

Statement by Professor Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions

United Nations Human Rights Council, Geneva, 3 June 2009

Mr President, distinguished delegates,

Today I am presenting the following reports: an annual report, a 400 page communications report, follow-up reports on Guatemala and the Philippines, and final reports on missions to Afghanistan, Brazil, the Central African Republic, Kenya, and the United States of America.

In 15 minutes I cannot hope to do justice to the complexity of these reports. I will thus confine my remarks to a few brief observations on some specific issues and situations.

A. Annual report (A/HRC/8/3)

I wish to draw attention to three issues addressed in my annual report.

(i) Reprisals against persons cooperating with Special Procedures

Intimidation of, or retaliation against, those cooperating with Special Procedures mandate-holders is a major problem. The Council should urge Governments, UN field presences and Special Procedures to give particular attention to the protection of those who have cooperated with a mandate-holder. The Council itself should define appropriate mechanisms to make representations to the Government concerned in a timely and effective manner and to monitor situations.

(ii) The execution of juvenile offenders

The prohibition on executing juvenile offenders is a clear and very important violation of international human rights standards. In view of the very significant number of such executions taking place in the Islamic Republic of Iran, the Council should designate one of its Bureau members to seek to visit Iran to engage in consultations with all stakeholders with a view to identifying appropriate measures which can be taken in order to bring an immediate halt to the sentencing and execution of juvenile offenders.

(iii) The killing of witches

In many countries around the world there is a strong belief in the power of witches. There are also a great many reports of individuals being killed after being accused of practicing witchcraft. The Council should acknowledge that it is entirely unacceptable for individuals accused of witchcraft to be killed including through extrajudicial processes. It should call upon Governments to ensure that all such killings are treated as murder and investigated, prosecuted and punished accordingly.

B. Final reports

Since my reports on Brazil and the Central African Republic were made public long ago I will not introduce them now but will be happy to answer any questions.

1. The United States of America

I am grateful to the United States Government for its invitation to visit and for the cooperation it showed me during my visit. The range of issues to which my attention might

have been directed was very large. My report and my comments today focus only on a small number of these.

In relation to the death penalty, the challenge is to ensure that its imposition complies with fundamental due process requirements. It is widely acknowledged that innocent people have likely been sentenced to death and executed. Yet, in Alabama and Texas, I found a shocking lack of urgency about the need to reform glaring criminal justice system flaws. These include a lack of adequate counsel for indigent defendants and racial disparities in sentencing. Given the inadequacies of state criminal justice systems, Congress should enact legislation permitting federal court habeas review of state and federal death penalty cases on the merits.

In relation to civilian casualties in the context of the US's international military and intelligence operations, there is a need for greater transparency and accountability. The Government should track and make public the number of civilian casualties. The military justice system should provide the public with basic information on the status of investigations into civilian casualties or prosecutions resulting therefrom.

Targeted killings carried out by drone attacks on the territory of other States are increasingly common and remain deeply troubling. The US Government should disclose the legal basis for such killings and identify any safeguards designed to reduce collateral civilian casualties and ensure that the Government has targeted the correct person.

Despite its sophistication and the good intentions of many of its personnel, the US military justice system suffers from serious shortcomings in terms of accountability for killings which violate the applicable law. The Government has failed to effectively investigate and punish lower-ranking soldiers for such deaths, and has not held senior officers responsible under the doctrine of command responsibility. Worse, it has effectively created a zone of impunity for private contractors and civilian intelligence agents by only rarely investigating and prosecuting them.

Finally, my report recommends that the US Government should honour its stated commitment to transparency and accountability by establishing a national commission of inquiry to conduct an independent, systematic and sustained investigation of policies and practices that lead to deaths and other abuses. An independent special prosecutor should also be appointed to pursue any criminal activities undertaken by Government officials.

