



KENYA

“Hold Your Heart”

Waiting for Justice in Kenya’s Mt. Elgon Region

HUMAN
RIGHTS
WATCH



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Waiting for Justice in Kenya’s Mt. Elgon Region

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SUMMARY AND RECOMMENDATIONS

Land is at the heart of the conflict in Mt. Elgon. As is the case in much of Kenya, these land disputes have their roots in the colonial era, but current grievances center on how those disputes have been managed and the politicization of the various attempts to resolve earlier displacements through resettlement schemes.







ETHIOPIA

SOMALIA

UGANDA

EASTERN

NORTH
EASTERN

RIFT VALLEY

MT. ELGON

WESTERN

KENYA

NYANZA

NAIROBI

CENTRAL

COAST

TANZANIA

SUMMARY

Elsa Chesut found parts of her husband Jerome's body in a forest in western Kenya three months after soldiers from the Kenyan army abducted him from his home. The soldiers who came for Jerome in April 2008 accused him of having knowledge about the activities of the Sabaot Land Defence Force (SLDF), a militia group that had been terrorizing the population of the Mt. Elgon region of western Kenya since 2006. They beat him, forced sand into his mouth to prevent him from crying out, tied him to the back of a truck, and dragged him towards a military camp known as Kapkota.

Elsa searched for her husband at the military camp and at a nearby prison, but no one would provide information about his whereabouts until a boy informed her that Jerome's body was in a nearby forest where the boy grazed his cattle. Three years later, Elsa is still waiting for justice to be done and has not been given full information on the events surrounding the death of her husband.

Elsa's story is one of the many told by victims of the Mt. Elgon insurgency, a conflict which started in 2006 when the SLDF began to resist government attempts to evict squatters in the Chebyuk area of Mt. Elgon district. Very quickly the SLDF set its sights on the upcoming December 2007 elections as both an opportunity to cause trouble and seize land by force, as well as a chance to ensure that candidates favorable to its cause were elected. The SLDF was financed and controlled by opposition Orange Democratic Movement (ODM) candidates as it did their bidding—intimidating opponents and voters prior to the elections of December 2007, and punishing them afterwards. In March 2008 the military and police conducted a heavy-handed joint operation—Okoa Maisha (“Save Lives” in Swahili)—to crush the SLDF insurgency which by then had gotten out of hand, becoming more than a political militia and a law unto itself.

Both the SLDF and the Kenyan security forces committed atrocities in Mt. Elgon between 2006 and 2008. The SLDF attacked thousands of civilians, killing, raping, and mutilating. In the Okoa Maisha operation security forces carried out hundreds of extrajudicial killings and the torture and arbitrary detention of thousands, including in the course of mass round-ups of men and boys. Since 2008, victim's families, despite themselves facing threats and intimidation, have gradually begun to come forward, informing local human rights organizations that their family members had been "disappeared," either abducted by the SLDF or arrested by the army in the course of Okoa Maisha.

The atrocities in Mt. Elgon ceased in mid-2008 after national and international human rights organizations drew attention to the insurgency and the army's brutality in addressing it. The army and police claimed to be conducting internal investigations into the conduct of units operating at Mt. Elgon, but ultimately dismissed the allegations of abuse, and no one was ever held accountable. Similarly, despite the fact that over 3,000 men were rounded up and detained (on suspicion of being members or supporters of the SLDF), to date only four people have been convicted of manslaughter; but the hundreds of killings, forced disappearances, and cases of rape and torture committed by the SLDF in Mt. Elgon between 2006 and 2008 have gone unpunished. Over 800 were charged with crimes allegedly related to SLDF involvement but most have been acquitted or had charges withdrawn due to lack of evidence.

Though Elsa and dozens of other victims reported their family members' disappearances at police stations, military camps, prisons, and morgues, the government did not investigate thoroughly, if at all, nor did authorities prosecute security personnel suspected of being involved in enforced disappearances and other human rights abuses.

Three years after the conflict, lawyers and human rights organizations are assisting victims by filing cases at the Bungoma High Court and the East African Court of Justice (EACJ), and taking complaints to the African Commission on Human and Peoples' Rights (ACHPR). Others have filed a complaint before the United Nations Working Group on Enforced or Involuntary Disappearances. But the Kenyan government has done nothing.

The plight facing the families of the disappeared remains one of the most enduring scars of the violence in Mt. Elgon. With no bodies to bury in accordance with local customs, no death certificates issued, and no official recognition of the loss of their family members, these families remain in a legal and psychological limbo.

While many human rights abuses dating to the Mt. Elgon conflict remain unpunished, this report focuses on the specific problem of unresolved abductions by SLDF militia and enforced disappearances at the hands of the Kenyan security forces.

The International Convention for the Protection of All Persons from Enforced Disappearance, to

which Kenya is a signatory, defines enforced disappearance as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.” Under customary international law and the Rome Statute of the International Criminal Court, to which Kenya is a party, enforced disappearances constitute a crime against humanity when committed as part of a widespread or systematic attack against a civilian population.

Enforced disappearance is a continuing human rights violation, which does not end until the disappeared person or their remains are located and the truth about their disappearance comes to light.

Disappearances carried out by organized armed movements fighting the state may amount to crimes against humanity when they are widespread or systematic and part of a policy. The Kenyan state’s failure to shed light on disappearances at the hands of the SLDF also creates a series of rights violations.

Kenyan law requires police officers to open inquest files into the cases of missing persons who are presumed to be dead. In Mt. Elgon several such files were opened, but only one resulted in a hearing, which has not yet been concluded.

The history, organization, and funding of the SLDF is an example of the relationship between land grievances and the manipulation of ethnicity and violence for political ends that is a disturbingly deep-rooted and longstanding element of the Kenyan political process. This came to prominence in the violence, much of it orchestrated, in the Rift Valley and western Kenya in early 2008 in the wake of the disputed presidential election of December 27, 2007. The election was widely perceived as rigged in favor of the incumbent, Mwai Kibaki of the Party of National Unity (PNU).

The abuses in Mt. Elgon intensified around the time of the election as the SLDF promoted its favored candidates in the election in a vicious campaign that, according to local residents, amounted to a campaign of terror. Abuses took on an overt political character as the SLDF targeted opponents of the ODM local government and parliamentary candidates. The government’s brutal effort to suppress the insurgency, coming as it did in March 2008, may represent a case of the selective deployment of security forces against a militia with an opposition ODM political affiliation.

Nonetheless, while the government devoted significant resources to investigating the post-election violence—albeit without ultimately bringing prosecutions against those most responsible—it did not investigate abuses in Mt. Elgon nor consider the situation in Mt. Elgon as part of the post-election violence.

The National Accord and Reconciliation Act of February 2008 that brought an end to the post-election violence led to the establishment of the Commission of Inquiry into Post-Election Violence (CIPEV), also known as the Waki Commission, after the head of the Commission, Justice Philip Waki. However, the resulting Waki Report explicitly excluded the Mt. Elgon atrocities from its mandate, on the basis that problems in Mt. Elgon predated the elections and thus the Waki Commission could not establish a link with the post-election violence; and that the problems were of such great magnitude that the commission could not address them given its limited time, resources, and mandate.

The Waki Report's conclusion concerning the magnitude of the issues in Mt. Elgon would suggest that a CIPEV-style, truly independent commission is necessary to cast light on abuses in Mt. Elgon. But, due to lack of political will, no such commission has ever been established.

The Truth, Justice and Reconciliation Commission (TJRC), a second truth-seeking body established in the wake of Kenya's post-election violence, has heard testimony regarding abuses on all sides in Mt. Elgon. However, the TJRC was only given two years

to investigate human rights abuses throughout all of Kenya from 1962 to 2008, allowing it to spend no more than a few days hearing testimony on any particular set of abuses, including in Mt. Elgon; thus, it has only scratched the surface. It is as yet unclear what recommendations the TJRC will make in its final report concerning Mt. Elgon. Further, given the government's dismissive response to previous commissions, it is unclear whether the government will abide by its obligation to implement TJRC recommendations, including recommendations that particular individuals be prosecuted.

Human Rights Watch recommends that President Kibaki, with no further delay, establish a commission of inquiry to investigate human rights abuses in Mt. Elgon. The commission, independent of government control and of the police and security forces—which have demonstrated their unwillingness to conduct impartial investigations into events in Mt. Elgon—should avail itself of all evidence collected to date by the TJRC, the Kenya National Commission on Human Rights (KNCHR), and other human rights organizations. It should have access to all necessary police, military and administrative records and should be able to summon all individuals who may possess relevant information, including suspects. The commission should ensure that inquests are conducted into the possible deaths of all persons alleged to have disappeared in Mt. Elgon and that mass graves are exhumed.

The Kenyan government should also provide assistance, including by issuing death certificates and establishing a mechanism for compensation, for the family members of victims of enforced disappearances.

International institutions, including the East African Court of Justice and the United Nations Working Group on Enforced Disappearances, have taken up cases related to the lack of accountability for human rights abuses in Mt. Elgon. They should continue these efforts, given the unwillingness of the Kenyan government to ensure accountability to date.

The International Criminal Court (ICC) in The Hague, on the basis of facts uncovered by the CIPEV, initiated investigations into the post-election violence in Kenya. To date, these investigations have resulted in summonses for six individuals on charges of crimes against humanity. The six include politicians and government officials suspected of involvement on both sides of Kenya's 2007-2008 post-election violence. Hearings to determine whether to send the cases to trial were held before the ICC in September 2011. The two cases currently before the ICC involve crimes committed during the post-election violence in Uasin Gishu, Nandi, Nakuru and Naivasha, but no one has been charged before the ICC for crimes committed in Mt. Elgon.

The ICC is a court of last resort, stepping in only where national authorities do not ensure credible domestic investigations and prosecutions of crimes of genocide, war crimes, and crimes against humanity falling within the court's jurisdiction.

While the primary responsibility to investigate international and national crimes that may have been committed in Mt. Elgon lies with the Kenyan authorities, as this report demonstrates, there has been an absence of credible investigations during the last three years for atrocities committed in Mt. Elgon. The cases currently under examination at the ICC involve the killings of approximately 450 people: at least 212 killed in Nakuru and Naivasha by pro-government forces, and 230 killed in Uasin Gishu and Nandi by opposition forces. In comparison, between 2006 and 2008, over a thousand individuals lost their lives in Mt. Elgon, and cases of rape and torture run in the thousands. In the absence of credible national investigations, Human Rights Watch recommends that the ICC prosecutor analyze whether crimes falling within the ICC's jurisdiction were committed in Mt. Elgon and consider opening additional investigations in the Kenya situation to bring to account persons most responsible.

The Kenyan government should facilitate victims' access to truth and justice in the cases filed before national and international courts; exhume reported mass graves; and provide assistance, including by issuing death certificates, to the family members of victims of enforced disappearances.

Two of these women lost their husbands to the SLDF and another lost her son when he was forcibly recruited into the militia; she presumes he was killed by the military.



WIDOWED



ENFORCED DISAPPEARANCES

Approximately 300 Kenyans were forcibly disappeared in Kenya's Mt Elgon region between 2006 and 2008 after being either arrested by Kenyan security forces or abducted by the militia group Sabaot Land Defence Force (SLDF). Three years after a military operation that aimed to flush out the militia – an operation that was accompanied by serious human rights abuses, including summary executions, enforced disappearance, and torture – the government has taken no action to shed light on the plight of the disappeared or to provide their families with access to justice.

DEATH CERTIFICATES

Under Kenyan law, a person is presumed to be dead when he or she has been missing for seven years. The only avenue whereby the seven-year requirement can be circumvented, according to Kenyan law, arises when an inquest is conducted into the case of a missing person presumed to be dead; the magistrate can, on the basis of the inquest, order that the victim's family be issued with a death certificate. To date, only one inquest has been initiated, despite reports of several hundred disappearances in Mt. Elgon.

A death certificate is important in accessing a number of benefits. For instance, death certificates are needed for widows or widowers to be able to secure ownership of property in their deceased spouse's name. Proof of the death of a spouse or parent can assist in accessing certain benefits such as scholarships. The state's failure to conduct inquests had not only deprived victims' families of truth and justice – it has also prevented them from accessing material assistance.

The children remember him. They ask, “Where is our dad?” Sometimes, I don’t know what to tell them. I say, “Dad was taken by certain people... and he wasn’t returned.”

Until this moment, even I don’t know where he is. As I haven’t buried him, my thoughts trouble me. I haven’t returned to our home. If I stay at home, I find myself wanting to call out to him.

Phyllis Kipteyo lost her husband, a government employee, after he was arrested by the Kenyan security forces in March 2008. She last saw her husband at a military camp in Chepkube in Mt. Elgon. He was bloodied and beaten and surrounded by three soldiers. She never saw him again and has received no explanation from the military or government during the three years since he disappeared.

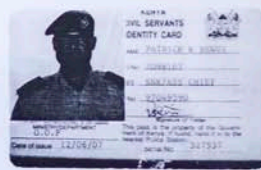
More than two years after her husband was taken by the military, Phyllis received a letter from the government saying that her husband had been fired from his post of Assistant Chief on account of desertion of duty. This means she will not receive a government pension, even though her husband worked for the government and was disappeared by them.

Phyllis has been offered a death certificate three times but refuses to accept it as it means the end of her case and a denial of justice. As a result, she remains in limbo and has no land rights to her husband’s property and no government support for her children’s school fees.





VICTIM



NEXT OF KIN





I have gathered the widows whose husbands were killed by the SLDF and by the military, and even those whose husbands just died. Because we are all widows, we don't have any divisions. We have all joined together.

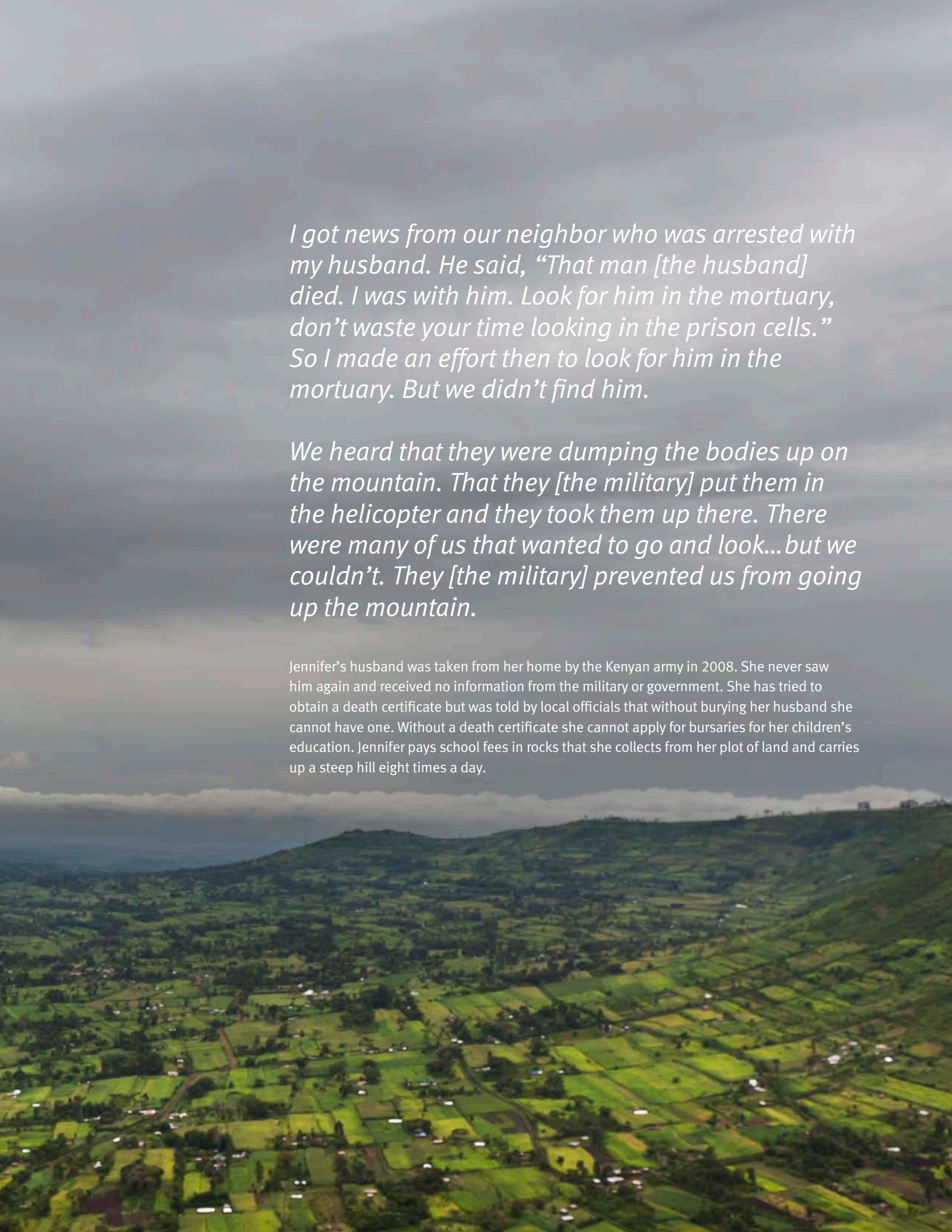
At that time we women were not given any say, we had no say in the affairs of the community. So it was the men that decided it. We women were not given any chance to speak. If I had been given a chance to speak I would have told my husband that it's not good to fight with the government because the government has a lot of power. We should have resolved things differently if someone had a grievance, so that we did it peacefully, instead of with guns. I tried to talk to my husband to tell him this. I told him many times...

