely to hold true where witness testimony implicates police and Government officials. In light of the history of impunity and intimidation, witnesses and civil society justifiably have little faith in a program that entrusts their safety to the very system they fear.

#### **VIII. COMPENSATION**

81. The families of victims unlawfully killed have little redress. Throughout the country, I met children and widows whose parents or husbands had been murdered. The family members have been left with few avenues to obtain sufficient funds to meet even basic necessities such as housing, food, and school fees. The Government should ensure that compensation is paid to the families of victims.

82. There is a one-year statute of limitations period for claims in tort against government officials. Given the factual complexity of many cases, the difficulties in accessing lawyers for many Kenyans, and the widespread displacement that the post-election violence caused, the limitation period has prevented many families of victims of the PEV from bringing civil suits against police or other officials. The DPP acknowledged that this was a problem. For unlawful killings and other serious abuses, the one-year limitation period should be removed.

#### **IX. THE DEATH PENALTY**

83. Kenya has had a moratorium on carrying out the death penalty since 1987. However, the death sentence continues to be handed down on a regular basis, and in a manner that violates international law. International law prohibits the mandatory death penalty, and requires

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<sup>74</sup> The Witness Protection Act, 2006. (Commenced 1 September 2008: *see* Gazette Notice No. 110 of 2008).

<sup>75</sup> The Witness Protection Regulations, 2008. The Government allocated 20 million shillings this year for the program.

<sup>76</sup> The Witness Protection Act, 2006, s 5.

individualized sentencing to prevent the arbitrary deprivation of life.<sup>77</sup> International law also strictly limits the crimes for which the death penalty can be applied to cases where it can be shown that there was an intention to kill which resulted in the loss of life.<sup>78</sup> Further, the death penalty is unlawful where it follows a trial that violates basic due process guarantees.<sup>79</sup>

84. However, Kenya has the mandatory death penalty for treason, murder, robbery with violence, and attempted robbery with violence.<sup>80</sup> The provision of the death penalty for robbery with violence is particularly concerning: the elements of the crime create a low threshold for conviction, robbery is very common, and there are many thousands convicted each year. In the period 2004-2007, 15,265 people were convicted of robbery with violence. There is no legal aid for those charged with robbery with violence, and only limited legal aid is provided for those charged with murder. In practice, this means that individuals face a death sentence often without the assistance of legal counsel. The high levels of corruption in the judiciary further call into serious question the fairness of trials.

## **X. RECOMMENDATIONS**

### **A. Killings by police**

**85. 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;**

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

**86. 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;**

**(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**

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<sup>77</sup> See A/HRC/420, paras. 54-62.

<sup>78</sup> See A/HRC/420, paras. 39-53.

<sup>79</sup> ICCPR, Arts 6, 14.

<sup>80</sup> See ss 40, 203-204, 295-297, Penal Code of Kenya. "Robbery with violence" is defined as: robbery of a person, with one of the following elements: the crime was committed with another person, or the criminal was armed with a weapon, or physical violence to any person was caused (ss 295-296).

**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;**

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

**87. 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.**

**88. 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.**

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

#### **B. Killings by the Mungiki**

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

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

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

**92. 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;**

**(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.**

#### **D. Criminal justice system**

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

94. **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.**
95. **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;**
  - (b) **Judicial appointment procedures should be made more transparent, and all appointments made following a merits-based review of the appointee;**
  - (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;**
  - (d) **The Judicial Service Commission should create a complaints procedure on judicial conduct.**

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

96. **Parliament should establish a constitutionally entrenched Special Tribunal, as recommended by the Waki Commission.**
97. **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.**
98. **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.**

#### **F. Killings in Mt. Elgon**

99. **The Government should immediately set up an independent commission for Mt 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 Mt Elgon should also take place.**
100. **The Government should make available to the ICRC and the 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.**

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

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

103. **In light of the seriousness of the allegations against the military, the units deployed to Mt Elgon should be barred from participating in UN 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.**

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

#### **G. Witness protection**

105. **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.**

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

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

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

108. **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.**

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

109. **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 behaviour by any person, such persons should be investigated, charged and prosecuted according to regular procedure.**

110. **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.**

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

111. **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.**

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

113. **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, Mr Oscar Kamau Kingara and Mr John Paul Olu.**

114. **The Government should report, publicly and to the UN High Commissioner for Human Rights, within 3 months following the publication of this report, on the steps it is taking to prevent and prosecute intimidation of human rights defenders.**