2. Kenya

Mr President, I want to begin by acknowledging that the Kenyan Government deserves full credit for having invited me to visit. It is also a credit to Kenya that the Waki Commission was established to investigate post-election violence. That Commission did a superb job and its report remains an indispensable guide to the reforms needed to prevent a repetition of that violence when the next elections are held. In addition, a police reform Taskforce has recently been established and, last Friday, a new judicial reform initiative was announced. I am also encouraged by the presence today of a large delegation representing Kenya which attests to the vigorous debate on these issues within the Government and the society as a whole.

In relation to my report on Kenya, the Council needs to ignore much of the background noise that has been generated, and to focus its attention on four issues which I hope all parties agree need to be resolved:

(i) *Post-election violence.* Well over 1,000 persons were killed following the December 2007 general elections. Those responsible, including police officers and politicians, remain immune from prosecution 18 months later.

(ii) *Police shootings.* These occur in large numbers on a regular basis, and are not publicly recorded or accounted for. In one five month period in 2007, the Kenya National Commission on Human Rights (KNCHR) documented approximately 500 people who were killed or disappeared. The report of a police whistleblower, Bernard Kiriinya, subsequently assassinated in October 2008, documents in great detail 24 separate occasions on which one particular police death squad extrajudicially executed some 58 suspects, mostly in cold blood. The testimony clearly implicates senior officials, including the Police Commissioner. No action has been taken.

(iii) *Mt Elgon.* There is compelling evidence that in 2008 at least 200 persons were killed or disappeared by the security forces in the Mt Elgon area. The military has produced no serious response to these allegations and a report by the police was a whitewash.

(iv) *Human rights defenders.* Before, during and after my mission, human rights groups and individuals were systematically harassed and intimidated. Many defenders have gone into hiding, others have gone into exile, and two were assassinated shortly after the mission.

Mr President, my report on the situation in Kenya was very critical. The reason is that, for all its strengths, Kenya has a major problem of extrajudicial executions and it is one which has not yet been adequately acknowledged and addressed. This is no secret to anyone in Kenya and in most respects I am simply retelling the story that I heard from the great majority of my interlocutors. I am also greatly encouraged by the goodwill that I have witnessed here in Geneva on the part of the politically heterogeneous Kenyan delegation.

This does not yet mean, however, that the crisis has been resolved. The police in particular remain a major stumbling block. Their attitude is reflected in the views expressed earlier this week by a member of the Government delegation to the Council, the Police Spokesman, Mr Eric Kiraithe. Earlier this week, he publicly called me a “bigoted activist”, and claimed that my report is a “baseless fabrication devoid of even an iota of fact”. In his view, and that of the Police Commissioner for whom he speaks, it “provides little beyond wild allegations”, is based on work plagiarized from local activists, includes “inexcusable falsehoods”, and manifests “an astonishing disregard for due process”. He accused me of having taken all of my recommendations from “activists keen to attract donor funding” and who were, “therefore, neither interested in truth nor accuracy”. Unsurprisingly, the response fails to address substantively any of the key concerns I raised.

This personal attack on the Special Rapporteur is unfortunately typical of the response by the Kenya Police in such contexts. Their approach has been to attack the messenger rather than address the issues raised. This is consistent with a longstanding practice of responding to alleged human rights violations by attacking the source of the allegations.¹

¹ I offer some examples:

- The Police Commissioner, who refused to provide me with any of the information that I sought when I was in Kenya, says my report’s “building blocks are rumours and utter lies. Its narrative was predetermined. And the substance is obviously false.” The meticulous and detailed reports of killings are simply not addressed.

Mr President, attacks on those who document abuses do not absolve a government of its obligation to investigate, prosecute and punish those responsible for extrajudicial executions. This will not, however, be achieved while the current Police Commissioner is in charge of investigations and prosecutions. Instead, impunity for official killings will continue while the deck chairs are reshuffled and more character assassinations are launched.

