

Kenya: Amnesty International's Recommendations to the African Union Peace and Security Council

Introduction

Ahead of the meeting of the Peace and Security Council (PSC) of the African Union to be held in Addis Ababa, Ethiopia, from 14 March 2008, Amnesty International is urging the PSC to seize the opportunity of the meeting to address urgent and critical human rights challenges arising from the post-election political and humanitarian crisis in Kenya.

Under the AU Protocol Relating to the Establishment of the Peace and Security Council of the AU adopted in 2002, the PSC is a standing decision-making organ for the prevention, management and resolution of conflicts. The PSC "shall be a collective security and early warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa" (Article 2). The Protocol provides in Article 3(f) that the PSC's objectives include "protect[ing] human rights and fundamental freedoms...as part of efforts for preventing conflicts". The PSC must be ready to use its influence and exercise its authority more proactively in the interest of human rights.

Under Article 20 of the Protocol, the PSC "shall encourage non-governmental organisations, community-based organisations, particularly women's organisations, to participate actively in the efforts aimed at promoting peace, security and stability in Africa".

Amnesty International urges the PSC to put the situation in Kenya on its agenda during its forthcoming meeting. This briefing paper contains Amnesty International's recommendations to the PSC to take urgent steps to address the human rights situation in Kenya as part of the PSC's mandate regarding peace and security.

Post-elections violence in Kenya

Over 1,000 people are reported to have lost their lives through politically-motivated ethnic violence and associated police killings as a result of the violence in Kenya following the 30 December disputed presidential and parliamentary elections. The UN has estimated that over 500,000 people were displaced from their homes. About 12,000 are reported to have crossed into neighbouring Uganda as refugees.

Amnesty International is deeply concerned by the recent violence and killings in Kenya. Amnesty International has condemned the politically-motivated killings by groups of armed youths in different parts of Kenya and has expressed concerns at the ethnic dimensions of the violence. Amnesty International has also condemned the reckless and excessive use of lethal force, including the firing of live ammunition into crowds, by the

Kenyan police and security forces that were deployed to quell the violence or break up mass protests called by the opposition.

An Amnesty International fact-finding mission visited Kenya on 5-14 February. The mission delegates visited some of the areas which were most affected by the violence and held meetings with the government and opposition representatives, representatives of the United Nations (UN), and local and international NGOs. The mission collected testimonies from victims of human rights abuses perpetrated during the post-election violence. The testimonies detailed unlawful killings in which victims were targeted on the basis of their ethnic identity; grievous wounding; sexual violence against girls and women; burning of homes and widespread forced relocation; and the use of excessive force by the Kenyan police, including instances of fatal shootings.

Based on its research in the country, Amnesty International established that some of the politically-motivated and ethnic attacks were organized. Victims told Amnesty International of pre-planned meetings that preceded the violence in many areas; the involvement of organized armed youth/gangs and that in most cases the attackers appeared to be under the instructions of particular individuals. Victims also recounted how in some cases these organized armed youth/gangs would be transported from other parts of the country into the scenes of violence. Victims interviewed in all areas visited by Amnesty International reported the involvement of different armed youth/gangs who they believed to have been organized.

Several forms of the post-elections violence include:

- politically motivated ethnic attacks targeting members of communities from which President Kibaki was perceived to have drawn his support, particularly members of the Kikuyu community.

- politically motivated ethnic attacks targeting members of communities perceived to have supported opposition candidate.

- politically motivated ethnic attacks targeting internally displaced persons (IDPs) seeking refuge after fleeing their homes as a result of the violence.

- excessive use of force (including instances of fatal shootings) by members of the Kenyan police and other security forces deployed to quell the violence and break up protests called by the opposition party.

- Some of the violence appears to have been criminally motivated, with perpetrators exploiting a period of lawlessness to steal, rape, and displace people from land and property.

Progress in political mediation and the need to reject impunity

On 28 February, President Mwai Kibaki and the Opposition leader Raila Odinga signed a power-sharing agreement under the auspices of the ongoing political mediation. The mediation is supported by the African Union and led by the Panel of Eminent African Personalities. It aims to reach agreement on measures to resolve the political and humanitarian crisis in Kenya. The power-sharing agreement envisages the establishment

of the post of Prime Minister and the formation of a coalition government drawn from all Kenyan political parties.