#### **K. The death penalty**

115. **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.**

## **Appendix I**

### **PROGRAMME OF THE VISIT**

1. I visited Kenya at the invitation of the Government from 16-25 February 2009. I travelled to Nairobi, Rift Valley Province (Nakuru, Eldoret and Kiambaa), Western Province (Bungoma and Kapsokwony), Nyanza Province (Kisumu), and Central Province (Nyeri).
2. From the Government of Kenya, I met with officials at all levels, including: the Prime Minister; the Minister and the Permanent Secretary in the Ministry of Justice, National Cohesion and Constitutional Affairs; the Assistant Minister and the Permanent Secretary in the Ministry of Defence; the Permanent Secretary in the Ministry of State for Provincial Administration and Internal Security; the Chief of Staff of the Kenyan Armed Forces; the Commissioner of Police, and police from the General Service Unit, the Administration Police, and the Criminal Investigations Department; members of the National Security Intelligence Service; the Public Complaints Standing Committee; the Police Oversight Board; the Director of Public Prosecutions; the Chief Justice and Registrar of the High Court; the Chairs and members of parliamentary committees on international affairs, internal security, justice, and outlawed organizations; the Provincial Commissioners and Provincial Security and Intelligence Committees for the Rift Valley, Nyanza and Central provinces; and the District Commissioners and District Security and Intelligence Committees for Uasin Gishu District (Rift Valley Province) and Mount Elgon District (Western Province). Subsequent to my visit, I was provided additional information from the Government of Kenya, including from the Attorney-General, the defence forces, and the police.
3. I met with a large number of representatives of the diplomatic community.
4. I spoke with many representatives from international, national and local civil society organizations. I also met with the commissioners and staff of the Kenya National Commission on Human Rights.
5. Before I visited Kenya, I was able to analyse in detail the many reports prepared on human rights issues in Kenya, including reports by the Government, parliamentary committees, commissions of inquiry, police, and international, national and local civil society organisations.
6. My team and I conducted over 100 individual interviews with victims, witnesses, and family members of victims of human rights abuses. They included victims of and witnesses to militia and gang violence, criminal violence, and police and military violence.
7. I also met with the UN Resident Coordinator, his Senior Human Rights Advisor and representatives from many UN agencies present in Kenya. I am grateful to the Resident Coordinator's Office for facilitating my mission.

## Appendix II

### SELECTED CASES

In this report I have taken particular caution in naming and identifying victims and witnesses. Most witnesses did not want their names or other identifying material made public in any way, or provided to the Government, even in confidence. Many of those with whom I spoke claimed to live in fear of the Government's security forces and felt that exposing their identities would open them up to (further) intimidation or worse. The very serious instances of intimidation against those who testified before me - detailed in section VI and Appendix III of this report - which took place both during and after my visit indicate clearly that such fears are warranted. For this reason, although my team and I conducted over 100 lengthy witness interviews, only a small number of individual cases containing identifying information are referred to in this report. In most of the selected cases summarized below, significant identifying material has been withheld to protect the witnesses and their families.

**Case 1:** Dr. James Nganga Kariuki Muiruri (29 years old) was killed on 24 January 2009. He had a law degree, a master's degree, and had just completed a PhD, all from universities in the UK. While visiting his family in Nairobi, he went out one night with his brother. Following a disagreement at a hotel, on their way home, their vehicle was blocked by two other cars. James got out of the car, and was harassed by the passengers from the other vehicles. One ordered James to handcuff himself. When he asked why, James was fatally shot. The assailants drove off. Subsequently, a police officer reported that he had shot a "bank robber" and "Mungiki member". When it became known to the police that James' brother was a witness to the event, that James' father was a well-known former member of Parliament, and that James was a respected scholar, they claimed that the officer who shot James was new to the force and "trigger happy".

**Case 2:** A group of six people were walking at night in May 2007. The group was taking a young child to hospital for emergency treatment. The group heard what they described as a hail of gunfire and threw themselves to the ground. Shortly thereafter, they were approached by men who identified themselves as police. The police asked why the group was walking at night, and stated that "only bandits walk at night". The group explained that they had been taking a child to hospital, and the police apologized for firing at them. Their shooting, however, had killed one male adult, a female adult and her 16 month old child. The post-mortem reports for the mother and the child indicated that one bullet killed both of them (the mother was holding the child). Family members made complaints, but there had been no progress on holding the police to account.

