

**RESPONSE TO THE REPORT OF THE SPECIAL RAPPORTEUR ON  
EXTRAJUDICIAL, ARBITRARY OR SUMMARY EXECUTIONS, PROFESSOR  
PHILIP ALSTON, ON HIS MISSION TO KENYA FROM 16-25 FEBRUARY, 2009**

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**RESPONSES TO THE SPECIAL RAPPORTEUR'S (SR) ALLEGATIONS**

**I. EXECUTIONS BY THE POLICE**

**A. Police Killings are officially sanctioned**

The Government of Kenya does not condone extrajudicial killings and there is no policy sanctioning such killings. In this regard, the Minister in charge of Provincial Administration and Internal Security has been unequivocal in parliament in his response to the allegations and at the policy level in his direction to the police departments. This is the Government's position to which it remains committed, to ensure the rights of all suspected persons are respected.

**B. Widespread Killings**

The assertion that Police killings are widespread, opportunistic, reckless or personal is not supported by facts. Deaths during police operations have mostly occurred in places where there are armed criminal gangs namely in Mount Elgon, some parts of Nairobi, Rift Valley and Central Province. It should be noted that such occurrences are rare in other parts of the country where there are no criminal activities by armed gangs. [See annex I]

**C. External and Internal Oversight and Accountability Mechanisms**

The SR alleges that the external and internal accountability mechanisms are virtually nonexistent. Like any other institution in the world, there are cases of indiscipline in the Police Force. However, there are mechanisms for discipline, including prosecutions. Between 2005 and March, 2009, 186 police officers had been prosecuted for various offences [see annex II]. As regards to murder and manslaughter, from the year 2000 to date, there have been 53 cases involving 81 police officers [See annex III].

Even where the courts of law have been unable to sustain a conviction, the Police Department has taken disciplinary measures in conformity with Force Standing Orders [See annex II].

During the Rapporteur's visit, the Police acknowledged unlawful killings by police have occurred during police operations. They furnished the Rapporteur with a list of police officers who have been punished for criminal activities and breach of professional ethics. The Rapporteur's assertion that the Government denied the existence of unlawful killings by the police is therefore incorrect.

▪ **Parliamentary oversight**

Kenya's parliamentary system provides effective oversight for effecting police accountability and transparency. The parliamentary Committee on Administration and National Security, and the Parliamentary Committee on Defence and Foreign Relations have the power to summon the relevant Ministers to respond to security concerns touching on police and military conduct.

- **Police Oversight Board**

The complaints investigation system is continuously under review. In 2008, the Government established the Police Oversight Board. The objective is to strengthen the public complaints mechanism. When the Special Rapporteur visited Kenya, there was already an active public debate on the establishment of the Police Oversight Board, its legal status and effectiveness. Taking into account public views and outcomes of consultation among stakeholders the relevant legislation will be put in place.

- **Public Complaints Standing Committee**

In addition, the Government has established the Public Complaints Standing Committee, which has the mandate to receive, review and investigate any complaint against all public officials, including the police.

To strengthen the internal and external oversight mechanism, the President of Kenya established a National Task Force on Police Reforms on 7<sup>th</sup> May, 2009. It will, among other things, review police accountability and oversight institutions. The Government believes the measures will offer redress in the event the Police or any other law enforcement agency is involved in human rights abuses.

#### **D. Use of force laws are contradictory and overly permissive**

The SR alleges that the use of force laws in Kenya are contradictory and overly permissive. Under the law the use of lethal force is allowed in the following circumstances:

- to protect human life and property,
- to effect lawful arrest, if the person to be arrested is armed with a dangerous weapon and intending to use the same against a police officer .
- to prevent the escape of a person in lawful custody convicted or charged with a felony
- suppressing a riotous mob committing or attempting to commit serious offences against life or property
- prevent the commission of a serious crime of violence

Police regulations make it mandatory for every use of firearm by a police to be investigated. The regulations state inter alia, “...a police officer may be compelled to use his/her firearm if he/she cannot, in any way, with the other means available to him, carry out his/her duty of protecting life, suppressing rioters, effecting the arrests or preventing the rescue or escape mentioned

*above. But, however well justified a police officer may consider himself to be in firing, the act, whether it results to loss of life or otherwise, must become the subject of legal investigation. He/she must, therefore, be prepared to prove that he/she acted with humanity, caution and prudence and that he/she was compelled by necessity alone to have recourse to firearm... ”*

The Government is in the process of domesticating the relevant international human rights instruments to ensure that national laws conform to international standards.

#### **E. Police Training, Discipline and Professionalism**

The SR alleges the Police force lacks sufficient training, discipline and professionalism. The Kenya Police are well trained professionals. They have provided training to a number of countries and served with distinction in various United Nations civilian police peacekeeping operations. The training curriculum is regularly reviewed for recruits and serving officers. It incorporates human rights and international humanitarian law. The service is committed to providing continuous training and development aimed at improving the skills and competencies of the police.

The SR did not examine the Kenya Police training curriculum neither did he interview any police officer in respect of their duties to evaluate their expertise. The allegation is therefore a subjective judgment.

