

State of Torture and Related Human Rights Violations in Kenya

Alternative Report to the Human Rights Committee

to Inform its Review of Kenya's Third Periodic Report at Its 105th Session (9 - 27 July 2012) on the Implementation of the Provisions of the International Covenant on Civil and Political Rights in Relation to Torture

Submitted by:



The Kenyan Section of the International Commission of Jurists (ICJ Kenya)



Independent Medico-Legal Unit (IMLU)



Kenya Alliance for Advancement of Children (KAACR)



Coalition on Violence against Women (COVAW) - Kenya



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The Kenyan section of the International Commission of Jurists (ICJ Kenya), the Independent Medico Legal Unit (IMLU), the Kenya Alliance for Advancement of Children (KAACR) and the Coalition on Violence against Women (COVAW) present this report to the Human Rights Committee to advise on the efforts towards implementation of the International Covenant on Civil and Political Rights (ICCPR) in relation to the protection from torture, associated issues and challenges arising from this process.

The Kenyan Section of the International Commission of Jurists (ICJ Kenya)

Established in 1959, The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-partisan, not-for-profit membership organisation registered in Kenya. With membership drawn from the Bar as well as the Bench, it is a National Section of the International Commission of Jurists based in Nairobi, Kenya. It currently has over 300 members dedicated to the legal protection of human rights in Kenya, and to the promotion of democracy and the rule of law.

Niche and service delivery

ICJ Kenya works towards creating an informed society that can demand for protection and promotion of their rights as well as democratic practice at all levels of structures of governance. ICJ Kenya is driven by the belief that an informed citizenry is able participate in fully in governance issues in the country. The organization advocates for; an increase in the number of judges and magistrates in Kenya as an avenue for increasing access to justice in the enforcement of rights and remedies; supporting rights awareness in the legal profession and within the larger public, capacity building of actors on issues of human rights, good governance and access to justice; campaigning for access to Information; advocating for anti-corruption, eradication of organised crime and money laundering; promoting civic education & electoral Reforms; conducting impact litigation on emerging issues; and legal research and analysis on international criminal procedures & transitional justice; supporting legislative reforms; as well as policy advocacy for enhanced rule of law and the protection of civil rights and liberties.

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Independent Medico-Legal Unit (IMLU)

Independent Medico Legal Unit, a non-governmental organisation founded in 1992 and seeks to promote the rights of torture victims and survivors, while protecting Kenyans from all forms of State perpetrated torture. The organisation advocates for medico- legal policy reforms through its forensic medical reports, psychological rehabilitation, research and advocacy with public interest litigations and legislative reforms.

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Kenya Alliance for Advancement of Children (KAACR)

Kenya Alliance for Advancement of Children (KAACR) is national umbrella body for NGO's cooperation and exchange of information on children rights in Kenya with a membership of over 100 children agencies in Kenya. KAACR is an NGO with Special Consultative status with the Economic and Social Council (ECOSOC) of the UN. KAACR is a registered national umbrella NGO under the National Non-Governmental Organizations (NGO) Coordination Act of 1990 in 1995. KAACR envisions a society that protects all the rights of children and youth to survive, develop and participate in all matters concerning them. KAACR's mission is to advocate for and promote the realization of rights and responsibilities of children and youth in Kenya. KAACR is the secretariat of the NGO Child Rights Committee consisting of 25 NGOs that advocates for policy and legislative reform that touch on children among other child rights issues.

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Coalition on Violence Against Women (COVAW) - Kenya.

COVAW was founded in 1995 as a response to the silence of the Kenyan society to addressing violence against women. COVAW works to promote and advance women's human rights through working towards a society free from all forms of violence against women. COVAW's mission is to build social movements opposed to and committed to eradicating violence against women. This work includes strengthening the voice and impact of women leaders as champions of change at the community level, linking the local to the regional and international policy processes and ensuring women access to services and justice in as far as ending violence against women is concerned.

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With coordination by and technical input from the **World Organisation Against Torture (OMCT)**

Created in 1985, the World Organisation Against Torture (OMCT) is today with 311 affiliated organisations in its SOS-Torture Network the main coalition of international non-governmental organisations (NGO) fighting against torture, summary executions, enforced disappearances and all other cruel, inhuman or degrading treatment. Based in Geneva, OMCT's International Secretariat provides personalised medical, legal and/or social assistance to hundreds of torture victims and ensures the daily dissemination of urgent appeals across the world, in order to protect individuals and to fight against impunity. Specific programmes allow it to provide support to specific categories of vulnerable people, such as women, children and human rights defenders. Submitting individual communications and alternative reports to the human rights treaty bodies of the United Nations is one of its primary activities. OMCT further actively collaborates in the development of international norms for the protection of human rights.

OMCT enjoys a consultative status with the following institutions: ECOSOC (United Nations), the International Labour Organization, the African Commission on Human and Peoples' Rights, the Organisation Internationale de la Francophonie, and the Council of Europe.

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1. Introduction

This report responds to the Third Periodic Report (CCPR/C/KEN/3) from the Government of Kenya to the Human Rights Committee under Article 40 of the International Convention on Civil and Political Rights (ICCPR) and the List of Issues (CCPR/C/KEN/Q/3) that arose from the Government Report. The Concluding Observations and the Comments adopted by the UN Treaty Bodies and special procedures in the past with regard to Kenya inform the contextual background on which this report based.

Since the accession to the ICCPR by Kenya, there have been significant changes to the legal environment in Kenya, not least of which has been the promulgation of the 2010 Constitution. Kenyans ratified a new Constitution in August 2010 through a national referendum. It is the supreme law that provides for an elaborate legal, policy and institutional framework to ensure substantive protection and promotion of fundamental rights including the express prohibition of torture and provides avenues for redress. It has now incorporated¹ and enhanced the status of international law which will be further entrenched in domestic law through a ratification of Treaties Bill 2011 currently under consideration in Parliament.

The new Constitution contains a progressive Bill of Rights that provides effective mechanisms for enforcement of fundamental rights. Articles 19, 21, 22, 23, 24, 25, 26, 28, 29, 48, 49, 50 and 59 of the Constitution of Kenya contain fundamental rights and freedoms i.e.; protection of the right to life; protection of the right to personal liberty; protection from inhuman treatment or degrading punishment or other treatment; protection against arbitrary search or entry; secure protection of the law; protection of the freedoms of expression; protection of the freedom of assembly, association and movement; protection and preservation of the dignity of individuals; protection of non-derogable rights including freedom from torture and cruel, inhuman or degrading treatment or punishment; human dignity; freedom and security of the person; right to access to justice; rights of arrested persons; a right to fair hearing and the right of persons detained, held in custody or imprisoned.

¹ Article 2(6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the constitution.

Section 21(1) states: *“It is the fundamental duty of the state and state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the bill of rights.”* This places an obligation on state officers such as security officers, prosecutors and judicial officers to take action to protect women from violations such as violence against women. In addition, Section 21(3) states: *“All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of the minority or marginalized communities and members of particular ethnic, religious or cultural communities.”*

Article 21 (4) imposes a duty on the State to enact and implement legislation to fulfill its international obligations in respect of fundamental rights. It also provides for the right to pursue public interest litigation to enforce human rights through the High Court which is empowered to uphold and enforce rights.

This report seeks to highlight the prevalent incidences of torture and related human rights violations in Kenya as serious concerns remain in this area. The overall conclusion is that whilst Kenya has endeavoured to include the principles of the ICCPR in its newly promulgated Constitution of 2010 and legislative framework, there continue to be important legislative and administrative gaps that still provide challenges towards full implementation of the ICCPR as specified in subsequent chapters. This alternative report adopts a thematic approach and specifically focuses on articles that relate to the protection from torture, cruel and degrading treatment under the Convention including extra-judicial killings, death penalty, the principle of non-refoulement, treatment of prisoners, access to effective remedies and right to a fair trial. The report ends with a list of recommendations and a list of questions to the government of Kenya.

2. Kenya’s International and Regional Human Rights Obligations

Kenya acceded to the International Covenant on Civil and Political Rights (ICCPR) on 1 May 1972; the Covenant entered into force on 23 March 1976. Kenya is a State Party to many other international human rights treaties relevant to the prohibition of torture and ill-treatment, including:

- International Covenant on Economic, Social and Cultural Rights (ICESR) (1 May 1972);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (21 February 1997);
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (9 March 1984);
- Convention on the Rights of the Child (CRC) (30 July 1990);
- Convention relating to the Status of Refugees (16 May 1966).

Kenya also ratified on 15 March 2005 the Rome Statute of the International Criminal Court (ICC).

Kenya is **not** a State party to the following international human rights treaties and optional protocols supplementing the treaties with specific human rights concerns which are of critical importance to the prohibition of torture, ill-treatment and related human rights violations:

- International Convention for the Protection of All Persons from Enforced Disappearance (signed in 2007);
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT);
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;
- Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (signed on 8 September 2000).

With regard to individual complaints, Kenya has **not** accepted the right to individual petition that exists under the various international treaties such as the First Optional Protocol to the International Covenant on Civil and Political Rights, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the Optional Protocol to the Convention on the Elimination of Discrimination against Women, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, the Optional Protocol to the Convention on the Rights of Persons with Disabilities and article 22 of the CAT. This means that the various UN Treaty Bodies that monitor the implementation of the aforementioned treaties have not the competence to receive and consider communications from or on behalf of individuals subject to Kenya's jurisdiction who claim to be victims of a violation by Kenya of the provisions of the Convention.

With regard to its regional commitments, Kenya has ratified the following core human rights instruments:

- African Charter on Human and Peoples' Rights (23 January 1992);
- Convention Governing the Specific Aspects of Refugee Problems in Africa (23 June 1992);
- The African Charter on the Rights and Welfare of the Child (25 July 2000);
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (6 October 2010).

3. Constitutional and Legal Framework in which the ICCPR is implemented, Right to an Effective Remedy (Article 2 ICCPR)

3.1 Constitutional Reforms

Since the promulgation of the new Constitution in 2010, Kenya has transformed from a dualist State to a monist State. Article 2(6) of the Constitution, establishes that all treaties ratified by Kenya form part of the laws of Kenya. Moreover, Article 21(4) of the Constitution specifically requires that: "The State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms." Thus, while

ratified treaties are part of Kenyan law, the need for implementing legislation to achieve the aims of those treaties is acknowledged and for practical purposes required.

Article 261 of the Constitution provides also for consequential legislation. In accordance with Article 261(1) and (4) and the Fifth Schedule of the Constitution (specifying the period to in which legislation has to be enacted by Parliament) the Ratification of Treaties Bill, 2011, which seeks to clarify the process by which ratified treaties are implemented, has passed a second reading in Parliament. As it stands however, the provisions of the ICCPR remain scattered throughout different legislations.

The ICCPR's obligation under article 2 (1) to ensure to all individuals within the State party's territory and subject to its jurisdiction the rights recognised in the Covenant without discrimination is mirrored in Article 27 of Kenya's constitution, which explicitly provides for the right to equality and freedom from discrimination. Article 27 of the Constitution provides all the principles listed under Article 2 (1) including equality before the law and prohibition against discrimination on the grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. Article 27(8) of the Constitution states that the State shall take legislative and other measures to implement the principle: not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

Moreover, in line with Article 2.3(b) of the ICCPR as read together with Article 2 (5) and (6) of the Constitution of Kenya 2010 means that the ICCPR is now part of Kenyan law, the protection of the rights provided for under the Covenant should be enforceable in Kenyan courts. Currently, to the extent that ICCPR rights are reflected in the Bill of Rights of the Constitution, which is borrowed heavily from the Covenant, Article 22 of the Constitution confirms the enforceability of the same by providing a broad scope of individuals, as well as associations, who may institute court proceedings for redress. These provisions are further complemented by those contained under Article 48 of the Constitution which provides that, "The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

In a case in point: *The Matter of Zipporah Wambui Mathara (2010)* eKLR, the Court declared that provisions of Kenya's Civil Procedure Code were in conflict with Article 11 of the ICCPR which prohibits imprisonment for inability to pay civil debt. In this instance, the Court took on Article 11 of the ICCPR appreciating that Article 2(6) of the constitution made the Covenant part of Kenya's law.

ICJ Kenya, KAAACR, IMLU, COVAW and OMCT would recommend the State party to:

While ratified treaties form now part of Kenyan law, urgently adopt and implement required appropriate laws and policies to guarantee full compliance, in the domestic legal system, with the obligations assumed under the Covenant and other international treaties.