**Case 3:** Benson Mwangi Waraga was a tailor, and photographed by the media while being arrested by police on 17 May 2007. Apparently, the police had entered the tailor's building in pursuit of suspected criminals. Mr Waraga and his employees were arrested along with a number of other people found in the building. At the police station, Mr Waraga was taken to a separate room from the other detainees and from his employees. His employees were released from custody on 18 May. Mr Waraga's family unsuccessfully attempted to find him at the police station. On 19 May, they found his body at City Mortuary. (The body was recorded as "unknown"). The family was told by mortuary staff that police had brought the body to the mortuary. A pathologist report states that Mr Waraga died due to "multiple organ injuries due to multiple gunshots" and that the "fatal bullets were shot from behind." According to the police

whistleblower testimony, the tailor and three other suspects were picked up from the Kamukunji police station, taken to City Park, and shot at 7.00 pm. Firearms were planted on the men. According to family members, they made complaints to the police, but the CID officer they reported to stated that he could not get statements from the officers believed to be responsible because they were his seniors.

**Case 4:** The witness, the mother of the victim, testified that her son was arrested by police while traveling on a matatu in November 2007. The mother went to the police station where her son was being held, and told to pay 30,000 KSH. She was told, “If you do not bring the money by tomorrow, we will kill him, because he is a Mungiki.” The next day, her son was released, despite non-payment by the mother. But a few days later, he was again arrested while traveling on a matatu, in front of a large number of witnesses. The mother has not seen her son since. She was told by CID that there was nothing they could do to help.

**Case 5:** The witness was arrested in August 2007. He paid the police 10,000 KSH, and they let him go with a warning not to say anything to anyone about what occurred.

**Case 6:** In a killing detailed by the police whistleblower, a suspected Mungiki named “Kibe” was arrested at Kariobangi Light Industries roundabout. He was taken to a police station, but instead of being detained in a cell, was interrogated in a police vehicle. He was told to get a bribe for the arresting police officers, and he raised 50,000 Kenyan shillings. When he gave this to the police, they released him. However, two of the officers followed Kibe, with the intent of re-arresting him. According to the police whistleblower, “It was planned in such a way that the relatives won’t suspect these police officers who had previously arrested him. Their argument was that as long as they saw him give bribe and subsequently being released, there is no way these relatives would suspect them to re-arrest him.” The two officers stopped Kibe, boarded his vehicle, and ordered him to drive to a secluded area (a forest). Four vehicles of police followed Kibe’s vehicle. At the forest, Kibe was strangled with a rope, and beaten with pangas (machetes) and rungs (sticks). After he died, his body was then dragged for some 100 metres behind his vehicle, with the rope that was tied around his neck. He was then untied and left along the roadside.

**Case 7:** On 21 June 2007, Kimani Ruo (an alleged Mungiki leader) was leaving court after charges against him had been dismissed. Various photographs were taken of him by the press, while he was walking out of court. Police officers are amongst those in the photos, walking next to Kimani. Witnesses saw Kimani speaking with police officers. Kimani told one of his acquaintances that he needed to go with the police. He then disappeared. His family and friends searched in police stations, but did not find him. According to the police whistleblower testimony, the members of the special police squad were instructed to go to the Nairobi Law Courts. Once there, they received instructions to detain Kimani. At approximately 12.30 pm, Kimani was told to get in the vehicle being driven by the whistleblower. The whistleblower was instructed to keep the tinted windows of the vehicle rolled up, and to not let Kimani make any calls or leave the vehicle. The whistleblower’s vehicle was subsequently joined by three other vehicles occupied by police officers. They drove to Ngong Forest, where Kimani (along with two other Mungiki suspects brought in the other vehicles) was interrogated, and tortured. The

interrogation was tape recorded, and played back to senior officers over a telephone. Kimani was held overnight, and the next day taken in a convoy of five vehicles to an unoccupied farm area where he was killed with ropes, pangas and rungas. The officers involved were subsequently all given 12,000 KSH by senior officials.

**Case 8:** The mother and wife of a male victim both testified that in 2008 the victim was asked to meet a police inspector at a restaurant. The man was accompanied by his wife and a male friend. As they left, the police inspector made a phone call, and two vehicles drove up to the front of the restaurant. The two men were put into the vehicles, and have not been seen since. The wife and her relatives made complaints to the Provincial Police Officer and the CID, but the case remains unresolved.