## **II. CRIME IN KENYA**

### **A. Indiscriminate and organized criminality.**

It is misleading to state that Kenyans are subjected to high levels of both indiscriminate and organized violent criminality. The statistics of crime indicate that armed robberies, carjacking and street crime cited in the report have reduced over the last five years (2004 to 2009) by a significant 6% annually, excluding the extraordinary cases of the 2007/2008 post election violence. An independent scientific baseline survey commissioned by the Ministry of Justice, National Cohesion and Constitution Affairs and published in 2007 found that;

*“Notwithstanding such dissatisfaction with the Police in terms of how they respond to crime, pluralities consider their performance as having improved in all four main areas of their work: preventing crime (which earned a bare majority), responding to crime, handling of crime victims, and handling of crime suspects; only 16 percent or fewer see their performance as worse in each of these four areas.”*

### **B. Organized Criminal Gangs**

The assertion that Criminal organizations exercise vicious control over significant geographical areas is not supported by facts. As shown in the map, **annex I**, criminal gangs activities are concentrated in Mount Elgon, some parts of Nairobi, Rift Valley and Central Province.

The Government has commenced an integrated approach to eliminate criminal gangs. The phenomenon of criminal gangs in Kenya poses serious threat to national security. The

Government is addressing the matter through a multi-pronged strategy which encompasses economic, social and political dimensions. Criminal gangs such as SLDF have been brought under control. It is therefore not true that criminal organizations exercise vicious control over some geographical areas.

### **C. Operations of the outlawed Mungiki**

The SR alleges that in the early 1990s the Mungiki started providing security and basic services in the slums. It is unfortunate that the SR was misled regarding the genesis of this gang. In the early 1990s, Mungiki was basically a social/religious movement seeking a revival of Kikuyu ethnic traditions. Today, Mungiki are responsible for grisly murders, forced disappearances, rape, genital mutilation, among other crimes. They use various ploys to get into a locality. For example, in the larger Nyeri district the gang initially began its activities under the guise of mobilizing youth to repair feeder roads. They then appealed to motorists to contribute for the upkeep of the youth. In less than a month they set a fixed fee. Those who failed to pay the illegal fee were violently attacked. The youth who had joined voluntarily were forced to take an oath.

In the slum areas of Nairobi, Mungiki is known for their extortion from those who fail to pay “protection” fees for their businesses. Contrary to the SR’s assertion, Mungiki is not a social service provider but an outlawed criminal extortionist gang.

### **D. Existence of Police death squads**

The Rapporteur’s allegation of the existence of police death squads is misinformed. At the height of the Mungiki violence in 2007, the Kenya Police launched an operation codenamed “Ondoa Kwekwe” from June to October, 2007, aimed at containing the violence, confiscating illicit arms and safeguarding the lives and property of the public. The operation was not secret and involved all internal security agencies.

The Rapporteur failed to take into account the recent social and political developments in Kenya especially their impact on national security. It is regrettable that the Rapporteur’s statement accusing the law enforcement agencies, especially the police of alleged extrajudicial killings of members of criminal groups in Nairobi, Central, and parts of Rift Valley Province have emboldened the criminal gangs especially the Mungiki. More recently, between 20<sup>th</sup> and 21<sup>st</sup> April, 2009, the Mungiki massacred twenty nine (29) people in Central Province.

The allegation that the Police are unable to account for their actions is not supported by any facts. In the last half of 2008, the police accounted for 56 people in Central Province and 68 in Nairobi Province who died during Police operations. During the operations, 2,498 firearms were recovered and destroyed in public on 23<sup>rd</sup> March, 2009. This demonstrates the considerable efforts the police have taken to address the problem of proliferation of small arms and light weapons which has impacted negatively on the country’s security due to lack of peace and stability in the Horn of Africa especially in Somalia.

### **E. Records of deaths attributed to police**

It is unfortunate that the SR attributed all deaths from bullet wounds to the police. Given that so many firearms were recovered by the police from criminals, it is only logical that some of them must have been used by the criminals against members of the public.

Under the Laws of Kenya, all persons whose death occur outside hospital must be collected and booked in mortuaries by the Police regardless of the cause of death. It is regrettable that the Rapporteur focused on information provided to him by sources that deliberately misrepresented data showing that police booked the bodies in mortuaries to support allegations that police were responsible for the deaths. The Rapporteur's interlocutors were motivated by personal agenda.

#### **F. Government Response To Mungiki Activities**

The Rapporteur's assertion that the Police have not taken decisive measures to investigate and prosecute Mungiki suspects and other criminals who continue to terrorize and extort the public is erroneous. During his visit to Kenya, the leader of the Mungiki was serving a prison sentence at a maximum security prison. Furthermore, between 2006 and 2008, 7,928 Mungiki suspects were arraigned in court on various charges related to their criminal activities. Many have been convicted while others have been acquitted due to lack of evidence. The Government is reviewing legislation to provide for deterrent sentences. The Organized Crimes Bill is one such legislation under consideration.

### **III. CO-OPERATION BY THE POLICE**

#### **A. Police failure to provide basic information**

The SR alleged that the police failed to provide basic information during his mission. The Government had issued explicit instructions that the SR be given unlimited access to any facility. Indeed, during his visit to Central province, the Provincial Commissioner expressly invited him to visit a police station 300 meters from his office. The SR declined. The only information withheld from the SR, for reasons of national security, relates to the specific number of police officers in Kenya and their deployment. However, the Special Rapporteur was provided with a police: population working ratio which is 1:800.