He changed because of the land re-distribution. The government sent soldiers, more than 400. They came to our house, chased me away and made it their headquarters. That day my husband changed. The soldiers chased me away like an animal with my children and I didn't have anywhere to go.

I don't have a good answer for my children but I tell them, "Your father was killed by the military when he went to the forest to fight for his right to land." I try and tell them, even if your plot is small, God can open ways for you so that in this Kenya of today you can live without land. So get educated, and live without land. If my husband had realized that life without land is good he would not have decided to go and fight. He decided without land, it was better he should die. But still, without land we could have lived well, with him.

The widow of the deputy leader of the SLDF militia, Wycliffe Matakwei, who was allegedly killed by the Kenyan police in May 2008. The police paraded his body and his wife positively identified the body as being her husband's. She created a support network for women widowed by the violence committed by both the SLDF and Kenyan security forces.





I got news from our neighbor who was arrested with my husband. He said, "That man [the husband] died. I was with him. Look for him in the mortuary, don't waste your time looking in the prison cells." So I made an effort then to look for him in the mortuary. But we didn't find him.

We heard that they were dumping the bodies up on the mountain. That they [the military] put them in the helicopter and they took them up there. There were many of us that wanted to go and look...but we couldn't. They [the military] prevented us from going up the mountain.

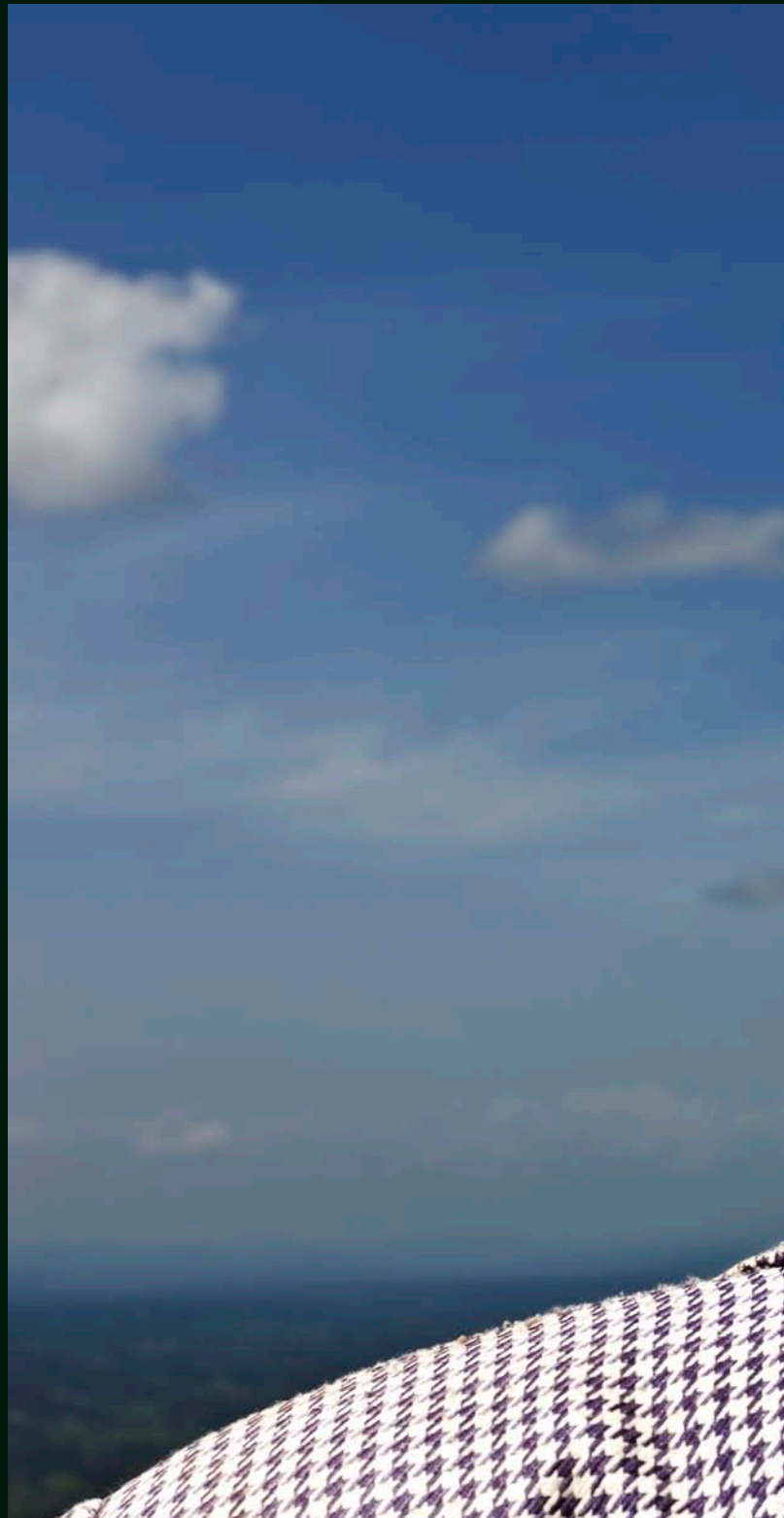
Jennifer's husband was taken from her home by the Kenyan army in 2008. She never saw him again and received no information from the military or government. She has tried to obtain a death certificate but was told by local officials that without burying her husband she cannot have one. Without a death certificate she cannot apply for bursaries for her children's education. Jennifer pays school fees in rocks that she collects from her plot of land and carries up a steep hill eight times a day.

TORTURED, RAPED, AND TERRORIZED

Following the March 2008 Kenyan security forces operation to quell the SLDF militia, which had been terrorizing the district for two years, the SLDF was much diminished and the extent of their crimes emerged: over 600 people killed since 2006; hundreds tortured, mutilated, and raped; and houses looted and destroyed.

However, members of the security forces also committed serious crimes, including extrajudicial killings and torture, in the course of counterinsurgency. Much of the male population was rounded up and beaten to force disclosure of the whereabouts of the militia. Over 4,000 people were taken to military camps for “screening” where victims described beatings, torture, and some deaths.

This 75-year-old woman had her ear cut off by the SLDF in 2007. The signature mutilation of the SLDF was to cut off the ears of those who did not obey their orders in what locals claim was a campaign of terror.





I was coming from the market. They [the SLDF] stopped me and asked, “Do you want us to cut off your head or your ear?”

“Then they talked amongst themselves. I was silent while they cut off my ear.”







This man had his ear cut off by members of the SLDF. He was later brutally beaten by Kenyan security forces during the operation to quell the SLDF insurgency. They swept up thousands of men and boys and tortured many to obtain information about SLDF movements. As a result of his experiences, he has suffered mental trauma and emotional distress.



They [the SLDF] said, “Why are you still cooking out here? We burnt your houses, leave this place.” I answered them, “Where should I go now when I have nowhere to go?” They said, “Your ears don’t listen,” and so they chopped my ear off.

I can’t work anymore. I don’t know if it’s the root of the ear or what, but I can’t carry anything on my head, my head hurts too much. And it roars like a car...it roars, and roars.

There is peace, but anxiety. We get jolted when we see the SLDF boys.

This woman had her ear cut off by the SLDF because she refused to abandon her land to the rebels.




Above: Benetta Nasambu, 40, was shot by members of the SLDF. The men banged on her door late at night. When she refused to open the door, they shot through it, wounding her three times. The men then seized her husband and took him into the forest. He was released months later.

Right: Joseph Chebonya, 47, was shot three times and tortured by members of the SLDF. He was awakened at midnight by ten militia who stole all his cattle, tortured him for information on government soldier movement, and then shot him in his leg, hip, and buttocks. He is a farmer, and as a result of his injuries his ability to work is compromised and he cannot afford school fees for his 12 children. He has never seen any justice in his case.



RECEIPT / INVOICE
SILOAMU MEDICAL CLINIC
P.O BOX 310, KAKAMEGA
TEL: 0733 802 231, 0723 204 020
0733 411 559

Logo: 

Date: 15/05/2014

Patient's Name: JOSEPH KULUWA

Amount Received: KES 1550.00

	Particulars	Kshs.	Cts
1	Consultation fees	155	00
2	Drugs	200	00
3	Dressing	1950	00
4	Stitching		
5	Laboratory Services		
6	Maternity Services		
7	Accommodation		
8	MCH Services		
9	Total	5500	00

L.A. 08

*They kicked my legs away. I fell down.
And they raped me there...*

*I still see them...and they are people
from home, and older than me, it is
not good.*

Helen, 27, was taken by men from the SLDF who gang raped her, forced her to consume human excrement and urine, then took her to their leader who ordered her release. These men, who were known to Helen from her village, then raped her again and took her back to her husband saying that now she was HIV-positive. He subsequently left her. She has since remarried but has experienced no justice for the crimes committed against her.



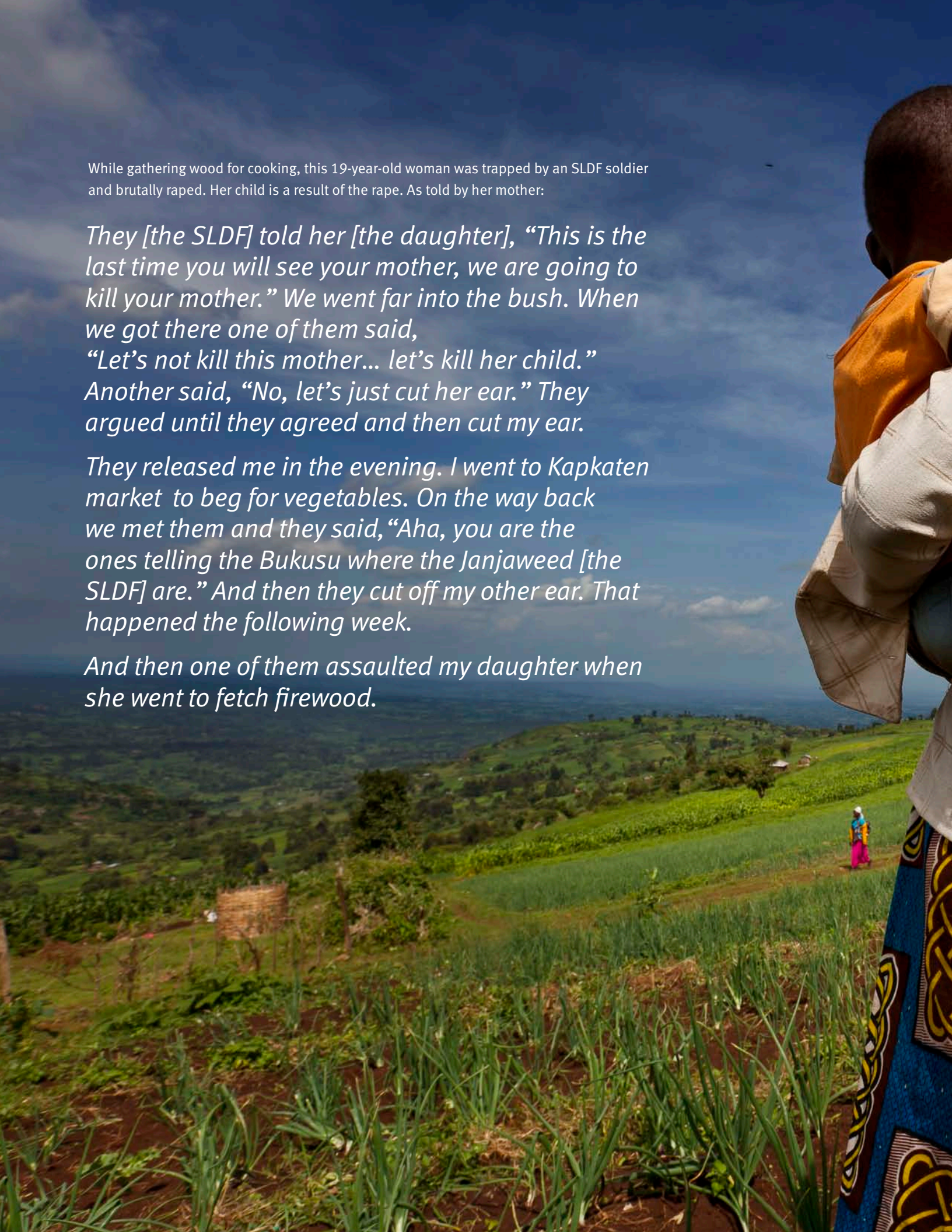


While gathering wood for cooking, this 19-year-old woman was trapped by an SLDF soldier and brutally raped. Her child is a result of the rape. As told by her mother:

They [the SLDF] told her [the daughter], “This is the last time you will see your mother, we are going to kill your mother.” We went far into the bush. When we got there one of them said, “Let’s not kill this mother... let’s kill her child.” Another said, “No, let’s just cut her ear.” They argued until they agreed and then cut my ear.

They released me in the evening. I went to Kapkaten market to beg for vegetables. On the way back we met them and they said, “Aha, you are the ones telling the Bukusu where the Janjaweed [the SLDF] are.” And then they cut off my other ear. That happened the following week.

And then one of them assaulted my daughter when she went to fetch firewood.





*They say we are trespassing, but we are not.
This has been our home since forever.*

*Whom should we ask permission from?
We have lived here since our grandfathers and
their grandfathers. Who should we ask? Maybe God.*

A cattle herder stands in an illegal Ndorobo settlement in the Chepkitala region of Mt. Elgon. The Ndorobo (also known as Ogiek), the original inhabitants of Mt. Elgon, are pastoralists famous for their honey. The herder was forcefully evicted by the government from the national park area and resettled four times since 1979. Each time, he and his family returned after a few years, because the plots of land they were given were too small for their cattle to graze on, and there was “no honey.”



DISPLACED

The roots of the violence in Mt. Elgon lie in a land conflict that has been going on for several decades, starting in the 1960s when the government evicted thousands of Mt. Elgon residents from a forested area that was to be gazetted as a game reserve. Some of those affected were resettled but never received title to their land, while others remained landless. An effort to reallocate land initiated by the government in 2005, which would have reduced the land holdings of some members of the Sabaot sub-clan, led to the insurgency activities by the SLDF, which had already begun training several years earlier after the issue of land redistribution arose during the 2002 elections. To date, the conflict has not been resolved to the satisfaction of many residents of Mt. Elgon, raising the specter of future violence—particularly if the culprits of the 2006-2008 violence continue to benefit from impunity.

Residents of an illegal settlement in the Chepkitala region of Mt. Elgon build shelters.



Cattle graze on an illegal Ndorobo settlement in the Chepkitale region of Mt. Elgon. The Ndorobo are pastoralists, but the small plots amidst heavy scrub and forest lower down the mountain where they were resettled at Chepyuk were not suitable for grazing.







