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# FIELD REPORTS

## CONFRONTING DICTATORSHIP IN KENYA

*Gibson Kamau Kuria*

*Gibson Kamau Kuria is a Kenyan lawyer and human rights activist. From 1975 to 1987 he taught at the University of Nairobi Law School and defended many human rights cases, which led to his arrest and detention without trial for eleven months in 1987. In 1988 he resumed his practice and was awarded the Robert F. Kennedy Memorial Human Rights Award. His life in danger, he left Kenya in July 1990 and is currently a visiting fellow at the Human Rights Program of Harvard Law School.*

Since June 1990, a battle has been raging over political pluralism in Kenya. On one side is a movement dedicated to restoring multiparty democracy and freeing a once-vibrant economy that is now staggering under the weight of statism and corruption. On the other is President Daniel arap Moi, a longtime enemy of free political competition who came to power in 1978 and imposed a constitutional ban on multiparty politics four years later.

The reform movement is led by an assortment of lawyers, Christian clergymen, and politicians who have concluded that unless democracy is restored, Kenya faces certain disaster, possibly even a bloody civil war. Committed to working peacefully for change, the reformers hope to forestall the possibility of a military coup or sectional rebellion designed to remove the current regime. Africa has seen too many such violent upheavals in the three decades since decolonization, they believe, and few have done much to help the cause of multiparty democracy. The

reformers hold instead that the methods used to effect changes are as important as the changes themselves. They want peaceful change like that recently witnessed in Czechoslovakia and Benin, and now promised in the Republic of Congo, where a national conference recently hammered out plans for a transition to democracy. The goal is to restore the constitutional principles Kenya adopted in 1963, with the addition of safeguards intended to prevent the reemergence of one-party dictatorship.

Africa has recently seen several countries move either to restore democracy where it was banished or to establish it where it has never been known. In Kenya, however, President Moi has declared that one-party rule will not end, and has threatened to deal "firmly" with those who advocate change. Yet intensified repression is having no effect. The democracy movement continues to press its case, and a showdown with the government is bound to occur soon. The movement has organized demonstrations and other forms of civil disobedience, to which the government has reacted with sometimes deadly force. It seems likely that once the armed forces comprehend how profound and widespread opposition to the current regime truly is, they will withdraw their support from Moi's one-party dictatorship, thus effectively sealing its doom. Although grimmer scenarios remain possible, this writer believes that a version of the Benin model will be followed. In this report, I discuss the current situation, its causes, and how the movement has grown.

### **The Current Situation**

Kenya today is wracked by tension and uncertainty. Grave civil disturbances could erupt at any time. Prodemocracy leaders know that they are subject to arrest and detention without trial. They may also be stoned in the street, or beaten up in their own homes in the dead of night. They know that they could be assassinated. Journalists who dare to cover events that the government does not want reported face some of the same risks. Magazine publishers know that they could find their journals impounded and themselves charged with sedition at any time. Poor people whom the government has identified as potentially unfriendly have had their homes demolished without notice and without pity. Lawyers who do human rights work know that the windshields of their cars may be smashed and police posted outside their offices to keep prodemocracy leaders from obtaining legal advice. They know that their practices may be ruined and clients driven away by the machinations of a hostile and unscrupulous government. Outspoken clergymen know that their services may be disrupted by the regime's goons, or even banned outright. They can also expect to be slandered, while their superiors will be pressured to silence or dismiss them. Although the constitution and the Public Order Act guarantee freedom of association to all, in practice only the members of the ruling party are allowed to enjoy it.

Three events since 1982 have drawn the international community's attention to the repression and instability that beset Kenya, a country which in the 1960s and 1970s was widely seen as an African showcase for political pluralism and the market economy. The failed coup that the Kenya Air Force staged on 1 August 1982 came six months after a crackdown on dissent and two months after parliament passed the constitutional amendment that officially made Moi's Kenya African National Union (KANU) the country's only lawful political party. The pattern of oppression that the Moi government set in responding to the coup has persisted and expanded. Next came the systematic torture and detention without trial of political prisoners in 1986 and 1987, offenses detailed by Amnesty International in the latter year. The government insisted that a violent Marxist guerrilla movement—"MwaKenya"—had sprung up, though the evidence consisted of nothing but coerced confessions.