3.2 Effect of the Constitutional Reforms in Practice

While it is important to note that the new Constitution ushered in a new era which has been well embraced by the Judiciary and the Covenant's provisions can be invoked and applied to enhance respect for human rights and eliminate incidences of torture, there are no tangible measures put in place yet to respond positively to the societal demands for justice, especially in relation to the elimination of torture, cruel, inhuman, degrading or punishment. The ways in which lives were being lost before the promulgation of the constitution still are being reported such as extrajudicial executions, murders and manslaughter. Incidences of houses being torched, torture, abductions, domestic violence, mob justice, among many other forms of human rights violations, continue to be reported in the media. Some of these forms have almost been sanitised in the society as part of the cultural practices, caused and entrenched by deep rooted cultures, traditions, attitudes, such as killing of witches, with others being committed under undue conditions, circumstances and with far reaching consequences to the families and communities.

IMLU's 2008 report entitled *Quest for Justice* describes that the leading type of violations reported up to 2008 remain to be categorized as cruel, inhumane and degrading treatment(33%), sometimes with combinations of acts of torture, with people who experienced both torture and cruel, inhuman and degrading treatment comprising 17% of all cases reported². The slow pace of the police reforms is also impacting negatively to the much anticipated shift in some of these practices. There are fears of unsupportive political will to realise the much desired police reforms as the National Police Service Act, assented to in 2011 but has not been Gazetted nor given a commencement date, despite the assent and commencement of complementary legislation such as the Independent Policing Oversight Authority Act and the National Police Service Commission Act that have a role of putting police reforms in place, as a means to upholding provisions of the ICCPR.

² IMLU, *Quest for Justice Report, A Journey With Torture Survivors And Families Of Victims To Access Justice In Kenya, 1999 - Feb. 2008*, Nairobi, 2012, p. 19.

ICJ Kenya, KACR, IMLU, COVAW and OMCT would recommend the State party to:

Operationalise urgently the Policing Acts and the National Police Service Act;

Enhance public education and awareness raising campaigns to change social and cultural dimensions that underlie torture and other forms of violence.

3.2.1 Effect of the Constitutional Reforms on the Promotion of non-discrimination and equality between men and women

Article 27 (8) of the Constitution which states that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender has already raised controversy and is currently greatly misunderstood. In the case of *Federation of Women Lawyers and others -versus- the Attorney General*, the court stated that the provisions of Article 27 are to be “realised progressively”, despite the fact that Article 27 of the Constitution does not explicitly mention “progressive realisation”.³ The general perception of the public is that this is a not a progressive clause and should be implemented immediately to ensure the empowerment of Kenyan women. The bone of contention lies mainly in the appointive positions as seen in the appointment of the Supreme Court Judges as well as the County Commissioners.

Despite the Constitution provisions on the 2/3rd principle rule, in May 2012 the President of Kenya went ahead and appointed 47 County Commissioners without bearing in mind the gender equality clause. Out of the 47 County Commissioners appointed, only 9 of them are female.⁴ Civil Society organizations have gone to court to seek redress on this disregard for the constitution. The matter is currently pending before the court. The appointment of High Court and Court of Appeal judges has been passed as Constitutional with 14 out of 23 being women.

Currently in the 10th parliament, there are only 22 female parliamentarians out of the total of 220. This is 10% of the total. Although this is an increase compared to the figures in the 9th parliament men still form the majority in parliament. The insignificant numbers of women in parliament has led to debates on women related issues being trivialized or not given the importance that they require. The State needs to form protective and pecuniary measures for the clause under article 27 (8) of the Constitution due to its high misinterpretation.

The Constitution further ensures the equality of women in the economic, cultural and social ambits especially through the citizenship rights where women may now confer citizenship to their spouses or children. It also allows persons to hold dual citizenship. Although these

³ *The High Court of Kenya in the case of Federation of Women Lawyers Kenya (FIDA-K) & 5 others -vs.- Attorney General & another [2011] eKLR.*

⁴ <http://www.capitalfm.co.ke/news/2012/05/kibaki-names-47-county-commissioners/>

Articles have not been in the public domain of discussion the State needs to ensure that the citizens have a clear *understanding* of their rights and how to legally claim these rights.

Under Article 45 of the Constitution, the rights of women and men are stipulated as equal at the time of marriage, during the marriage and at the dissolution of the marriage. However the Bills that would give effect to this Article have been pending for several years. These are the Matrimonial Property Bill and the Marriage Bill. The raising concern is that these Bills have been slated to be passed 5 years after the passing of the Constitution under the 6th Schedule. Constant lobbying of States parties is being done to ensure that the State parties recognise the urgent need to pass the Bills related to family and family property. The Bills are discussed in further detail in paragraph 11 hereunder.

ICJ Kenya, KACR, IMLU, COVAW and OMCT would recommend the State party to:

Clarify article 27 (8) of the new Constitution which provides that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender and form protective and pecuniary measures.

3.3 Access to Effective Remedies

Article 48 of the Constitution provides for the State to ensure that there is access to justice for all. Also, the Pauper briefs that were considered in the previous Constitution now lie under the mandate of the Chief Justice who may waive fees for human rights and freedoms court proceedings. Whilst pursuing the implementation of this Article it is inherent to pass the Legal Aid Bill which shall provide for the provision of legal aid and awareness to indigent persons of society. The Bill also highlights the methodology that shall be used between state and non-state actors in the provision of legal aid to the general public.

The judiciary is currently undergoing transition both institutionally and culturally in accordance to one of the key recommendations in the National Accord and Reconciliation Act, under Agenda Four is judicial reform. The Judiciary is currently undergoing the vetting of judges and magistrates, taking a top-down approach by starting with the vetting of the judges of the Court of Appeal. The aim is to restore the faith of the public in the Judiciary and that more cases will be taken to the courts.

While the Constitution of Kenya has incorporated the right to a fair trial and public hearing before court under Article 50, the implementation of this right is yet to be evidenced. However, there appears to be a slight increase in public confidence and perception that the courts can now be trusted to 'fairly' adjudicate on matters. Especially the setting up of additional court houses and decentralisation of the High Court to other towns to ease the distance in terms of access to justice is much welcomed by the Kenyan population. The compensation of the victims of Nyayo House Torture Chambers in 2010 presents a

judicious example towards realisation of the Bill of Rights in the Constitution (see for more information chapter 5.2 of this report).

The Kenyan Judiciary has embarked on an ambitious Judicial Transformative Framework which was officially launched on 31st May 2012. Amongst the list of priorities will be the need to address case backlog and digitise case management. Furthermore, the legislation has now provided for financial independence of the judiciary stipulated under Article 173. In the last financial year, budgetary allocation to the judiciary has increased to 1B compared to previously 300Million which is a significant improvement. Presently, the legislation required to spell out the parameters of the judiciary funding is yet to be enacted.

At the same time, the measures taken to improve access to remedies by individuals by addressing the limited access to domestic courts and judicial remedies remain unaccomplished. The Equal Opportunity Bill 2007⁵ and the Small Claims Court Bill 2007⁶ have been published since 2007 and are yet to be tabled for discussion.

Furthermore, as noted in the IMLU's Report *Quest for Justice*, the existing systems of investigating acts of torture as well as prosecuting and punishing the perpetrators are seriously flawed, starting with lack of defining torture within the Laws of Kenya.⁷ The investigations of alleged torture claims are still vested on the same institutions implicated and this goes even to cases of extrajudicial killings, summary executions or custodial deaths, leaving families of the victims extremely devastated in their search for justice, with unwillingness of the Attorney General to prosecute, employing delaying tactics to bury case or even failing to produce in court key witnesses or exhibits.

Measures being taken to address the prevalent failure to enforce court orders and judgments have also been inadequate, which is attributable to the culture and state of the judiciary prior to the promulgation of the constitution and still hinged on lack of political will, especially where perpetrators are state actors.

Equality before the courts requires that similar cases be dealt with in similar proceedings.⁸ While Article 27 of the Kenyan Constitution provides that every person is equal before the law and is entitled without any discrimination to the equal protection of the law before courts and tribunals, the Kenyan judiciary continues to be riddled with bias from both the member of the Bench and Bar. Women, and particularly the poor and vulnerable before the Kenya courts are not treated equally. There continues to be 'differential treatment' amongst court users and there is a general perception that justice is only for those who can afford it. Court orders have not been enforced or obeyed in particular by the executive. For example in the case of *Liza Catherine Wangari vs. Attorney General*, the Plaintiff was

⁵ See <http://www.kenyalaw.org/klr/index.php?id=124>.

⁶ *Ibid.*

⁷ IMLU, see note 3.

⁸ See UN Doc. CCPR/C/GC/32, UN Human Rights Committee, General Comment No 32, Article 14 Right to Equality Before Courts and Tribunals and to a Fair Trial, para. 14.

awarded seven million shillings as damages for suffering while in police custody in the court's judgement in September 2010. To date, the state has failed to release the compensation despite several claims for the same.

ICJ Kenya, KAACR, IMLU, COVAW and OMCT would recommend the State party to:

Ensure that all individuals subject to its jurisdiction have equal access, without discrimination, to effective remedies;

Ensure that all court orders and judgements are enforced.

3.4 Counter-Terrorism Measures and Respect for Covenant Guarantees

The war against terrorism took a new dimension in Kenya with extraordinary renditions used as a measure to counter terrorism activities. For instance, the arbitrary detentions in Kenya and the transfers to Somalia, Ethiopia and Guantánamo Bay in 2009 violated a range of Kenya's obligations under international law, including the absolute prohibition of torture and other cruel, inhuman or degrading treatment, the absolute principle of non-refoulement, the absolute prohibition of enforced disappearance, the right to liberty and security of the person, the right to consular access and the right to due process.⁹

On 11 July 2010, bombings in Kampala Uganda led to the deaths of 74 people and dozens injured. Subsequently under unclear circumstances, five Kenyans were arrested in Kenya and handed to the Uganda authorities while 11 others were arrested in Uganda. The Kenyans were detained in 2010 and taken to Uganda for questioning about the two suicide bomb attacks. Some of them, including the executive director of a Nairobi-based Muslim Human Rights Forum Al-Amin Kimathi, have since been released. However the trials against six Kenyans continue in Uganda. The detention in Kenya and Uganda is riddled with reports of torture and cruel, inhuman and degrading treatment.

The government is being compelled to prosecute officials including senior police officers who were involved in transferring the Kenyans to Uganda in relation to the Kampala bombing in July 2010. This is after Members of Parliament endorsed in May 2012 a report prepared by the Defence and Foreign Relations Committee with far reaching implications on the fight against terrorism in Kenya and its neighbouring countries. In the report, the

⁹ See *Redress and Reprieve, Kenya and Counter-Terrorism: A Time for Change, 2009* at <http://www.redress.org/downloads/publications/kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf>.

Defence Committee observed that legal provisions for extradition were not followed and that the whole process was unconstitutional. “The rendition and subsequent holding of Kenyans in Ugandan prisons facilities violates the fundamental freedoms and liberties of the affected Kenyans as provided for under the Constitution, customary international law, as well as International Treaties and Conventions on Human Rights which Kenya is a signatory.”¹⁰ This can be attributed to the failure to abide by the pre-existing international human rights obligations when countering terrorism. So far there are no tangible measures to ensure that counter-terrorism activities abide and comply with what the Covenant postulates, a loophole that is exploited especially with the incessant attacks that are being linked to Al-shabaab and other terror groups even with the Contiguous and Foreign Countries Act, The Extradition (Commonwealth Countries) Act and The Witness Summonses (Reciprocal Enforcement) Act.

ICJ Kenya, KACR, IMLU, COVAW and OMCT would recommend the State party to:

Ensure that all counter-terrorism measures comply with its international obligations under the human rights treaties, including the ICCPR;

Immediately reverse the renditions of the Kenyan nationals to Uganda and to try them locally for the terrorism charges;

Provide for effective remedies and reparations to those subjected to extraordinary renditions.

4. Right to Life (Article 6 ICCPR)

4.1 Constitution

The current Constitution provides for the right to life in Article 26(1). This right is qualified in Article 26(3) which states that, “A person shall not be deprived of life intentionally, except to the extent authorized by the Constitution or other written law.”