#### **B. Information on police investigations and prosecution**

The allegation by the SR that police officials throughout the country blocked attempts to find detailed information on investigations and inquests is incorrect. The inability of the police to respond adequately to the SR's inquiries on ongoing investigations and inquests was not a deliberate attempt to block his work but rather is attributable to the procedures and the capacity challenges in the police service. Inquest files in Kenya are retained at the police stations and not at the Police headquarters. The SR acknowledges the challenges that the police face. The police to population ratio of 1:800 seriously constrains their capacity to deliver services. The Government has since 2004, taken steps to address them; these include increased recruitment, training and the provision of modern equipment. The allegation that police leadership has no will to carry out investigations is subjective.

### **IV. POLICE INVESTIGATIONS**

**A. Police investigations of murders are generally inadequate, largely due to resource, training and capacity constraints.**

In 2004, the Government identified deficiencies in capacity in the Police service particularly, investigative capacity. The problem has been mitigated through increased recruitment, training, and provision of modern equipment. The perception that the Police leadership has no will to institute reforms to improve transparency is a subjective judgment.

**B. Investigations into KNCHR report.**

The KNCHR report which the Special Rapporteur heavily relied on and the evidence of the whistle blower contain serious inconsistencies. The Rapporteur failed to note that the KNCHR does not have investigative capacity. Talking to a witness does not constitute an investigation.

On Mount Elgon, the SR has relied on the KNCHR report titled “the Mountain of Terror’ and disagreed with Government investigators who confirmed the report was inaccurate. The findings of police investigators were based on sound facts. For example, page 14 paragraph 3 the report states that one of the witnesses was tied to a flying helicopter, collapsed, and then was dropped on a tree and lived to tell the story. This is preposterous [see annex IV].

It was on such grounds that the police found the report unsubstantiated hearsay, not an analysis of competent investigations and therefore unreliable.

▪ **Whistleblower’s evidence**

The SR quoted the evidence of one police deserter turned human rights whistleblower as further evidence of the existence of extra judicial killings and accused the police of dismissing the “compelling” testimony contained therein. However, closer scrutiny of the testimony reveals it is not only false but also irrational [See annex IV]

**C. Cases**

The Government has taken note of cases referred to by the Special Rapporteur and undertakes to conclude the ongoing investigations. With regard to the murder of Dr. James Ng’ang’a Kariuki Muiruri, the suspected police officer was arrested on the same day and is being prosecuted for murder.

**V. WITNESS PROTECTION**

**Witnesses to Abuse are Often Intimidated, And Fear Reporting or Testifying And The Inadequate Witness Protection Programme**

The Government acknowledges the fact that an effective and efficient witness protection programme is a cornerstone of successful prosecution of cases. Consequently, the Witness Protection was enacted 31<sup>st</sup> of December 2006 to provide a substantive legal frame for protecting witness among other functions. The Act became operational on 1<sup>st</sup> September 2008. In January 2009 regulations for effective and efficient implementation of the WPA were promulgated vide

legal Notice No. 5 of 2009. This places Kenya as the second Country in Africa, after South Africa to have a witness protection programme

On 1<sup>st</sup> March 2009 the Hon. Attorney General created the Kenya Witness Protection Unit (WPU) Comprising officers from the State Law Office, Director of Public Prosecutions, National Intelligence Services, Immigration, Police, Kenya Anti Corruption Commission and Office of the President. The Mandate of this multi sectoral team is to set up and operationalise an effective professional and efficient Witness Protection Unit. During the 2008 to 2009 financial the government committed a total of Kshs. Thirty five million (Kshs.35 million) towards the setting and operationalization of the Witness Protection Programme. This demonstrates the government's determination and commitment to combat serious crimes like, corruption money laundering, serious crimes war crimes, genocide and crimes against humanity among other crimes.

The Kenya witness Protection Programme is modeled along the UNODC international best practices, International Criminal Court (ICC), European Union, Australia, and South African, the Netherlands, Philippines, Australia among other successful models. These are successful models that have survived the test of time and are premised on international practices.

The Kenya Witness Protection Unit has received and continues to receive support from UNODC which has seconded a Resident adviser/consultant who is currently setting the Witness Protection Programme. The country has also received support from United States of America through the Department of Justice Overseas Department which has also seconded an in house trainer to the WPU. The UNODC is currently committed towards rising over USD 750000 to support the activities of the WPU. Proposals for funding have been developed and sent to the prospective donors

### **CURRENT SET UP AND IDENTITY OF THE WITNESS PROTECTION UNIT**

Kenya is governed by the rule of law and due process. The Witness Protection Act in Particular, Section 4 obligates the Hon. Attorney General to set up WPU which is a Unit within the office of the Attorney General. The WPU is answerable directly to the Attorney General. The WPU is headed by a head of Unit who reports directly to the Hon. Attorney General. The Unit is independent and impartial in the execution and exercise of its mandate.

### **JUSTIFICATION FOR THE CURRENT SET UP**

Kenya is not the first country to host a WPU within the office of the Hon. Attorney General. A comparative analysis of good practices in other jurisdictions does confirm that in the United States of America; the Philippines, the Netherlands, South Africa and Colombia to name a few, the Witness Protection Programme is placed under the Office of the Attorney or Ministry of justice to which is equivalent to the Attorney General's office here in Kenya. In these jurisdictions, the programme is separate from the police force. It follows that any fears and

apprehensions about the role of the Attorney General's office lack any merit and should be disregarded.