The third key event was the crackdown on dissent that began in June 1990 and culminated in the bloody suppression of prodemocracy demonstrations a month later. The crackdown was the government's reaction to the clamor for the restoration of multiparty democracy that had begun six months earlier. President Moi, fearing for the future of his regime, called an immediate halt to the debate on political pluralism. He was, in effect, suspending the Bill of Rights, something he had no authority to do. Harassment of lawyers, entertainers, journalists, and politicians started in June 1990. In early July, three prodemocracy leaders and three human rights lawyers—including Gitobu Imanyara, editor of the *Nairobi Law Monthly*—were arrested and detained without trial. Prodemocracy protests were put down at a cost of many lives. Many supporters of political pluralism found themselves arrested and charged with either sedition or behaving in a manner likely to cause a breach of the peace. Only international outrage and Western threats to suspend economic assistance to Kenya led to a scaling down of the repression.

This tactical withdrawal notwithstanding, harassment of the advocates of political pluralism continues. August 1990 witnessed the ugly spectacle of cabinet ministers publicly inciting assaults upon advocates of political pluralism. No minister was charged with incitement, and general intimidation continued. In the same month, Anglican bishop Alexander Kipsang arap Muge, a vocally prodemocratic clergyman, died in a suspicious car accident after having been warned by a cabinet minister that if he made the journey in the course of which he died, he would not return home alive. Journalists have been stoned, beaten, and jailed; magazines seized; and over 30,000 Nairobi shanty dwellers ruthlessly evicted from their homes. Even people seen doing nothing more than wearing T-shirts with multiparty slogans have been arrested.<sup>1</sup>

Kenya's dependence on Western economic assistance is such that it cannot ignore the West's criticism of its human rights record. President

Moi cannot refuse to change course and expect to keep receiving foreign aid. The West's stand on human rights matters has greatly boosted the morale of the prodemocracy movement. The press remained notably vibrant, despite the banning of several magazines, until 21 June 1991, when President Moi threatened to proscribe the two most widely read daily newspapers, *The Daily Nation* and *The Standard*, and other publications if they continued to give extensive coverage to what dissidents were saying about the system. Since then, the press has become noticeably compliant, declining to publish statements of dissidents.

The immediate cause of President Moi's repression is obvious: he and his party want to retain power without seeking the consent of the governed. Moi knows that he cannot keep wielding unchecked power unless he prevents political competition. To this end, he has not hesitated to subvert or reshape vital institutions.

### **The Colonial Legacy**

Colonized by Britain in 1895, Kenya was ruled from then until 1906 by a British governor general sent from London. In the latter year, a legislative advisory council was established with members appointed by the governor. In 1920, European settlers were allowed to elect some representatives to this council. In 1928, the same right was extended to Asians. Not until 1944 did the governor general appoint an African to represent native interests in the legislative council. That same year, the Kenya African Study Union (KASU) came into being as a moderate African political party. There had been groups resembling political parties since the 1920s, but none could match KASU's broad base and farsighted calls for constitutional reforms leading to independence. With its fertile soil and natural beauty, Kenya attracted a large number of white settlers during colonial rule. This accounts in part for the legacy of racism and repression that rejected all popular, democratic, and peaceful movements for independence. Consequently, Kenya's independence struggle took a violent turn in 1952, and over the subsequent eight years of fighting, the colonial rulers mounted considerable repression. But shortly after declaring a state of emergency in October 1952, they also began to address the economic and political grievances that were fueling the revolt by introducing both constitutional and economic reforms designed to remove the causes of strife. The most perceptive British colonists, meanwhile, had already concluded that colonial rule was untenable and should be replaced by an acceptable representative government as soon as possible.

Constitutional reforms aimed at eventual representative government began in 1954. Between 1960 and 1963, the structure of independent Kenya's constitution was the subject of negotiations among the country's

various political groups. They agreed that the market economy introduced under colonialism would be retained, but reformed to enable everyone to participate in it equally. The new constitution, they decided, would be a charter for representative government, with provisions establishing limited, effective government and guaranteeing both individual rights and an independent judiciary to enforce them.