4.2 Extra-judicial Killings

¹⁰ <http://www.the-star.co.ke/national/national/77758-police-may-be-prosecuted-over-uganda-rendition/>, Article by Francis Mureithi.

Although great strides have been made to reform the judiciary as mentioned above, it is paramount to state that there has not been any tangible progress in the investigations and prosecution of the widespread extrajudicial killings by the police that were reported from 2007. No investigations and prosecutions of the 2007 post elections violence, where 405 gunshot deaths were recorded out of the 1,113, have been carried out. Fifty-seven percent of the killings have shown various injuries that were inflicted by assorted crude weapons which resulted in arrow wounds, cut wounds; blunt objects trauma, stab wounds, amputations, decapitations and even burns.

Although the Government Report acknowledges that there has been a major challenge arising out unlawful killings by the police,¹¹ contrary to what is stated in the Government Report,¹² allegations of unlawful killing are rarely investigated by the authorities, and the perpetrators are rarely tried and convicted of the crimes committed, and where unreasonable force is used. Sixty-three percent of the Kenyan people are unhappy with the police performance owing to claims of corruption, brutality and a culture of extrajudicial killings.¹³

The killings that occurred at Mt. Elgon during the joint police –military operation, “Operation Okoa Maisha” in 2008 have never been properly investigated or prosecuted. In its report entitled *Double Tragedy*,¹⁴ IMLU had found that there was also systematic torture, cruel, inhuman degrading treatment or punishment by security officers and / or the criminal militia (SLDF). Moreover, there were allegations of enforced disappearances of persons in custody by both the police and the military. The Operation was characterised by secrecy, lack of transparency and accountability and although the operation was intended to preserve law and order, instead it systematically engaged in gross human rights violations on a population hitherto terrorised by criminal gangs.

In November 2008, the Committee against Torture expressed concern about the allegations of mass arrests, persecution, torture and unlawful killings by the military in the Mount Elgon region during the "Operation Okoa Maisha" conducted in March 2008.¹⁵ The Committee urged Kenya “to take immediate action to ensure prompt, impartial and effective investigations into the allegations of use of excessive force and torture by the military during the "Operation Okoa Maisha" in March 2008. The State party should further ensure that perpetrators are prosecuted and punished according to the grave nature of their acts, that the victims who lost their lives are properly identified and that their families, as well as the other victims, are adequately compensated.”¹⁶

¹¹ UN Doc. CCPR/C/KEA/3, para 136.

¹² Ibid.

¹³ IMLU, *Up-scaling Torture Prevention and Response in Kenya National Torture Prevalence Survey Report*, 2011.

¹⁴ IMLU, *Double Tragedy Report on Medico-Legal Documentation of Torture and Related Violations in Mount Elgon “Operation Okoa Maisha”, August 2008*.

¹⁵ UN Doc. CAT/C/KEA/CO/I, para 21.

¹⁶ Ibid.

IMLU also recommended in 2008 that the Attorney General exercises his powers to initiate investigations and prosecutions of all perpetrators of torture, cruel inhuman degrading treatment or punishment in Mt. Elgon.¹⁷ Since Kenya had not taken any such action to ensure effective investigations into all the reports of unlawful killings, torture and enforced disappearances and prosecute those responsible, IMLU has filed cases with the East African Court of Justice Reference No. 3 of 2010 and the African Commission Communication Number 381 of 2010.

The government is obligated to provide statistical data disaggregated by crime on prosecution as well as criminal and disciplinary actions against law enforcement officials found guilty of torture and ill treatment. However, information on the number of investigations launched against the alleged perpetrators of extrajudicial executions since 2007 and the type of charges brought against the perpetrator has not been documented or has not been made public.

On matters related to the ICC and information on the measures taken to cooperate with the Court towards prosecutions of those who bore the greatest responsibility for the post-election violence remains blurred. The Attorney General has formed an Advisory Committee that has to date not made its recommendations public. In fact, glaring efforts are observed to defer the cases.

It should be observed that that whenever state sponsored special security operations are sanctioned, there are hardly any measures put forward in terms of ensuring accountability of such operations. As highlighted in IMLU's *Double Tragedy* report, any state security operation and their agencies respond with denial of acts of torture, cruel inhuman degrading treatment, denial of intimidations and harassment of the civilian population and human rights defenders who raise concerns about the violations.¹⁸

Despite the fact that the Committee against Torture also expressed its concern in 2008 about consistent allegations of ongoing extrajudicial killings and enforced disappearances by law enforcement personnel, particularly during special security operations, such as the "Chunga Mpaka" Operation in the Mandera district in September 2008, and operations against criminal bands, such as the "Mathare Operation" in June 2007 and about the lack of investigation and legal sanctions in connection with such allegations, as well as about information regarding impediments that non-governmental organizations face in their attempts to document cases of disappearance and death,¹⁹ so far there have been no tangible responses on the alleged extrajudicial killings and enforced disappearances in Operation Chunga Mpaka and the Mathare Operation. While the Committee against Torture urged Kenya to "conduct immediate, prompt and impartial investigations into these serious allegations, and to ensure that perpetrators are prosecuted and punished with

¹⁷ IMLU, *see note 13*.

¹⁸ Ibid.

¹⁹ UN Doc. CAT/C/KEA/I, para 20.

penalties appropriate to the grave nature of their acts as required by the Convention [and to] take all possible steps to prevent acts such as the alleged extrajudicial killings and enforced disappearance,²⁰ there have been no investigations, legal sanctions or any other measures have been adopted in connection with the allegations to prevent their recurrence.

Moreover, there are no known actions that have been taken towards investigating and prosecuting those responsible for the killing of Oscar Kamau King'ara and John Paul Oulu on 5th March 2009. The Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns noted in his follow up country recommendations of 26th April 2011, which analyses the progress made by Kenya in implementing the recommendations made by the former Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, following his visit to the country from 16 to 25 January 2009 (A/HRC/11/2/Add.6), that the Government was requested to provide information on the investigations and criminal proceedings regarding the killings of Mr. Kingara and Mr. Oulu but that two years later, the Government had yet to respond to these communications.²¹ The Special Rapporteur further noted that the Government failed to accept international offers to provide criminal investigation assistance to identify those responsible for the 5th March 2009 killings of the two prominent human rights defenders.²²

ICJ Kenya, KACR, IMLU, COVAW and OMCT would recommend the State party to:

Ensure prompt, impartial and effective investigation of all allegations of excessive use of force and torture by the police and the military during the different 'operations' since 2007, to prosecute and punish perpetrators with appropriate penalties and to adequately compensate the victims;

Provide statistical data disaggregated by crime on prosecution as well as criminal and disciplinary actions against law enforcement officials found guilty of torture and ill treatment.

4.3 Death Penalty

²⁰

Ibid.

²¹

UN Doc. A/HRC/17/28/Add.4.

²²

Ibid.

Despite the existence of the death penalty, President Kibaki in 2009 commuted all death sentence, nearly 4 000, to sentences of life imprisonment. The President also requested all relevant Government Ministries and departments to conduct empirical studies and engage stakeholders to determine whether the death penalty should continue in Kenya. To date however, no such studies under this directive have been completed or published.

While the death penalty remains in Kenya, there has been a significant case from the Court of Appeal, *Godfrey Ngotho v Republic [2010] eKLR*, which determined that the mandatory application of the death penalty for the crime of murder was unconstitutional and “antithetical to the Constitutional provisions on the protection against inhuman or degrading punishment or treatment and fair trial.” While the case only applies to the crime of murder, the court expressly stated that the reasoning behind its rejection of the mandatory death penalty for the crime of murder might also apply to other capital crimes that carry the mandatory death sentence such as treason, robbery with violence and attempted robbery with violence.

Unfortunately, since this case, a reverse position was taken by the High Court in *Republic v Dickson Mwangi Munene [2011] eKLR*, in which it was held that the death penalty was the only sentence imposable in law for the crime of murder and that the Court of Appeal had taken a step in the wrong direction. The Court moreover stated that the President was failing to exercise his legal duty by not signing impending death warrants. These conflicting court decisions and judicial philosophy in Kenya do not augur well nor paint a clear position with regard to the existing moratorium on the death penalty.

In its report, the Government highlights that the Kenyan public is still not ready for the abolition of death penalty. However, the State ought to take responsibility to ‘protect’ human life and not to be guided by the public mood. There are currently no tangible campaigns to show commitment towards its abolition noting that IMLU’s report on Forensic Investigations into Post Election Violence Related Deaths showed that 43% of those sampled cases died of gunshot injuries, meaning the Government agencies still lead in committing people to deaths through this method. While public education would play a major role towards abolition, it is imperative that amendment to the death penalty laws is done so that it only applies to the crime of intentional deprivation of life. But even with this, death penalty should be abolished all together.

Kenya has not yet acceded to the Second Optional Protocol to CCPR and the Government seem not to consider and take clear measures in order to abolish the death penalty within its jurisdiction.

ICJ Kenya, KAACR, IMLU, COVAW and OMCT would recommend the State party to:
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Abolish the death penalty in line with international human rights standards as it is an unacceptable derogation of the right to life;

Provide training to judicial officers on the interpretation and application of international human rights instruments which would contribute towards the harmonising the divergent and conflicting judicial philosophy on the right to life principle under ICCPR;

Sensitize the public on the implications of the death penalty.

4.4 Reproductive Health Rights

The Kenya National Commission on Human Rights (KNCHR) carried out a public inquiry in 2011 on Sexual and Reproductive Health Rights violations in Kenya. The inquiry highlighted mainly that citizens stated their inability to plan their families due to their lack of awareness of family planning measures and lack of family planning methods.²³ Kenya has made key commitments towards Sexual and Reproductive Health Rights (SRHR) but their actualization has not been achieved yet. The Constitution of Kenya 2010 underscores the importance of health care. Maternal health care has more often than not been ignored. According to a report that was commissioned by COVAW²⁴ in Narok and Isiolo, most women cannot access health care facilities due to the long distances and the fact that there is no means of transportation compounds access to health care. They therefore opt to give birth at home.

15. Article 26(4) of the Constitution provides that abortion is not permitted unless the life or health of the mother is in danger, or if permitted by any other written law. While Kenya is a secular state, religious beliefs that border on religiosity and fundamentalisms are always used to promote anti-choice messages on matters of women's access to safe abortion. For this reason most issues surrounding abortion and reproductive health rights have been left to general interpretation.

ICJ Kenya, KAAACR, IMLU, COVAW and OMCT would recommend the State party to:

Improve access to family planning services for all;

²³ KNCHR 2011, Realising Sexual and Reproductive Health Rights in Kenya: A myth a reality - A report of the public inquiry into violations of sexual and reproductive health rights in Kenya

²⁴ COVAW (K) 2012, Experiences of child birth by women and their care providers in Narok and Isiolo

Review its abortion laws to ensure that they do not have to undergo life-threatening clandestine abortions.

5. Prohibition of Torture and Cruel, Inhuman or Degrading Treatment (Article 7 ICCPR)

5.1 Constitutional, Legislative and Institutional reforms

A prohibition against torture in Kenya was found in the former Constitution of Kenya at Section 74(1) which stated: “No person shall be subject to torture or to inhuman or degrading treatment.” Unfortunately, the prohibition of torture under Article 29 of the new Constitution is not much more comprehensive. It states:

“Every person has the right to freedom and security of the person, which includes the right not to be:

- c) subjected to any form of violence from either public or private resources;
- d) subjected to torture in any manner, whether physical or psychological;
- e) subjected to corporal punishment; or
- f) treated or punished in a cruel, inhuman or degrading manner.”

The Constitution further provides in Article 25(a) that the right to freedom from torture and inhuman, cruel and degrading treatment is an unlimited right and is in accordance to international law is non-derogable. However, as noted in the *Proposed Legislative Framework for the Prevention of Torture in Kenya*,²⁵ these provisions fall far short in effecting the prevention of and redress for acts of torture and cruel, inhuman and degrading treatment. For example, the provisions do not define torture, nor do they establish any means of attaining a remedy leaving it as a bald statement with no practical application.

The former Police Act (Cap 84)²⁶ made also reference to torture in Section 14 providing that: “...any police officer who engaged in torture is guilty of a felony.” This was further supplemented by Police Regulations Part 11(3) (17) which makes it a disciplinary offence for an officer to unlawfully strike any person, or use any unlawful violence to any person.

²⁵

See Annex A to this report.