The UNODC needs assessment report dated October 2008 recommended the office of the Attorney as the most suitable institution to run the programme. This is in accord with the Witness Protection Act and the regulation thereto. Indeed, the office of the Attorney General is strategically placed to coordinate the activities of the programme better than any other agency as it has the requisite professional capacity. The officers currently implementing the programme have the requisite qualifications, determination and commitment to implement the program. The office also has the institutional capacity and autonomy to implement the WPP. Consequently, there is no basis of concluding the office of the Attorney General does not have capacity nor the requisite independence and impartiality to deal with the programme.

In addition to the above, the WPU officers will be recruited through a competitive and vetting procedure in compliance with international acceptable best practices and standards. The successful candidates will be subjected to specialized rigorous training to enhance their capacity to undertake their specific duties within the programme.

#### **ACHIEVEMENTS REALISED BY WITNESS PROTECTION UNIT**

1. Appointment of a Multi-Sectoral Witness Protection Unit vide Section 4 of WPA which is already functional.
2. Appointment of the Acting Head of the WPU
3. Acquisition of office premises at NSSF building, 19<sup>th</sup> Floor, Western Wing, equipping and furnishing of the office.
4. Joint trainings by UNODC and US Department of Justice of the officers operationalizing the WPP on the best practices and acceptable international standards. In July 2008, Workshop held at Nairobi, whose objective was to provide and expose Kenya to internationally accepted good practices. In March 2009, Workshop held to launch the Witness Protection Unit and sensitize the members of the unit and on 27<sup>th</sup> – 29<sup>th</sup> April 2009, Workshop held at Naivasha to prepare the structure, rollout plan and in-house policy documents like accounting guidelines, transport guidelines among other documents.
5. Witness Protection Regulations and Memorandums of Understanding have been developed and were promulgated on the 15<sup>th</sup> of January 2009 vide Legal Notice no. 5 of 2009
6. Preparation of in house policy operational documents meant to facilitate the setting up and operationalization of the WPU as follows:
  - a. Redrafted Regulations under WPA. The drafts have been forwarded to the legal drafting department for their input and final polishing before they are forwarded to the Hon. Attorney General for his appropriate action.

- b. A Structure (Organizational Chart) & job descriptions have been developed. Guidelines have developed to facilitate the recruitment of suitable staff.
- c) Operational roll out plan has been developed
- d) Guidelines in respect of payments, confidential accounting, documentation and security among others have been developed to facilitate internal Operations of the WPU
- e) Work plan and Budget for 2009 – 2010 have been developed to facilitate future projections

Kenya has made progress in operationalizing and implementing the WPP as enumerated above. This is a new concept in Africa save for South Africa. The programme needs expertise, equipment and technical assistance, and personnel with right skills and training to set up a professional, efficient and effective Witness Protection Programme. To achieve this, the government has enlisted the support of consultant from UNODC.

Against the foregoing, the SR should have given credit and recognition for the work the government has already done and the commitments shown in establishing an effective, independent and impartial WPP in Kenya. There is political good will from the government to accomplish this task and support from the development partners towards the realization of this goal.

## **VI. THE OFFICE OF THE ATTORNEY GENERAL**

### **A. Prosecutorial System**

The SR's allegation that the Attorney General has presided over a prosecutorial system that does not work, is baseless. The Attorney General states that Kenya's prosecutorial system works and has served the country well since before independence. However, like any other prosecution system in the world, including those in most developed jurisdictions, Kenya's prosecution system is not without challenges and hence the need for continued review and reform.

Records with the State law office states do not disclose a single complaint or request for criminal investigations that has been made to him in respect of which the Attorney General has failed to

discharge his constitutional duty under Section 26 (4) of the Constitution by directing the Commissioner of Police to investigate. The same applies to recommendations made by commissions of inquiry or parliamentary committees.

The Government further states that in all cases where investigation files submitted to the Attorney General by the Police or other investigative agencies disclose sufficient evidence to sustain a criminal charge, the Attorney General has discharged his constitutional powers under Section 26 (3) of the Constitution by prosecuting or ordering the prosecution of the persons implicated regardless of their status.

### **B. Prosecution of Senior Officials**

The SR alleged that the Attorney General has failed to prosecute senior officials in Government.

The decision whether or not to prosecute is based on the sufficiency of the evidence and not such extraneous considerations as the rank or seniority of the official involved. It is worthy of note that the SR has not given any single case where an investigation file with sufficient evidence has been submitted to the Attorney General and the Attorney General failed to prosecute. It is also on record that the Attorney General has, where the investigation files submitted to him contain sufficient evidence, prosecuted and continues to prosecute high ranking officials of Government including Ministers, Permanent Secretaries and chief executives of State corporations.

In the premises, the accusation by the SR that the Attorney General has presided over a bankrupt prosecution system or that he is guilty of impunity is utterly unfounded and displays on the part of the SR a complete lack of understanding of Kenya's constitutional framework and its criminal justice system. In addition, it manifests an acute sense of bias and prejudice on the part of the SR.