I am happy to be able to report that there are others in government who have fully recognized the scale of the challenges that Kenya faces in this area. The Prime Minister, and several other Cabinet members have acknowledged the central message of my report. Martha Karua, the then Justice Minister with whom I dealt, has urged the Government to accept the recommendations, observing that “Alston is saying what Kenyans on the ground are saying”. Indeed, most of the relevant civil society groups have been strongly supportive of the report. Public opinion, predictably, has been mixed. A great many comments have lamented the extent of unrestrained police killings. Most importantly, there is considerable public insecurity as a result of the threat posed by criminal gangs, along with some questioning of the role of an outsider (the UN Special Rapporteur). A good example is “sam7” who noted in a post to the Daily Nation website on May 28:

“Why are we even listening to this yellow teeth pale skin guy. What report does he have about the victims of Mungiki . . . or was he only concerned by the killings of these thugs who have no respect for human life?”

Sam raises two issues, leaving aside my need for dental renewal. The first concerns the issue of why a UN Special Rapporteur needs to be the one to raise these issues. This concern was echoed in the Government’s official response which claims that my report questions the “very basis of the Kenyan state” and thus “impinges on sovereignty”. But it bears repetition that my report revolves around two concerns: killings by Government officials and subsequent impunity. Much of the information that I have brought to public attention was

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- The response to a detailed and balanced Parliamentary report on the killings at Mt Elgon is dismissed on the grounds that the Committee Chairman (MP Fred Kapondi) was under investigation.
 - Another report on Mt. Elgon, coming from the International Committee of the Red Cross, is rejected because the ICRC “lack investigation ability, mandate, expertise and capacity.”
 - When two human rights defenders with whom I met are assassinated in broad daylight and the evidence points to the police, the only substantive response to date is reject international assistance with the investigation and for the police to announce that one of those killed was under investigation and that the car he was driving was probably stolen.
 - When the Kenyan National Commission on Human Rights produces reports detailing police killings, they are dismissed on the grounds that Commission members have been bribed.
 - When the Western Kenya Human Rights Watch’s meticulous accounts of killings are dismissed, and virtually all of their staff intimidated and harassed by government officials, the response is that the organization is alleged to have bribed witnesses to criticize the Government.
 - And when a former member of a police death squad describes in compelling detail the killings he and his colleagues were directed to undertake, the Police response (Annex IV to its report to the Human Rights Council) is first to hint darkly at the “known antecedents of the Whistleblower” and then to say that his testimony is “not only false but also irrational”. His “narrations ... are imagined” and they are thus “not witness accounts that can be properly investigated.” Therefore, no investigation of any sort is undertaken.

Not one of these allegations has been substantiated, let alone prosecuted successfully, but they have been used as a pretext to avoid all investigations of a wide range of well documented allegations of police and military killings.

already available within Kenya but had, at least until recently, been ignored by the Government.

My decision to call for the dismissal of the Police Commissioner and to suggest that the Attorney-General might wish to resign after many years in office reflects my conclusion that these two officials are the key individuals with direct responsibility for the current state of affairs. Ultimately, of course, it is the Government as a whole which bears responsibility. I would note that the Prime Minister has roundly condemned extrajudicial executions, while the President has yet to do so. On May 15 this year, President Kibaki announced that he had “appointed a national Taskforce to fast-track Reforms in the police department ...”. My sincere hope is that this Taskforce will produce a blueprint for the sort of comprehensive reform that is needed.

The second issue raised by Sam is the one that is uppermost in the minds of many members of the public. It relates to the climate of fear and insecurity generated by the activities of criminal gangs, including the Mungiki. Since my visit, a further 44 people have been killed, either by the Mungiki or in vigilante-style responses to that gang’s extortion activities. In my report, I roundly condemned the Mungiki.² The challenge is simple. The Kenyan Police need an effective strategy for responding to this threat. Hyper-active death squads have brought no relief. They have only succeeded in undermining the rule of law, distracting the police from their protection and investigative roles, fuelling the cycle of violence, and tarnishing Kenya’s reputation. It is urgent that a detailed and convincing strategy for combating violence, extortion and other crime by gangs, including the Mungiki, be given the utmost priority. Statements that they will be ‘crushed’ or ‘smashed’ provide no meaningful reassurance that such efforts are underway.