A family shares a meal in an illegal settlement in the Chepkitala region of Mt. Elgon.



JUSTICE?

MASS GRAVES

Residents of Mt. Elgon told Human Rights Watch that both parties to the conflict – the SLDF and the Kenyan security forces – dumped the bodies of their victims in mass graves. Despite ample evidence that this was the case – and recognition from the government that, at least, SLDF graves exist – the government has made little effort to identify and exhume these graves and allow for a dignified burial for victims. The state has also refused requests to preserve evidence at mass grave sites, and has taken little initiative to legally and forensically exhume the graves, raising questions about what might be found within. Some bodies disappeared but the SLDF were exhumed in 2009, but residents claim that many remain. NGOs that attempted to investigate the mass graves were subjected to threats. In June 2011, widows told Human Rights Watch that 64 of them had gone to demand that the former District Commissioner at Cheptais allow them to go into the forest to search for the bodies of their husbands but they were denied. The current District Commissioner claimed no knowledge of such a request.

An area called Kimama suspected of being a dumpsite for the bodies of those disappeared by the SLDF militia.





SUSPECTED GRAVESITES





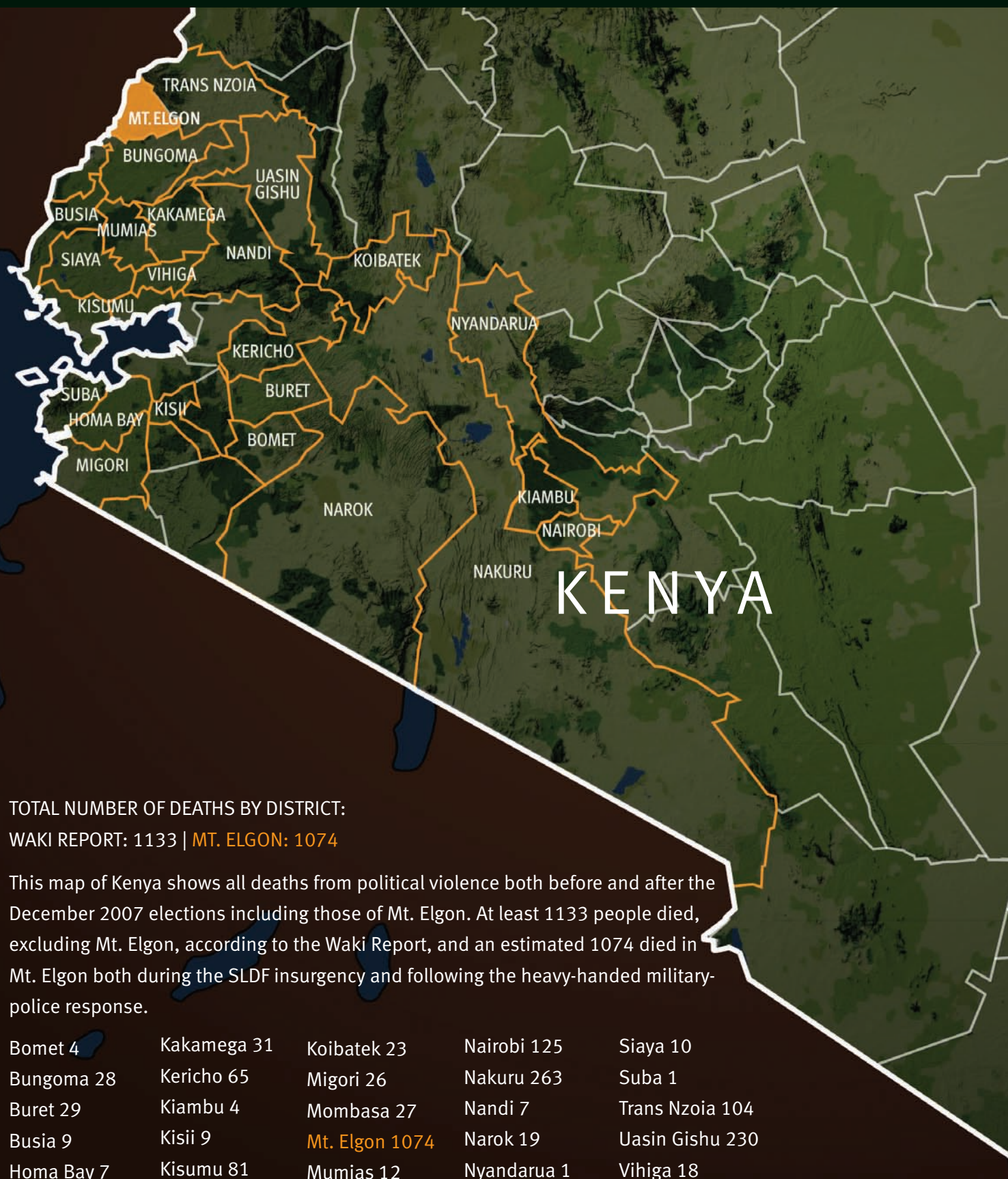
LIST OF SUSPECTED GRAVESITES

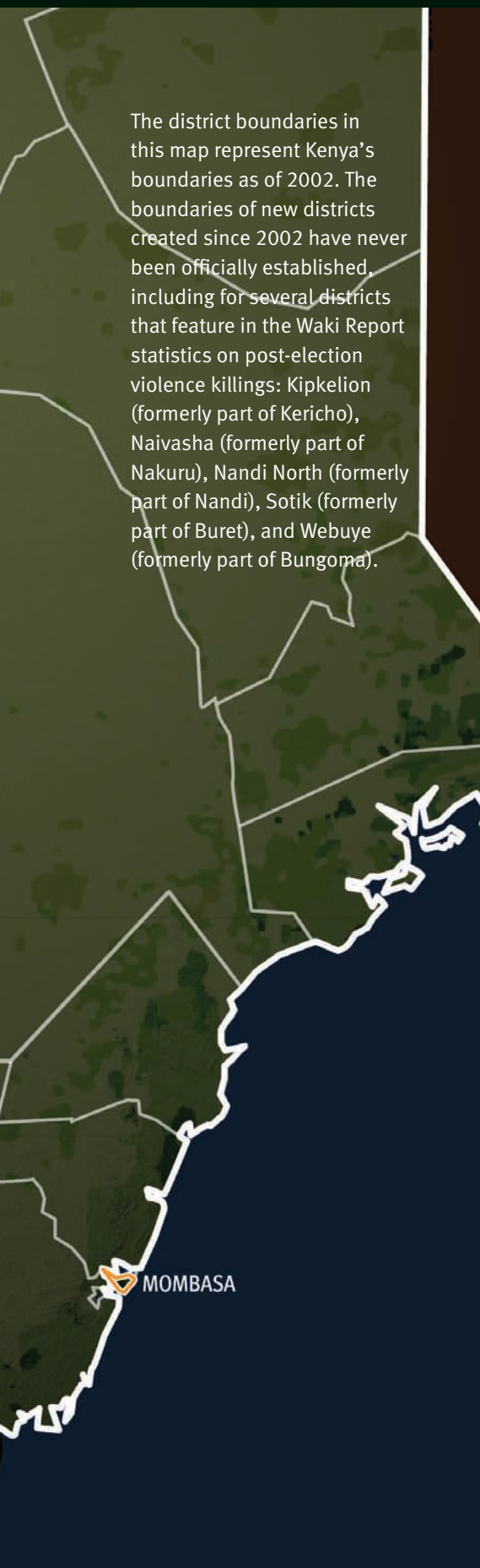
- 01 KAPKOTA MILITARY CAMP
- 02 CHEBWEK
- 03 CHEBOMBOI
- 04 KAMARAN'GA-MEZA
- 05 KAPTOBOI
- 06 CHESEREK
- 07 KIMAMA
- 08 KABORIOT
- 09 KAPTUM
- 10 BANANTEGA MILITARY CAMP
- 11 KUBRA
- 12 SOSOPEL
- 13 KAPKONG
- 14 KABERWA

Graves can be within 8 kms inside the forest from marked areas

Human remains found by locals in an area called Kimama, suspected of being a dumpsite for the bodies of those disappeared by the SLDF militia.

POLITICAL VIOLENCE DEATHS





The National Accord and Reconciliation Act of February 2008 that brought an end to the post-election violence led to the establishment of the Commission of Inquiry into Post-Election Violence (CIPEV), also known as the Waki Commission. However, the resulting Waki Report explicitly excluded the Mt. Elgon atrocities from its mandate, on the basis that problems in Mt. Elgon predated the elections and thus the Waki Commission could not establish a link with the post-election violence; and that the problems were of such great magnitude that the commission could not address them given its limited time, resources, and mandate. To date, the Kenyan government has still not investigated the violence in Mt. Elgon.

Human Rights Watch recommends that President Kibaki, with no further delay, establish a commission of inquiry to investigate human rights abuses in Mt. Elgon.

Based on the Waki Report, the International Criminal Court is investigating political violence in Kenya. It also excluded Mt. Elgon from its remit because the issue was deemed to be too complex. However, the crimes committed in Mt. Elgon are on a scale comparable to the political violence of 2007-2008, indeed they are an integral part of it. The ICC should expand its investigation to include Mt Elgon and bring to account persons most responsible for the crimes committed by both the Sabaot Land Defence Force and Kenyan security forces.

RECOMMENDATIONS

TO THE PRESIDENT OF KENYA

- Establish a commission of inquiry into the killings, disappearances, and other human rights violations in Mt. Elgon in accordance with the Commissions of Inquiry Act of 2009. Direct the commission to avail itself of evidence collected by the Truth, Justice and Reconciliation Commission and the Kenya National Commission on Human Rights; to pay particular attention to the conduct of the police and armed forces at Mt. Elgon; and to ensure that witnesses are able to give testimony either publicly or confidentially.
- Direct the commission of inquiry to review all the cases of those disappeared and provide all known information, including on deaths, to the families.

TO THE ATTORNEY GENERAL'S OFFICE AND THE DIRECTOR OF PUBLIC PROSECUTIONS

- Order a team of magistrates to conduct inquests into the possible deaths of all persons alleged to have disappeared in Mt. Elgon between 2006 and 2008, as per articles 385-388 of the Criminal Procedure Code. If necessary, temporarily relocate magistrates from other parts of Kenya to courts in the Mt. Elgon region in order to have the human resources to conduct inquests into all cases without further delay. In furtherance of the inquest proceedings, order the exhumations of mass graves in order to identify those buried in those graves, with the assistance of international forensics experts. .
- Ensure the criminal investigation and prosecution—before a special mechanism to prosecute post-election violence, if appropriate—of those responsible for forced disappearances.
- In the case of any person presumed to be dead at the conclusion of an inquest, ensure that family members are issued an appropriate certificate of death in accordance with the Births and Deaths Registration Act.

TO THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION

- Pursuant to TJRC hearings in Mt. Elgon, recommend that the government ensure the thorough investigation of enforced disappearances and other human rights abuses committed in Mt. Elgon.
- Recommend criminal investigations of alleged perpetrators of human rights abuses in Mt. Elgon, including military officials and SLDF leaders, and politicians against whom evidence of criminal acts has been presented in TJRC hearings.
- Order reparations for victims of enforced disappearance, torture, and other human rights abuses in Mt. Elgon.
- Use upcoming TJRC thematic hearings on human rights violations by the security forces as an opportunity to further elucidate crimes committed in Mt. Elgon.

TO THE KENYAN PARLIAMENT

- Ratify the International Convention for the Protection of All Persons from Enforced Disappearance.
- Ensure that enforced disappearance is a crime under Kenyan law.
- Establish a special mechanism within the Kenyan judicial system to prosecute serious crimes linked to the 2007-2008 post-election violence, including crimes carried out in the Mt. Elgon region.
- In conjunction with the Ministry of Finance, ensure that the Witness Protection Agency is fully funded, as required by the Witness Protection Act of 2006 and the Witness Protection (Amendment) Act of 2010.

TO THE WITNESS PROTECTION AGENCY

- Offer protection to witnesses from Mt. Elgon who wish to report abuses but who may be at risk.

TO THE KENYAN SECURITY FORCES, INCLUDING ALL POLICE AND MILITARY UNITS

- Cooperate fully with any investigations, by Kenyan or international bodies, into human rights abuses in Mt. Elgon, including by turning over documentary evidence and ensuring that police and military personnel are made available for questioning.

TO THE GOVERNMENT OF KENYA

- Invite the African Commission on Human and Peoples' Rights to send a fact-finding mission to Kenya to investigate whether abuses in Mt. Elgon violate the African Charter on Human and People's Rights.
- Invite the United Nations Working Group on Enforced or Involuntary Disappearances to visit Kenya in order to investigate alleged disappearances and to evaluate the government response in addressing these allegations.
- Provide compensation to families whose members were disappeared by the state.
- Establish a mechanism to provide compensation to families whose members were disappeared by the state and to victims of rights violations committed by state agents.

TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

- Establish an independent mechanism to investigate the human rights violations alleged in the submission made by the Kenyan Section of the International Commission of Jurists (ICJ-Kenya).
- Direct the Government of Kenya to investigate and prosecute all perpetrators of enforced disappearances and unresolved abductions in Mt. Elgon between 2006 and 2008.

TO THE UNITED NATIONS WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

- Transmit to the Government of Kenya a list of cases of enforced disappearances, as requested by nongovernmental organizations (NGOs) submitting complaints on behalf of the victims.
- Request an invitation to visit Kenya in order to investigate alleged disappearances and to evaluate the government response in addressing these allegations.

TO THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

- Analyze whether crimes falling within the ICC's jurisdiction were committed in Mt. Elgon and consider opening additional investigations in the Kenya situation currently before the ICC to bring to account persons most responsible for these crimes. The Office of the Prosecutor should consider in its analysis crimes committed by both the Sabaoth Land Defence Force and Kenyan security forces.





Children play in an illegal settlement in the Chepkitala region of Mt. Elgon.

Methodology

In February and June 2011 Human Rights Watch conducted field investigations in Kenya's Western Province, including in the towns of Bungoma and Kakamega and the wider Mt. Elgon area, in order to establish the outcome of victims' efforts to determine the whereabouts of family members who had been disappeared. This followed previous research missions to the Mt. Elgon area in March and April 2008, July 2008, and February 2009.

Human Rights Watch interviewed 31 family members of the disappeared during the 2011 field investigations. Of the 31 victims, 19 had been arrested by the Kenyan armed forces, while 12 had been disappeared by the Sabaot Land Defence Force. Interviews were arranged by the Bungoma-based Western Kenya Human Rights (WKHR).¹ Interviews with families of victims were conducted in Kiswahili, Luhya, or Sabaot with the assistance of translators from WKHR. The names of victims have been changed or withheld because they fear reprisals at the hands of the Kenyan security forces or persons linked to the SLDF. Names provided, where victims' accounts are cited, bear no relation to their real names.

Human Rights Watch also interviewed police, administrative, and judicial officials, local human rights activists, journalists, lawyers, and religious leaders in Bungoma and elsewhere in Western Province.

Follow-up research, including interviews with a member of parliament, lawyers, Kenyan and international nongovernmental organizations, diplomats, and judicial, police, and Ministry of Internal Security officials, was conducted in Nairobi between February and August 2011, and at the Truth, Justice and Reconciliation Commission hearings in Mt. Elgon in May 2011.

On May 10, 2011, Human Rights Watch delivered a letter to Internal Security Minister George Saitoti by email and fax requesting information on steps taken by security agencies to address claims of human rights violations in Mt. Elgon (see Appendix). As of October 17, Human Rights Watch had received no response to the letter.

¹ Western Kenya Human Rights (WKHR) is an independent Kenyan nongovernmental organization based in Bungoma that has no affiliation of any form to Human Rights Watch.

I. Background

Disappearances, extrajudicial killings, torture, and other human rights abuses committed in Mt. Elgon between 2006 and 2008 took place in the context of a low-intensity armed conflict between Kenya's security forces, both police and army, and the Sabaot Land Defence Force. Most of the abuses by government forces were committed when the conflict escalated dramatically in 2008 with the joint police-military operation to combat the SLDF, Operation Okoa Maisha.