American and, above all, English constitutional jurisprudence gave the Kenyan framers their model for self-government under law. Kenya would be a multiparty democracy, with power divided among an independent judiciary, a bicameral legislature, and an independent executive. The government's power would be further restrained by a justiciable bill of rights, federalism, a professional civil service, civilian supremacy over the armed forces, a tenured attorney general, and restrictions on the exercise of emergency powers. Finally, the new constitution was designed to be hard to amend. Except for adjustments of regional boundaries, all constitutional amendments required the support of nine-tenths of the Senate and three-quarters of the House of Representatives.

Despite all their care, the framers could not eliminate everything that militated against the success of constitutional democracy in Kenya. The country had no tradition of well-developed constitutional theory, for instance, and also suffered from a shortage of lawyers trained to work with a written constitution. Kenya's lawyers had been educated in Britain or under British auspices, and Britain, of course, has no written constitution. The thin ranks of African lawyers were augmented by large numbers of British lawyers, many of whom had served as judges, magistrates, or Crown counselors in various colonies. These, however, not only shared their African colleagues' lack of experience with a written constitution, but also had interests identical to those of the leftover colonial elite whose property was threatened by African rule.

Furthermore, some repressive features of the old colonial system (such as "antisedition" laws) were left in place even as independence was gained. More serious than such unfortunate institutional legacies of colonialism, however, was the pervasive atmosphere of bitterness that it left behind. Democratic institutions and principles had an unavoidable association with the late colonial power; this alone was enough to render them suspect in the eyes of many newly decolonized Kenyans. Lingering resentment of Britain also encouraged the naive belief that power could not be abused, nor oppression perpetrated, by fellow blacks. Consequently, they were prepared to trust their new black-dominated government more than one should trust *any* government.

Against the background of the Cold War, views hostile to democracy began to arise. The new nations, it was said, needed authoritarian government to achieve rapid development. Many people accepted some combination of colonialist and communist arguments that democracy is

unworkable among certain races or during certain phases of a country's history. Influential leaders like Julius Nyerere of Tanzania and the late Kwame Nkrumah of Ghana advocated "one-party African democracy" for the allegedly fragile new nations of their continent. Authoritarian politics also reinforced the widespread notion that massive government involvement in the economy was good, and that constitutions should mandate such involvement in ways ranging from welfare-state paternalism to full-fledged central planning.

### **From Independence to Dictatorship**

Kenya held its first democratic elections in May 1963. Three parties—Jomo Kenyatta's Kenya African National Union (KANU), the Kenya African Democratic Union (KADU), and the Akamba People's Party (APP)—participated, as did a number of independent candidates, some of whom won seats in parliament. KANU, which called for the creation of a socialist society (along the lines of the British welfare state) in Kenya, won a majority of seats. KADU and APP followed in that order. At the last constitutional conference, held in September 1963, KANU pressed unsuccessfully for constitutional amendments designed to give it a more "flexible" British-style constitution than the one that had been agreed upon.

Upon assuming power in December 1963, KANU became painfully aware that some constitutional alteration would be needed if it were to carry out its program. However, KANU was fortunate in this regard because the framers had failed to state explicitly that a majority in parliament has no constitutional power to pass legislation that either takes away minority rights or fundamentally alters the constitution. Thus KANU could argue that the new constitution embodied a version of parliamentary supremacy, meaning that parliament could do whatever it wished so long as it followed the proper procedures and had the required majority.

After KADU dissolved itself and merged with the ruling party in 1964, KANU secured a constitutional amendment lowering the proportion of each house needed to pass additional amendments to 65 percent. Constitutional manipulation had been made easy. Over time, it would become clear that no amendments were barred. Everything depended on the concept of democracy held by the parliamentary majority. In the 1980s, Moi's government would pass a series of amendments that effectively installed a dictatorial order of a kind not seen since the heyday of colonialism.

The groundwork for Moi's usurpation was laid during the rule of Kenya's first president, Jomo Kenyatta (1963-78), who engineered constitutional changes that abolished the federal system, did away with bicameralism and set up a unicameral legislature, greatly relaxed



restrictions on the use of emergency powers, and banned independent candidates from taking part in elections.

During the debates over some of these amendments, the Kenyatta government claimed that the original constitution, though agreed upon by all parties, was unsatisfactory because it did not sufficiently reflect “African” views. While the exact nature of these views was never made clear, the damage that Kenyatta’s amendments did to constitutional democracy was only too apparent.

