

Mandates of the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

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KEN 4/2016:

26 July 2016

Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 24/7, 27/1, 26/12, 24/5, 25/18, 26/7, 25/13.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the alleged disappearance, torture and extra-judicial executions of a human rights lawyer, Mr. **Willie Kimani**, as well as Mr. **Josephat Mwenda** and Mr. **Joseph Muiruri**.

Mr. Willie Kimani was a human rights lawyer working for the International Justice Mission (IJM), an international NGO headquartered in the USA which fights sex trafficking, forced labour, slavery, illegal property grabbing, police abuse of power, child sexual assault and other human rights violations. Mr. Josephat Mwenda was a client of the IJM represented by Mr. Kimani. Mr. Joseph Muiruri was a taxi driver and was driving Mr. Kimani and Mr. Mwenda in his car when they were last seen alive.

According to the information received:

On 10 April 2015 at about 2:00 p.m., Mr. Josephat Mwenda was allegedly shot by the police at a traffic stop in Machakos county without provocation. He received medical treatment, was then arrested and taken to Mlolongo Police station. In order to justify the shooting, the police allegedly fabricated charges against Mr. Mwenda for "being in possession of narcotic drugs," "gambling in a public place" and "resisting arrest". Mr. Mwenda filed a complaint to Kenya's Independent Policing Oversight Authority (IPOA) for the shooting.

On 13 December 2015, the police officer who had shot Mr. Mwenda arrested him again at his domicile and charged him with six new allegations: riding a motorcycle without a helmet; riding a motorcycle without a reflective jacket; carrying excess passengers; carrying un-insured passengers; riding un-insured

motorcycle; and riding a motorcycle without a driving license. This is despite the fact that Mr. Mwenda was still receiving treatment for the wounded arm and unable to ride a motorcycle at the time.

On 16 February 2016, Mr. Mwenda was again arrested by the police for a violent robbery. Mr. Kimani represented Mr. Mwenda and claimed that all charges had been fabricated as an attempt to intimidate Mr. Mwenda and make him withdraw his claim against the police.

On 23 June 2016, Mr. Willie Kimani, Mr. Josephat Mwenda and Mr. Joseph Muiruri were returning from a court hearing at Mavoko Law Courts, Machakos county, when they were abducted by unidentified persons at around 12:00 p.m.

The Law Society of Kenya, member of the International Bar Association, staged several protests and accused police officers from Machakos county to have arrested the three individuals and subjected them to enforced disappearance.

On 1 July 2016, Mr. Kimani, Mr. Mwenda and Mr. Muiruri were found in a river in Ol-Donyo Sabuk, Machakos county. Their bodies presented signs of having been tortured. Later on the same day, the Inspector General of Police, Joseph Boinnet, announced that he had ordered the arrest of three police officers suspected for the disappearance and death of the three men. On 4 July, a judge ordered that they be held in custody for two weeks while investigations are carried out. On 18 July 2016, four police officers were charged with three counts of murder in connection to the case. The suspects pleaded not guilty in front of a High Court Judge, who ordered that they remain in custody.

The killings appear to be the latest in a long list of police brutality cases in Kenya.

The Kenya National Commission on Human Rights documented a pattern of widespread and systematic human rights violations which include 25 extrajudicial killings and 81 enforced disappearances, as well as arbitrary arrests, extortion, illegal detention and torture, in a 2015 preliminary report about alleged human rights violations by security agencies in relation to counter-terrorism measures

We express serious concern at the disappearance, torture and executions of Mr. Kimani, Mr. Mwenda and Mr. Muiruri, allegedly perpetrated by police forces. Additional serious concern is expressed that those actions seem to be directly related to Mr. Kimani's legitimate work as a lawyer and human rights defender in the defense of Mr. Mwenda's rights as a victim of excessive use of force by the police. We express further concern at the allegations of widespread police brutality and serious human rights abuses by Kenyan security forces.