The roots of the violence in Mt. Elgon lie in a land conflict that has been going on for several decades, starting in the 1960s when the government evicted thousands of Mt. Elgon residents from a forested area that was to be gazetted as a game reserve. Some of those affected were resettled but never received title to their land, while others remained landless. An effort to reallocate land initiated by the government in 2005, which would have reduced the land holdings of some members of the Sabaot sub-clan, led to the insurgency activities by the SLDF, which had already begun training several years earlier after the issue of land redistribution arose during the 2002 elections.² To date, the conflict has not been resolved to the satisfaction of many residents of Mt. Elgon, raising the specter of future violence—particularly if the culprits of the 2006-2008 violence continue to benefit from impunity.

While the SLDF was formed with the stated initial aim of protecting the land interests of members of the Sabaot community who were squatting on land which was to be redistributed, it also sought to advance the political interests of a group of politicians. According to witnesses and residents, the SLDF originally had links to the 2002-2007 Member of Parliament (MP), John Serut, but when Serut supported the 2005 government evictions of Sabaot squatters, the then-leader of the SLDF, Fred Kapondi, fell out with Serut and used the militia as a launching pad for his 2007 election campaign.³ The SLDF began targeting local government officials and councilors deemed to be hostile to their interests or supporters of the then-sitting MP, Serut, and effectively established a parallel administration within Mt. Elgon, levying taxes and carrying out forced recruitment.⁴

² For more background on the land conflict leading to the formation of the SLDF, see Human Rights Watch, *"All the Men Have Gone": War Crimes in Kenya's Mt. Elgon Conflict*, July 2008, <http://www.hrw.org/en/reports/2008/07/27/all-men-have-gone>, pp. 11-14.

³ Human Rights Watch interview with a religious leader (name withheld), Bungoma, February 2008; testimony tendered at the Truth, Justice and Reconciliation Commission public hearings in Mt. Elgon, May 25, 2010, attended by a Human Rights Watch researcher. See also Human Rights Watch, *"All the Men Have Gone"*, pp. 11-14.

⁴ Human Rights Watch, *"All the Men Have Gone"*, p. 20.

In 2006 the SLDF began committing serious human rights abuses against its opponents in the run up to the December 2007 elections, including an estimated 750 killings of civilians and mutilations of others.⁵ The vast majority of SLDF abuses were committed in the context of political competition for the Orange Democratic Movement nomination won by its chief political backer, the current MP for Mt. Elgon, Fred Kapondi, and then during his general election campaign. The SLDF militia intimidated political opponents and their supporters across the district during 2007 and led a campaign of terror forcing people to vote for Kapondi and other ODM candidates for council.⁶ SLDF members themselves admitted to voting 12, 13, and 15 times each for Kapondi at the ballot box.⁷

Following the election, the SLDF carried out reprisals against candidates that had stood against the ODM and its supporters.⁸

The police launched sporadic operations against the SLDF in 2007. These operations, which were largely ineffective in addressing the crisis and were marred by allegations of human rights abuses, including shooting of civilians by the Rapid Deployment Unit (RDU), a unit of the administration police that “killed with impunity,” according to a Mt. Elgon religious leader interviewed by Human Rights Watch.⁹ These operations were followed in March 2008 by Operation Okoa Maisha, a massive, joint police-military campaign to root out the SLDF. The Government of Kenya claims that the mission was police-led,¹⁰ but the dozens of witnesses told Human Rights Watch in 2008 and 2011 that the operations were primarily led by the military. This was confirmed by witnesses who testified before the Truth, Justice and Reconciliation Commission in Mt. Elgon in May 2011.¹¹

The operation was an exercise in terror: security forces detained over 3,000 men and teenage boys in March and April 2008, often on the basis of little or no evidence, and tortured hundreds.¹² Bodies of victims who had been beaten to death appeared regularly in

⁵ Ibid., pp. 22-23.

⁶ Ibid.

⁷ Human Rights Watch interviews with three former SLDF members, Cheptais, June 12, 2011.

⁸ Human Rights Watch, *“All the Men Have Gone”*, pp. 10-12; and interviews with former SLDF members and human rights activists, Cheptais and Bungoma, June 2011.

⁹ Human Rights Watch interview with a religious leader (name withheld), Bungoma, February 2011.

¹⁰ Internal police inquiry report, unpublished, but circulated to journalists in August 2008, p. 1; Ministry of State for Defense, “Allegations against the Military Unfounded,” undated statement, http://www.mod.go.ke/?page_link=Mt%20Elgon%20%28SLDF%29 (accessed June 8, 2011).

¹¹ Human Rights Watch, *“All the Men Have Gone”*; Human Rights Watch interviews, Bungoma, February 2008; testimony tendered at the Truth, Justice and Reconciliation Commission public hearings in Mt. Elgon, May 25, 2010, attended by a Human Rights Watch researcher.

¹² The Special Rapporteur on extrajudicial executions received official reports according to which 3,839 persons were “screened” at Kapkota military camp; another report stated that 3,265 persons were detained there. UN Human Rights

Bungoma and Webuye mortuaries during the height of Operation Okoa Maisha, in March and April of 2008.¹³

The military left its bases in Mt. Elgon abruptly on August 31, 2008, in the wake of multiple reports of human rights violations by the army.¹⁴

The operation halted SLDF activities, but at great human cost. The Independent Medico-Legal Unit (IMLU) identified more than 400 torture survivors remanded at Bungoma prison in March and April 2008.¹⁵ The UN Special Rapporteur on extrajudicial, summary or arbitrary executions (Special Rapporteur on extrajudicial executions) reported in 2009 that the number of persons killed or disappeared by the security forces during the operation was “conservatively estimated at over 200.”¹⁶ According to Western Kenya Human Rights, over 300 victims disappeared, the majority of them after having been taken into military custody.

Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Kenya, A/HRC/11/2/Add.6, May 26, 2009, p. 20. Others were detained at Chepkube military camp.

¹³ Human Rights Watch, *All the Men Have Gone*, pp. 28-29.

¹⁴ Robert Wanyonyi, “Kenya Army withdraws from Mt. Elgon amid torture claims,” *The Standard*, September 1, 2008, <http://majimbokenya.com/home/2008/09/01/kenya-army-withdraws-from-mt-elgon-amid-torture-claims/> (accessed April 9, 2011).

¹⁵ Independent Medico-Legal Unit (IMLU), “Double Tragedy: Report on Medico-Legal Documentation of Torture and Related Violations in Mount Elgon ‘Operation Okoa Maisha’,” August 2008, p. 5.

¹⁶ UN Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Kenya, A/HRC/11/2/Add.6, May 26, 2009, p. 21.

II. “We Look for the Husbands in the Forest”: Unresolved Disappearances

Victims were subjected to disappearances by both the SLDF and the Kenyan security forces, and state agencies have not provided information on disappearances by either side. Government officials recognize that there are mass graves in Mt. Elgon, but claim that all the bodies in the graves are victims of SLDF atrocities.¹⁷ The state has refused requests to preserve evidence at mass grave sites and has taken little initiative to legally and forensically exhume the graves, raising questions about what might be found within.¹⁸

SLDF leaders should be held accountable for killings and abductions perpetrated by its fighters. The state, however, as the basic guarantor of security and justice for all its citizens, is also responsible for the lack of accountability for crimes, including kidnapping and killings, carried out by the SLDF.

Western Kenya Human Rights has compiled a list of 317 names of persons disappeared by either the SLDF or the Kenyan security forces between 2006 and 2008. The organization said that over 80% of those disappearances were carried out by the Kenyan army.¹⁹

¹⁷ Human Rights Watch telephone interview with a government official, February 16, 2011.

¹⁸ Human Rights Watch telephone interview with a local administrative official, April 27, 2011; IMLU, “Double Tragedy,” p. 17. Local officials assisted with several exhumations in 2008, while the military operation was still ongoing, but no exhumations have taken place since. See also Bernard Kwalia, “Mt. Elgon killings: Fingers point at army and rebels,” *Daily Nation*, August 25, 2008, <http://www.nation.co.ke/News/-/1056/463582/-/tk8ylw/-/index.html> (accessed April 26, 2011); Peter Ng’etich and Bernard Kwalia, “Residents’ fears over bodies buried in wells,” *Daily Nation*, August 26, 2008, <http://www.nation.co.ke/News/-/1056/464024/-/tk9juj/-/index.html> (accessed April 26, 2011); and Erick Ngobilo, “Militia ‘turned well into a mass grave’,” *Daily Nation*, May 26, 2010, <http://www.nation.co.ke/News/Militia+turned+well+into+a+mass+grave/-/1056/926542/-/view/printVersion/-/jeqpyi/-/index.html> (accessed August 26, 2011).

¹⁹ Human Rights Watch telephone interview with WKHR Director Job Bwonya, April 6, 2011.

Enforced Disappearances by the Kenyan Armed Forces

Three Women's Stories

Faith V.

Faith V.'s husband was arrested by soldiers at his home on March 16, 2008. According to Faith V.:

They started torturing him just next to our house. They were soldiers from Chepkube. When I witnessed him being beaten, I locked the children in the house so they wouldn't see that. I couldn't stand it.... I decided to run away [into the house] and not see it.

When I started crying and the children started crying, the military brought [my husband] back and he showed them his ID. They told me "We have brought him back for you to see him for the last time. Have you heard those bullets at Kimaswa? That's the weapon that is going to be used on your husband." The soldiers suspected my husband because he was from Chepyuk [an area from which residents had been displaced due to the disputed government land resettlement scheme opposed by the SLDF].²⁰

Faith V.'s husband was taken to Chepkube, an improvised military camp at a coffee factory. Faith V. heard from a neighbor that the detainees at Chepkube were taken to Kapkota military camp the same day. Two days later, she went to Kapkota where soldiers directed her to Chepkube. There, she was sent back to Kapkota. Narrating her ordeal, she told Human Rights Watch that on her second attempt to seek information at Kapkota, "The soldiers told me 'Your husband has been taken up in the forest.'"

Following this, Faith V. approached the District Officer at Cheptais, who did not provide any assistance.²¹ Several days later, she also made a report to the Provincial Commissioner (PC). She said, "The PC told me to go in the forest and look for my husband to bury him."

²⁰ Human Rights Watch interview with Faith V., Bungoma, February 10, 2011.

²¹ Within the provincial administration, District Officers report to District Commissioners, who in turn report to the Provincial Commissioner. The Provincial Commissioner reports to the Minister of Internal Security and Provincial Administration in the Office of the President. This is the so-called "Provincial Administration" structure in Kenya inherited from the colonial authorities. The Provincial Commissioner was the nominal head of operation Okoa Maisha. Within the police force, which is also under the Minister of Internal Security and Provincial Administration, each local police station is run by an Officer Commanding Station (OCS). The OCS reports to an Officer Commanding Police Division (OCPD) at the division level, who in turn reports to the Provincial Police Officer (PPO).

Faith V. also submitted a written statement to the Officer Commanding Station (OCS) from Chesikaki police station, providing details of her husband's abduction. The OCS and other officials who were present when she submitted the statement, including a military commander, promised to assist her: "They said, 'We want the truth. If your husband is dead, then we'll assist you with relief.' I asked 'What type of assistance will you provide?' They said 'assistance will come, you just wait.' We have waited for assistance up to now."

Despite numerous efforts, Faith V. never obtained information about what happened to her husband and she has not had access to any form of justice or compensation.²²

Shirley D.

Shirley D.'s husband was taken to Chepkube military camp by eight soldiers who came to their home at 11 p.m. on April 25, 2008. Shirley D. went to the camp the following day. She was not allowed to see her husband, but, she said, "As I was leaving I saw my husband flat on the floor, next to a building. His clothes were blood-stained and he was covered with blood. He was surrounded by about three soldiers. He was not dead because his legs were still moving."

Shirley D. immediately informed the District Officer (DO) of Cheptais that her husband was at Chepkube and appeared to have been beaten. He promised to investigate, but later that same afternoon, when she again approached the DO, he told her he "had a lot of work to do." Shirley D. went back to the camp, where she saw a table with the shape of a human body stretched across it, covered by a red cloth. A man living next to the military camp saw her distress: "He told me, 'Hold your heart.' I started crying. I was sure that was my husband whom I had seen and that he was dead."

Over the next few days Shirley D. and her family members went to Chesikaki police station, Kapkota military camp, and the mortuaries at Bungoma, Webuye, and Kakamega, but she was unable to obtain any information about what had happened to her husband.²³

²² Human Rights Watch interview with Faith V., Bungoma, February 10, 2011.

²³ Human Rights Watch interview with Shirley D., Bungoma, February 10, 2011.

Peris M.

Peris M.'s husband was arrested by soldiers at the restaurant he ran in Chepkube sub-district on March 26. He was taken in a military truck to the camp at Chepkube and then to Kapkota military camp, according to another man who was arrested along with him but later released. Peris M. went to Kapkota two days later, but the soldiers at the gate denied that her husband was being held there. Leaving the camp she met several police officers, one of whom she knew. She asked him for information about her husband. That evening the police officer sent a message, through a neighbor, to inform her that her husband was dead.

Peris M. reported the incident at the police stations at Chepkube and Bungoma. Some time later police came to her house and asked her to write a report, which she did, but to her knowledge the police never conducted further investigations.²⁴

Sadly, the stories of Faith V., Shirley D., and Peris M. are common among families in the Mt. Elgon area. Many families repeatedly sought their relatives at police stations, military camps, prisons, and morgues and filed complaints with a variety of local officials. In some cases, government officials wrote down the names of those reported to be missing and took formal reports; but in most cases they declined to even make note of the complaints.

Other women were threatened in order to prevent them from making formal complaints, although this did not stop them from seeking their husbands. Triza D., whose husband was arrested on March 10, went to Kapkota camp the next day where a soldier confirmed that he was held there, but she was not permitted to see him. According to Triza D.,

On the 14th I went back to Kapkota and they said “Don’t come here again. Just stay at home and wait for your husband or we will beat you up here.” ... [The] soldiers told me “These women whose husbands are missing—if you go to complain, you will be arrested and killed.”

Triza D. then looked for her husband at Bungoma Prison and at police stations at Chesikaki, Webuye, Kimilili, Kakamega, Busia, and Kitale before giving up on her search. She told Human Rights Watch, “I’ve heard stories that he was shot and put on a plane, but I never really knew what happened. No one has seen him dead.”²⁵

²⁴ Human Rights Watch interview with Peris M., Bungoma, February 10, 2011.

²⁵ Human Rights Watch interview with Triza D., Bungoma, February 7, 2011.

Ruth M. was also prevented from filing a complaint. After her husband was arrested by soldiers on April 14 she learned from a cousin who was also arrested but later released that the men were airlifted by helicopter and taken to Kapkota. A family member went to look for him at Kapkota, but was told “Look for him in all the prisons.” Ruth M. went to Bungoma Prison, but her husband was not there. She then went to Chesikaki police station on May 5. According to Ruth M., “The police chased us from there. Just when we reached the gate, they chased me. They didn’t even let me explain what happened. They said ‘Go away. We don’t want to see you here.’ They never even bothered to ask my name.” She added, “I want to know the truth about what happened to my husband. We are many whose husbands have never come back.”²⁶

Irene T. saw her husband, bleeding, being thrown into a Land Rover by soldiers on March 13. Two days later, she went to the Chesikaki police station to inquire into her husband’s whereabouts. She said,

They told me “We have not seen him. Look for him elsewhere.” They were not interested in talking. They never wrote anything down. They just said look for him elsewhere. On March 25 I came to Bungoma Prison. But there, too, they gave me the same story ... he’s not here, look for him elsewhere. So I just returned home.²⁷

She later heard from a man who had been released from Kapkota that her husband had been beaten to death there.