**Case 9:** On 9 April 2008, the wife of Maina Njenga (a Mungiki leader currently in prison) and her driver were killed. (Earlier in the year, police had gone to the home of the driver's parents and told them that the police would kill their children. The police used one of the children to locate the homes of the two brothers they were particularly looking for, one of whom was the driver). A friend of Maina's wife was on the phone with her the day she was killed. While in her car, Maina's wife told her friend, "we're in trouble". Her phone then disconnected, and remained switched off. Her and the driver's body were found, mutilated, in a forested area a few days later. According to the police whistleblower, while driving, the two were blocked by three police vehicles, and taken first to Ngong Forest, and then to Machakos District. There, they were killed. The bodies were dumped in Gatundu. Two weeks later, on 28 April 2008, the driver's brother was shot and killed while driving his car. According to the police whistleblower, he was tracked down and shot by the police. Most of the family members of the three deceased are in hiding, and fear reporting or pursuing the cases because they assume they will also "disappear".

**Case 10:** A victim was fatally shot 3 times by police. The incident was witnessed by a group of people. But they all refused to give statements to the police for fear that they would suffer reprisals. The wife of the victim was forced to relocate.

**Case 11:** The victim was arrested by police on 30 June 2008 from a bus station. He was photographed by a member of the press while being handcuffed. The victim was put in a police car. A bus driver who knew the victim called the victim's wife and informed her of what had occurred. The wife, with other members of her family, searched for four days in a large number of police stations. On 6 July, the wife found her husband in the City Mortuary. Records there indicated that her husband had been brought to the mortuary on 1 July by police officers. The husband had been strangled. The wife and her family members made complaints to the police, and believe an inquest file was opened, but nothing has happened since.

**Case 12:** The female witness went to a police station to report that her male relative had been shot in the leg by a stray bullet fired by police. She was seeking compensation for the medical treatment. When she reported the matter, the police were aggressive and denied that the event had taken place.

**Case 13:** The witnesses were family members of a victim who was last seen being arrested by the police. The family attempted to find their relative, but searched in police stations and

mortuaries in vain. Two members of the family, who had been particularly active in looking for their relative, were asked to report to the police station. They then also disappeared, and at the time of my interview with the remaining family members, had not been found. The remaining family members live in fear, and have been forced to relocate.

**Case 14:** The witness, from Mt Elgon, was forced to join the SLDF in early 2007. The SLDF came to his home and told him that, while he did nothing to secure his land, they were fighting on his behalf in the forest. They forced him to go to the forest with them. His duties in the SLDF camp were to chop firewood and cook for the approximately 300 other members who lived in the camp. While he was with the SLDF in the forest, his wife was abducted and killed by the SLDF because she was a Ndorobo.

**Case 15:** The witness, a former SLDF member, joined the SLDF voluntarily in 2006. He lost some land in the land allocations, and - together with many other men from his village - joined the SLDF so that they could force the return of their land. He stayed in his village as an “informer” for the SLDF. Members of the SLDF subsequently raped his wife, and the witness fled from the area, and began to assist the police with intelligence about the location and operations of the SLDF. When the joint police-military operation began in March 2008, he provided further information to the security forces. He was provided a camouflage military uniform, and assisted in identifying SLDF members, and locating SLDF forest base camps.

**Case 16:** The witness, a former SLDF member, initially joined the SLDF voluntarily in 2006. He joined because he was not allocated land during the land allocations, and the land he had been living on was allocated to someone else. One of his neighbours, a senior SLDF member, told the witness about the SLDF and its aims. The witness then joined the SLDF so that he could “fight for [his] land”. At least 20 other men from the witness’s village also joined. They resided in the forests around Mt Elgon. His brother was subsequently murdered by other SLDF members in a dispute over land allocations (the brother had been formally allocated land, and so he was considered by the SLDF to be a collaborator). The witness wanted to leave the SLDF at that point, but believed that if he left, he would be killed.

**Case 17:** The witness, a former SLDF member, was forced to join in 2006. He left the SLDF after members of the group killed his brother in 2007. The witness formed another small armed group, composed largely of SLDF defectors. This group was subsequently attacked by the SLDF, and some of its members were killed.