### **C. Legislative and Institutional Reforms**

The assertion that the Attorney General has done little in terms of institutional reforms is unfounded. The Attorney General's office has undertaken and overseen the introduction of key legislative and institutional reforms, including the following:

#### **Reforms in the Department of Public Prosecutions**

Since 2004, the Department of Public Prosecutions has been undertaking a reform and restructuring programme with the objective of enabling it provide effective and efficient prosecution service to the public. Some of the critical reforms being undertaken are the following:

- a) Establishment and operationalization of key thematic sections including:
  - i) Anti-corruption and Economic Crimes Section
  - ii) Narcotics and Counter-terrorism Section

- iii) Extradition, Mutual Legal Assistance and International Cooperation Section
- iv) Sexual Offences, Domestic Violence and Victims' Rights Section
- v) Witness Protection Unit
- vi) Anti-piracy Unit ( currently handling the prosecution of 8 cases involving 84 pirates)

b) Development and Publication of key prosecutorial instruments including the National Prosecution Policy; Code of Conduct for Prosecutors and the Prosecutors Training Manual;

c) Membership in International Prosecutors Association (IAP) and the African Prosecutors Association (APA) and subscribing to their international best practices and standards

d) Ongoing initiative to phase out Police prosecutions.

e) Specialised training of prosecutors to equip them with skills to handle and prosecute complex fraud cases and transnational organized crimes.

### **Other Reform Initiatives**

The Attorney General initiated an ambitious Legal Reform programme aimed at overhauling existing laws, which were archaic and colonial in origin expanding the democratic space, incorporating good governance, transparency and accountability ideals, respect for rule of law and human rights, by appointing 17 Task forces which examined various aspects of the laws of Kenya. The membership of these task forces was mainly composed of the stake holders who stood to be affected by the proposed changes in the law and representatives of the civil society. Representatives of the relevant government departments were a minority. The Attorney General pioneered a consultative approach to political, legal and social issues in Kenya.

In the area of administration of justice the following are some of the key areas which have resulted in legislation being enacted:

1. **Law and Order:** Such as the reform of the **Preservation of Public Security Act**, by removing powers of detention without trial; the **National Security Intelligence Services Act**, which replaced the Police unit for intelligence blamed for gross and consistent human rights violation, with the National Security Intelligence Service as an institution independent of the police carrying its functions within the confines the law and respect for human rights ; amended the **Public Order Act**, which had cumbersome procedures for licensing of public meetings and peaceful demonstrations by repealing the licensing procedure with only the requirement of notification to the law enforcement authority thereby enhancing the enjoyment of freedom of assembly.

2. **Legal Sector:** In 1998, initiated the Legal Sector Reform Programme (LSRP) by setting up the Legal Sector Reform Coordinating Committee with representatives from the Judiciary, the Police, Prisons Department, probation Department and the Children's Department. The Committee had the mandate of carrying out a comprehensive review of the legal sector to improve operational efficiency. This was later transformed into the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme involving 30 departments and providing a precedent for a framework for cooperation between the Government, the private sector and development partners.
  
3. **Administration of Justice:** Enactments include **Community Service Orders Act**, which was aimed at decongesting prison population and reform prisoners; the **Auctioneers Act**, which consolidated various legislations and aimed at professionalizing auctioneers and developing standards of auctioneering; **Council of Legal Education Act**, aimed at ensuring and harmonizing high standards of legal education; the National Council for Law Reporting to ensure publication of law reports.
  
4. **Reform of Criminal Laws and Procedures:** such as the **Criminal Law (Amendment) Act, 2004** which introduced wide ranging reforms including provisions for the protection of minors in court and made confessions before law enforcement officers inadmissible in court, thereby reducing considerably incidences of torture by law enforcement officers; and further removed corporal punishment as a penalty under the penal laws; **Organized Crime Bill, 2007** that was introduced to deal with organized crime including its financing. However the Bill was not passed by Parliament. Despite this setback the Government is confident that the Bill will be passed when re-introduced; Plea bargaining legislation was enacted in 2008. This law is aimed at easing the congestion in the courts and provide for speedy conclusion of criminal cases.
  
5. **Corruption:** drafted and oversaw the enactment of the **Anti Corruption and Economic Crimes Act, 2003** and the **Public Officer Ethics Act, 2006**, both of which are key statutes in governance on the war against corruption in Kenya
  
6. **Specific Legislation for Women:** such as the National Commission on Gender and Development which provides for gender rights and facilitates gender mainstreaming in National Development; the **Sexual Offences Act** which provides the framework for dealing with sexual offences and introduces mandatory sentencing and enhancement of sentences. In addition, it makes provisions for the protection of vulnerable witnesses and relaxes the strict applications of the rules of evidence to enable the courts of law receive evidence of victims without undue prejudice to them; the **Domestic Violence (Family Protection Bill)** is now ready for enactment
  
7. **Children:** such as the **Children Act** to domesticate the UN Convention on the right of the child and the African Charter on the rights and welfare of the child.