A senior police official acknowledged to Human Rights Watch, “Some people made reports of disappearances to the police that were not recorded.”²⁸ Additionally, many victims, unaware of their rights, did not seek to file formal complaints because they could not imagine that members of the state security forces could ever be held accountable for abuses, a fact that highlights the need for the authorities to take initiative to conduct investigations and prosecute suspects. Ruth M. asked Human Rights Watch, “How can they imprison soldiers? How can I sue a soldier? [A soldier] is someone who is above me.”²⁹

The enforced disappearances had a tremendous psychological impact on victims’ families. One woman described how she stripped off her clothes and walked naked through the

²⁶ Human Rights Watch interview with Ruth M., Bungoma, February 8, 2011.

²⁷ Human Rights Watch interview with Janet T., Bungoma, February 8, 2011.

²⁸ Human Rights Watch interview with a senior police official (name and location withheld), February 2011.

²⁹ Human Rights Watch interview with Ruth M., Bungoma, February 8, 2011.

town after being unable to locate her husband.³⁰ Another woman contemplated suicide, and struggled to explain the disappearance to her three children. She told Human Rights Watch that after her husband was arrested she went to Kapkota with another woman to try to find him, but was chased away by soldiers. She explained,

After they had chased us away, we saw the girls who were ferrying water for these soldiers, so we enlisted their help. [One girl] said she would ask the one she was carrying water for to find out from the records or the computer whether these people are there or not. The girl was told “If they are the ones, they were killed on the 13th ... the same day.” She told me that the *askari* [guard] said, “Those people were ferried at night in a truck to a forest up at Mesa.” We returned crying because there was nothing we can do. We said “We have got the truth.”

At the time I was tempted to commit suicide. I have never seen the body up to now. One of the kids asked me “For three years, where has this old man gone to?” I told them “Just persevere. You’ll get another father.” So now they have forgotten.³¹

Disappearances by the Sabaot Land Defence Force

In addition to enforced disappearances by the army, Western Kenya Human Rights has also documented dozens of cases of victims abducted and disappeared by the SLDF.³² In most cases government officials provided victims’ families with no assistance in locating their loved ones. Other victims were afraid to file complaints because of the climate of fear in Mt. Elgon. Many, to this day, fear retribution from SLDF members, who continue to share the hillsides with their former victims.

Complaints filed about SLDF abductions were often met with inaction by the police.³³ Milka T., whose mother, a shopkeeper, was abducted by SLDF in July 2007, reported the incident the next morning to both the police and the local chiefs. “They didn’t do anything,” she told Human Rights Watch.³⁴

³⁰ Human Rights Watch interview with Shirley D., Bungoma, February 10, 2011.

³¹ Human Rights Watch interview with Ursula C., Bungoma, February 9, 2011.

³² Human Rights Watch telephone interview with WKHR Director Job Bwonya, April 6, 2011.

³³ Human Rights Watch interview with Adelaide H., Bungoma, February 10 2011.

³⁴ Human Rights Watch interview with Milka T., Bungoma, February 10, 2011.

Others did not file complaints, in part due to the parallel administration operated by the SLDF in 2007. Farida C. explained,

At that time we didn't know who was the government, because these people had their own chiefs, their own administrative structures. There were police not far away. The police were not interfering with what they [the SLDF] did; I think they overpowered the police.³⁵

Similarly, Jane A. told Human Rights Watch that after her son was kidnapped by the SLDF, "I have never gone to the government to file a complaint. I didn't know how to go to the government to report, and I couldn't distinguish between the thugs and the police."³⁶

Operation Okoa Maisha, designed to restore security to Mt. Elgon, did not contribute to either truth or justice in the wake of SLDF disappearances. For instance, Hiba N.'s husband was abducted by the SLDF on March 7, 2008, after refusing to allow one of his sons to join the militia. Hiba N. hoped that the military operation that was launched several days later would assist her in locating her husband, but she had no such luck. Despite filing a report at Chesikaki police station around March 17 and submitting another statement to the military at Kapkota, to her knowledge the security forces have never investigated her husband's whereabouts.³⁷

³⁵ Human Rights Watch interview with Farida C., Bungoma, February 7, 2011.

³⁶ Human Rights Watch interview with Jane A., Bungoma, February 7, 2011.

³⁷ Human Rights Watch interview with Hiba N., Bungoma, February 10, 2011.

III. Government Response to Disappearances and Other Abuses

Failure to Investigate

The Government of Kenya has never conducted an independent, impartial inquiry into the abuses at Mt. Elgon. A 2008 police report and an undated military statement allegedly based on investigations of rights abuses, both appeared to have the aim of whitewashing the abuses. A subsequent parliamentary investigation published in November 2008 raised serious concerns about human rights violations and urged the government to take further action, but its conclusions were dismissed by the government, as discussed below. The Truth, Justice and Reconciliation Commission has, to date, heard some testimony concerning the abuses in Mt. Elgon. Whether it will issue recommendations that result in further government action remains to be seen.

In its response to a case brought before the East African Court of Justice regarding human rights violations at Mt. Elgon, discussed below, the government filed a response in 2010 stating “the Respondents expressly deny that the Kenya police, Kenya Army or any of Kenya’s security agents carried out any executions, or acts of torture, or cruelty or other inhuman or degrading treatment on any person or at all as alleged therein”—demonstrating the ongoing unwillingness to acknowledge that state agents committed human rights violations in Mt. Elgon.³⁸ This follows a long sequence of denials and refusals to acknowledge evidence that was in fact collected by some state agencies.

The Police Report

In May 2008 the Commissioner of Police appointed a team of four police officers to conduct an inquiry into human rights violations in Mt. Elgon.³⁹ The police did not publish any formal findings, but an undated and untitled internal report was leaked to journalists and NGOs in August 2008. Deputy Police Spokesperson Charles Owino, interviewed by Human Rights Watch in August 2011, also pointed to this report as evidence of police investigations.⁴⁰

In the report the police responded to a series of NGO reports that had recently been published on torture, enforced disappearances, and other abuses in Mt. Elgon, including

³⁸ Letter from Muthoni Kimani, MBS, Senior Deputy Solicitor General, for the Attorney General, served upon Kethi D. Kilonzo & Co., Advocates, undated 2010, on file with Human Rights Watch.

³⁹ Police report, untitled, undated 2008, p. 3.

⁴⁰ Human Rights Watch interview with Deputy Police Spokesperson Charles Owino, Nairobi, August 2, 2011.

reports by Western Kenya Human Rights and the Independent Medico-Legal Unit; the quasi-governmental Kenya National Commission on Human Rights; and the international organizations Medecins Sans Frontieres (MSF) and the International Committee of the Red Cross (ICRC).

The police team attempted to seek a number of victims whose cases were documented in the various reports. It had difficulty tracing them—in part, as the police report acknowledges in relation to one case, because “residents were apprehensive about police enquiries on the alleged torture victim.”⁴¹ One victim did agree to meet with the police, but her detailed description of torture by the security forces was dismissed because, according to the police report, she “appeared crafty and unreliable.” The report does not however point to any inconsistencies in her testimony.⁴²

Concerning disappearances, no explanation is given as to the whereabouts of those alleged to be disappeared. The police report claimed that some unidentified bodies that were found in morgues were “awaiting DNA analysis to help in identification.”⁴³ Human Rights Watch addressed a letter to the Kenyan Ministry of Internal Security in May 2011 to inquire whether DNA analysis was ever carried out, but had not received a response as of this writing.⁴⁴

The police dismissed every one of the reports produced by the five national and international organizations. For instance, the ICRC was described as “not competent authorities to document reports on allegations of human rights abuses during internal security operations.”⁴⁵ The torture victims interviewed by MSF were considered likely to be “mischievous opportunists out to get sympathy and humanitarian assistance from the organization.”⁴⁶ In sum, according to the police, “the alleged reports on torture were found to be unreliable, misleading, obnoxious, unsubstantiated, and made in bad faith. They are therefore a nullity and of no evidentiary value.”⁴⁷

The UN Special Rapporteur on extrajudicial executions, Philip Alston, said of the police report: “It is a whitewash. The investigation they conducted was superficial and

⁴¹ Police report, undated 2008, p. 29.

⁴² Ibid., pp. 31-32.

⁴³ Ibid., p. 37.

⁴⁴ Letter from Human Rights Watch to Hon. George Saitoti, Minister of State for Internal Security and Provincial Administration, “RE: Enforced Disappearances and Impunity in Mt. Elgon,” May 10, 2011.

⁴⁵ Police report, undated 2008, p. 38.

⁴⁶ Ibid., p. 42.

⁴⁷ Police report, undated 2008, p. 49.

misdirected.” Alston further charged the security forces with undertaking a “campaign of reputation-smearing and intimidation” in response to NGO work.⁴⁸

Had the government been willing to engage with the NGOs that produced the reports, it might have reached different conclusions. According to the Independent Medico-Legal Unit, as part of the police inquiry, members of the team “visited IMLU and interviewed IMLU’s officials, but indicated they were only making general inquiries and declined to receive evidence tendered.”⁴⁹

Although the police report was never published, its content is revealing. The lack of trust between the police and the civilian population of Mt. Elgon, the reticence of the police to engage with the NGOs that investigated abuses at Mt. Elgon, and the quickness of the police to dismiss the NGO reports suggest the need for a body other than the police that can carry out independent investigations and bring cases before the judicial system.

The Military Statement

The military also stated that it had conducted its own internal investigation into the Mt. Elgon atrocities. In an undated statement entitled “Allegations against the Military Unfounded,” which appears from its content to have been produced in 2008 while Operation Okoa Maisha was ongoing, the Ministry of Defense claimed:

Our troops have investigated the allegations of torture (where this is possible) and found no evidence whatsoever to support the claims. It has also been alleged that people arrested during the operation are being held in military camps and prisons. It is emphasized that this is a police operation and therefore all arrests are made by the police and where the military and civilians make arrests; the people are handed over to the police who process them through the judicial system. It is clarified here that the military has no military camps or prisons in the operation area.

The Ministry claimed that reports of human rights violations were the result of a smear campaign “which [the SLDF] finance and orchestrate.” In response to claims from a local

⁴⁸ UN Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Kenya, A/HRC/11/2/Add.6, May 26, 2009, p. 22-23.

⁴⁹ IMLU, “Double Tragedy.”

activist that he was threatened by the military, the Ministry of Defense responded with sarcasm that “hunting for petty criminals is a police, not a military function.”⁵⁰

According to the report of the Special Rapporteur on extrajudicial executions, “Given the official responses to the allegations, it is clear that a credible investigation cannot be conducted either by the police or the military.”⁵¹

The Parliamentary Report

The Kenyan Parliament took allegations of human rights violations in Mt. Elgon more seriously than did the police and the Ministry of Defense. Members of Parliament conducted a “fact finding visit” to Mt. Elgon from August 17 to 20, 2008.⁵² Although the report concluded Operation Okoa Maisha “restored peace and calm in the area,” it also found that “There are cases of human rights abuses by the security forces in Mount Elgon which should be investigated further to ascertain which arm of the security forces perpetrated the abuses.”⁵³

The parliamentary report further made note of a lack of collaboration from the police: “There are reports of disappearances of people in custody of security agencies which should be investigated to establish the whereabouts of these people. Attempts by the Committee to verify these allegations in the OB [Occurrence Book] were frustrated by the Police.”⁵⁴

The report recommended that the government investigate and prosecute allegations of human rights abuses and disappearances, further investigate SLDF activities, and disarm the militia.⁵⁵

The government did not implement these recommendations. It dismissed the parliamentary report as being based upon the allegations of “handpicked SLDF

⁵⁰ Ministry of State for Defense, “Allegations against the Military Unfounded,” undated statement, http://www.mod.go.ke/?page_link=Mt%20Elgon%20%28SLDF%29 (accessed June 8, 2011).

⁵¹ UN Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Kenya, A/HRC/11/2/Add.6, May 26, 2009, p. 24.

⁵² Kenya National Assembly, “Report of the Joint Visit to Mount Elgon Region by the Committees on Defence and Foreign Relations, and Administration, National Security and Local Authorities, 17th to 20th August, 2008,” November 2008.

⁵³ “Report of the Joint Visit to Mount Elgon Region by the Committees on Defence and Foreign Relations, and Administration, National Security and Local Authorities, 17th to 20th August, 2008,” p. 18.

⁵⁴ Ibid.

⁵⁵ “Report of the Joint Visit to Mount Elgon Region by the Committees on Defence and Foreign Relations, and Administration, National Security and Local Authorities, 17th to 20th August, 2008,” p. 20.

sympathizers.”⁵⁶ Indeed, the prominent former SLDF leader Fred Kapondi, who was jailed in 2007 on charges related to SLDF activities and was elected into Parliament after being acquitted, was co-chair of the parliamentary delegation that conducted the inquiry into events at Mt. Elgon. While the government may have good reason to question Kapondi’s neutrality, it did not produce any evidence that any of the report’s findings—which echoed those previously published by human rights organizations—were flawed.

The Kenya National Commission on Human Rights Report

The Kenya National Commission on Human Rights, established by an act of parliament in 2002, is an independent national human rights institution that is authorized by law to investigate human rights violations and make recommendations to the government to address those violations.

In May 2008, the KNCHR issued a report, “Mountain of Terror,” based on its investigations into human rights violations in Mt. Elgon. The report recommended that the Attorney General institute legal proceedings against nine senior security officials, based on evidence that they were involved or complicit in such violations. The government dismissed the report and ignored its recommendations.⁵⁷

The Truth, Justice and Reconciliation Commission Hearings

In April 2011, the Truth, Justice and Reconciliation Commission, formed in the aftermath of the 2007-2008 post-election violence, began a series of public hearings around the country. The TJRC’s mandate includes investigating human rights violations committed between 1962 and February 28, 2008, when the National Accord and Reconciliation Act was signed.

Based on written statements, which Kenyans from all walks of life were encouraged to submit to the TJRC, the commission invited victims of abuses and other informed community members to testify at public hearings in Mt. Elgon between May 23 and May 25, 2011. Initially, the TJRC had planned to sit at several different locations in Mt. Elgon, for a total of 10 days, but its visit to Mt. Elgon was cut short, due to time and resource constraints. The commission abandoned plans for a public hearing in Cheptais, the area where most of the violence took place in 2006-2008, sitting instead in Kapsokwony, a

⁵⁶ Government of Kenya, “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,” <http://www.communication.go.ke/documents/KenyaGovernmentsResponseToAlstonReport.pdf> (accessed April 10, 2011), p. 16.

⁵⁷ Anthony Kagiri and Bernard Momanyi, “KNCHR: Prosecute Abuses in Mt. Elgon,” *Capital FM*, May 15, 2008, <http://www.capitalfm.co.ke/news/2008/05/15/KNCHR-prosecute-abuses-in-mt-elgon/> (accessed September 25, 2011).

location that is difficult to reach for most of Mt. Elgon's impoverished residents because of long distances and high transport costs.⁵⁸

A number of victims told the commission of the assassinations, torture, and disappearances carried out by the SLDF and the political character and backing of the militia. Although the TJRC's mandate technically expired after February 2008, the commission at its May 2011 hearings demonstrated flexibility by also calling on victims of the military operation Okoa Maisha to testify. At least three speakers addressed human rights violations by the army, including one woman whose husband was a victim of enforced disappearance at the hands of the army.⁵⁹

Further witnesses from Mt. Elgon, including current MP Fred Kapondi and former MP John Serut, testified at hearings in Bungoma town in July 2011. Serut publicly accused Kapondi of being behind SLDF atrocities, a charge that Kapondi denied, blaming Serut in turn.⁶⁰

The TJRC is mandated to recommend prosecutions for offences that qualify as gross human rights violations and reparations for victims.⁶¹ Recommendations will be made only after the commission concludes its hearings throughout the country. The law establishing the commission requires the government to implement its recommendations.⁶² It is too early to tell whether the government will comply with this requirement. While the TJRC's hearings on Mt. Elgon revealed a series of human rights violations, the commission's work does not, in itself, constitute the type of thorough, impartial inquiry called for by Human Rights Watch and other organizations, and the government should not use the TJRC as a pretext to resist calls for further investigations.

⁵⁸ Human Rights Watch interviews with a Bungoma-based activist and with an academic researcher, Mt. Elgon, May 25, 2011.