**Case 18:** In February 2008, the SLDF went to the female witnesses house in Mt Elgon at approximately 10 pm. The SLDF shot in the air, and took her family’s cows by force. When her husband attempted to stop them, he was shot. The witness took her husband to the local hospital, but he died the next morning.

**Case 19:** The witness’s husband was killed by the SLDF in January 2007. In the months before the murder, her husband had frequently invited the police to his house for tea or meals. On the day her husband was shot by the SLDF, the police had come to the victim’s home just hours prior. Her husband was rushed to a nearby health centre, but was pronounced dead on arrival. The witness believed that the circumstances of the killing suggested that the SLDF shot the victim because he was judged to be a “collaborator”.

**Case 20:** The witness's husband was taken by the SLDF in late 2007. A group of six SLDF came to the home of the witness and her husband late in the night. The SLDF broke the front door, two of them grabbed the husband by the arms, and took him outside. The SLDF also took two cows owned by the family. The militia members were armed with long knives, and had covered their faces with pieces of cloth so that only their eyes were showing. Most of the homes in the village - occupied primarily by those of Ndorobo ethnicity - were burnt down by the SLDF. The next day, the witness saw a number of bodies in the destroyed village, but did not find her husband.

**Case 21:** The witness's brother, a school teacher in Mt Elgon, was close friends with a senior police officer. In October 2007, a large group of SLDF went to the witness's brother's home. They killed the brother, and forced the brother's young son to watch. The SLDF told the son that they were killing his father because he was a "friend to the police".

**Case 22:** Three male witnesses were detained by the security forces in March 2008. They were transported in an army truck to Kapkota camp. On the way, a fourth man - who other witnesses had seen being beaten by security officials - died in the vehicle. At Kapkota, the three witnesses were stripped naked. They were told not to look at the security officials, who wore camouflage military fatigues. The detained men were told to jump up and down, and were kicked by security officials. They were also beaten on the genitals. They were "screened" for SLDF membership, a process that involved being taken in turns before a vehicle, and told to call out their names. Detained men were either told to walk to one side of the vehicle and put their clothes on, or walk to the other side. Each of the three witnesses were determined not to be SLDF members. None of them reported to any official the abuse they suffered as they feared further abuse. The family members of the deceased man were never able to find his body. When they attempted to report the death to the police station, the police refused to take the complaint, and told the family to look for the body in the local mortuary.

**Case 23:** In March 2008, security officials went to the home of the witness in Mt Elgon. They detained her husband. She never saw him again. She searched surrounding police stations, prisons and mortuaries, and checked Kapkota camp. She was told by a teacher who had been detained at Kapkota that her husband had been one of a group who were tortured at the camp. The teacher witnessed the husband being released from custody upon determination that he was not an SLDF member, but collapse and die at the camp. The teacher saw the body covered by tarpaulin by security officials. At the time of the interview with the witness, she still had not found her husband.

**Case 24:** The witness was arrested at a market in Mt Elgon by security officials in March 2008. He was taken in a military lorry to a small military camp in Mt Elgon. Security officials at the camp removed the witness's clothes and tortured him. He was then taken to a local police station. The police released him, and the witness's family took him to a health centre for treatment for his wounds. The witness believes that he was detained because a male relative of his was a prominent public figure, and had been accused of being a member of the SLDF.

**Case 25:** The witness, a female relative of the victim, was told by a Government official in Mt Elgon that the men in her family were invited to a meeting with the official. Two of her male relatives attended the "meeting", at which they were beaten by security officials and taken in an

army vehicle to Kapkota camp. There, one of her male relatives received particularly severe torture. The next day, he was taken to Webuye prison. He died in prison that day. The witness found his body in the mortuary the following day. The family of the victim was told by the Government official not to pursue the matter or talk about it.

**Case 26:** The witness lived in Mt Elgon. From mid-2006, the SLDF started coming to her village during the night. They would arrive in large groups, and two or three SLDF members would approach the homes of those they were looking for. Sometimes they would kill, abduct or beat the male head of a household. The SLDF called this “disciplining”, and it was targeted against those who were reported to have criticized the SLDF. In mid-2007, the police started going to her village, to look for SLDF. The police also killed and beat residents. The witness and her relatives fled to another area to escape the SLDF and police operations. In March 2008, a male relative of the witness was arrested from his home by security forces. At the time of arrest, he was beaten with batons. The witness was raped at her home by security officers. The male relative was taken to Kapkota camp. Another male detainee at the camp told the witness that he had seen her male relative beaten at Kapkota, and that he was then left lying on the ground, and died there. The family of the deceased man never found his body.