8. **Persons with Disabilities:** The **Person's with Disabilities Act, 2003** which provides for the rights and privileges of persons with disabilities and a National Council and National Development fund for Persons with disabilities.
9. **Labour Laws:** Complete overhaul of legislation for workers. Enacted the **Labour Relations Act**, the **Labour Institutions Act**, the **Employment Act** and the **Work Injury Benefits Act**. These laws also domesticate the various ILO conventions.
10. **Environment:** enacted the **Environment Management and Coordination Act**, which has been lauded as a precedent setting statute in the world; the **Forests Act**, and the **Water Act**.
11. **Commercial Laws:** The drafting of the **Companies Bill** and the **Insolvency Bill**, both of which are now ready and should be enacted by parliament this year.
12. **Laws Relating To Economic Liberalization, Reform And Management:** the **Government Financial Management Act** which provides for the management of the governments financial affairs; the **Public Procurement Act**, which provides a transparent system of procurement and thereby considerably reducing instances of corruption and leveling the field for any interested person to participate; the **Public Audit Act**; laws removing foreign exchange controls and enhancing the independence of the governor of central bank and management of monetary policy.
13. Initiated the creation of the **Standing Committee on Human Rights** and thereafter drafted the **National Commission on Human Rights Act, 2002** creating an independent commission with wide ranging powers for the better promotion and protection of human rights in Kenya.
14. Participated in police reform in Kenya and in particular advising and initiating the training of law enforcement officers in the human rights aspect of their work and the necessity of having an independent override body to deal with complaints against the police.

#### **D. Proposals for An Independent Prosecutorial Agency**

The Attorney General has for a long time been at the forefront in advocating for the establishment and entrenchment in the Constitution of an independent Directorate of Public Prosecutions.

The proposal was included in the draft Constitution (popularly referred to as the “Wako draft”) that was rejected in the 2005 referendum.

## **VII. THE JUDICIARY**

### **A. Judicial Integrity**

The SR alleged that the Judiciary is slow and corrupt. The Government acknowledges the court process is slow due to manual recording of court proceedings, inadequate capacity, personnel and physical infrastructure. Several measures are being undertaken to address the shortcomings. They include:

- Introduction of digital recording of court proceedings
- Establishment of online filing of cases
- Automation of filing system of the court registries
- Appointment of case managers to monitor cases
- Recruitment of additional judicial officers
- Construction of additional courts
- Introduction of alternative dispute resolution

Matters relating to allegations of corruption are being addressed. The initiatives include;

- Creation of a Standing Ethics and Governance Committee that will undertake;
  1. On the spot anti-corruption auditing
  2. Monitor and report all forms of corruption for further action

### **B. Distrust of The System**

Due to the underlying challenges, there is distrust of the judicial system. To address these, the following measures are being undertaken:

- Establishment of a communication center within the judiciary to engage with the public on the court processes and reform measures being undertaken.
- Promotion of dialogue with other stakeholders through
  1. Establishment of court users committee
  2. Regular open days
  3. Formulating Bar-Bench Committees
- Simplification and modification of Rules of Procedure.

### **C. Judicial Appointments**

The SR alleged that there is crony opaque appointments and extraordinary levels of corruption in the Judiciary. The Government expresses reservations on the wholesale condemnation of the institution of the judiciary. It suffices to note the judiciary has set in motion procedures to curb corruption, incompetence and indiscipline. The judiciary has also established a training institute to continuously strengthen its human resource capacity in all areas of work including gender, human rights, children and anti-corruption. Contrary to the SR's allegations, appointment, tenure of office and removal of judges is governed under sections 61 and 62 of the Constitution of Kenya. The Judicial Service Commission (JSC) is mandated to deal with issues of corruption and indiscipline, in addition to the appointment and removal of other judicial officers. The JSC is set to be expanded to include other actors.

## **VIII. EXTRAJUDICIAL EXECUTIONS IN MOUNT ELGON**

### **A. Government Action (2006-2008)**

The SR states that the Government did nothing or little to help civilians in Mt. Elgon between 2006 and 2008. The assessment and conclusion reached by the SR on the role of the Government in responding to the security challenges in the Mt. Elgon area are largely based on speculation and misinformation. It is contradictory for the SR to state that the Government did little between 2006 and 2008 and at the same time ridicule Government action. Operation "Tafuta Amani" (seek peace) was launched in January, 2007, to address the insecurity caused by activities of Sabaot Land Defence Force (SLDF) criminal gang. The so called "small operation" was part of the Government's coherent response to resolving the problem in its earlier phase. The only difference with the March 2008 operation 'Okoa Maisha' (save lives) was that the military provided logistical support to the civilian police.

During the operation, there were several visits by high level Government officials to advocate for law and order. The Provincial administration conducted regular public meetings to appeal for the surrender of illicit firearms and cooperation with security agencies. These efforts culminated in a major meeting held on 24<sup>th</sup> March, 2007. Approximately 430 District leaders met at Kaibuk Girls High School and committed to a peaceful end to the problem. Despite this, the SLDF launched systematic criminal atrocities against the local population.

All these efforts demonstrate the Government's commitment to restoring law and order in the region.

### **B. Joint Military Operation (2008)**

In Mt. Elgon District, the Police sought reinforcement from the Military in conformity with *Section 3(2) Armed Forces Act (Cap 199)* Laws of Kenya. Consequently, on 10<sup>th</sup> March, 2008, the Military and the Police launched a joint operation "Okoa Maisha" (save lives) against the

illegal SLDF. This operation was directed by the Western Provincial Police Officer. Needless to state, the SLDF had perpetuated insecurity in the District for over two years despite sustained efforts by the Police to contain the group's activities. The role of the Military was primarily to support the Police, provide advice and logistics. It should be noted that during the "Okoa Maisha" operation eight people were killed.