⁵⁹ Human Rights Watch interviews with an academic researcher and a member of the National Integration and Cohesion Commission, Mt. Elgon, May 25, 2011; testimonies tendered at the TJRC hearing in Mt. Elgon, May 25, 2011, attended by a Human Rights Watch researcher; John Nalinya, "Women in Mt. Elgon recall their SLDF woes," *The Star*, May 25, 2011, <http://www.nairobistar.com/national/national/25663-mt-elgon-mt-elgon-women-recall-rapes-and-killings> (accessed August 31, 2011).

⁶⁰ Erick Ngobilo, "Serut weeps as he tells TJRC of his close shave," *Daily Nation*, July 11, 2011, <http://www.nation.co.ke/News/Serut+weeps+as+he+tells+TJRC+of+his+close+shave+/-/1056/1199126/-/ynox2jz/-/index.html> (accessed August 6, 2011); Simbi Kusimba, "Kapondi blames Serut for Mt. Elgon violence," *The Star*, July 13, 2011, <http://www.nairobistar.com/local/western--nyanza/31496-kapondi-blames-serut-for-mt-elgon-violence> (accessed August 6, 2011).

⁶¹ Truth, Justice and Reconciliation Commission, "Mandate and Activities," <http://www.tjrkenya.org/index.php/about-tjrc/mandate-and-activities> (accessed May 26, 2011).

⁶² The Truth, Justice and Reconciliation Committee Bill, 2008, section 49(2).

Lack of Initiative in Undertaking Further Investigation

The Government of Kenya did not utilize several avenues available for further investigation into the atrocities committed in Mt. Elgon.

Under Kenyan law the officer in charge of any police station, upon receiving a report that a person is missing and believed dead, is required to immediately inform the nearest magistrate. Magistrates, in turn, are required by law to conduct an inquiry into the cause of death.⁶³ The Attorney General, under laws in effect at the time of the abuses in Mt. Elgon, had the power to order magistrates to open inquests; under Kenya's new constitution, which came into effect in 2010, that power lies with the newly-independent Director of Public Prosecutions.⁶⁴

The District Commissioner for Cheptais, Omar Salat, told Human Rights Watch that he had only met one widow whose husband had disappeared and that if people believed that their family members had been disappeared, rather than simply gone missing, then they should report the matter to the police and that he would look into it. He said the government could do nothing unless missing person's reports were filed.⁶⁵ Police at Chesikaki police station in Cheptais division confirmed that they had received 26 such reports during March and April 2008 but that sometime in 2009 the District Criminal Investigation Officer (DCIO) had taken over all such cases and requested the files be forwarded to him for further action.⁶⁶ The families have had no feedback from the police or the DCIO since filing the reports despite numerous visits to the police station.

To date only one inquest has been conducted into the case of a victim of enforced disappearance in Mt. Elgon; it was only ordered after the victim's family brought a habeas corpus case before the Bungoma High Court.⁶⁷ A number of victims told Human Rights Watch that they reported disappearances to police officials, and WKHR told Human Rights Watch that several inquest files were indeed opened. However, they did not result in further investigations or public hearings.⁶⁸ The Attorney General could have reacted to the numerous reports by NGOs highlighting enforced disappearances by ordering magistrates to conduct inquests, but he did not. The Kenyan president is also empowered to intervene

⁶³ Criminal Procedure Code, Chapter 75 of the Laws of Kenya, revised 2009, arts. 385-387.

⁶⁴ Criminal Procedure Code, art. 388; Human Rights Watch interview with Director of Public Prosecutions Keriako Tobiko, Nairobi, September 22, 2011.

⁶⁵ Human Rights Watch interview with Omar Salat, District Commissioner, Cheptais, June 17, 2011.

⁶⁶ Human Rights Watch interview with Officer Commanding Station, Chesikaki, June 17, 2011.

⁶⁷ See chapter IV, below.

⁶⁸ Human Rights Watch interview with WKHR Director Job Bwonya, Mt. Elgon, May 25, 2011.

when law enforcement agencies do not appear to be acting in accordance with the law: he can establish a commission of inquiry, “to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest.”⁶⁹ Despite public outcry over the atrocities at Mt. Elgon and the clear indications of misconduct by the state security forces, the president took no such action.

Lack of Witness Protection

Victims of atrocities on both sides of the Mt. Elgon conflict told Human Rights Watch they were afraid to file a complaint because of fear of retribution from their neighbors. Their testimonies highlight the need for Kenya to rapidly establish a credible witness protection program. Despite the passage into law in 2008 of the Witness Protection Act of 2006, and a subsequent Witness Protection Amendment Act in 2010 which strengthened the initial bill, the Witness Protection Agency, established in 2011 pursuant to these acts, is not yet operational. The agency’s mandate includes taking any actions necessary to ensure the safety and welfare of a witness, including allowing a witness to assume a new identity or by relocating a witness.⁷⁰ But during the July 2011 budgetary allocation process, the agency received less than one fourth of the budget it had requested, effectively crippling its operations.⁷¹ To date the government has not provided protection for a single witness.⁷²

The lack of witness protection is a serious barrier to seeking truth and justice in the Mt. Elgon disappearance cases. One woman, whose husband was disappeared by the army, explained the problem presented by living alongside “brokers,” SLDF defectors who assisted in the military operation in 2008,

The soldiers had brokers with them, and the brokers are our neighbors. So when you talk, the brokers can take these things up. They can even kill us if they know that we have talked. I am afraid of death because of the neighbors.⁷³

⁶⁹ Commissions of Inquiry Act, revised 2009, art. 3.

⁷⁰ See the Witness Protection Act, 2006, No. 16 of 2006, http://www.kenyalaw.org/Downloads/Acts/The_Witness_Protection_Act_2006.pdf, and the Witness Protection (Amendment) Act of 2010, sections 6, 7.

⁷¹ Bernard Namunane, “Kenya Witness Protection Plan Gets Sh300m,” *Daily Nation*, August 1, 2011, <http://allafrica.com/stories/201108020031.html> (accessed September 25, 2011).

⁷² Human Rights Watch interview with KNCHR official, Nairobi, April 5, 2011, and with members of Kenyans for Peace, Truth, and Justice, Nairobi, May 31, 2011; email communication from IMLU to Human Rights Watch, March 11, 2011.

⁷³ Human Rights Watch interview with Maureen I., Bungoma, February 9, 2011.

SLDF victims face similar problems, according to one woman whose husband was abducted,

I didn't go to the chief or the police because if I had gone, I would have been killed. I was afraid that if I reported it, my life would be in danger. I still haven't reported it. I still feel that way. Those guys are still in the forest. Some of them have been acquitted by courts and they're just there. Mentioning now their names, you can be finished.⁷⁴

Medecins Sans Frontieres, in its 2008 report "Mount Elgon: Does Anybody Care?," notes that, "The few who have dared to report attacks to the police then found themselves targets of retaliatory violence by the militia in the following days, including some cases in which people had their ears chopped off as punishment."⁷⁵

A judicial official in Bungoma said that although a number of cases were filed against the SLDF for a range of abuses, witnesses did not come to testify against them in trial due to fear of retribution.⁷⁶ He said these cases would have been good candidates for witness protection, but that the government has not provided funds for the witness protection program.⁷⁷

Human Rights Watch learned that one woman who filed a case in the Bungoma courts against the security forces was subjected to surveillance and intimidation by individuals her neighbors suspected of being police officers. She subsequently fled to neighboring Uganda for several months.⁷⁸

Most victims of torture were also afraid to file legal complaints due to the lack of witness protection, according to WKHR.⁷⁹ One Mt. Elgon resident thought that testifying in such sensitive cases could mean a death sentence. He told Human Rights Watch, "Witness protection is needed. How do you go and put a rope on your neck?"⁸⁰

⁷⁴ Human Rights Watch interview with Hiba N., Bungoma, February 10, 2011.

⁷⁵ Medecins Sans Frontieres, "Mount Elgon: Does Anybody Care?," May 2008, http://www.doctorswithoutborders.org/publications/reports/2008/MSF_MtElgon_May2008.pdf (accessed April 10, 2011), p. 4.

⁷⁶ Human Rights Watch interview with a judicial official, Bungoma, February 15, 2011.

⁷⁷ Human Rights Watch interview with a judicial official, Bungoma, February 15, 2011. See also Mugomo Munene, "Sh1 Billion Needed for Witness Protection Plan," *Daily Nation*, April 23, 2011, <http://allafrica.com/stories/201104250137.html> (accessed April 26, 2011).

⁷⁸ Human Rights Watch interviews with Mt. Elgon residents and local human rights activists, Bungoma, February 10, 2011.

⁷⁹ Human Rights Watch interview with WKHR Director Job Bwonya, Bungoma, February 11, 2011.

⁸⁰ Human Rights Watch interview with a religious leader (name withheld), Bungoma, February 2011.

Failure to Exhume Mass Graves

Residents of Mt. Elgon told Human Rights Watch that both parties to the conflict—the SLDF and the Kenyan security forces—dumped the bodies of their victims in mass graves. Despite ample evidence that this was the case—and recognition from the government that, at least, SLDF graves exist—the government has made little effort to identify and exhume these graves and allow for a dignified burial for victims.⁸¹ Some bodies were exhumed during the military operation in 2008, but residents claim that many remain.⁸² NGOs that attempted to investigate the mass graves were subjected to threats.⁸³ Widows told Human Rights Watch that 64 of them had gone to demand that the former District Commissioner at Cheptais allow them to go into the forest to search for the bodies of their husbands but they were denied.⁸⁴ The current DC claimed no knowledge of such a request.

In May 2010 the TJRC visited Mt. Elgon and heard testimonies about the existence of mass graves. One resident who testified to the TJRC, the owner of a pit latrine into which 16 bodies had been dumped by the SLDF, also told a reporter about this improvised grave: “We tried to exhume one body but it [the body] just fell apart. We asked the government to help us but no one has bothered.”⁸⁵ Despite the attention brought to this case by the TJRC, the bodies still have not been exhumed.⁸⁶

State officials also tampered with crime scenes, removing bodies that had been found in the forest in the absence of any legal process to record what was found or where the bodies were subsequently taken, despite requests from human rights organizations to preserve the crime scenes for independent documentation.⁸⁷ Elsa Chesut was one of the victims whose husband’s body was found in the forest, and then disappeared once again. She said:

⁸¹ Human Rights Watch interview with M.T., Bungoma, February 10, 2011.

⁸² Bernard Kwalia, “Mt. Elgon killings: Fingers point at army and rebels,” *Daily Nation*, August 25, 2008, <http://www.nation.co.ke/News/-/1056/463582/-/tk8ylw/-/index.html> (accessed April 26, 2011); Peter Ng’etich and Bernard Kwalia, “Residents’ fears over bodies buried in wells,” *Daily Nation*, August 26, 2008, <http://www.nation.co.ke/News/-/1056/464024/-/tk9juj/-/index.html>; and Erick Ngobilo, “Militia ‘turned well into a mass grave’,” *Daily Nation*, May 26, 2010, <http://www.nation.co.ke/News/Militia+turned+well+into+a+mass+grave/-/1056/926542/-/view/printVersion/-/jeqqyi/-/index.html>.

⁸³ Human Rights Watch telephone interview with WKHR Director Job Bwonya, April 20, 2011; UN Human Rights Council, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston,” A/HRC/11/2/Add.6, May 26, 2009, p. 24.

⁸⁴ Human Rights Watch interviews with widows, Cheptais, June 11-12, 2011.

⁸⁵ Simon Siele, “Kenya: Truth Witnesses Seek Protection,” *Daily Nation*, May 25, 2010, <http://allafrica.com/stories/201005251100.html> (accessed April 9, 2011); Robert Wanyonyi, “TJRC tours mass graves in Mt Elgon,” *The Standard*, May 26, 2010, <http://www.standardmedia.co.ke/InsidePage.php?id=2000010317&cid=159&> (accessed April 9, 2011).

⁸⁶ Human Rights Watch interview with a Mt. Elgon resident (name withheld), Bungoma, February 15, 2011.

⁸⁷ IMLU, “Double Tragedy,” p. 17.

On the 20th, after seeing that my husband was not returning, I went to Kapkota to find out. But at the gate, a soldier told me “We don’t look for husbands in the camp. We look for them in the forest. Go and look for your husband in the forest.” He said this because the mortuary was in the forest. It was where the bodies were being dumped. But at the time I didn’t think like that. I didn’t believe he was dead.

In July of the same year, the soldiers came back in civilian clothes because there had been many complaints. They collected the skeletons in the forest. They pretended they were human rights representatives. When these people came, all people who lost relatives went to the forest to identify the bodies. I saw the head of my husband. I could recognize him by the teeth. He had removed teeth in the back and [there was] a gap between his front teeth. I don’t know what happened to the body parts but people were saying they were going to burn them.

In August I found the clothes. He was wearing trousers and a Kaunda shirt and blue slippers when he left. I found his vest in the forest, and his trousers. In August my son was in the forest and said “I saw something that looked like Daddy’s trousers.” I went with him and saw that it was true.⁸⁸

A lawyer under instructions from IMLU petitioned the Bungoma Court in August 2008 to issue orders to preserve the scene where three women believed they had located remains and clothing of their husbands, but the court declined jurisdiction and transferred the matter to the High Court, which did not hear the case.⁸⁹ Victims told Human Rights Watch they do not know the current location of these remains.

One Mt. Elgon resident told Human Rights Watch that she was aware of the existence of a mass grave in the grounds of Chebwek Primary School. She said this grave contained the bodies of at least three people killed by the army in 2008.⁹⁰ A former SLDF informer who worked with the military during the operation claimed there were human remains inside the forest reserve at places called Drum, Sosok, Cheptel, Cheperut, Chemeren, Mfarisa, Kipchonge, and Daraja Mungu.⁹¹ Two teachers claimed to have seen multiple bodies in

⁸⁸ Human Rights Watch interview with Elsa Chesut, Bungoma, February 7, 2011.

⁸⁹ IMLU, “Double Tragedy,” p. 17.

⁹⁰ Human Rights Watch interview, Bungoma, February 2011.

⁹¹ Human Rights Watch interview with former SLDF and former military informer, Mt. Elgon, June 18, 2011.

2009 near the water intake point for the municipal water plant at Kaptaboi, but that they had since been removed.⁹²

A journalist who had investigated the violence in Mt. Elgon told Human Rights Watch that government officials had told him of the existence of mass graves at locations in Kamarang, Huruma, Kubra, and Cheptandan, containing the bodies of persons killed by the military during Operation Okoa Maisha.⁹³ However, contacted by Human Rights Watch, one government official recognized the existence of these graves but claimed they only contained the bodies of victims of the SLDF.⁹⁴

Difficulties in Accessing Death Certificates

In line with the government's standard denial that mass disappearances were carried out during the conflict in Mt. Elgon, government officials have blocked the families of the disappeared from accessing compensation that would come with official recognition of their relatives' deaths. Several victims' family members told Human Rights Watch they were unable to access death certificates for their missing family members.

Under Kenyan law a person is presumed to be dead when he or she has been missing for seven years.⁹⁵ The only avenue whereby the seven year requirement can be circumvented, according to Kenyan law, arises when an inquest is conducted into the case of a missing person presumed to be dead; the magistrate can, on the basis of the inquest, order that the victim's family be issued with a death certificate.⁹⁶ As noted above, only one inquest has been conducted, despite reports of several hundred disappearances in Mt. Elgon.

A death certificate is important in accessing a number of benefits. For instance, death certificates are needed for widows or widowers to be able to secure ownership of property in their deceased spouse's name. Proof of the death of a spouse or parent can assist in accessing certain benefits such as scholarships; it is also necessary to gain legal title to land and other property held in the name of the deceased. One woman testified to the TJRC that she has been unable to access her husband's bank account because she lacks a

⁹² Human Rights Watch interview with teacher, Cheptais, June 8, 2011 and June 11, 2011.

⁹³ Human Rights Watch interview with journalist (name and location withheld), February 2011.

⁹⁴ Human Rights Watch telephone interview with government official (name withheld), February 2011.