Under Kenyatta, Kenya’s mixed economy grew rapidly. His policy of friendliness toward the West helped to bring in considerable foreign aid. Kenya was also spared the coups that were common in Africa during the 1960s and 1970s. The country clung to multipartism even though one-party systems were springing up all around—in Ghana, Malawi, Tanzania, and Zambia, among other places. The rule of law was upheld; courts remained independent. Basic rights, particularly those securing property and barring discrimination, were rigorously enforced.

Yet all was not well. Prominent politicians Pio Gama Pinto, Tom Mboya, and Josiah Mwangi Kariuki were assassinated in 1965, 1969, and 1975, respectively. In 1969 Kenyatta banned the Kenyan People’s Union (KPU), a new opposition party that had sprung up in 1966. In 1974, former KPU members who had rejoined KANU were barred from running for parliament on the ground that they had not yet shown the necessary “change of heart.” There were also signs that the civil service was allowing KANU to use it for partisan political purposes. Licenses needed for political meetings were mysteriously withheld, with no challenge from the courts.

There also emerged during this period concern over the issue of succession. Under the constitution, the vice-president becomes acting president for 90 days after the incumbent president’s death, during which time a new president is to be elected. The acting president can exercise certain executive powers only with the prior approval of the cabinet. As Kenyatta’s health declined and his demise approached, Kenyans who were familiar with then vice-president Moi’s weaknesses (his lack of education, political insecurity, and intolerance) began to grow anxious. In 1976 there was an unsuccessful attempt to amend the constitution in order to bar the vice-president from serving as acting president. In 1977 came calls for party officials to stand for election. Moi, it was hoped, might lose his party post that way and be dropped from KANU’s leadership. Owing to President Kenyatta’s illness, however, the party elections were never held. When Kenyatta died on 22 August 1978, Moi became acting president.

Moi knew better than anyone that to hold the presidency, he had to forestall political competition for the office until he could abolish such competition altogether. In a sense, Kenyan history since 1978 has been the story of how Moi has destroyed democratic institutions in pursuit of

this goal. Moi swore soon after his inauguration as acting president that he would follow in the "footsteps of the late Jomo Kenyatta." The truth, however, is that Moi has plunged straight down the path of dictatorship.

He first curtailed freedom of association, a right guaranteed by the Bill of Rights, in order to prevent rival politicians from holding political meetings during the 90-day presidential campaigning period. Moi then arranged his own nomination by KANU, a procedure he would repeat in 1983 and again in 1988. Shortly after becoming full president, Moi began to ban all associations and trade unions that seemed capable of engendering opposition movements or parties. His next step was to concentrate power in the Office of the President. This meant, among other things, weakening the judiciary. Legislation shifting authority over land disputes from the courts to the civil service was passed in 1981.

That same year, the administration maneuvered a case in which a civil servant was challenging the president's power of dismissal out of the jurisdiction of an independent-minded judge and into the courtroom of a friendlier jurist, who is now the chief justice of Kenya. In ruling for the president, this judge spelled out a new judicial philosophy based on a rejection of the separation of powers. In 1986, judges who upheld a citizen's claim that his constitutional right to a fair trial had been violated were forced to resign. A year later, another independent-minded judge was stripped of jurisdiction after he threatened to jail a senior civil servant who appeared to be covering up a murder. In 1988, a constitutional amendment deprived judges of tenure. Since then, Moi has used his new powers to dismiss several judges. In 1989, the Kenya High Court reversed its own previous rulings and held that it had no authority to enforce the Bill of Rights.

Moi's high-handed manipulation of the constitution and his shake-ups of the government aroused considerable discontent. In 1982, the veteran politician Oginga Odinga and George Anyona, a prodemocracy leader now facing sedition charges, announced their intention to establish a registered opposition party in accord with the constitution. This sparked the crackdown that led to the Air Force officers' coup attempt in August of that year.

Moi's manipulation of the constitution has proceeded alongside his manipulation of the ruling party in particular and Kenyan institutions in general. The president runs KANU with an iron hand, personally approving all candidates and expelling or even jailing dissident party members.

Lawyers brave enough to defend the government's critics have been arrested and detained without trial and have had their practices destroyed, while harsh contempt of court laws administered by a cowed judiciary aim at muzzling the bar as a whole. The government also routinely tampers with trade unions and other associations in order to ensure that only "politically correct" officers are elected.