### **C. Abuses by Security Forces**

Contrary to the Rapporteur's assertions, the Kapkota Camp was a temporary military camp used solely as a screening centre. No persons were detained in the camp unless they were arrested suspects. Those identified as SLDF adherents were handed over to the Police for further investigation and prosecution. The local people volunteered to undergo the screening exercise in order to be cleared. As a result, 3,839 persons were screened at the camp.

There is no discrepancy between the figures given by the police and the Military on the numbers of persons at Kapkota camp. The military figures included all persons screened where as the police figures were for those arrested for further questioning.

The common border between Kenya and Uganda is porous, and communities living along it cross over at will. It has therefore been a challenge for investigators to conclude investigations into the whereabouts of the alleged missing persons. It should be noted that some suspects have chosen to remain across the border. The Government requests, for reasons of confidentiality and security, that the names of persons screened/detained that were provided to the SR should not be published.

### **D. Official Responses to Allegations of Abuse**

The SR cited the report by Parliamentary Committees on Administration and National Security, and Defence and Foreign Relations to support his assertion that the Government failed to act on recorded allegations of human rights abuses in Mt. Elgon.

He failed to appreciate that the Hon. Fred Kapondi, Member of Parliament for Mt Elgon, who co-chaired the joint visit by the Parliamentary Committee on Administration and National Security, and the Committee on Defence and Foreign Relations, was at the material time under investigation for aiding and abetting SLDF criminal activities. The victims quoted in the case studies in the parliamentary report were handpicked SLDF sympathizers. Their unfounded allegations on human rights abuses by security forces were aimed at discrediting them so that they would be withdrawn from the Mt. Elgon area. If this had happened, it would have allowed SLDF to continue with their illegal activities. The Government believes that the alleged human rights violations cited in the report are unfounded.

The SR cited reports by NGOs and human rights groups on alleged abuses by security forces. The SR acknowledges that the information he gathered could be insufficient for him to reach an incontestable conclusion. The evidential value of these reports has been analyzed elsewhere [see annex IV].

### **E. Independent Investigations and Reform**

Considering the unusual circumstances under which the operation in Mt. Elgon was undertaken and taking into account complaints of alleged human rights violations, the Government launched investigations. A comprehensive report was compiled and submitted on 25<sup>th</sup> March, 2009, to the Office of the High Commissioner for Human Rights in Geneva through the Permanent Mission of Kenya to the United Nations.

With regard to allegations against the Military, the Government is satisfied that the Ministry of State for Defence has legislation that adequately provides for procedures for investigation and has carried out sufficient investigations.

The SR raised concerns on the independent forensic analysis of graves. The areas where decomposed remains of victims of murder were found in Mt. Elgon during “Operation Okoa Maisha” have been treated as scenes of crime and sealed off. The Government is keen on having forensic investigations carried out in order to facilitate prosecutions in pending cases of murder. General access can therefore not be allowed. Any party wishing to access the areas is required to liaise with the police.

#### **F. Resettlement of the locals in the Scheme**

Following requests by the residents of Mt. Elgon District, the Government has since established a Military camp and Police base at Kapkota to respond to any security threats. In addition, the Government has established a Task Force to resettle the bonafide allottees of land at Chebyuk Phase III.

### **IX. POST ELECTION VIOLENCE**

The violence in the aftermath of the 27<sup>th</sup> December, 2007, General Election was largely spontaneous. It arose out of the disputed election results and was of such a great and overwhelming magnitude that left the police seriously constrained. There were instances in which individual police officers were deemed to have contravened the law. Investigations were launched and prosecutions were instituted. Nevertheless, it is important not to lose sight of the circumstances and the pressure under which they were working at great risk to their own lives.

Following mediation by Dr. Kofi Annan, the National Accord and Reconciliation Act, 2008 was concluded paving way for the establishment of the Grand Coalition Government. In line with the Government’s commitment to investigate the root causes of the post election violence, it constituted the Waki Commission. The Commission’s report has been adopted by Parliament. The Government is fully committed to implementing the recommendations despite some difficulties encountered in the political process. The Waki Report provides a clear road map to deal with post election violence.

The Government reorganized of its security machinery in the affected areas after the post election violence. In the Rift valley alone, 32 new Police Stations and administration Police posts have been built. A lot of internal reorganization of security agencies was also carried out.

Compensation of the victims of post election violence is tied to ongoing political processes and will be addressed comprehensively by the proposed Truth Justice and Reconciliation

Commission. Meanwhile, the Government has expended over USD 40 million in the provision of humanitarian assistance to families and victims of the post election violence.

## **X. HUMAN RIGHTS DEFENDERS**

Allegations of intimidation of human rights defenders by security agents were investigated and found to be baseless. A visit to the offices of one of the non- governmental organizations and the home of a member of one of the human rights groups in an attempt to establish the substance of these allegations were later cited as evidence of intimidation.