²⁶

Repealed by the National Police Service Act 2011

The new National Police Service Act under Article 95 also prohibits the police from subjecting any person to torture or to cruel, inhuman, or degrading treatment and makes improvements in sanctions, stating that those who engage in torture may be punished with a prison term not exceeding 25 years and those who engage in cruel, inhuman or degrading acts may be punished with a prison term not exceeding 15 years. However, it is worth noting that since this Act was assented to in 2011, it has not been gazetted nor given a commencement date hence is not in fact in force posing a great roadblock in the implementation of its provisions.

Furthermore an Act of Parliament has been passed establishing an Independent Policing Oversight Authority (IPOA). The IPOA has been given the mandate to conduct inspections of police premises, and other places of detention, for the purposes of monitoring the respect of rights. The Kenya National Commission on Human Rights has also been given permission under Section 16 of the Kenya National Commission on Human Rights Act to visit prisons and places of detention for monitoring purposes. However, it is noteworthy at this juncture that Kenya has not yet ratified the optional protocol to the Convention Against Torture which we believe would strengthen the legislative provisions that have been included in the mandate of the Police oversight Authority.

Torture is prohibited, though not defined, in two further pieces of legislation: The Chiefs' Authority Act (Cap 28) and the Children Act (2001). The Chiefs authority act, in addition to prohibiting torture in Section 20(1)(b), punishes transgressors with a mere fine of Ten thousand shillings (Kshs 10 000) or a period of imprisonment not to exceed one month.

Article 1(1) of the Convention against Torture defines torture in the following terms:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

According to article 4 of the Convention against Torture, furthermore:

"[e]ach State Party shall ensure that all acts of torture are offences under its criminal law" and "[t]he same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."

It is noteworthy in this respect that the Committee against Torture has stated in its General Comment No 2 that it ‘considers that articles 3 and 15 are likewise obligatory as applied to both torture and ill-treatment.’²⁷ This means that the State parties are legally obliged also to penalise other cruel, inhuman or degrading treatment or punishment referred to in article 16 of the Convention against Torture.

While torture is prohibited under the Constitution and other laws mentioned above, there is no comprehensive legislation which defines torture, or offers a process of redress and accompanying sanctions.

The Committee against Torture already expressed its regret about the fact that the Penal Code and Code of Criminal Procedure do not contain a definition of torture and therefore lack appropriate penalties applicable to such acts, including psychological torture according to Articles 1 and 4 of the Convention against Torture.²⁸

The efforts to define the crime of torture in the penal legislation conform international standards is thus urgently required, with legislative penalties appropriate to the gravity of the offence around torture and other related violations.

In an attempt to address this gap in the legislation, a draft Prevention of Torture Bill was created in 2010.²⁹ The Bill attempts to capture the principles of the Convention against Torture, as well as the ICCPR, with the objective of preventing, prohibiting and punishing torture and other cruel, inhuman or degrading treatment and to further provide for remedy and compensation for victims. The Bill was a collaborative effort between ICJ Kenya, IMLU, Ministry of Justice, National Cohesion and Constitutional Affairs, the Kenya Law Reform Commission and the Kenya National Commission on Human Rights. The Bill has now been forwarded to the Commission on Implementation of the Constitution to be considered as priority legislation as part of those spelt out under the Fifth Schedule of the Constitution.

Prior to the enactment of the new Constitution, the Kenyan government had, in an attempt to address the “systematic” practice of torture, introduced legal provisions that outlawed torture: The Criminal Law Amendment Act, 2003. The Miscellaneous Criminal Amendment Act 2003 sought to specifically make inadmissible any confessions made by persons in police custody, unless made before a magistrate through the amendment of the Evidence Act, CAP 80 by adding the new Section 25A. The Criminal Law Amendment Act NO. 5 of 2003 states that “A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in open court.” This provision has the potential to contribute to the

²⁷ **Committee against Torture, General Comment No. 2, Implementation of article 2 by State Parties, UN Doc. CAT/C/GC/2, 24 January 2008.**

²⁸ UN Doc. CAT/C/KEA/CO/I, para 21.

²⁹ See Annex B to this report.

reduction of incidences of torture by policemen for the purposes of obtaining confessions. With the new political and juridical order ushered in by the new dispensation, accountability of the police to civilian authority, has been enhanced through several pieces of legislation enacted which creates oversight and management institutions that will help eradicate the prevalence of torture and instill observance of human rights standards.

The Independent Police Oversight Authority Act 2011 provides for an independent civilian body to look into complaints against the police; the National Police Service Act 2011, which operationalizes how two previous outfits, the Regular police and the Administration police, will report to a single command, and also provides for the vetting of members of the police force by the Commission, with a view to restore confidence and integrity to the service; and the National Police Service Commission Act 2011, which will handle vetting, recruitment, promotions and discipline of police officers. The Judicial Service Act 2011 which operationalized the Judicial Service Commission granting it enhanced powers for the administration of the judiciary with a broad mandate to ensure integrity and judicial independence.

The Vetting of Judges and Magistrates Act 2011 gives effect to section 23 of the Sixth schedule in the new Constitution of Kenya which requires Parliament to enact legislation providing for the vetting of all judicial officers for their suitability to continue serving under the principles of the new constitution. In releasing the findings of the vetting of court of appeal judges, four senior most judges of appeal were ejected from judicial service for having various transgressions including hostility to litigants as well as issuing rulings that seemed to favor the government particularly during the repressive regimes when perceived political dissents were subject to torture or ill-treatment during their trials.

Kenya Human Rights Commission Act 2011 which operationalises art 59 of the Constitution that provides for an empowered human rights commission to monitor human rights compliance by government agencies. The Commission on Administrative Justice Act 2011 establishes an ombudsman office to check on government excesses and an avenue for receiving complaints from the public where they are dissatisfied with any government action.

ICJ Kenya, KAACR, IMLU, COVAW and OMCT would recommend the State party to:

Include, without delay a definition of torture in its penal legislation conform Article 1 of the Convention against Torture as a minimum. The definition should go hand in hand with fast tracking and prioritising of essential Bills to combat torture such as Torture Prevention Bill, the Coroners' Bill, and the Ratification of Treaties Bill among others;

Enact anti-torture legislation ensuring that all acts of torture and cruel, inhuman and degrading treatment or punishment are punishable by appropriate penalties taking into account their grave nature, with specific provisions that outlaw and penalise torture and other forms of violence against children and which contains child-friendly enforcement provisions and mechanisms;

Ratify the Optional Protocol to the Convention against Torture which would strengthen the legislative provisions that have been included in the mandate of the Police oversight Authority.

5.2 The Kenya Judiciary in the Determination of Torture Cases

The judiciary's response to torture cases in Kenya has tended to reflect the prevailing political, constitutional, legislative and institutional environment during three critical epochs of the country's history. These were the KANU era³⁰, the NARC era³¹ and lastly the Grand Coalition era³². During the KANU era, especially after the aborted 1982 military coup, the judiciary was used to rubberstamp government repression to dissent through trumped up charges and targeted prosecutions. Under Moi's rule, torture was widespread and systematic and persons perceived to be dissidents were arbitrarily, arrested, detained, tortured, charged and convicted for certain crimes under circumstances that violated their fundamental rights and freedoms.

The atmosphere of State repression meant that survivors of torture could only in very few instances even attempt to sue the government for breach of their human rights and freedoms by one or more of its agencies and seek both compensation and a declaration that their rights had been violated. *Wanyiri Kihoro v The Attorney General*³³ was one of several cases involving situations where the State, through the police, arbitrarily arrested suspects without warrants of arrest, searched their offices and homes, blind folded them and whisked them away to illegal underground cells.

In these cells, that were cold, dark, and sometimes water-logged, those arrested would be stripped naked and sprayed with pressurized water. They were denied food, water, beddings and opportunities to sleep. Furthermore, they were held incommunicado – prevented

³⁰ Kenya African National Union (KANU) was Kenya's ruling party from independence in 1963 under President Jomo Kenyatta (1963-78) the President Daniel Arap Moi (1978-2002).

³¹ In 2002 the opposition parties united under the NARC banner with Mwai Kibaki as Presidential candidate to dislodge KANU from power.

³² PNU and ODM parties signed a peace pact to govern jointly as a Grand Coalition as a solution to the disputed 2007 Presidential elections.

³³ HCC Civil Appeal No. 151 of 1988.

from either communicating with their families or seeking legal representation. The suspects were also subjected to heinous acts of physical torture that included severe beatings with pieces of timber, whips and broken legs of chairs, and being burnt with lit cigarettes butts — all in a bid to intimidate, threaten and extract false confessions.

Cases are reported of instances where political prisoners were held in solitary confinement or together with mentally challenged inmates in segregated prison blocks. Some of the victims were arbitrarily detained without trial while others were arraigned before the Chief Magistrate's Court at the Nairobi Law Courts (now known as the Central Division) outside normal court hours. These violations not only led to grievous bodily harm but to emotional, psychological and social distress as well. The survivors of these events also suffered professional and career disruptions, with most losing their jobs and livelihoods.

In isolated cases, however, some survivors had their rights safeguarded, convictions withdrawn and reparations awarded. More prominently under the Grand Coalition government, the judiciary has begun to emerge as an independent institution to accept that such atrocities occurred, accepts the evidence of various local and international investigations and reports, and has seen fit to compensate numerous individuals who suffered at the hands of the police and other security agents. The rulings of these cases set progressive precedents which are still upheld during the trial of, or advocacy around, similar or related cases at national and international levels.

A major milestone of such judgments at the national level is exemplified in the case of the *Republic v Amos Karuga Karatu*³⁴ which entrenched fundamental human rights safeguards. The accused had been held beyond the statutory period required for one to be arraigned in court. Court held that a prosecution mounted in breach of the law is a violation of the rights of the accused and it is therefore a nullity. The accused was discharged. The judge further observed that the courts had a cardinal duty to protect fundamental rights unlike the KANU era when court turned a blind eye as police trampled upon human rights.

*Godfrey Ngotho Mutiso v Republic*³⁵ held that section 204 of the Penal code which provides for a mandatory death sentence as negating the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. It is inconsistent to the letter and spirit of the Constitution which while recognizing the legality of a death sentence does not however prescribe a mandatory sentence for the offence of murder.

In *Wachira Weheire v The Hon. Attorney-General*,³⁶ a victim of the notorious Nyayo House torture chambers, Mr Weheire was awarded Kshs.2.5 million damages in recognition of the fact that certain of these fundamental, constitutional rights “were contravened and violated

³⁴ Nyeri HCC Court Criminal Case No. 12 of 2006 (decision rendered in May 2008 during the coalition government.

³⁵ Cr Appeal 17 of 2008.

³⁶ Misc. Civil Case 1184 of 2003, *Wachira Weheire v The Hon. Attorney-General* [2010]eKLR .

by police officers and other government servants or agents”. Mr Weheire was unlawfully arrested at his workplace in December, 1986. What followed was sixteen days of torture in the Nyayo House basement before being taken before a Magistrate and convicted on his own, albeit coerced, plea of guilty. He was sent to jail for four years. The High Court found in 2010 that his arrest was unlawful and in breach of the rights outlined in the Constitution. They also found that he was tortured at Nyayo House and that he was not produced to a Court within 24 hours of his arrest, or as soon as practicable – all facts which are in breach with the Constitution.

Structure of judiciary

The structure of the judiciary in the new Constitution emphasizes its independence from the executive and dispensation of justice in a non-discriminatory manner. The judicial service commission has been revamped by inclusion of representatives from the public and law society. It is responsible for the recruitment and discipline of judicial officers. The launch of the National Council on Administration of Justice has marked an important milestone in the administration of justice in Kenya. It is for the first time that a legal mandate has been bestowed in an all inclusive body to ensure a coordinated efficient, effective and consolidated approach in the administration, delivery of justice and the transformation of the justice system.

The Supreme Court has been brought into operation following the swearing in of the Supreme Court judges, development and gazettelement of the Supreme Court rules. To enhance efficiency in the delivery of justice, the High Court was restructured by creating additional divisions namely: the constitutional and human rights division and the judicial review division. To ease the work load and minimize backlog, the number of judges has been increased per division. Kenya having adopted the Geneva Conventions Act enables courts to take human rights instruments incorporated into domestic law into account when deciding human rights cases, citing the binding force of such treaties by virtue of the Constitution.³⁷

ICJ Kenya, KAAACR, IMLU, COVAW and OMCT would recommend the State party to:

Carrying out a full, independent and impartial investigations on all allegations of torture, bringing to justice those responsible for authorising and inflicting torture and other ill-treatment, with proper identification mechanisms and punishments of those responsible for these crimes;

Enforce decisions holding the state accountable for torture, ill-treatment and related human rights violations;

Reinforce that information obtained by torture or other ill-treatment should not, whatsoever, be invoked as evidence in any proceedings.