When manipulation has not yielded the desired results, Moi has used his rubber-stamp parliament to pass laws that simply give him the power he wants. A 1986 constitutional amendment, for example, stripped the attorney general of tenure in order to foreclose the possibility of embarrassing outbreaks of independent-mindedness like those that had seized the office's incumbent in 1980 and 1981. The 1988 amendment depriving judges of tenure applied to civil servants as well. Moi feared that, if not brought to heel, they might someday conduct fair elections and permit his enemies to win. A second amendment that year extended the period for which the police may hold suspects without charges from 24 hours to 14 days. This was particularly ominous given the growing and well documented practice of police torture against political detainees, which had reached scandalous proportions by 1987.<sup>2</sup> In 1988, Moi's ruling party also promulgated new rules that abolished the secret ballot in intraparty races and introduced "queue voting," a method that requires KANU electors to line up publicly behind their chosen candidates.

In the late 1980s, repression mounted as Kenya's once-vibrant economy began to reel from the effects of disinvestment sparked by foreign anxiety over statism, corruption, and government-sponsored lawlessness. Nor did Moi shrink from forcing residents of the Rift Valley out of their homes when he began to fear that they might wage guerrilla war. Increasingly under challenge, the regime acts as if it is entitled to use force whenever Moi's grip on power seems threatened by legal or constitutional means.

## **The Democracy Movement**

Kenya's democracy movement consists primarily of politicians, lawyers, and Christian clergymen who are working to vindicate the rule of law, human rights, and free multiparty competition. It also includes entertainers, intellectuals, and journalists who support the cause of democracy, though not as systematically and directly as the primary activists. All of those who support democracy may act either within their callings, or as citizens exercising fundamental rights such as freedom of speech and worship. Some, including many lawyers, operate in both modes. The daily press, magazines, the courts, the pulpit and pastoral letter, the popular song, and the scholarly seminar or conference have all become vehicles for the defense of democracy. The government often subjects the defenders to severe harassment. Some lawyers, journalists, and politicians have been detained without trial for periods ranging from 20 days to over 10 years. Careers have been destroyed. Religious services have been disrupted, and clergymen slandered, jailed, assaulted, and in one case, apparently assassinated.

The Catholic clergy, which speaks collectively through pastoral letters, and its Protestant counterpart have become targets of government efforts

to foment disunion through displays of official favoritism to quiescent clerics (e.g., permission to import cars duty-free) and official harshness towards troublesome ones. Despite such machinations, however, the Christian clergymen of Kenya remain overwhelmingly united in their anxiety over the destruction of democratic institutions and the threat of civil war; their condemnation of corruption, official malfeasance, and human rights violations; and their concern for the plight of the poor.

Among politicians, those distinguished by consistent opposition to authoritarianism include such senior figures as Achieng Oneko, Oginga Odinga, and Masinde Muliro, all of whom have been speaking out for liberty since colonial times. Some younger men like Martin Shikuku, Charles Rubia, and George Anyona have done likewise during both the Kenyatta and the Moi eras, while others like Kenneth Matiba have gone into opposition more recently, sometimes after having served as cabinet ministers under Moi. All are united in their grasp of and commitment to liberal democracy.

The lawyers in the movement are mainly those whose human rights advocacy has brought them into contact with persecuted politicians and clergymen. With the end of multipartism and the death of parliamentary independence, Kenya's activist lawyers have become the only recourse for those who run afoul of the president and his henchmen.

During colonial rule, the bar was part of the colonial elite, and showed little interest in either human rights or the rule of law. Even so, there were lawyers who defended victims of overweening power like the Masai tribesmen, whose land the British government seized early in this century to give to British settlers; the Kamba, whom the British government forced to sell their cattle in the 1930s; and nationalists like Jomo Kenyatta, who was charged in the 1950s with masterminding the Mau Mau insurgency. At the height of repression, conscientious lawyers may be the only ones who can stand up to an oppressive regime.

In the mid-1970s, Kenya was witnessing grave deviations from constitutionalism even as the Kenyan bar, a majority of whose members were now Africans, was growing more interested in the defense of human rights and law-based government. Individual lawyers began to publish articles criticizing the drift away from constitutional rule. In 1978, the Kenya Bar Association held its first conference that addressed rule-of-law issues. The Moi administration's numerous departures from the constitution cried out for criticism, especially given the absence of opposition parties. We lawyers realized that we were ideally situated to comment objectively on recent developments, making clear to our fellow citizens just exactly what the president and his allies were doing. Victims of human rights violations began to appear, and lawyers began assisting them.