**Case 27:** In April 2008, seven security force officials and three neighbours went to the home of the witness in Mt Elgon. The witness’s male relative was arrested, put in an army truck, and taken to Kapkota. The witness went to Kapkota the next day, but was told that her relative was being questioned and she was told to go home. The following day, she again went to Kapkota, but she was told to go to the police station. The police told her that her relative had been brought in to the police two days earlier, but that he had been returned to Kapkota. She went to Kapkota again, and was told to go to Bungoma prison. Prison officials stated that her relative was not detained there. She searched in nearby towns, but could not find her relative. She was later told by another male who had been detained in Kapkota that he relative had died there.

**Case 28:** The male witness, from Mt Elgon, was arrested early in the morning in his village by security officials, together with two male relatives, and a group of other men in March 2008. The head of the security officers identified himself as an “Army Major”. The men were ordered to lie down, and the officials beat them. The witness showed the officials his employment card, and he was released. His male relatives were taken to Kapkota. The witness searched for his relatives, but did not find them. In June 2008, the witness went to the police station. He was told not to ask about the relatives again, because, according to the police officer, they were “criminals”.

**Case 29:** Witnesses and victims of the church massacre in Kiambaa (a small town near Eldoret) described being corralled inside the church, and watching their attackers block entrances, and stack mattresses against the church walls. The attackers set fire to the mattresses. Those who managed to escape from the burning church were chased, and when caught, beaten to death. Others were forced back inside the church. One witness described watching as an attacker threw a young child back into the burning church through a window.

**Case 30:** In the Rift Valley, on 31 December 2007 at approximately 4 p.m., the victim was shot in the arm, from the back, while he walked past a group of police officers. He was taken to a health centre by some other people who saw him injured on the street. Civil society groups assisted the victim to make a complaint to the police. At the time of the interview, no outcome of police investigations was known.

**Case 31:** On 30 December 2007, the witness's village (primarily Kikuyu) was attacked by a large group of armed youth. The witness and her husband ran from the house, together with many of their neighbours. The attackers started burning their homes. They attacked and killed the witness's husband with machetes and sticks. She also saw three other people similarly murdered. The witness reported the death of her husband to the police, but has received no notice of any follow-up.

**Case 32:** Before the elections, the Kikuyu witness was told by Kalenjin colleagues that he should consider leaving the Rift Valley before the voting, because of possible violence. The witness decided to stay, and was walking on 3 January 2008 with two male relatives, and one male friend. They were confronted by a group of approximately ten Kalenjin youths, armed with metal bars and sticks, and asked to produce identification. The group of ten was then joined by another group of approximately thirty. They demanded from the witness and his relatives and friend their valuables. They beat the witness (leading to a broken arm and severe cuts), and beat to death his two relatives. The witness reported the incident to the police, but had received no follow-up and does not expect any.

**Case 33:** The witness lived in a mixed Kalenjin, Kikuyu, Kisii, Luo village in the Rift Valley. On 31 December 2007, attackers came to her village, were escorted by residents to Kisii and Kikuyu homes, and burnt down those homes. There are now no Kisii or Kikuyu homes left in the village. At the time of the interview, the witness was still living in tents with her son and other relatives.

**Case 34:** The witness went to visit his mother in a village in the Rift Valley on 29 December 2007. He could not immediately get to her because her village was surrounded and being attacked by a group of 50 + youth, armed with pangas, machetes, and bows and arrows. His mother later died from the injuries inflicted on her during the attack.

**Case 35:** The witness's brother was killed during an attack on the witness's village by a group of 100 + armed youth. The witness and other family members recorded complaints with the police. There has been no follow-up from the police. When they attempted to ask the police what action had been taken, they were told that the post-election violence was an "old story".

**Case 36:** The Kikuyu female witness watched as her husband was hacked to death metres in front of her house by a group of men armed with machetes. The witness also saw the attackers kill a small boy at the same time. Approximately eight police were sitting in a car near her home, and did not intervene. When the witness subsequently asked them why they did not stop the attack, they said that it was not their duty. After the killing, the police took the two bodies to the mortuary.