5.3 Current Trends Relating to Torture

The current trends on torture are taking various forms. They include:

- a) Enforced disappearances - where persons are arrested in the context of fighting organized groups then disappear without trace and unexplained circumstances. This was largely used in the guises of fighting “Mungiki;”³⁸
- b) Being held incommunicado where a person is arrested and held in detention facilities with no opportunity to communicate to other persons, for example relatives or lawyers, meant to coerce the persons to confess or give information;
- c) Kidnapping and ransom seeking is also a form of torture prevalent in Kenya today, where a person is suspected of having money, him, her or a close relative gets arrested with allegations of having broken the law. The person would then be locked up in a police station without any charges being preferred on them. When a relative starts searching or enquiring, they are intimidated to pay a certain amount of money;
- d) Extortions and blackmailing;
- e) Extra judicial executions where the police intent to avoid the laborious court processes or where they know they do not have enough evidence to prosecute;
- f) Threats and intimidations through short text messages on phones;
- g) Spreading fear and using intimidation by criminal gangs in cohorts with the police or through police inactions;³⁹
- h) Lack of public information on the activities of Kenyan forces in Somalia given their history in security operations such as “Operation Okoa Maisha” in Mt. Elgon.

Over 60% of the Kenyan population believe that torture is still very common in the country, both physically and psychologically.⁴⁰ Enforced disappearance of persons is seen as an emerging, common form of torture, mainly practiced within the context of fighting organized groups, followed by being incommunicado detention.⁴¹

The challenge of the investigating officer being police officers presents a picture of compromised justice, as rarely will the investigating officer, being a police officer, implicate

³⁸ Mungiki is a politico-religious group and a banned criminal organisation.

³⁹ *MLU, see note 12.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

fellow police officer unless it is a blatant offence. They decline interviews on the subject with responses that torture is no longer applied.

The time factor required for one to contact a lawyer is not postulated and this remains a gap within the Criminal Procedure Code and can be abused in some cases, especially where the police are implicated on issues of torture, intimidation and harassment. Further, poor infrastructure in police cells and the socio-economic circumstances of the arrested persons should not be used as excuses by the Government to deny suspects and detained persons access to a lawyer or their relatives. It is known fact that upon arrest or detention, confiscations of communication gadgets like mobile phones follow, especially where capital offences are reported and the trend has not fully changed. Still measures to ensure prompt and impartial investigations of torture have not improved. Reportedly, the situation has become worse, as more people undergo psychological torture and ill-treatment, with reporting of cases going down as there is no progress from the reported ones.⁴² However, with proactive judiciary, it is slowly becoming clear that time is of essence in matters of justice.

ICJ Kenya, KAACR, IMLU, COVAW and OMCT would recommend the State party to:

Abide to obligations under international law, particularly in relation to the absolute prohibition of torture and other ill-treatment, including the absolute principle of non-refoulement, prohibition of enforced disappearance and incommunicado detention among other obligations should be upheld;

Carry out full, independent and impartial investigations into issues of torture, bringing to justice those responsible for authorising and inflicting torture and other ill-treatment, with proper identification mechanisms and punishments of those responsible for these crimes, including extraordinary renditions, should be initiated and strengthened;

Carry out full, independent and impartial investigations into the allegations of police corruption, intimidation and blackmailing, bring to justice those responsible and apply appropriate punishments;

Reform practices and repeal national laws (Penal Code, Criminal Procedure Act, Evidence Act, Public Order Act etc) to prohibit any form of torture;

Publicly condemn all forms of torture and ill-treatment as a preventative measure and raise public awareness about the enormous negative effect and impact of torture;

Reinforce that information obtained by torture or ill-treatment, should not, whatsoever, be invoked as evidence in any proceedings;

⁴² **Ibid.**

As part of its judicial reform agenda fast tracks *the training of judicial officers on interpretation and application of international human rights instruments*, which would contribute towards the harmonising the divergent and conflicting judicial philosophy on the right to life principle under ICCPR.

5.4 Non-Refoulement

Despite the Government having published the Refugee Regulations operational for effective implementation of the Refugee Act, 2006 and having planned to develop a National Refugee Policy, there have not been measures taken to amend the Act, which provides for an exception to the general principle of non-refoulement thereby allowing the expulsion of refugees on the basis of national security. The challenge has been placed on the fear of influx of refugees and concerns for insecurity especially during the fight against terrorism.

The exception is contrary to the obligations under international law, such as article 3 of the Convention against Torture and article 7 of the International Covenant on Civil and Political Rights, no person may be sent back to a country where he or she would be at risk of being subjected to torture or other forms of ill-treatment (non-refoulement principle). This is an absolute rule that must be applied in all circumstances, including in times of war or in the fight against terrorism.

While Kenya acceded to all the 13 Conventions set out in Resolution 1373 (2001) of the UN Security Council Kenya remains in breach with the non-refoulement principle.

ICJ Kenya, KAAACR, IMLU, COVAW and OMCT would recommend the State party to:

Reform practices and repeal national laws (Penal Code, Criminal Procedure Act, Evidence Act, Public Order Act etc) to prohibit any deportation, extradition, rendition, expulsion, return where an individual would appear at risk of torture or other ill-treatment.

5.5 Domestic Violence, including marital Rape - Enactment of Gender Related or Women's Rights Bills

The government and Parliament has taken a rather lethargic approach when it comes to enactment of the gender related Bills. In the years 2000-2002⁴³, women civil society organizations initiated the drafting of gender responsive legislations. Article 45(5) of the new Constitution of Kenya mandates Parliament to enact legislation for the protection of the family unit. One of the initiatives that have been undertaken is to consolidate all the laws governing marriage laws.

Currently, the following Bills have been drafted and forwarded to the Commission on the Implementation of Constitution (CIC):

⁴³ Shadow Report to the 5th and 6th combined Report of the Government of the Republic of Kenya on International Convention on Elimination of All Forms of Discrimination Against Women(CEDAW)

a) Protection Against Domestic Violence Bill 2012 seeks to protect and offer relief to victims of domestic violence. As for now there is no single legislation that explicitly prohibits domestic violence. Domestic Violence is not an offence per se and to charge a perpetrator for that offence you have to use the offence of assault causing actual bodily harm which is provided for in section 251 of the Penal Code.⁴⁴ Despite marital rape being a heinous act, it is still not recognized as an offence in any national legislations. This is despite Kenya having ratified CEDAW that seeks to end all forms of discrimination against women. During the 48th CEDAW Committee Session that took place between 17th January to 4th February 2011 in Geneva, there were concerns about Kenya's reluctance to expressly prohibit acts like polygamy and marital rape that discriminate against women.

Intimate partner violence (including marital rape) is a common feature across Kenya and is overwhelmingly driven by factors ranging from the low status society accords to women, to poor policy and legal frameworks that condone the prevalence of domestic violence.⁴⁵ According to the 2008-09 Kenya Demographic and Health Survey, 13 per cent of married women are being raped by their male partners. Marital rape still remains one of the under-reported violent crimes because it is socially tolerated. Another aspect is that women who are abused fear reporting the violence since they are financially dependent on their spouses.

b) The Marriage Bill 2012 seeks to amend and consolidate all the laws relating to marriage. Currently we have a couple of marriage laws which is problematic. In operation we have the Marriage Act, African Christian Marriage and Divorce Act, Matrimonial Causes Act and Mohammedan Marriage, Divorce and Succession Act among others.

c) The Matrimonial Property Bill 2012 makes provisions for the rights of spouses in relation to matrimonial property. This has been a thorny issue especially for women who continue being disinherited once their spouses pass on.

Between 11 and 15 June 2012, the CIC held Public Forums on the Family Bills in various Counties in Kenya. The forums were meant to get views from the public and some of the issues that formed the basis of the discussion include⁴⁶; equality at the time of marriage, during marriage and dissolution of marriage, what constitutes matrimonial property, protection from domestic violence among others. This is a great step in the enactment of the Family Bills that have taken decades. It should be noted that in the past the similar legislation like the Domestic Violence (Family Protection) Bill, was never voted on.

ICJ Kenya, KACR, IMLU, COVAW and OMCT would recommend the State party to:

Enact urgently the Protection Against Domestic Violence Bill (2012) for the prevention, prohibition and punishment of domestic violence as the majority of cases of domestic violence remain unreported or at least unpunished;

Enact urgently the Marriage Bill 2012 and the Matrimonial Property Bill 2012;

⁴⁴ The Penal Code Cap 63

⁴⁵ Gender-Based Domestic Violence in Kenya, Federation of Women Lawyers in Kenya, 2008, p 6

⁴⁶ <http://cickenya.org/news/cic-hold-public-forums-family-law-bills>

Launch a public awareness campaign to sensitize the Kenyan society to the gravity of domestic violence including marital rape and to eradicate traditional beliefs regarding the subordinate status of women both in the family and society;

Investigate, prosecute, punish and redress domestic violence with due diligence.

5.6 Female Genital Mutilation

The Prohibition of Female Genital Mutilation Act of 2011 was assented to on 30th September 2011 which is a milestone in the fight against FGM. The purpose of the Act is 'to prohibit the practice of female genital mutilation, to safeguard against violation of a person's mental or physical integrity through the practice of female genital mutilation and for connected purposes'

The Act creates a number of offences in regards to the practice of FGM as well as a Prohibition of Female Genital Mutilation Board. This board is yet to be constituted and this is harboring the implementation of the FGM Act as the board is intended to be the body charged with ensuring adherence to the Act. Membership of the board is also planned as inward looking in that most of the members are to be derived from the Ministry of Gender, Social Development and Children. This Ministry is tasked with policies that appertain to Gender, Social Development and Children. The Act also provides that the appointment of the three other members of the board shall be done by the cabinet secretary.

A number of policies and studies concerning FGM have been carried out. Key among them is the National Plan of Action for the Elimination of Female Genital Mutilation 2008-2012 that provides a road map on the implementation of anti- FGM activities. Moreover, there is an initiative to draft an anti- FGM policy that will foresee in the implementation of the Prohibition of Female Genital Mutilation Act 2011.

The enactment of the Children Act 2001 prohibits FGM of children, that is, anyone below the age of 18 years. Section 14 of the Act protects children against harmful cultural practices. Although this may be interpreted as having created a loophole in that it did not prohibit FGM among adults, there now exists the Prohibition of FGM Act as stated above that takes cognizance of different aspects and levels of the practice.

The Constitution also seeks to address issues of FGM and other forms of discriminative cultural practices. Article 2 (4) of The Constitution provides that any law including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in contravention of this Constitution is invalid. This provision seeks to address issues such as FGM and wife inheritance that is conducted under the guise of customary law.

Furthermore, Article 44(3) of the Constitution states that a person shall not compel another person to perform, observe or undergo any cultural practice or rite. This stipulation speaks to persons in the community who coerce women to undergo some practices that are contradictory to the Constitution. Again, these include wife inheritance, female genital mutilation and forced/ early marriage among others.

However, the passing of the laws that prohibit the practice of FGM has not necessarily acted as a deterrent to immediately stop the practice. It is a deeply rooted practice and changing attitudes, beliefs and practices is slow process. With the constitution stating the rights of Kenyans to observe their cultures, this is being misconstrued in many communities to imply that they can therefore continue practicing FGM and wife inheritance. Criminalization of FGM has also driven the practice underground in some instances with new shifts in the practice including medicalization of the same. In such cases, some medical personnel such as nurses have been reported to be doing it in what is seen to be “sanitized” environments. This raises concerns about the implementation of Ministry of Health policies that provide guidelines on the conduct of health workers and health service providers.