Only since 1986, however, have clergymen, lawyers, and politicians taken identical oppositionist stands on the same issues. The watershed

was the amendment passed that year to strip the attorney general of tenure, plus Moi's move to abolish the secret ballot in party nominations. Since then, the three groups have made parallel comments on many issues. Informal ties have grown as well: Lawyers now act as official and unofficial counselors to clerics and politicians, giving valuable advice on how to tread safely when the authorities stand ready to pounce at the slightest misstep. Lawyers have also helped to establish and staff justice and peace commissions in the churches. In 1990, some lawyers formulated a plan for restoring multiparty democracy through the exercise of rights protected by the Bill of Rights. Indeed, the recent crackdown can be understood as Moi's attempt to block this effective strategy. Oppositionists have in turn become more and more daring as the repression has mounted. The movement has called publicly for Moi's resignation and the installation of an interim government to oversee the return to multiparty democracy.

Since 1990, the movement has successfully sought to 1) press the case for scrapping the current one-party dictatorship; 2) devise the best method for making the transition back to democracy; 3) identify necessary constitutional reforms; and 4) mount a court challenge to the government's refusal to register the National Democratic Party, an opposition grouping formed in February 1991, as a legal party.

### **The Beginning of the End**

The government's ferocious reaction is a sign of its fearful realization that most Kenyans support the democracy movement. Since 1990, the Moi regime has been desperately trying to destroy the reputations and careers of its critics; stifling demonstrations and other signs of unrest; muzzling free discussion of the issues facing the country; and denying whatever other constitutionally protected rights seem to pose a threat to the dictatorship.

In February of this year, the regime impounded all copies of the three monthly magazines that cover the democracy movement. The *Nairobi Law Monthly*, a leading organ of the prodemocratic bar, was banned in September 1990, though a stay pending legal challenge was granted early in the following month. The *Monthly* thus continues to publish even though its editor, Gitobu Imanyara, has been jailed twice since the summer of 1990.

The Moi government is fighting a war it cannot win with a strategy it cannot make coherent. The regime claims to be committed not merely to the preservation of the one-party state, but to democracy, human rights, and the rule of law as well. Yet the regime's own actions, to say nothing of the experience of the rest of the world, show that democracy, human rights, and the rule of law are incompatible with single-party rule. The government has declared itself ready to exploit all the legal means

it can to retain power: In Kenya as elsewhere, the logic of one-party rule demands that the law be used to destroy the political “enemies” of the sole legal party. Yet in Kenya’s case there are limits on how far the law may be bent to this end, since at the time of independence Kenya opted for constitutionalism. This means that the government must suspend laws and constitutional provisions and manipulate institutions like the judiciary, the parliament, and the civil service in order to strike at its political foes. The legal system, however, has proved hearteningly resilient in the face of official efforts to subvert it, and it continues to provide a forum for the democracy movement’s attempts to restore competitive multiparty politics and human rights.

The regime has neither the political authority nor the funds to carry out full-scale repression. Its efforts to exploit lingering impressions of Kenya as a democracy with a thriving market economy in order to attract foreign aid and investment have hampered its ability to muzzle its critics and laid bare its continuing vulnerability to international disapproval. Indeed, Moi has indirectly acknowledged this weakness by making a series of minor cosmetic concessions, including the abolition of queue voting, the partial restoration of judicial tenure, and the release of a few prominent and ailing detainees.

In coming months, the democracy movement will use the courts and the press to expose the hollowness of the government’s claim that the one-party system can be combined with democracy, human rights, and the rule of law. Strikes and demonstrations—which the government will strive ruthlessly but unsuccessfully to suppress—will force it to concede the need for multiparty democracy in principle. Moi will then either flee the country, resign outright, or surrender all executive powers to an interim government formed by all Kenyan factions. This caretaker administration can then begin planning for multiparty elections and the restoration of democracy in Kenya.

## NOTES

1. The pervasive violations of human rights under the Moi regime are extensively documented in the 329-page report issued on 30 July 1991 by Africa Watch, *Kenya: Taking Liberties*.
2. See for example, Amnesty International’s July 1987 report on Kenya, and its 1988 annual report, 46–49.