Finally, Mr President, I want to end my observations on Kenya with three succinct comments. The first is to hope that the herculean and admirable efforts of the coalition partners to craft a joint statement today presage a new era in Kenya’s approach to extrajudicial killings. The second is to express the hope that the international community will be fully supportive of any comprehensive and good faith plan prepared by the Government’s Taskforce, provided it wins the support of civil society. And the third is to call upon the Government to reign in the campaign of violence against human rights defenders and to permit the safe return of the many who have fled into exile and to guarantee that they shall not be killed as a result of their efforts to remind all Kenyans that their future lies in a society which transcends the scars of the past and respects the human rights of all individuals and groups within society.

3. Afghanistan

In relation to Afghanistan, my report’s principal recommendations have already been considered by this Council last year. I thus wish only to reiterate my strong concern at the continuing problem of preventable civilian casualties, especially in the context of aerial bombing. An incident, less than one month ago (on 4 May 2009) in Gerani visit, Farah Province, provides an important if distressing example. A Taliban attack on ANP checkpoints led to a call for ANA reinforcements and then for air support from the IMF. There has been much debate about the number of civilians killed, whether Government figures are inflated, and whether the dead included significant numbers of Taliban fighters.

² I noted that those who resist them 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.”

Various human rights and other groups have spoken of dozens of civilians killed including women and children. There is compelling evidence that the bombardments occurred after an apparent lull in the fighting. It also appears that insufficient precautionary measures were taken to limit civilian casualties.

The incident highlights two lessons. The first is the need for real accountability based on credible independent investigations. It must become routine for independent monitors to be introduced at a certain stage in response to such incidents. The second is the need to use extreme caution when bombing inhabited villages, in view of the high likelihood of significant civilian casualties. It is clear that the Taliban will endeavour to draw coalition forces into such situations by using civilian households for military purposes, but this makes prudence all the more important. Mr President, I am encouraged in this regard by official statements reported this morning which acknowledge that serious errors were made in this incident and that more robust efforts will be made in the future.

C. Follow-up reports

1. Guatemala

There has been a significant rise in the rate of killing since my visit in August 2006. Particularly concerning are the continued attacks on human rights defenders, increases in the killings of women, and the emergence of new targets of unlawful killings, such as public transit operators. The State has not adequately investigated or otherwise responded to these killings. Much needed improvements to the criminal justice institutions, witness protection, budget allocation, and fiscal policy have not been implemented. The most encouraging development has been the establishment of the International Commission Against Impunity in Guatemala (CICIG). The CICIG has the potential to improve criminal investigation and prosecution procedures, witness protection, and to assist the State in implementing necessary national security legislation. I am concerned, however, that the CICIG appears to be devoting itself almost exclusively to the prosecution of corruption cases, and has not placed an emphasis on extrajudicial executions which constitute a central part of its mandate.

2. The Philippines

The fact that this Council has the capacity to enhance respect for human rights on the ground is well demonstrated by the case of the Philippines. In my follow-up report I call upon the Government to take more energetic steps to implement the needed structural reforms and especially to make a more concerted effort to prosecute those responsible for the killings. By the same token, it is essential to point out that the number of killings has fallen dramatically in each of the two years since my visit. In addition, the Philippines Human Rights Commission has been reinvigorated, a major and highly credible investigation of the death squads in Davao has been opened, and the Government continues to announce new initiatives designed to reduce the number of killings and identify those responsible.

C. Conclusion

Mr President, the mandate on extrajudicial executions was never intended by the Council to be an easy one. It is called upon to address issues that lie at the heart of human rights and go to the core of governmental interests. The challenge before us all is to be able to confront those issues systematically and objectively and to be able to engage in the sort of constructive dialogue that will help to put an end to unlawful killings.