**Case 37:** The witness, from Nyanza, was shot by police just in front of his home in January 2008, while with his mother and his children. At the time of the shooting, he was sitting and talking with his mother. Medical reports and x-rays showed that he was shot in the lower abdomen. He now has difficulty walking, and his urinary tract functioning has been impaired. The witness believed that he was simply shot recklessly or indiscriminately. He reported the shooting to the police. They took no action, so the witness retained lawyers in mid-2008 to seek compensation.

**Case 38:** On 28 January 2008, in Nyanza, the male victim was shot in the back of the head by police. The victim worked at a school. In the morning, there was confusion outside the school, and the victim went outside with school guards to assess the situation. He was then shot without warning, and he fell and died instantly. Three witnesses saw the incident. Witnesses believed that the shooting was either an accident or simply reckless. Relatives made a complaint to the police, but the police were hostile. When it became clear to the family that the police were doing little to investigate, they retained a lawyer to institute a civil suit.

**Case 39:** In late December 2007, an 11 year old girl was fatally shot by police when bullets went through the family's front door. When the family attempted to make complaints with the police, they were simply told "sorry". The family had received no follow-up from the police.

**Case 40:** The male victim was shot from the back on 30 December 2007. He was on a street in an estate, 4-5 kilometres from Kisumu. A group of looters began running up the street, and he started to run with them. He saw one police vehicle, chasing the looters, with police shooting into the air and at looters from the vehicle. The witness was shot, and fell to the ground. He also saw two other men fall, and subsequently die. He made complaints to the police, but never received any follow-up communication.

### **Appendix III**

#### **INTIMIDATION OF HUMAN RIGHTS DEFENDERS**

1. Before, during, and after the visit of the Special Rapporteur to Kenya, human rights defenders were systematically intimidated by the police, military, and Government officials.
2. In Mt Elgon, human rights defenders (HRDs) were told not to bring witnesses or victims to meet with the Special Rapporteur. Human Rights defenders were also told not to personally testify before the Special Rapporteur about abuses committed by the police or military. They were told to speak only about abuses by the Sabaot Land Defence Force (SLDF) armed group. HRDs were warned by text message, telephone calls, and in person. In one instance, officials addressed an internally displaced persons (IDP) camp. They told the residents that they should tell the Special Rapporteur about killings by the SLDF, but not about those by the Government. The officials told the IDP camp residents that if they followed these instructions, they would continue to receive food aid from the Government.
3. During the Special Rapporteur's visit to Mt Elgon, National Security Intelligence Officers unsuccessfully attempted to obtain from NGOs the list of witnesses with whom he was going to meet. Civil society organizations were harassed repeatedly for information about the program and schedule of the Special Rapporteur, and for details of the NGO involvement in the Special Rapporteur's mission. During meetings, the Special Rapporteur was alerted to the nearby presence of intelligence officers. When these officers were confronted by the Special Rapporteur, they ran away.
4. Subsequent to the Special Rapporteur's meetings with witnesses, police, military and Government officials went to the homes and workplaces of human rights defenders, in an attempt to obtain lists of those who had testified before the Special Rapporteur. Individuals were told that they would be arrested if they did not hand over the list of names. This led to a number of human rights defenders being forced to flee the area. They were delivered further messages by telephone to "keep away" and "not come back". Following the Special Rapporteur's press statement, demonstrations were held in Mt Elgon against NGOs. Individuals were told that they would be denied their food assistance if they did not participate.
5. When the Special Rapporteur was in Kenya, he sought written assurances from the Government that this conduct would cease. In return, he received an official letter which stated that none of the human rights advocates had been threatened. The letter also referred to allegations about the conduct of the HRDs, and indicated that they would be investigated. At the time, this gave rise to even graver concerns about reprisals than he had initially. These concerns were borne out in the following weeks after he left Kenya, as increased numbers of HRDs continued to be intimidated, and were forced to flee or go into hiding.

6. Subsequent to his visit, the intimidation meted out to HRDs in Mt Elgon was extended across Kenya. Advocates in nearly all of the civil society organizations who provided the Special Rapporteur information during his mission received threats. Their work has been severely impeded, many have been required to take extra personal security measures, and others have been forced to go into hiding or exile. Two weeks after his visit, two HRDs - Mr Oscar Kamau Kingara and Mr John Paul Oulu - who worked for the Oscar Foundation, a human rights organisation providing free legal aid services to the poor, were assassinated in their vehicle. The Special Rapporteur met with both men during his fact-finding mission to discuss the issue of killings by police. No one has yet been charged in connection with these murders.

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