

Mandates of the Working Group on Arbitrary Detention and the Special Rapporteur on extrajudicial, summary or arbitrary executions

REFERENCE:
AL KEN 2/2019

13 March 2019

Excellency,

We have the honour to address you in our capacity as Working Group on Arbitrary Detention and Special Rapporteur on extrajudicial, summary or arbitrary executions, pursuant to Human Rights Council resolutions 33/30 and 35/15.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning what appears to be a **persisting and growing pattern of extrajudicial executions due to excessive use of force by Kenyan law enforcement personnel and other security agencies, in the context of combating criminality and terrorism.**

Concerns regarding alleged extrajudicial executions by police forces have been raised by Special Procedures mandate holders in two previous communications sent to your Excellency's Government on 11 July 2017 (AL KEN 9/2017) and on 16 October 2017 (UA KEN 13/2017). We would like to thank you for your response to KEN 13/2017 from 18th October 2017 and await a "substantive response from relevant authorities in Nairobi", as indicated by your Excellency's Government's letter. We respectfully urge your Excellency's Government to provide us with replies at your earliest convenience to other letters previously sent regarding these and similar concerns.

According to the information received:

Instances of enforced disappearances, torture and extrajudicial executions by law enforcement personnel against youth in slum areas in Kenya have been on the rise, particularly during the past five years, surrounded and encouraged by what appears to be a general climate of impunity.

Most recently, between mid-October and early November 2018, at least 25 young men have been killed by police officers associated with the Huruma and Dandora police stations, in Mathare, Majengo, Kayole, and Dandora in Nairobi.

1. On 15 October 2018, Stephen Weru Wangui and an unidentified man were taken to Mollem police station at approximately 18:00 hours by two police officers. Witnesses state that the victims were then dragged behind the police station, where the officers asked them to choose the spot where they would be killed, then forced them to lie down and shot them at close range in the face and throat. The same police officers had previously arrested Mr. Wangui earlier that day and taken him to Dandora Police Station, then releasing him

without charges. The family of Mr. Wangui was forced to pay 6300 kes for his post-mortem report.

2. On 28 August 2018, Alex Githuku Macharia, 34, was shot and killed at approximately 23:30 near a scrap metal shop where he worked, by two police officers from Dandora Police division. The officers shot the victim at close range without provocation, then proceeded to set fire to his shop. Police authorities threatened witnesses.
3. On 26 October 2018, Evans Odhiambo, 25, was rounded up during police operations conducted by Huruma or Pangani Police divisions, and executed in broad daylight near Mathare North Primary School. The victim survived his shooting. At approximately 19:00 hours, Mr. Odhiambo was rushed to nearby Huruma Nursing Home hospital by passers-by. According to witnesses, while he was being treated for the injuries he sustained, the same police officers who had shot him, entered the hospital, dragged him out of the operating room and executed him behind the building.

It is also reported that a police officer belonging to the Pangani police station who is known to having committed a significant number of extrajudicial killings continues to work. This officer is said to feature in a publicly available video dating 2017, executing two unarmed suspects in broad daylight; and to be part of a team of police officers known as the Pangani Six, who have carried out systematic operations of extrajudicial executions.

According to the information, the victims are young men from some of the poorest urban slums caught by the police when carrying out their daily activities. In a number of instances, police officers are reported to have planted makeshift weapons known as “Bonoko” on the corpses of victims. Information has been received regarding executions of victims carried out in front of friends, families or neighbours at close range, in order to intimidate witnesses and discourage complaints, as these police officers are well known in the communities and can easily be identified. During 2016 and 2017, the Independent Police Oversight Authority (IPOA) of Kenya received 53 complaints of extrajudicial killings by law enforcement officials. The overall number of complaints reportedly received between 2012 and 2017 approximately amounts to 263. Thus far, as of this date, there have only been six convictions of alleged perpetrators.

It was also reported that civil society organizations working to document these and similar cases, to bring them to the attention of the authorities, and to challenge what appears to be a prevailing impunity, often receive threats, intimidation and have been attacked in retaliation of their work.

Mr. Kennedy Chindi, field coordinator of Mathare Social Justice Centre, an organisation working in the slums of Nairobi, has expressed fear for his life after receiving death threats from a prominent police officer, implicated in its reporting

to the IPOA. The most recent killings that he has documented are part of the 24 instances that allegedly took place in Dandora, Mathare, and Kayole.

Information received indicates that individuals who are not linked to any criminal activities are being targeted under a shoot to kill policy. Many of the executions occur outside of an active situation of unlawful criminal activity and are carried out in the hours and days following alleged criminal incidents against victims who are usually unarmed and pose no risk at the time of capture.