⁹⁵ The Evidence Act, Chapter 80 of the Laws of Kenya, 2009, <http://www.kenyalaw.org/Downloads/GreyBook/10.%20The%20Evidence%20Act.pdf> (accessed April 26), section 118(A), "Presumption of death".

⁹⁶ Criminal Procedure Code, art. 388.

death certificate.⁹⁷ But according to WKHR, none of the families of the disappeared have been able to obtain death certificates or burial permits, which are required in addition to death certificates in order to access some benefits. Thus, the state's failure to conduct inquests had not only deprived victims' families of truth and justice—it has also prevented them from accessing material assistance.

Linda O. is certain that her husband was killed in March 2008. The day after he voluntarily went to Kapkota, obliging a soldier's request that he turn himself in for questioning, she heard gunshots from Kapkota and she never saw her husband again. When she went to the local chief to try to get a death certificate, he refused to help. Linda O. told Human Rights Watch, "He doesn't want to be involved. He fears we can revive this case."⁹⁸

Ursula C., whose husband was also disappeared by the army, leaving her with nine children, told Human Rights Watch:

I'm really having problems taking care of these kids. There were two kids in secondary school and I was unable to pay school fees. They [school officials] never gave me any bursary. They said, "Go and bring the death certificate of your husband." The chief told me, when I went to seek the death certificate, "You have not buried your husband. Do you want me to be in prison? What evidence do you have that your husband passed away? How do you know he died? He might have just gone to Uganda or other places." So he chased me away. So I sold the cow that was left to pay the school fees.⁹⁹

⁹⁷ Email communication from an official state observer to the TJRC hearings at Kapsokwony to Human Rights Watch, July 21, 2011.

⁹⁸ Human Rights Watch interview with Linda O., Bungoma, February 9, 2011.

⁹⁹ Human Rights Watch interview with Ursula C., Bungoma, February 9, 2011.

IV. Status of Attempts to Seek Justice

The state is the first guarantor of justice for its citizens. But in the absence of credible prosecutions in the Kenyan courts, human rights organizations have been assisting the families of the disappeared, helping them seek justice before international bodies.

Enforced Disappearance Cases

Bungoma Habeas Corpus Case

One victim's family sought the assistance of the Independent Medico-Legal Unit to file a habeas corpus case at the Bungoma High Court in July 2008, seeking to force the Kenyan security forces to produce Patrick Kipteyo Sewei, an assistant chief arrested by the army in April 2008. According to court documents consulted by Human Rights Watch, Sewei's wife, Phylis Tamnai Kipteyo, claimed that he had been taken to Chepkube military base; that she had seen her husband there being tortured on the morning of April 26; and that after that date, she had never seen him again.¹⁰⁰

The lawyer representing Sewei's wife faced several difficulties in moving the case forward through the judicial system. Initially one of the respondents, a commander of the Administration Police, refused to be served a summons, leading to delays. The lawyer also told Human Rights Watch that an affidavit he filed in December 2009, listing the names of three soldiers identified by Sewei's wife as being involved in his disappearance, disappeared from the court file.¹⁰¹

In March 2010 the court issued a ruling denying the habeas request on the basis that it could not determine with certainty that the victim's body had been in the custody of government forces. However, the court ordered the Attorney General, the Chief of General Staff, and the Commissioner of Police to "initiate an inquest into the disappearance of the said Patrick Kipteyo Sewei with a view of bringing to book any culprits who may be involved."¹⁰² The court ordered that a report be filed within 120 days.

The state repeatedly asked for extensions, and the report that the police finally submitted to the court indicated that the police did not interview any of the victim's family members

¹⁰⁰ Republic of Kenya in the High Court at Bungoma, Misc. Application No. 27 of 2008, Ruling, March 24, 2010, on file with Human Rights Watch, p. 2.

¹⁰¹ Human Rights Watch interview with Nicholas Kiprotich Ronoh, Advocate, Bungoma, February 11, 2011.

¹⁰² Republic of Kenya in the High Court at Bungoma, Misc. Application No. 27 of 2008, Ruling, March 24, 2010, p. 5.

or other witnesses. The judge rejected the report, ordering that a proper inquest be conducted by a magistrate.¹⁰³

Only in March 2011 did police re-initiate the inquest. The victim's wife and several other witnesses testified in a public hearing at the Sirisia Magistrate's Court. However, the court ruled, in spite of witness testimony, that it could not determine whether the victim was dead, and the victim's wife received no relief.¹⁰⁴

Preparation of a Complaint before the United Nations Working Group on Enforced or Involuntary Disappearances

The Kenyan civil society organization WKHR has reported that over 300 victims of disappearances have not been accounted for; most of them were believed to have been disappeared by state forces. WKHR has received reports of 126 victims alleged to have been abducted by the SLDF, 188 victims alleged to have been disappeared by the military, and 11 alleged to have been disappeared by the police. In May 2011 WKHR, with the assistance of the Geneva-based nongovernmental organization TRIAL (Tracking Impunity Always), filed an application before the United Nations Working Group on Enforced or Involuntary Disappearances in order to seek justice on behalf of victims.¹⁰⁵ The initial application was filed on behalf of 20 victims whose family members have been disappeared, and the organizations intend to collect further documentation to add additional cases to the list.¹⁰⁶

The United Nations Working Group on Enforced or Involuntary Disappearances was established by the UN Commission on Human Rights (now the Human Rights Council) in 1980.¹⁰⁷ The Working Group's mandate is to "[assist] families in determining the fate and whereabouts of their disappeared relatives who are placed outside the protection of the law."¹⁰⁸ It also monitors states' compliance with the obligations outlined by the United Nations Declaration on the Protection of All Persons from Enforced Disappearance.

¹⁰³ Human Rights Watch interview with Nicholas Kiprotich Ronoh, Bungoma, February 11, 2011.

¹⁰⁴ Human Rights Watch telephone interviews with Nicholas Kiprotich Ronoh, May 24, 2011, and October 14, 2011.

¹⁰⁵ Tracking Impunity Always (TRIAL), "Kenya: General Allegation to the United Nations Working Group on Enforced or Involuntary Disappearances," Geneva, May 25, 2011, http://www.trial-ch.org/fileadmin/user_upload/documents/CAJ/Kenya/Kenya_General_Allegation_Confidential_25.05.2011.pdf (accessed June 8, 2011).

¹⁰⁶ Human Rights Watch telephone interview with WKHR Director Job Bwonya, April 6, 2011; email communication from TRIAL to Human Rights Watch, June 2, 2011.

¹⁰⁷ UN Commission on Human Rights, "Question of missing and disappeared persons," Resolution 20 (XXXVI), February 29, 1980.

¹⁰⁸ UN Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/13/31, Annex I, November 14, 2009.

Cases submitted to the Working Group are transmitted to the government alongside a request for clarification. They are also reported to the Human Rights Council, alongside any government response received.

Other Human Rights Cases Filed

The East African Court of Justice

In July 2010 IMLU filed a case before the EACJ in Arusha, Tanzania, alleging that over 3,000 residents of Mt. Elgon were subjected to “executions, actions of torture, cruelty, inhuman and degrading treatment” between 2006 and 2008. The case charges the government with failure to prevent or prosecute these abuses, in violation of the treaty establishing the East African Community. IMLU’s application calls upon the EACJ to declare that Kenya’s failure to investigate and prosecute the abuses, and its failure to compensate victims, are in violation of the treaty and its fundamental principles, and to make any orders to the Kenyan government that are deemed necessary as a result of this finding.¹⁰⁹

The case was first heard on March 31, covering preliminary points of law including questions of the court’s jurisdiction and the statute of limitations. The Kenyan government argued that human rights cases do not fall within the jurisdiction of the East African Court of Justice, and that the two month statute of limitations on filing complaints had been exceeded. The court, however, found in favor of IMLU on both points in a June 29 ruling.¹¹⁰ The Kenyan government filed notice to appeal the preliminary ruling on July 26. At the time of writing, the court had not yet scheduled a hearing on the appeal.¹¹¹

The African Commission on Human and Peoples’ Rights

The Kenyan Section of the International Commission of Jurists filed a communication before the African Commission on Human and Peoples’ Rights in May 2010.¹¹² The communication charges Kenya with violating provisions of the African Charter on Human and Peoples’ Rights concerning the right to equality before the law and equal protection of law; the right to life; torture and cruel, inhuman, or degrading treatment; liberty and

¹⁰⁹ East African Court of Justice Reference No. 3 of 2010, on file with Human Rights Watch.

¹¹⁰ IMLU argued that because the Kenyan government’s failure to investigate was ongoing, and therefore victims continued to be deprived of access to justice and the rule of law, the two month statute of limitations had not been surpassed. IMLU further cited court precedents admitting EACJ jurisdiction over human rights cases. Email communication from IMLU to Human Rights Watch, April 6, 2011.

¹¹¹ East African Court of Justice, Hearing on East African Court of Justice Reference No. 3 of 2010, July 28, 2011, Arusha, Tanzania, attended by Human Rights Watch.

¹¹² African Commission on Human and Peoples’ Rights, Complainant’s Communication No. 385 of 2010, May 11, 2010.

security of the person; and peace and security.¹¹³ The complaint charges that domestic remedies have been exhausted and calls upon the African Commission to send an independent investigatory mission to Kenya to document the abuses. It also asks the commission to direct the Kenyan government to investigate and prosecute SLDF and state security agents found to be responsible.¹¹⁴

The communication explicitly faults the Kenyan government for failure to prevent and prosecute abuses committed by the SLDF, as well as abuses committed by state security forces. It notes international legal precedent according to which a human rights violation not directly attributable to a state can still lead to a finding of state responsibility “because of the lack of due diligence to prevent the violation or to respond to it as required.”¹¹⁵

The communication was scheduled for consideration at the commission’s 49th session in Banjul, the Gambia, in April 2011, but consideration was postponed due to other business. ICJ-Kenya anticipates that the communication will be heard at the next session in October 2011.¹¹⁶

¹¹³ Ibid., para. 23.

¹¹⁴ Ibid., para. 45.

¹¹⁵ Ibid., para. 31, citing *Velasquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988 (Series C) No. 4.

¹¹⁶ Email communication from ICJ-Kenya to Human Rights Watch, June 9, 2011.

V. Kenyan and International Law

On Enforced Disappearance

The United Nations Declaration on the Protection of all Persons from Enforced Disappearance, adopted by the General Assembly in 1992, prohibits states from practicing or tolerating enforced disappearance, setting forth that the practice “constitutes a violation of the rules of international law guaranteeing, inter alia , the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.”¹¹⁷ It further sets forth that any person alleged to have perpetrated an act of enforced disappearance shall be prosecuted.¹¹⁸

The declaration provides that enforced disappearance “shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified,” and that statutes of limitations shall be suspended until the disappearances are clarified.¹¹⁹

In 2007 Kenya became a signatory to the International Convention for the Protection of All Persons from Enforced Disappearance, which came into force in December 2010. Although Kenya has not yet ratified the convention, international law provides that signatories to international treaties agree not to commit acts that would defeat the objects and purposes of the treaty.¹²⁰

The convention guarantees that states undertake a “thorough and impartial investigation” in response to allegations of enforced disappearance, regardless of whether a formal complaint has been filed.¹²¹ State parties agree that a statute of limitations only takes effect “when the offence of enforced disappearance ceases.”¹²²

¹¹⁷ United Nations Declaration on the Protection of all Persons from Enforced Disappearance, adopted December 18, 1992, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 20, U.N. Doc. A/47/49 (1992), art. 1(2), art. 2(1).

¹¹⁸ *Ibid.*, art. 14.

¹¹⁹ *Ibid.*, art. 17.

¹²⁰ Vienna Convention on the Law of Treaties, adopted May 23, 1969, entered into force January 27, 1980, art. 18.

¹²¹ International Convention for the Protection of All Persons from Enforced Disappearance, adopted January 12, 2007, G.A. Res. 61/177, entered into force December 23, 2010, art. 12(1, 2).

¹²² *Ibid.*, art. 8(b).

The convention requires state parties to “take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.” It also binds them to guarantee to victims a right to compensation.¹²³

Kenya is also a state party to the Rome Statute establishing the International Criminal Court (ICC). Enforced disappearances that have been committed as part of a widespread or systematic attack (that is, as part of a state or organizational policy) against a civilian population are prohibited and amount to a crime against humanity under the Rome Statute of the ICC.¹²⁴

Kenya’s penal code does not expressly prohibit enforced disappearances. However, it prohibits abduction, a felony punishable by up to 10 years imprisonment.¹²⁵ Kenya’s Criminal Procedure Code requires police to report all arrests to the nearest magistrate.¹²⁶ The Kenyan constitution stipulates that detained persons shall be brought before a court within 24 hours after their arrest.¹²⁷ The nongovernmental organization TRIAL, in its submission to the United Nations Working Group on Enforced or Involuntary Disappearances, recommends that Kenya pass legislation explicitly criminalizing enforced disappearances.¹²⁸

On Other Human Rights Abuses Committed at Mt. Elgon

Three years after the abuses committed at Mt. Elgon, Kenya has failed to abide by its own criminal code and its regional and international human rights obligations in addressing human rights violations committed in the area, including torture and extrajudicial executions.

Torture is prohibited in all circumstances, by customary international law, and specifically the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), to which Kenya is a state party, and by Article 5 of the Universal Declaration on Human Rights.¹²⁹ Failure to investigate, prosecute, and

¹²³ Ibid., art. 24(3, 4).

¹²⁴ Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, ratified by Kenya on March 15, 2005, art. 7.

¹²⁵ Penal Code, Chapter 63 of the Laws of Kenya, Chapter 25, arts. 258-261.

¹²⁶ Criminal Procedure Code, art. 37.

¹²⁷ This right is provided for in both the old constitution, which was in effect at the time of the abuses, and the new constitution voted into law by referendum in August 2010. The Constitution of Kenya, 1969, art. 72 (2)(b); The Constitution of Kenya, 2010, art. 49(f).

¹²⁸ TRIAL, “Kenya: General Allegation to the United Nations Working Group on Enforced or Involuntary Disappearances,” pp. 12-16.

¹²⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered

provide redress to victims of torture are violations of the convention.¹³⁰ Like enforced disappearance, torture may also amount to a crime against humanity under the Rome Statute where committed as part of a widespread or systematic attack (that is, as part of a state or organizational policy) against a civilian population.

Kenya's penal code does not expressly prohibit torture, a failing noted by the Committee Against Torture in its last evaluation of Kenya's compliance with the Convention against Torture in November 2008.¹³¹ However, torture is prohibited by Kenya's new constitution of 2010 as well as the former constitution that was in effect at the time of the Mt. Elgon abuses.¹³² Further, Kenya's penal code prohibits "assault on a person," an offense that encompasses torture and ill-treatment.¹³³

Human Rights Watch noted in its 2008 report "All the Men Have Gone" that the fighting in Mt. Elgon in 2008 might rise to the level of an armed conflict under international humanitarian law (the laws of war). Both the Kenyan military and the SLDF committed violations of the Geneva Conventions of 1949, including prohibitions on summary or extrajudicial executions and the mistreatment of detained persons.¹³⁴ Kenya is obliged under international law to investigate and prosecute war crimes, including those committed by members of its armed forces. Failure to prosecute and investigate war crimes and crimes against humanity can trigger investigations by the International Criminal Court.¹³⁵

Mt. Elgon, the International Criminal Court, and the Post-Election Violence

Three years after the insurgency was brought to a brutal end, those most responsible for the crimes of the SLDF remain at large and those most responsible for the crimes committed by the Kenyan state in response are also still in office.

The ICC prosecutor opened investigations into post-election violence in Kenya in March 2010. The prosecutor sought to open investigations on his own motion (*proprio motu*) and so was

into force June 26, 1987; Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948).

¹³⁰ Convention against Torture, art. 13, 14.

¹³¹ Committee Against Torture, "Consideration of Reports Submitted by State Parties under Article 19 of the Convention," CAT/C/KEN/CO/1, November 21, 2008.

¹³² The Constitution of Kenya, 1969, art. 74 (1); The Constitution of Kenya, 2010, art. 25(a).