The reasons given for supporting the practice among practicing communities are various. Some communities indicate that the practice is part of their culture and traditions while others wrongly but strongly indicate it is a religious practice. Among the Somali, the practice is seen a means to preserve virginity while the Maasai indicate it ensures women are not promiscuous.⁴⁷ In an interview with IRIN ⁴⁸one of the FGM practitioners indicated that *"When you cut a girl, you know she will remain pure until she gets married, and that after marriage, she will be faithful"*

There are a number of interventions by non-state actors addressing the practice through community awareness and education, alternative rites of passage for girls and young women in practicing communities, creation of rescue centres and schools to provide a safe haven and education for girls who escape the practice of FGM and early marriage. These interventions at times fall short of addressing the actual reasons associated with the practice such as creation of agency and status for both girls and women. Education of girls is an important avenue of demonstrating the difference education can make and as a tool for expanding the spaces for agency for girls and women.

ICJ Kenya, KAAACR, IMLU, COVAW and OMCT would recommend the State party to:

Urgently constitute the Prohibition of Female Genital Mutilation Board;

Provide equal education to girls;

Launch a public awareness campaign on the new laws on FGM, the gravity and the consequences of FGM;

Live up to the provision of article 5 of the UN Convention on the Elimination of All Forms of Discrimination against Women and to eliminate cultural and traditional practices that perpetuate discrimination and gender stereotyping of women.

5.7 Torture of Children

⁴⁷ <http://www.irinnews.org/InDepthMain.aspx?InDepthId=15&ReportId=62470>

⁴⁸ *ibid*

Children in Kenya experience torture mostly at the hands of security forces, in institutions (CCIs) and even in home settings. A recent example is a case of a youth, 19 years old, from Pokot district who was tortured by the Kenya police in 2009 when he was a child herding his father's cows but mistaken for a cattle rustler. The boy's case has been widely covered in the Kenyan media. Even though the Police Commissioner promised to bring the perpetrators to book within seven days, nothing has been done so far yet the youth is unable to make a family due to the injury caused by the police.

This prevalence of torture and other forms of violence against children in Kenya can be well illustrated by the voices of Internally Displaced Children (IDCs) from different parts of Kenya specifically the Rift Valley and western provinces that they presented at the Trust, Justice and Reconciliation Commission (TJRC) hearing in December 2011 in Nairobi. Prior to the presentation, over 100 IDCs held a two days workshop organized by the Provincial Children Network of Rift Valley and KAACR in Nakuru. The children shared their experiences on the various physical, psychological and emotional violence and torture that they faced following the post election violence in 2007. Below a sample experience that a child shared in his own words:

After two years of hardship in Nakuru, 2002, my mother decided to take us back to our father who was working in Mombasa as she thought it was also his responsibility to bring us up as our biological father. This act of my mother brought a sign of relief to us but it was not after the divorce, my father remained and they had a daughter with the stepmother. I was 3 years old by that time. I could cook for the whole family. Imagine cooking a meal for five people on a stove in my age. I would be told to go fetch water using a ten-liter Jerri cane to fill a sky plast of 125 liters a distance of about 2km from our home. I would also be told to wash cloths for my brother and my stepsister and I which I could do very strenuously I also face severe beating from the stepmothers on the failure to perform the duties. After about one year of hard life in Mombasa we went upcountry for another miserable life. The work upcountry increased tremendously. After my father returned to Mombasa all the work was pressed against of our chest of my brother and I. We were supposed to do all the house chores as my stepmother shouted orders from the bedroom on which in failure to carry them out we received firewood from a distance, cook, wash clothes and feed her babies as they had gotten another child. This was very difficult for my brother and me. To top it up we could receive thorough beating in the morning if we could not wake at her first call for us to wake up. This inflicted a lot of pain to us both physically and psychological as I was very sad wondering why this was happening to us. Later, in 2006 my mother came to our rescue and we went with her to Nakuru again where a happy life stated. The recommendation I make to TJRC is that they should ensure that these violations happening to children should not be done and carry out the prevention measures necessary like teaching the parents, Inflicting severe punishment on the perpetrators to act as example to the whole community.

ICJ Kenya, KAACR, IMLU, COVAW and OMCT would recommend the State party to:

Enhance protection against torture and violence against children by law enforcement agencies;

Fast-track police reforms, which must ensure a new code of conduct for service members prohibiting torture and violence against children.

6. Liberty and Security of the Person and the Treatment of Prisoners (Articles 9 and 10 ICCPR)

6.1 Rights of Persons Deprived of their Liberty

Article 49(1) of the new Constitution provides for the rights of arrested persons. These rights include, but are not limited to: the right to be informed, in a language that the person understands, of the reason for arrest; the right to communicate with an advocate; the right not to be compelled make any admission or confession; the right to be brought before a court as soon as reasonably possible but not later than 24 hours; at the first court appearance, the right to be charged or informed of the reason for continuing detention, or to be released; and the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

The rights of persons who are detained are protected under Article 51(1) of the Constitution which provides: “A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned,” and Article 51(2) which provides that: “A person who is detained or held in custody is entitled to petition for an order of *habeas corpus*.”

In relation to Article 10(1) of the ICCPR, Article 51(3) of the Constitution directs the enactment of legislation that “provides for the humane treatment of persons detained, held in custody or imprisoned” and which “takes into account the relevant international human rights instruments,” such as the ICCPR. The Constitution also upholds the right of the accused to be separated from convicted persons in Article 49(1) (e).

Despite the Constitutional guarantees, there remain many problems, both in the law and in practice with regard to arrest and detention.

The Committee against Torture expressed concern in 2008 about the bail system in place and recommended to reform the system with a view that it is more reasonable and affordable.⁴⁹ The case of *Republic v Gerald Irungu* of 2010 deals with the unconstitutionality of

⁴⁹ UŃ Doc. CAT/C/KEF/CO/I, para 12.

the current bail system in Kenya. However, the Court found that while Section 123(1) and Section 123(4) of the Criminal Procedure Code, which prohibit the court from giving bail to a person charged with the offence or murder, treason, or robbery with violence, are inconsistent with the Constitution, until they are so declared they still provide a compelling reason as to why an accused should not be given bail.⁵⁰

While the law is clear on the measures to ensure that arrested persons are promptly brought before a judge, adherence to these requirements remain a challenge, largely due to lack of will, resources, attitudes and a worrying trend where only 25% victims of these incidents report to authorities which can be explained by pessimism and distrust of the authorities or ignorance of the fundamental rights and freedoms⁵¹ among other factors. Furthermore, cases of persons being held incommunicado, where a person is arrested and held in detention facilities with no opportunity to communicate to other persons, for example relatives or lawyers, limits prompt attempts to see a judge and access to justice.

In 2005, the Human Rights Committee expressed concern about the fact that most suspects do not have access to a lawyer during the initial stages of detention. It recommended the State party to guarantee the right of persons in police custody to have access to a lawyer during the initial hours of detention.⁵²

Torture is frequently practiced during unlawful or arbitrary arrests by the police, with some arrests being for the purpose of extorting bribes and especially so in the transport sector. Police still remain the main perpetrator of torture with 63% of respondents interviewed by IMLU affirming this. Other perpetrators of torture are vigilante groups, the City Council askaris and the prison warders, 7%, 5% and 5% respectively.⁵³

In 2008, the Committee against Torture expressed its deep concern about the common practice of unlawful and arbitrary arrest by the police and the widespread corruption among police officers, which particularly affects the poor living in urban neighbourhoods.⁵⁴ The Committee urged the State party “to address the problem of arbitrary police actions, including unlawful and arbitrary arrest and widespread police corruption, particularly in slums and poor urban neighbourhoods, through clear messages of zero-tolerance to corruption from superiors, the imposition of appropriate penalties and adequate training. Arbitrary police actions must be promptly and impartially investigated and those found responsible punished.”⁵⁵

ICJ Kenya, KAACR, IMLU, COVAW and OMCT would recommend the State party to:

Address the problem of arbitrary arrests and police corruption through adequate investigations and penalties as well as police training;

⁵⁰ High Court Criminal Case Number 97 of 2010

⁵¹ IMLU, *see note 12*.

⁵² UN Doc. CCPR/CO/83/KEN, para 17.

⁵³ IMLU, *see note 12*.

⁵⁴ UN Doc. CAT/C/KEN/CO/1, para 12.

⁵⁵ *Ibid*.

Investigate torture during arrest and detention and prosecute and punish those responsible and provide adequate remedies to the victims;

Reform the bail system.

6.2 Treatment of Prisoners

The judiciary has moved to enhance efficiency in the courts in matters of addressing the problem of case backlogs, but without an articulated policy in terms of access to the detention centres, detention without trial, ill-treatment and massive violations of the rights of detainees as well as deaths in custody remain a major concern and always happen as news flash. Those fighting for a torture free society still have hard times visiting some of these detention centres, further compounded by the Prisons Act (CAP 90) that was reviewed in 2006 and up to date it remains unpublished. The Borstal Act (Cap 92) is under review to synchronize it with the Children's Act in order to capture the multiple needs and challenges of juveniles in prison custody.

Without access to detention centres, it is not easy to ascertain the overall state of torture cases in all places of detention particularly the non-traditional places of detention like health facilities for mentally challenged persons or places where child offenders are detained and also it remains impossible to access information regarding police operations around the country.⁵⁶

In relation to access to detainees, the Human Rights Committee has stated in his General Comment No 20 on article 7: "The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members."⁵⁷

ICJ Kenya, KAACR, IMLU, COVAW and OMCT would recommend the State party to:

Protect detainees by allowing them prompt and regular access to a lawyer, doctor and, when the investigation so requires under appropriate supervision, family members;

Ratify the Optional Protocol to the Convention against Torture.

7. Right to a Fair Trial (Article 14)

As elaborated above, the judiciary is proactively leading the way in search of justice and the reforms being undertaken by the institution are being well received by Kenyans as those whose rights are violated by lack of accessing a lawyer are largely the poor, the

⁵⁶ Ibid .

⁵⁷ Human Rights Committee, General Comment 20.

marginalised, low income earners, the vulnerable living in poor conditions as highlighted in IMLU's *Quest for Justice* Report. Fifty percent of the respondents mentioned poverty as a main predisposing factor to torture, weak enforcement mechanisms (43%) and lack of awareness of fundamental rights.⁵⁸ The measures taken to ensure that suspects have access to a lawyer during the initial stages of detention remains unaccomplished despite the efforts by all actors. This is largely due to poor infrastructure, distance that might be covered to access a lawyer, lack of awareness on rights among other factors.

So far, the outputs of the operationalized National Legal Aid and Awareness Programme, operating in six centres is required to know the results it is achieving on matters of legal aid, legal advice, awareness and representation of the poor, the marginalised and those vulnerable in the society including the suspects, other than those facing a capital offences, and how they benefit from the legal assistance scheme.

ICJ Kenya, KACR, IMLU, COVAW and OMCT would recommend the State party to:

Ensure that all individuals subject to its jurisdiction have, without any form of discrimination, to right to a fair and public hearing.

8. **List of Recommendations to the State**

ICJ Kenya, KACR, IMLU, COVAW and OMCT would recommend the State party to:

- While ratified treaties form now part of Kenyan law, urgently adopt and implement required appropriate laws and policies to guarantee full compliance, in the domestic legal system, with the obligations assumed under the Covenant and other international treaties;

⁵⁸

Ibid.