Considerable concern is expressed regarding these allegations, which, if confirmed, violate article 6 of the International Covenant on Civil and political Rights (ICCPR) acceded by Kenya on 1 May 1972, which guarantee the right to life and provides that this right must be protected by law and that no one can be arbitrarily deprived of his life. In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations, including those that constitute obligations of the state of Kenya under the international treaties it has ratified.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any information and comment that you may have on the above-mentioned allegations.
2. Please provide information on the grounds and circumstances of the alleged extrajudicial executions of Stephen Weru Wangui, Alex Githuku Macharia and Evans Odhiambo, by police officers.
3. Please provide the details, and where available the results, of any investigation, judicial, medical or other carried out in relation to these and other similar killings. If no inquiries have taken place, or if they have been inconclusive, please explain why, and how this is compatible with Kenya's international obligations under ICCPR.
4. Please provide statistical information on the number of cases of alleged extrajudicial killings officially recorded in the context of the campaign to combat crime, the number of investigations initiated, the number and affiliation of the perpetrators of these killings involved, the number of prosecutions to date and the number of convictions. If no statistical information is available, please explain why.
5. Please provide information on what appears to be a deliberate policy authorizing certain police officers to extra-judicially execute people accused or suspected of criminal activities, in their custody. If such a

policy does not exist, please explain why and how these killings have occurred and continue to occur in what seems to be a pattern; and what measures have been adopted and implemented to prevent such killings from happening.

6. Please clarify what are the instructions and the procedures concerning the use by police officers of their firearms, to ensure that it is legal, necessary and proportionate. In this regard, we would welcome information about the training curriculum for police officers.
7. Please explain what measures are in place to ensure that when force causing death or serious injury is used by the police, timely information is shared with IPOA as per the National Police Service Act and what sanctions have been applied to officers who have disregarded this provision.
8. It is the understanding of the signatories of this communication that on August 2018, the Director of Public Prosecution (DPP) announced his intention to step up cooperation with IPOA concerning investigations into allegations of extrajudicial killings. In a follow up meeting with OHCHR, in October 2018, the DPP sought assistance to reinforce his office capacity to deal with serious human rights violations, such as those described in this letter. Please provide information on the extent and results of this cooperation, including evidence sharing; information on deployments regarding command responsibility; and responsibility or sanctions of police who fail to appear in court without the case file.

While awaiting a reply, we urge that all necessary measures be taken to halt the violations of the type alleged in this letter and prevent their re-occurrence; and in the event that the investigations confirm the allegations to be correct, to ensure the accountability of any person responsible of the violations.

We would like to inform your Excellency's Government that after having transmitted an urgent appeal to the Government, the Working Group on Arbitrary Detention may transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. Such appeals in no way prejudice any opinion the Working Group may render. The Government is required to respond separately for the urgent appeal procedure and the regular procedure.

We are considering to publicly express our concerns in the near future as, in our view, the information upon which the concerns expressed in this letter appears to be sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the implications of these allegations on the enjoyment and exercise of rights. Any public expression of concern on our part will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

Elina Steinerte
Vice-Chair of the Working Group on Arbitrary Detention

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions

Annex

Reference to international human rights law

In relation to the above-mentioned allegation, we would like to refer you to article 6 of the ICCPR acceded to on 01 May 1972 by your Excellency's government. "States parties have the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life. They must also exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities, whose conduct is not attributable to the State. The obligation of States parties to respect and ensure the right to life extends to all threats that can result in loss of life. States parties may be in violation of article 6 even if such threats have not actually resulted in loss of life."

We wish to stress that, under international law, any loss of life that results from the excessive use of force without strict compliance with the principles of necessity and proportionality is an arbitrary deprivation of life. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990) provide that intentional lethal use of firearms may only be applied when strictly unavoidable in order to protect life (principle 9). Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles (principle 8).

We would like to remind your Excellency's Government of the duty to conduct thorough, prompt and impartial investigations of all suspected cases of extrajudicial killing and to bring to justice all those responsible. In this regard, we recommend that all cases of alleged extrajudicial killing be investigated in conformity with the Minnesota Protocol on the Investigation of Potentially Unlawful Death (United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions), updated in 2016. According to the Minnesota Protocol, where an investigation reveals evidence that a death was caused unlawfully, the State must ensure that identified perpetrators are prosecuted and, where appropriate, punished through a judicial process. Furthermore, persons whose rights have been violated have the right to a full and effective remedy. Family members of victims of unlawful death have the right to equal and effective access to justice; to adequate, effective and prompt reparation; to recognition of their status before the law; and to have access to relevant information concerning the violations and relevant accountability mechanisms.

We also wish to note that, where it is found that a State agent has caused the death of a detainee, or where a person has died in custody, this must be reported, without delay, to a judicial or other competent authority that is independent of the detaining authority and mandated to conduct prompt, impartial and effective investigations into the circumstances and causes of such a death. We wish to stress that, owing to the control exercised by the State over those it holds in custody, there is a general presumption of state responsibility in such cases, particularly in circumstances where the deceased was an opponent of the government or a human rights defender. The State is under the obligation to provide all relevant documentation to the family of the deceased, including reports on the investigation held into the circumstances surrounding the death.

Further, we would like to draw the attention of your Excellency's Government to the African Charter on Human and Peoples' Rights. In particular, we would like to highlight articles 4, 5, 6 and 9 of the ACHPR, which respectively protect the right to life (including the prohibition on arbitrary deprivation of life); the respect of inherent human dignity; the right to liberty and security of the person; and the right to express opinions, and receive and disseminate information.