Amnesty International acknowledges the positive role the Africa Union has played in the ongoing political mediation. The organisation urges the PSC to build on this and to recommend that the AU uses its influence to keep human rights concerns at the heart of the negotiated agreements, and in particular, in the implementation of reforms in key identified areas.¹

The parties to the mediation signed an agreement on 4 February on 'immediate measures to address the humanitarian crisis and to promote reconciliation, healing and restoration'. It is significant that the preamble to this agreement provides that the 'final goal of the mediation is to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect of human rights.'

Amnesty International reiterates that human rights must have a central place in the political negotiations and the implementation of measures to resolve the crisis in Kenya. Steps must be taken to create an environment in which human rights are respected, protected and fulfilled. In particular there should be no impunity for perpetrators of human rights abuses. Allegations of human rights abuses must be investigated promptly, independently and impartially. Suspected perpetrators must be brought to justice in fair trials and victims must receive reparations.

Impunity for human rights violations and abuses has remained rampant in Kenya. In 1998, the government set up the "Akiwumi Judicial Commission of Inquiry on Tribal Clashes", named after its Chair, Judge (Rtd) Akilano Akiwumi. It heard testimonies from over 200 witnesses of ethnic violence across Kenya in the run-up to the 1992 and 1997 general elections. This violence had led to the ethnic killings and displacement of thousands of people. The Akiwumi Commission submitted its report to the President in March 1999. The report recommended that several former cabinet ministers and other senior government officials be investigated for their role and involvement in the violence and be prosecuted where evidence points to their criminal responsibility. The government has not taken any action on this recommendation of the Akiwumi Commission. None of the individuals mentioned in the report have been investigated and/or brought to justice contrary to the recommendations of the report.

The proposed Commission of Inquiry on the post-election violence

¹The parties to the mediation (both will now be in a coalition government) have agreed on 'urgent' reforms including, comprehensive constitutional reforms; comprehensive electoral reform – including of the electoral laws, the electoral commission and dispute resolution mechanisms; the establishment of a truth, justice and reconciliation commission; identification and prosecution of perpetrators of violence; reforms on respect for human rights; parliamentary reform; police reform; legal and judicial reforms; commitment to a shared national agenda in Parliament for these reforms; other legislative, structural, political and economic reforms as needed. Along with these reforms, they have agreed on long-term reforms regarding; consolidating national cohesion and unity; land reform; tackling poverty and inequity, as well as combating regional development imbalances, particularly promoting equal access to opportunity; tackling unemployment, particularly among the youth; reform of the Public Service; strengthening of anti-corruption laws and public accountability mechanisms; reform of public finance and revenue management systems and institutions; and, addressing issues of accountability and transparency.

On 4 March, the parties to the political mediation agreed on the establishment of a Commission of Inquiry on the post-election violence in Kenya. Amnesty International calls on the PSC to use its influence to call on the Kenyan government to immediately establish the Commission of Inquiry and to ensure that it is independent and impartial. Amnesty International believes that the Inquiry must be immediately established in order to avoid extensive delays in justice for victims, as well as the deterioration of evidence. According to the contents of the mediated agreement reached on 4 March, the Inquiry will “start its work within thirty days following the appointment of its members and will operate for three months, with an additional month if required”.

According to the mediated agreement, the Inquiry’s mandate will include an investigation of the facts and surrounding circumstances related to acts of violence that followed the December elections; the actions or omissions of State security agencies during the course of the violence and make recommendations as necessary. Amnesty International notes that the mediated agreement provides that the establishment of the Inquiry “aims to prevent any repetition of similar deeds and, in general, to eradicate impunity and promote national reconciliation in Kenya”. According to the mediated agreement, the Inquiry will also be mandated to recommend measures of a legal, political or administrative nature as appropriate, “including measures with regard to bringing to justice those responsible for criminal acts”.

Amnesty International is of the view that the mandate of the proposed Commission of Inquiry should be defined in terms consistent with international human rights law. The Inquiry should investigate human rights abuses by both state and non-state actors, and hence include an investigation of the organized and/or spontaneous nature of the post-election violence, the involvement of different armed youths/groups, the role played by the politicians in the violence, the role of the police and other security forces. Amnesty International is concerned that under the mediated agreement, the Inquiry’s mandate does not explicitly address the right of victims of human rights abuses committed during the post-election violence to redress and reparation, including compensation.