- Include, without delay a definition of torture in its penal legislation conform Article 1 of the Convention against Torture as a minimum. The definition should go hand in hand with fast tracking and prioritising of essential Bills to combat torture such as Torture Prevention Bill, the Coroners' Bill, and the Ratification of Treaties Bill among others;
- Enact anti-torture legislation ensuring that all acts of torture and cruel, inhuman and degrading treatment or punishment are punishable by appropriate penalties taking into account their grave nature, with specific provisions that outlaw and penalise torture and other forms of violence against children and which contains child-friendly enforcement provisions and mechanisms;
- Abolish the death penalty in line with international human rights standards as it is an unacceptable derogation of the right to life;
- Reform practices and repeal national laws (Penal Code, Criminal Procedure Act, Evidence Act, Public Order Act etc) to prohibit any deportation, extradition, rendition, expulsion, return where an individual would appear at risk of torture or other ill-treatment;
- Address the problem of arbitrary arrests and police corruption through adequate investigations and penalties as well as police training;
- Reform the bail system;
- Ensure that all counter-terrorism measures comply with its international obligations under the human rights treaties, including the ICCPR;
- Provide statistical data disaggregated by crime on prosecution as well as criminal and disciplinary actions against law enforcement officials found guilty of torture and ill treatment;
- Abide to obligations under international law, particularly in relation to the absolute prohibition of torture and other ill-treatment, including the absolute principle of non-refoulement, prohibition of enforced disappearance and incommunicado detention among other obligations should be upheld;

- Ensure prompt, impartial and effective investigation of all allegations of excessive use of force and torture by the police and the military during the different 'operations' since 2007, to prosecute and punish perpetrators with appropriate penalties and to adequately compensate the victims;
- Carry out a full, independent and impartial investigations into issues of torture, bringing to justice those responsible for authorising and inflicting torture and other ill-treatment, with proper identification mechanisms and punishments of those responsible for these crimes, including extraordinary renditions, should be initiated and strengthened;
- Carry out full, independent and impartial investigations into the allegations of police corruption, intimidation and blackmailing, bring to justice those responsible and apply appropriate punishments;
- Ensure that all court orders and judgements are enforced, including decisions holding the state accountable for torture, ill-treatment and related human rights violations;
- Enhance public education and awareness raising campaigns to change social and cultural dimensions that underlie torture and other forms of violence;
- Ensure that all individuals subject to its jurisdiction have equal access, without discrimination, to effective remedies;
- Immediately reverse the renditions of the Kenyan nationals to Uganda and to try them locally for the terrorism charges;
- Provide for effective remedies and reparations to those subjected to extraordinary renditions;
- Publicly condemn all forms of torture and ill-treatment as a preventative measure and raise public awareness about the enormous negative effect and impact of torture;
- Enhance protection against torture and violence against children by law enforcement agencies;

- Ensure that all individuals subject to its jurisdiction have, without any form of discrimination, the right to a fair and public hearing;
- Protect detainees by allowing them prompt and regular access to a lawyer, doctor and, when the investigation so requires under appropriate supervision, family members;
- Ratify the Optional Protocol to the Convention against Torture as well as other International and regional Instruments for the protection and promotion of human rights;
- Reinforce that information obtained by torture or ill-treatment, should not, whatsoever, be invoked as evidence in any proceedings;
- As part of its judicial reform agenda fast tracks the training of judicial officers on interpretation and application of international human rights instruments, which would contribute towards the harmonising the divergent and conflicting judicial philosophy on the right to life principle under ICCPR.
- Clarify article 27 (8) of the new Constitution which provides that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender and form protective and pecuniary measures.
- Improve access to family planning services for all;
- Review its abortion laws to ensure that they do not have to undergo life-threatening clandestine abortions.
- Enact urgently the Protection Against Domestic Violence Bill (2012) for the prevention, prohibition and punishment of domestic violence as the majority of cases of domestic violence remain unreported or at least unpunished;
- Enact urgently the Marriage Bill 2012 and the Matrimonial Property Bill 2012;
- Launch a public awareness campaign to sensitize the Kenyan society to the gravity of domestic violence including marital rape and to eradicate traditional beliefs regarding the subordinate status of women both in the family and society;
- Investigate, prosecute, punish and redress domestic violence with due diligence.
- Urgently constitute the Prohibition of Female Genital Mutilation Board;
- Provide equal education to girls;
- Launch a public awareness campaign on the new laws on FGM, the gravity and the consequences of FGM;

- Live up to the provision of article 5 of the UN Convention on the Elimination of All Forms of Discrimination against Women and to eliminate cultural and traditional practices that perpetuate discrimination and gender stereotyping of women;
- Implementations the concluding comments and recommendations by UN Treaty bodies.

9. List of Questions for the state

- Was the second periodic report circulated for the attention of the non-governmental organisations operating in the country?
- Can the state demonstrate what follow up did they do on the concluding observations and recommendations?
- How has the state demonstrated its commitment towards conducting investigation of extra judicial killings perpetrated by police and other law enforcement agencies?
- Is there any available data on the number of perpetrators accused of extra judicial killings that have been convicted and the nature of the sentences on issues of extrajudicial execution?.
- Has the state developed a database of victims that contains information that includes action taken by the government to compensate or rehabilitate them?
- How has the state taken effective measures to prevent abuse of police custody, torture and ill? What has the state done to investigate death in police custody including allegations of torture and ill treatment?
- Where is the detailed information of filed complaints in connection with such acts on the disciplinary and criminal sanctions imposed on law enforcement officers?
- What steps has Kenya taken to abolish the death penalty? Has any study been completed or published on the question whether the death penalty should continue in Kenya?
- What steps is Kenya taking to enact the Prevention of Torture Legislation?
- What mechanisms and strategies does the state have to disseminate the past and present Concluding Observation to children and the children sector in Kenya?

- Does the state have disaggregated data on information of filed complaints by victims and disciplinary and criminal measures taken against the perpetrators (law enforcement officers)?
- What mechanism has the state put in place to investigate the many reported/un-reported cases of torture and violence perpetrated by other law enforcement Agencies against children?
- What follow up measures have been taken to prosecute security forces for child abuse regarding the incidence in Turkana?
- What steps has the state taken to reverse the rendition of Kenyan citizens to face trial in Uganda?
- What steps has the state taken to effect the right to remedy to victims and survivors of torture?

Annexures

Annexure 1 - Kenya's proposed Legislative Framework for the Prevention of Torture in Kenya An Analysis

PROPOSED LEGISLATIVE FRAMEWORK FOR PREVENTING TORTURE IN KENYA

Prepared by a network of human rights organisations spearheaded by the Independent Legal Medical Unit, the Kenya Section of the International Commission of Jurists, and Muslims for Human Rights; in partnership with the Kenya National Commission on Human Rights; and the Ministry of Justice, National Cohesion and Constitutional Affairs

May 2011

PREFACE

Kenya acceded to the Convention on the Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ('cat') on 21 February 1997. The Committee Against Torture issued its first concluding observations for Kenya in November 2008 once Kenya had presented its country report to the Committee in terms of Article 19 of the Convention which requires states to report on the measures they have taken to effect their obligations under the Convention.

The concluding observations of the Committee Against Torture included firm advice that Kenya should take more concrete steps to domesticate the Convention and in particular that the state should legislate a definition of torture and criminalise acts of torture including by providing sanctions commensurate with the grave nature of the crime of torture.

During the period 2009-2011, a tripartite partnership involving a number of human rights non-governmental organisations, Kenya's national human rights institution - the Kenya National Commission on Human Rights ('KNCHR'), and the Ministry of Justice, National Cohesion and Constitutional Affairs ('MOJNCCA') leveraged political will, human rights commitment and resources towards preparation of draft legislation on prevention of torture. The civil society component of this tripartite effort was spear-headed by the Kenya Section of the International Commission of Jurists ('ICJ Kenya'), the Independent Medical Legal Unit ('IMLU') and Muslims for Human Rights ('MUHURI'); while KNCHR's Research and Compliance Department led its efforts.

At least eight meetings involving state and non-state actors were convened to brainstorm on and provide feedback to initial drafts of the anti-torture legislation. A legal draftsman from the Kenya Law Reform Commission prepared and made revisions to the draft law to its completion.

The principal object of the Prevention of Torture Bill, 2011, is to implement Kenya's obligations under CAT and all other relevant international conventions to which Kenya is a party. The Bill criminalises torture and other cruel, inhuman or degrading treatment. This Bill further seeks to establish the necessary institutional mechanisms for the support and assistance of victims of torture and cruel, inhuman or degrading treatment or punishment to ensure just and effective punishment of offenders convicted of offences under the Act.

Considerations for the Draft Law

A number of considerations drove the need for preparing the draft legislation. First, ICJ Kenya, IMLU, KNCHR and MOJNCCA were aware of the danger that the concluding observations from the Committee would remain mere hot air unless concerted steps were taken to implement them. That by and large had been Kenya's experience in relation to concluding observations made by other core human rights treaty bodies. The general consensus was that in the very minimum Kenya should work towards domestication of the Convention. Indeed, MUHURI had independently begun to prepare an anti-torture bill before it joined the common effort.

Second, the question of domesticating the Convention into Kenyan law had remained an outstanding matter for far too long. Section 74(1) of Kenya's Former Constitution had outlawed torture using fairly broad terms, to the effect that: 'No person shall be subject to torture or to inhuman or degrading treatment.'⁵⁹ This phrasing could not be enforced easily without far more specific criminal and civil sanctions. Attempts to legislate against torture perpetrated by security forces and administrators involved lukewarm provisions scattered in multiple statutes. These provisions by and large again made generic statements forbidding torture but stopping far short of legislating firm enough sanctions for perpetrators of torture. For example, Section 14A (2) of the Police Act, Cap. 84, states that: 'No police officer shall subject any person to torture or to any other cruel, inhuman and degrading treatment or punishment';⁶⁰ following which subsection (3) simply provides that offenders will be guilty of a felony. Then, Section 20 of the Chiefs' Act, Cap. 128, prohibits a chief from subjecting a person to torture or ill treatment. No sense of the gravity of torture is shown in the law since the punishment for an offending chief amounts to a mere misdemeanour (either a fine of Kshs 10,000 or a month's imprisonment).⁶¹

Third, torture remained a very real part of the experiences of Kenyans. The 2007-2008 post election violence, operations by security forces such as Okoa Maisha, responses to alleged or actual terrorist threats particularly by the Anti Terrorism Police Unit, and continual extrajudicial killings remained indicting indicators of the systemic and individual extent to which Kenya's governance structures and personnel remained culpable in perpetration of torture in the country. Decisive action therefore was called upon.

Normative Foundations for Prevention of Torture

The International Covenant on Civil and Political Rights ('ICCPR') sets the overall normative context within which torture is prevented globally. Article 7 forbids subjection of a person to torture or ill treatment. As significant, Article 4 establishes torture as a non-derogable right. CAT and OP-CAT then provide the detailed nuts and bolts principles which mesh the whole normative framework into a competent body of protective and preventive measures. It defines torture, establishes key principles for protection against torture, and sets out obligations which states should abide by. At the continental level, the African Charter on Human and Peoples' Rights ('ACHPR') again establishes the overall continental normative context for preventing and protecting against torture in Article 5. The Robben Island Guidelines – Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment - were adopted by the African Commission on Human and Peoples' Rights in 2002 and by Africa's heads of states in 2003 to provide more detailed content to Article 5 of the ACHPR.

⁵⁹

Former Constitution of Kenya, available at:

http://www.kenyalaw.org/kenyalaw/klr_app/Frames.php

⁶⁰

The Police Act, available at: http://www.kenyalaw.org/kenyalaw/klr_app/Frames.php

⁶¹

The Chiefs' Act, available at:

http://www.kenyalaw.org/kenyalaw/klr_app/Frames.php

While preparing the draft legislation cognisance was taken that international and regional norms establish minimum standards and that wherever possible and suitable Kenya's anti-torture legislation should set even higher preventive and protective standards for the country.

The Constitution of Kenya 2010

One of the greatest boons which the process of preparing this draft legislation encountered was the promulgation of the Constitution of Kenya 2010. The provisions of Article 2(6) of the Constitution have implications on how this proposed law will be enacted. Under Article 2(6) any treaty or Convention ratified by Kenya shall form part of the law of Kenya. Kenya's laws therefore need to be aligned with the CAT so that the Convention can be implemented seamlessly as part of Kenya's laws.

Article 29 of the Constitution forms the basis for the prohibition of torture and other cruel, inhuman or degrading treatment. It provides that:

'Every person has the right to freedom and security of the person, which includes the right not to be— ... (c) subjected to any form of violence from either public or private sources; (d) subjected to torture in any manner, whether physical or psychological; (e) subjected to corporal punishment; or (f) treated or punished in a cruel, inhuman or degrading manner.'

While Article 29 of the Constitution prohibits torture, it still does not define or criminalise torture. It is significant though that torture under the Bill of Rights is non-derogable, a factor in tandem with Article 4 of the ICCPR.

Options Moving Forwards

Following finalisation of the draft legislation, all stakeholders now must embark on advocacy work to ensure that this draft law is passed by Parliament. It is necessary that the Government prioritises passage of this law because it will be key to realising protection against torture and hence beginning to ensure realisation of the Bill of Rights. This Bill's passage may encounter resistance from certain elements of the Government, but the fact that MOJNCCA participated in preparing this Bill should mean that the Bill will have an ally with solid credentials as it goes to Cabinet.

Another priority revolves around advocating for Kenya's accession to the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment. A technical meeting which took place in July 2010 bringing civil society actors, the KNCHR and state officials recommended that Kenya should accede to OP-CAT. Outstanding questions here include how to establish a national preventive mechanism which will be effective and broad-based while paying heed to the need not to over-escalate the number of public institutions undertaking human rights work.