¹³³ Penal Code, Chapter 63 of the Laws of Kenya, chapter 24.

¹³⁴ Geneva Convention relative to the Treatment of Prisoners of War, adopted August 12, 1949, 75 U.N.T.S. 135, entered into force October 21, 1950; see also Human Rights Watch, "All the Men Have Gone", pp. 40-42.

¹³⁵ International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law* (Cambridge, UK: Cambridge University Press, 2005), p. 607, rule 158, citing ICC Statute, preamble.

required to first seek authorization from a chamber of ICC pre-trial judges. The pre-trial chamber authorized the ICC prosecutor to investigate crimes against humanity committed in Kenya between June 1, 2005—the date Kenya joined the ICC—and November 26, 2009—the date of the ICC prosecutor’s request to the judges for authorization.¹³⁶ ICC investigations have resulted in summonses to appear for six individuals on charges of crimes against humanity committed during post-election violence of 2007-2008. The six include politicians and government officials suspected of involvement on both sides of Kenya’s 2007-2008 post-election violence. Hearings to determine whether to send the cases to trial were held before the ICC in September 2011; decisions are expected in December 2011.

In the absence of credible national investigations, Human Rights Watch recommends that the ICC prosecutor analyze whether crimes falling within the ICC’s jurisdiction were also committed in Mt. Elgon and consider opening additional investigations to bring to account the persons most responsible for crimes committed by both the SLDF and the Kenyan security forces.¹³⁷ The crimes committed in Mt. Elgon resulted in a net loss of life significantly greater than the crimes currently being considered before the ICC.¹³⁸ Like the crimes currently under ICC investigation, many of the crimes committed in Mt. Elgon by both militiamen and the security forces appear to have been orchestrated with a political aim in mind. For instance, during the post-election violence that occurred between December 2007 and February 2008, security forces appeared less willing to use force in Nakuru and Naivasha to prevent violence orchestrated by the PNU-affiliated Mungiki militia against ODM members than they were to use force against rioting ODM supporters in the provinces of Nyanza, Western, Rift Valley, Coast, and Nairobi.¹³⁹

In its analysis and in any investigations opened, the Office of the Prosecutor should examine the role of the politicians cited by witnesses as most responsible for the violence in Mt. Elgon, including members of parliament and leading local councilors. It should also examine

¹³⁶ International Criminal Court, “Situation in Kenya—Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,” ICC-01/09, March 31, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> (accessed June 28, 2011).

¹³⁷ The ICC prosecutor is currently authorized to investigate only crimes against humanity. To investigate war crimes committed in Mt. Elgon, the prosecutor would need to seek additional authorization from the pre-trial chamber.

¹³⁸ The first Kenya case being considered before the ICC, on crimes against humanity committed in Uasin Gishu and Nandi districts, involves, among other crimes, the deaths of 260 people. The second Kenya case, on crimes against humanity committed in Nakuru and Naivasha towns, involves, among other crimes, between 161 and 213 killings in Nakuru and at least 50 killings in Naivasha. See International Criminal Court, “Situation in the republic of Kenya in the Case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua arap Sang, Document Containing the Charges,” ICC-01/09-01/11, August 1, 2011, p. 11; and “Situation in the Republic of Kenya, Document Containing the Charges,” ICC-01/09-02/1-257/AnxA, August 19, 2011, pp. 21, 25.

¹³⁹ See Human Rights Watch, *Ballots to Bullets: Organized Political Violence and Kenya’s Crisis of Governance*, March 16, 2008, <http://www.hrw.org/reports/2008/03/16/ballots-bullets>.

the role of the government officials that have been accused of having authorized, overseen, and covered up crimes committed by the military and police in responding to the SLDF insurgency, including the ministers with ultimate command responsibility and other high-ranking military and police officials who oversaw the execution of Operation Okoa Maisha.

VI. Conclusion

The victims of the Mt. Elgon conflict have waited too long for justice. Prompt, independent investigations into human rights violations in Mt. Elgon—particularly in the cases of enforced disappearances as an ongoing human rights violation—are imperative. In the interim, magistrates should immediately initiate inquests into all cases of persons who are missing and presumed to be dead. They should issue death certificates and order compensation in order to allow affected families to rebuild their lives. The government should also carry out exhumations in all areas of Mt. Elgon where bodies are reported to be buried in clandestine graves. In order to ensure that victims and witnesses can testify without threats to their security, the Witness Protection Agency must be urgently funded and made operational.

In the cases of post-election violence in Kenya in 2007 and 2008, only the establishment of the Waki Commission—and the subsequent intervention of the International Criminal Court—provided victims and their families a glimmer of hope that they might one day see justice. A similar commission of inquiry is required to address the atrocities of Mt. Elgon. The ICC prosecutor should determine whether crimes falling within the court's jurisdiction were also committed in Mt. Elgon, and if so, open additional investigations in the Kenya situation to bring to account those most responsible for the crimes by the state and the SLDF.

The lack of government action has compelled victims and human rights organizations to turn to international bodies to seek justice, including the East African Court of Justice, the African Commission on Human and Peoples' Rights, and the United Nations Working Group on Enforced or Involuntary Disappearance. These bodies should play a role in casting light on the atrocities committed in Mt. Elgon. But it is imperative that the Kenyan government fulfills its obligation to protect the rights of all its citizens, including the victims of the Mt. Elgon conflict, who have waited for over three years to have access to justice.

Acknowledgments

This report was researched and written by Neela Ghoshal, researcher in the Africa Division at Human Rights Watch. Ben Rawlence, senior researcher and Horn of Africa Team Leader at Human Rights Watch, edited the report and contributed to the research. The report was reviewed by Clive Baldwin, senior legal advisor, and Babatunde Olugboji, deputy Program director. Additional editorial assistance was provided by Jamie Vernaelde. Grace Choi, Kathy Mills, Anna Lopriore, and Fitzroy Hepkins provided production assistance.

Human Rights Watch is grateful to the families of victims of enforced disappearances and abductions who agreed to be interviewed for this report.

We would also like to thank many Kenyan organizations and individuals that provided invaluable assistance in compiling information for this report, notably Western Kenya Human Rights, Mwatikho Torture Survivors' Organization, International Medico-Legal Unit, and the Kenyan Section of the International Commission of Jurists.

Appendix: Letter to Internal Security Minister George Saitoti, May 10, 2011

Human Rights Watch delivered the following letter to Internal Security Minister George Saitoti by email and fax on May 10, 2011. The letter was again emailed to staff at the Ministry of Internal Security on August 2, 2011, and was discussed in a meeting with ministry staff. At that meeting, ministry staff assured Human Rights Watch that a response from Minister Saitoti would be issued the following week. As of October 17, Human Rights Watch had received no response to the letter.

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May 10, 2011

Hon. George Saitoti
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kenneth.lusaka@kenya.go.ke, klusaka@yahoo.com;
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RE: Enforced Disappearances and Impunity in Mt. Elgon

Dear Minister Saitoti:

I am writing on behalf of Human Rights Watch to follow up on the Government of Kenya's efforts to investigate and prosecute human rights violations committed between 2006 and 2008 in Mt. Elgon by the Sabaot Land Defence Force (SLDF) and the Kenyan police and army.

Human Rights Watch researches human rights violations around the world, and brings them to the attention of governments, calling for justice and accountability.

As you know, in 2008 we published a report entitled, "All the Men have Gone": War Crimes in Kenya's Mt. Elgon Conflict," about human rights violations committed by the SLDF and the Kenyan security forces in the course of the SLDF insurgency in Mt. Elgon between 2006 and 2008, including extrajudicial executions, enforced disappearances, and torture and ill-treatment. Several other organizations including the Kenya National Commission on Human Rights (KNCHR) documented the same patterns of abuses. At the time, we communicated with your office and the Kenya Police, and the Kenyan parliament investigated the allegations.

Human Rights Watch is compiling a report documenting the legacy of the conflict in Mt. Elgon, the ongoing human rights violations in terms of the hundreds of people who remain disappeared by the SLDF and the Kenyan security forces, and the legal actions that have been filed before national and international courts as a result of the alleged failure of the Kenyan government to take the necessary legal actions. As part of this research, we would like to seek information from you about the status of the ongoing cases and human rights violations in Mt. Elgon, and to ask for specific feedback on a number of questions below. In order to give context to the questions, we begin with a brief summary of the major developments so far.

Previous Efforts Seeking Accountability

The 2008 Kenya Police report dismissed all allegations of abuses documented by human rights groups. However, the parliamentary report concluded, along with the Independent Medico-Legal Unit (IMLU), the

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KNCHR, Médecins Sans Frontiers, the International Committee of the Red Cross, the Western Kenya Human Rights Watch, and the UN Special Rapporteur on Extra-Judicial Killings and Enforced Disappearances, that major human rights violations had occurred. Parliament pressed the Kenyan government to investigate further and prosecute those responsible. In addition, the US military activated Leahy vetting procedures to screen potential Kenyan recipients of US training for involvement in rights violations in Mt. Elgon.

Despite all of these calls for further investigation and prosecution, it appears that the Kenyan government has done nothing to date. This has led to several independent efforts at seeking legal redress, including a case before the East African Court of Justice brought by IMLU and a complaint submitted to the African Commission on Human and Peoples' Rights by the Kenyan Section of the International Commission of Jurists (ICJ Kenya).

Follow Up

In February 2011 Human Rights Watch conducted field investigations in Kenya's Western Province, including in the towns of Bungoma and Kakamega and the wider Mt. Elgon area, in order to establish the outcome of victims' efforts to determine the whereabouts of family members who had been disappeared. This followed previous research missions to the Mt. Elgon areas in March and April 2008, July 2008, and February 2009. Human Rights Watch interviewed 21 family members of the disappeared.

Human Rights Watch also interviewed police, administrative and judicial officials, local human rights activists, journalists, lawyers, and religious leaders in Bungoma and elsewhere in Western Province.

Kenya is a signatory to the International Convention for the Protection of All Persons from Enforced Disappearance, which came into force in December 2010. The convention guarantees that states undertake a "thorough and impartial investigation" in response to allegations of enforced disappearance, regardless of whether a formal complaint has been filed.¹ State parties agree that a statute of limitations only takes effect "when the offence of enforced disappearance ceases."² Enforced disappearance is an ongoing human rights violation until appropriate efforts have been taken to account for the person.

The Convention requires state parties to "take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains." It also binds them to guarantee to victims a right to compensation.³

Acts of Commission and Omission by the Kenyan State

In this respect, in the effort to establish justice and truth for the victims of the conflict in Mt. Elgon – victims of both SLDF and Kenyan state violations – the Kenyan state has so far been remiss and in some cases appears to have actively frustrated efforts at accountability.

The case against the Kenyan state, together with questions of clarification, is set out below.

1. Failure to successfully investigate and prosecute SLDF violations.

¹ International Convention for the Protection of All Persons from Enforced Disappearance, art. 12(1, 2).

² International Convention for the Protection of All Persons from Enforced Disappearance, art. 8(b).

³ International Convention for the Protection of All Persons from Enforced Disappearance, art. 24(3, 4).

The SLDF terrorized the population of Mt. Elgon for three years whilst half-hearted government efforts to combat the insurgency failed. When the government eventually deployed in sufficient numbers to quell the militia, the human rights consequences were immense. Hundreds of SLDF members were rounded up, detained and charged. Yet, nearly all the suspects are free again and living in the area once more amongst the communities whom the SLDF terrorized, raped, and murdered. Judges threw out several cases against members of the SLDF for lack of evidence. It appears that the state relied on informers to identify suspects and failed to build a proper case that would stand up in court. And, according to people familiar with the cases in Bungoma, a lack of a functioning witness protection program meant that many witnesses were terrified into withdrawing.

- To what does the government attribute the failure to prosecute SLDF suspects?

2. Failure to independently and impartially investigate abuses by the state during Operation “Okoo Maisha.”

The police report was an internal investigation, not an independent judicial inquiry as called for by all other observers of the conflict, including the Kenyan parliament and the UN Special Rapporteur on Extrajudicial killings, Philip Alston. This is also the call behind the cases before the African Commission and the East African Court of Justice. Human Rights Watch has received information according to which the military also conducted an internal investigation into its personnel’s conduct in Mt. Elgon, but that report has never been published.

- Why has no independent investigation been conducted to date?
- A number of victims’ family members told Human Rights Watch that they reported to the police after their family members were arrested by the military and subsequently disappeared. Do existing police records, for example from Chesikaki Police Station, include information on reports of men being arrested by the army and subsequently disappearing between March and April 2008? If so, would you avail to Human Rights Watch the names of those reported?
- Would you be willing to make available to Human Rights Watch the contents of any internal military inquiry into human rights violations in Mt. Elgon?
- Why has the internal military investigation not been made public to date?

3. Tampering with evidence.

Residents in Mt. Elgon and NGOs examining the situation there allege that the state made no effort to secure evidence relating to the serious crimes (crimes against humanity) of enforced disappearances, in particular the mass graves in Mt. Elgon, even when requested by IMLU and the KNCHR to do so. They claim, moreover, that the state removed some bodies without the presence of forensic experts of independent observers and without accounting for them.

- Have the mass graves not been examined and exhumed in accordance with requests by human rights organizations?
- Have any graves in Mt. Elgon been exhumed by the authorities in any manner? If so, where were these graves located; when were they exhumed; how many bodies were found; and what was done with the bodies? Were attempts made to interview the family members and identify the perpetrators?

- According to the unpublished Police report, unidentified bodies in Bungoma morgue were being tested for DNA. Did this happen and if so why have the results not been made public or communicated to the families concerned?

4. Failure to issue death certificates.

The families of those who were disappeared have been unable to access death certificates, in some cases being told that there is no evidence that their family member is dead. Without an accounting for the disappeared and the issuing of death certificates, where possible, the families affected in Mt. Elgon are unable to access humanitarian assistance such as school bursaries and state support where appropriate.

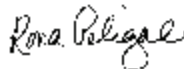
- Will the government commit to making death certificates available for persons who were disappeared in Mt. Elgon between 2006-2008?

The forthcoming draft report also notes that in our 2008 report, "All the Men Have Gone," we found that the fighting in Mt. Elgon in 2008 rose to the level of an armed conflict under international humanitarian law (the laws of war). Both the Kenyan military and the SLDF committed violations of the Geneva Conventions of 1949, including prohibitions on summary or extrajudicial executions and the mistreatment of detained persons. Kenya is obliged under international law to investigate and prosecute war crimes, including those committed by members of its armed forces. Failure to prosecute and investigate war crimes and crimes against humanity can trigger investigations by the International Criminal Court.

I hope that you are able to respond to our request for more information on this matter, and to provide an official response which we would be happy to include in our final report either in full or part. If you would like your response to be included for publication, we would be grateful to receive it before June 7, 2011.

If you would like to discuss any aspect of this research or any other human rights matters please do not hesitate to contact me by email, peligar@hrw.org.

Yours sincerely,



Rona Peligal
Deputy Director
Africa Division

“Hold Your Heart”

Waiting for Justice in Kenya’s Mt. Elgon Region

Approximately 300 Kenyans were forcibly disappeared in Kenya’s Mt. Elgon region between 2006 and 2008, after being either arrested by Kenyan security forces or abducted by the militia group Sabaot Land Defence Force (SLDF). Over three years after a military operation was launched to flush out the militia—an operation that was accompanied by serious human rights abuses, including summary executions, enforced disappearance, and torture—the government has not provided any information on the plight of the disappeared, and their families are yet to have access to justice.

“Hold Your Heart”: *Waiting for Justice in Kenya’s Mt. Elgon Region* documents the attempts of families of those forcibly disappeared by the Kenyan army and the SLDF to seek truth and justice. Human Rights Watch calls on the Kenyan government to open an inquiry into the fate of the missing persons. The International Criminal Court should also extend its Kenyan investigation to Mt. Elgon, the site of the highest concentration of pre- and post-election violence in the country.

A collective of women, widowed by the 2006-2008 clashes between the insurgent Sabaot Land Defense Force (SLDF) and the Kenyan government, have bonded together to support one another in the aftermath of their husbands’ disappearances and deaths.

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