Under the mediated agreement, the Inquiry will be “composed of three impartial, experienced, and internationally respected jurists, or experts in addressing communal conflict or ethnic violence. Two of these shall be international, and one shall be Kenyan”. According to this agreement the Commission “shall develop its own work plan and procedures. These will be guided in all respects by principles of fairness, impartiality, transparency and good faith”. The agreement also provides that “Kenyan authorities, institutions, parties, and others shall fully cooperate with the Inquiry in the accomplishment of its mandate, in response to requests for information, security, assistance or access in pursuing investigations”.

Amnesty International believes that the Inquiry’s terms of reference, appointment of the members of the Commission, the establishment of the Commission and its operation must ensure its independence, impartiality and thoroughness. Members of the commission should be appointed on the basis of their recognized impartiality, competence, integrity and independence as individuals. They should not be closely associated with any individual, government or other entity, political party or other

organization potentially implicated in the issues under inquiry or with an organization or group associated with victims.

The proposed commission must be complementary to the legal system. It should not become a substitute for an independent, impartial and properly resourced judiciary whose rulings are enforced. It should complement pending or ongoing criminal investigations into the post-election violence. To ensure the implementation of its recommendations, if the Inquiry obtains information indicating that identified individuals may have been responsible for committing, ordering, encouraging or permitting human rights abuses that information should be passed to the relevant judicial or law enforcement bodies for investigation with a view to bringing them to justice. In carrying out its inquiry the commission should bear in mind the rules and conditions for the admissibility of evidence in the criminal process and should ensure that it produces admissible evidence for later criminal proceedings.

The commission should also have the power to recommend changes in law, political or administrative procedures and practice, including mechanisms for training and accountability and disciplinary and other administrative measures against responsible state officials, in particular, the police.

The results of the inquiry and the commission's recommendations should be officially proclaimed, published and disseminated in a public report issued without undue delay.

The formation of a Truth, Justice and Reconciliation Commission (TJRC)

Under the mediated agreement signed between the parties on 4 March, there is a proposal for the formation of "a Truth, Justice and Reconciliation Commission (TJRC) that includes local and international jurists". Under this agreement the TJRC will be created through an Act of Parliament, which will be adopted by the legislature within the next four weeks".² The TJRC "will inquire into human rights violations, including those committed by the state, groups or individuals ...between December 12, 1963 and February 28, 2008."

Amnesty International believes that the TJRC should be part of a broader, long-term, comprehensive action plan to uphold the rights of victims of past human rights abuses and obtain truth, justice and reparation.

The TJRC should clarify the facts about past human rights abuses, provide information to continuing and new investigations and other criminal and civil judicial proceedings, and formulate effective recommendations for providing full reparations to all victims and their relatives.

The TJRC should not be considered as a substitute for the judicial process to establish individual criminal responsibility for human rights abuses. Rather, it should be complementary in particular to the proposed Commission of Inquiry and the immediate

²Four weeks from the date of signing of the mediated agreement (4 March).

investigation of all allegations of human rights abuses and the bringing to justice of perpetrators.

In its work, the TJRC should consider reports of the proposed Commission of Inquiry into the post-election violence, reports of past inquiries such as the Akiwumi Commission and reports by local and international civil society and international and regional bodies such as the UN Office of the High Commissioner for the Human Rights and the African Commission on Human and Peoples' Rights of findings of research into the post-election violence.

Recommendations

Amnesty International urges the PSC to ask the Kenyan government to:

- establish without further delay the proposed commission of inquiry with a mandate to inquire into allegations of all human rights abuses during the post-election violence and ensure that suspected perpetrators are held responsible through trials that comply with international standards. Victims and their families must benefit from the right to redress and reparation, including compensation;
- ensure that the proposed TJRC forms part of a broader, long-term, comprehensive action plan to uphold the rights of victims of past human rights abuses and obtain truth, justice and reparation;
- take all appropriate steps to protect people from human rights abuses caused by politically-motivated and ethnic attacks;
- ensure that Kenyan political leaders do not implicitly or explicitly encourage politically-motivated or ethnic violence.