The murder on 6<sup>th</sup> March, 2009, of Oscar Kamau King'ara and George Paul Oulu, two human rights defenders, in as yet unclear circumstances, is regrettable. It will be recalled that at the time of the unfortunate incident, the Government issued a public statement expressing its concern during the 10<sup>th</sup> Session of the Human Rights Council meeting held in Geneva. Investigations were launched and a brief on the matter is contained in **annex VI**. The Government is not averse to independent investigations.

Under no circumstances have human rights activists been harassed by law enforcement agencies. Kenya upholds NGOS participation in the work of the HRC, based inter alia on ECOSSOC resolution 1996/31 and the modalities established by the human Rights Council. Politicization in the consideration of human rights issues benefits no one.

## **XI. DEATH PENALTY**

The death penalty remains a lawful sentence under the laws of Kenya. Attempts were made to address the matter during the constitutional review process in 2003; however, there was no consensus because the public rejected the proposal to abolish the death penalty. Nonetheless, the matter will be revisited in the current constitutional review process. The Government recently launched the legal aid programme that is currently in its pilot stage, to ensure enhanced accessibility to justice by the poor and most vulnerable in the society.

## **XII. APPOINTMENT AND REMOVAL OF CONSTITUTIONAL OFFICE HOLDERS**

The appointment and removal of constitutional office holders such as Judges, Attorney General, and Commissioner of Police is provided for under the Constitution of Kenya. Any proposals for change of the established procedure of appointment and removal can only be considered during the Constitutional review process which is imminent.

Further, the Police force has a well established structure with a clear chain of command. It is therefore untrue to state that the Police Commissioner has established a highly centralized leadership. Numerous reforms in the police force have been undertaken and the perception that the Police leadership has no will to institute reforms to improve transparency is unmerited.

## **XIII. METHODOLOGY AND CONDUCT**

Kenya is fully committed to the work of the Human Rights Council and the various mechanisms through which the Council conducts its work, including the special mandate holders. While we appreciate that he has highlighted important situations that require the attention of the government, we strongly believe that the mandate holder should have conducted his mission in

an objective manner, on the basis of credible and reliable information. The mandate holder should be guided by, and observe the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council contained in Human Rights Council Resolution 5/2 of June, 2007.

It is evident from the Rapporteur's draft report that he overly relied on incredible information provided by KNCHR, civil societies and purported victims of Police brutality. His demeanor and hostility during his interactions with Government officials attests to the fact that his impartiality and objectivity were compromised. This is contrary to the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council. *Article 3(e)* requires the Rapporteur to "Uphold the highest standards of efficiency, competence and integrity, meaning, in particular, though not exclusively, probity, impartiality, equity, honesty and good faith." *Article 3(f)* stipulates that he shall "Neither seek nor accept instructions from any Government, individual, governmental or non-governmental organization or pressure group whatsoever".

Following investigations by the Government, it has emerged that the Western Kenya Human Rights Watch (WKHRW) and the Independent Medico-Legal Unit (IMLU) bribed people to give false information about the military. The local people were vulnerable and easy to manipulate due to the poverty following SLDF terror. The Government has since received statements from the locals, showing that the Human rights groups paid out money ranging from Ksh. 10,000 to 15,000 to these people to lie. [See annex V].

The Government of Kenya expected the Special Rapporteur to establish the facts based on objective reliable information emanating from relevant credible sources that he had duly cross-checked to the best extent possible in keeping with *Article 6* of the Code of Conduct. Furthermore, *Article 13(c)* states the "...concerned Government authorities are the first recipients of the conclusions and recommendations concerning ... and are given adequate time to respond..."

The decision by the SR to hold a press conference at the United Nations office in Nairobi (UNoN) at the end of his visit, which was attended by the spokesperson of the outlawed Mungiki gang, Mr. Njuguna Gitau wa Njuguna, was unprecedented. Most regrettably, it gave Mungiki legitimacy.

The Rapporteur failed to grasp the prevailing mood in the country and this had far reaching repercussions. The press conference triggered panic and sparked widespread demonstrations in some parts of Central Kenya and Mt. Elgon, by victims of organized criminal gang activities. The Mungiki was emboldened and increased its extortion fees by 100 percent. In response, members of the public organized themselves in readiness to resist the Mungiki. Consequently, 44 Kenyans lost their lives in unfortunate circumstances, including, 15 suspected Mungiki members who were lynched by the public. In retaliation, Mungiki attacked a rural village and killed 29 members of the public on the night of 20<sup>th</sup> and 21<sup>st</sup> April, 2009.

## CONCLUSION

From the foregoing, it is clear that most of the reforms recommended by the SR such as those on capacity building, witness protection, expediting the judicial process, and strengthening the internal and external oversight mechanisms, were already being undertaken by the Government

even before the visit by the SR. The Government is committed to ensuring that such reforms as well as those articulated in Vision 2030, and those under Agenda 4 are carried out to finality.

As stated earlier, the Government had hoped that a more open and constructive dialogue with the Rapporteur would have engendered a spirit of mutual respect and encouragement and given added impetus to the implementation by the Government of its reform agenda.

Once again Kenya affirms its strong commitment to its human rights obligations under the various international instruments. It is in this spirit that the Special Rapporteur was invited to the country.

**GOVERNMENT OF THE REPUBLIC OF KENYA**

**22<sup>nd</sup> MAY, 2009**

**NAIROBI**