In connection with the above alleged facts and concerns, please refer to the Reference to International Law Annex attached to this letter which cites international human rights instruments and standards relevant to these allegations.

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 additional information and/or any comment(s) you may have on the above-mentioned allegations.
2. Please provide the details, and where available the results, of any investigation carried out in relation to this case. If no inquiries have taken place, or if they have been inconclusive, please explain why. Please provide the full details of any prosecutions which have been undertaken in this case.
3. Please indicate what measures have been taken to ensure that human rights defenders, including lawyers representing victims of police abuse, can continue their legitimate human rights work in Kenya without fear or threats of intimidation, harassment or assassination.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures to prevent reprisal against the families or colleagues of the victims, and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

It is our intention to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

José Guevara
Vice-Chair-Rapporteur of the Working Group on Arbitrary Detention

Houria Es-Slami
Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances

Christof Heyns
Special Rapporteur on extrajudicial, summary or arbitrary executions

Maina Kiai
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst
Special Rapporteur on the situation of human rights defenders

Mónica Pinto
Special Rapporteur on the independence of judges and lawyers

Juan Ernesto Mendez
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your attention to the following human rights standards:

The above mentioned allegations appear to be in contravention of article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR), accessed by Kenya on 1 May 1972, which provides for the right to life, security and not to be arbitrarily deprived of life.

When the State detains an individual, it is held to a heightened level of diligence in protecting that individual's rights. When an individual dies as a consequence of injuries sustained while in State custody, there is a presumption of State responsibility. In order to overcome the presumption of State responsibility for a death resulting from injuries sustained in custody, there must be a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions (principle 9 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions). This principle was reiterated by the Human Rights Council at its 17th Session in Resolution 17/5 on the "Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions" (OP 4). The Council added that this obligation includes identifying and bringing to justice those responsible; granting adequate compensation to the victim or his family; and taking steps to end impunity and the recurrence of such executions.

We wish to draw your Excellency's Government's attention to relevant international principles and norms governing the use of force by law enforcement authorities, such as the Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169 of 17 December 1979) and 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). 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 and therefore illegal.

Furthermore, we would also like to refer to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.

We would also like to bring to the attention of your Excellency's Government such provisions in the Declaration as article 12, which provides that State must take all

necessary measures to ensure the protection of everyone against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration. Articles 5 and 6 reiterate the rights to meet or assemble peacefully; to form, join and participate in non-governmental organizations, associations or groups; to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms; as well as the right to freely publish, impart or disseminate information and knowledge on all human rights and fundamental freedoms, and to study, discuss and hold opinions on the observance of these rights. Article 9, paragraph 3 (c) provides for the right to provide legal assistance in defending human rights and fundamental freedoms.

In relation to the professional activity of Mr. Willie Kimani as a lawyer, we would like to refer to the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from 27 August to 7 September 1990, according to which Governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference. The Basic Principles also provide that lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions, and that where their security is threatened as a result of discharging their functions, lawyers shall be adequately safeguarded by the authorities.

We would further like to draw the attention of your Excellency's Government to paragraph 8a of Human Rights Council Resolution 16/23, which reminds States that "Intimidation and coercion, as described in article 1 of the Convention against Torture, including serious and credible threats, as well as death threats, to the physical integrity of the victim or of a third person can amount to cruel, inhuman or degrading treatment or to torture."

Moreover, we would like to remind your Excellency's Government of the absolute and non-derogable prohibition of torture and other ill-treatment as codified in articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Kenya ratified on 21 February 1997. Further, article 7 of the International Covenant on Civil and Political Rights, to which Kenya is a party, provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

We are further drawing your Excellency's Government's attention to the United Nations Declaration on the Protection of All Persons from Enforced Disappearances which establishes that no State shall practice, permit or tolerate enforced disappearances (art.2).

The Declaration also proclaims that no circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances (art.7). Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.

We wish to recall that, according to the Declaration, the victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation (art.14).

Finally, we wish to stress that Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control (art.19).