We acknowledge all the hard work which various organisations and individuals put into this initiative without which the draft legislation would not have been completed. In particular,

we wish to acknowledge the following persons Independent Legal Medical Unit, the Kenya Section of the International Commission of Jurists, and Muslims for Human Rights; in partnership with the Kenya National Commission on Human Rights; and the Ministry of Justice, National Cohesion and Constitutional Affairs

Commissioner Lawrence Mute
Kenya National Commission on Human Rights

THE PREVENTION AND PROHIBITION OF TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT KENYA: THE PREVENTION ON TORTURE BILL, 2010

1.0 INTRODUCTION

Historically, governments across the world have used torture against their enemies and as part of their legal systems. Indeed there has been resurgence in torture and cruel and degrading treatment in the 20th century. The political pressures of the modern state were blamed for this increase, particularly its use by armies, intelligence services, and police forces during wartime and political turmoil. In Kenya, torture and ill-treatment has persisted since independence and the same reached its peak in the 1980s and 90s during the one party rule and the nascent stages of Multi-Party democracy. To date torture and ill-treatment persist as an undercurrent. Torture in police custody is common throughout the country – inflicted on criminal suspects.

Torture and Cruel or Inhuman or degrading treatment or punishment strikes at the heart of the dignity of any human being and must not be tolerated. As early as the Universal Declaration on Human Rights (UDHR) in 1948, the world recognized torture as one of the main causes of human rights violations and agreed to have it properly and effectively addressed. Freedom from torture and cruel and degrading treatment was considered so critical to the well being of the universe that the United Nations came up with a separate convention, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and reiterated it in the *Convention on the Elimination of Discrimination Against Women* (CEDAW), the *Convention on the Rights of the Child* (CRC) and the Rome Statute of the International Criminal Court. These Conventions together with other Human Rights instruments have formed the basis for the prohibition of torture international and have further led to the freedom from torture being a *jus cogens* in international law.

In 1997, Kenya acceded to the *Convention Against Torture and other Cruel or Inhuman Treatment or Punishment* (CAT). However Convention has not been domesticated. Provision prohibiting torture are scattered across a number of legislations, but the legislations were never enacted with a view to domesticated CAT.

2.0 TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT AND PUNISHMENT DEFINED

Whereas the definition of torture still remains an issue of discussion, there is general consensus as to what amounts torture. Thus international human rights instruments broadly define torture as the intentional infliction of severe pain or suffering, whether physical or mental, for the purposes such as obtaining information or confession, or punishing or coercing or otherwise discriminating against a person. Further, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* provides a definition which is widely accepted by State Parties to the Convention. Article 1 thus defines torture to mean:

“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions.”

The Inter-American Convention on the Prevention and Punishment has a similar definition albeit in a slightly different language. It defines torture thus:

“..Any act intentionally performed whereby physical or mental pain and suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.”⁶²

Kenya being a state party to the CAT, has adopted the above definition under CAT. It should however be noted, that the above definition has been viewed as providing the bare minimum as to what amounts to torture and can therefore be expanded.

Cruel, Inhuman or degrading treatment or punishment: are broadly defined as the infliction of pain or suffering that do not reach the same level of severity as torture but are capable of causing intense physical or mental suffering or giving rise to fear and anguish in the victim.

The definition however has been developed by various states and courts because Convention Against Torture does not define the same.

3.0 INTERNATIONAL LEGAL BASIS FOR THE PROHIBITION OF TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT

The international community has developed a number of instruments and mechanisms aimed at combating torture. These instruments and mechanisms range from treaties, declarations, principles, codes of conducts and guidelines. With treaties and conventions to which states are parties, state parties are obliged to respect their obligations under those instruments. Accordingly, the legal basis for the prohibition of torture and cruel, inhuman or degrading treatment or punishment is found in a number of international instruments to which Kenya is a signatory. The instruments are both international and regional.

3.1 International Legal Instruments on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

3.1.1 Universal Declaration on Human Rights (UHDR) and the International Covenant on Civil and Political Rights (ICCPR)

First is the *Universal Declaration on Human Rights* (UHDR). Article 5 of UHDR provides:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

The *International Covenant on Civil and Political Rights* (ICCPR) contains a similar provision. Article 7 provides:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”

Article 4 of ICCPR further provides that the right to freedom from torture is absolute which must not be suspended even ‘in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed...’ In General Comment 5 of 31st July 1981, the Human Rights Commission stated that the protection of human rights, especially the non-derogable rights like the right to freedom from torture, should be prioritised in cases of state emergency.

3.1.2 Optional Protocol to ICCPR

The Optional Protocol to ICCPR to which at least 35 African States are parties, gives the Human Rights Commission jurisdiction to entertain communications from individuals claiming to be victims of violations of any human rights set forth in the Covenant, provided the state recognises the competence of Commission to receive and consider communications.⁶³ The right to freedom from torture being one of the rights protected under the Covenant, its violation has led to many communications being filed against various African states to compensate victims and bring torture to an end.⁶⁴

3.2 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The right is so central to the enjoyment of human rights that the United Nations developed a separate Convention, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁶⁵ CAT is the major international instrument wholly dedicated to the fight against torture and cruel, inhuman or degrading treatment or punishment. The Convention lays down the steps that State parties must take to prohibit and prevent torture. It obliges a State party to take effective legislative, administrative, judicial and other measures to prevent acts of torture. It emphasises the absolute nature of the right to freedom from torture by providing that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.⁶⁶

The convention further provides that an order from a superior or a public authority may not be invoked as a justification of torture.⁶⁷ The Convention forbids state parties from expelling, returning or extraditing a person to a country where there is a substantial danger that the person may be torture.⁶⁸ The convention further requires State parties to:

- Criminalize all acts of torture and to have jurisdiction to try torture whenever and wherever committed;
- Make torture an extraditable offence;
- Cooperate and offer assistance in respect of criminal proceedings in cases of torture;
- Educate all personnel responsible for the custody, interrogation or treatment of any person deprived of their liberty that torture is prohibited; and
- Keep under systematic review interrogation rules, methods and practices and also to ensure that public authorities immediately investigate allegations of torture.

⁶³ Preamble to Optional Protocol and article I.

⁶⁴ In *Marcel Mutezi v Democratic Republic of Congo*, Communication No. 962/2001, CCPR/C/81/D/962, the DRC was held to have violated article 7 of ICCPR.

⁶⁵ Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10th December 1984 and entered into force on 26th June 1987.

⁶⁶ Article 2(2).

⁶⁷ Article 2(3).

⁶⁸ Article 3.

The Convention further requires State parties to outlaw the use of any statement extracted from an accused through torture as evidence.

3.2.1 The Optional Protocol to CAT

OPCAT⁶⁹ is an important instrument aimed at combating the use of torture in detention facilities. The object of OPCAT is to 'establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.'⁷⁰

It establishes a subcommittee on the Prevention of Torture with the mandate to visit the places of detention 'and make recommendations to State parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.'⁷¹ The Subcommittee also has the mandate to make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms and the mandate of national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment; and to cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organisations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.⁷²

3.3 International Humanitarian Law

International Humanitarian Law has for a long period of time ensured that limits are put to the manner in which an armed conflict can be conducted and has among other things, regarded the use of torture as inappropriate. Common article 3 of the Four Geneva Conventions⁷³ provides that cruel treatment and torture 'shall remain prohibited at anytime and in any place whatsoever.'

3.4. Other International Legal Instruments prohibiting torture and other cruel, inhuman or degrading treatment or punishment

3.4.1 Convention on the Rights of the Child

This Convention provides under article 43 that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. It establishes a Committee on

⁶⁹ Adopted by the UN General Assembly Resolution 57/199 on 18th December 2002 but has not yet entered into force.

⁷⁰ Article I.

⁷¹ Article II(a).

⁷² Article II.

⁷³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; and Geneva Convention relative to the Protection of Civilian Persons in Time of War.

the Rights of the Child with jurisdiction to examine reports submitted by State Parties on its implementation.

3.4.2 Convention on the Elimination of all Forms of Racial Discrimination;

The International Convention on the Elimination of all Forms of Racial Discrimination prohibits torture indirectly through the recognition of the right to security of person and protection by state against violence or bodily harm. Article 5(b) obliges government officials, individuals and groups of individuals to respect this right. This provision, unlike article 1 of CAT, puts obligations on individuals, whether acting in their official or private capacity to respect this right.

3.4.3. Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

The right to freedom from torture is further reiterated in the CEDAW. The Convention indirectly outlaws gender-based violence. In its General Recommendation 19⁷⁴ on Violence against Women, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) recommended that among the rights women are entitled to enjoy, is the right to freedom from torture.

3.4.4. Convention on Apartheid

The International Convention on the Suppression and Punishment of the Crime of Apartheid defines policies and practices of Apartheid to include the infliction upon the members of a racial group or groups of serious bodily or mental harm, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.⁷⁵

3.4.5. Convention on Migrant Workers and Members of Their Families

The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁷⁶ provides that ‘no migrant worker or other member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’⁷⁷ To protect the rights of the migrant workers and their families, the treaty establishes the Committee on the Protection of the Rights of the Migrant Workers and Members of Their Families with jurisdiction to examine periodic reports relating to the implementation of the provisions of the treaty and make comments.⁷⁸

In addition, the (UN) *Code of Conduct for Law Enforcement Officials* ensures promotion of the dignity of every human person against torture. Article 5 of the Code provides:

“No law enforcement official may inflict, instigate or tolerate any act of torture or cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a

⁷⁴ CEDAW General Recommendation 19, A/47/38 (on Violence against Women).

⁷⁵ Article 11(ii).

⁷⁶ Adopted by the General Assembly Resolution 45/158 of 18th December 1990 and entered into Force on 1st July 2003.

⁷⁷ Article 10.

⁷⁸ Article 74.

justification of torture or other cruel, inhuman or degrading treatment or punishment”

3.5 REGIONAL INSTRUMENTS PROHIBITING TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The protection of the right to freedom from torture is not confined to international level. The three regional human rights systems, the Inter-American human rights system, the European human rights system and the African human rights system have both general and specific human rights instruments that specifically contain provisions that prohibit torture, and also have torture specific-instruments.

3.5.1 Europe and America Legal Instruments on Prevention of Torture

3.5.1.1. The European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (The European Convention on Torture)

European Convention for Protection of Human Rights and Fundamental Freedoms and the European Convention of Torture and Inhuman or Degrading Treatment or Punishment, both contain provisions on torture prevention. The European Convention for the Prevention of torture is specifically dedicated to prevention of torture. Thus Article 3 of the European Convention on Human Rights and Article 4 of the Charter of Fundamental Rights of the European Union state that;

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”

The European Convention on Torture supplements the above instruments. It recognises that if torture is to be addressed, there is need to look beyond judicial means.

3.5.1.2. The American Declaration of the Rights and Duties of Man

The American Declaration on the Rights and Duties of Man provides in article xxv that ‘every individual...has a right to humane treatment during the time he (she) is in custody.’ Article xxvi entitles every person the right ‘not to receive cruel, infamous or unusual punishment’ it does not specifically mention torture but it can be implied be interpreted to include torture because all methods of torture are cruel, infamous and unusual and make an individual lose their dignity.

3.5.1.3. The American Convention on Human Rights

The Convention which was adopted in 1969 by Inter-American States provides under article 5 (2) that ‘no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.’ The Convention further establishes the Inter-American Court of Human Rights with jurisdiction to preside over ‘all cases concerning the interpretation and application of the provisions of the.. Convention that are submitted to it...’⁷⁹

3.5.1.4. The Inter-American Convention to Prevent and Punish Torture

The Inter-American Convention to Prevent and Punish Torture was adopted in 1985. The Convention defines torture to mean;

“..Any act intentionally performed whereby physical or mental pain and suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal

⁷⁹ Article 62(3).

punishment, as preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.⁸⁰

The Convention also applies to public officials and makes torture a non-derogable⁸¹ right with the defence of superior order⁸² not allowed. Article 5 recognises the vulnerability of persons under detention and provides that ‘neither the dangerous character of the detainee or prisoner, nor lack of security of the prison establishment or penitentiary shall justify torture.’

The Convention requires State Parties to;

- criminalize torture;⁸³
- take measures and train police officers and other persons responsible for the custody of persons to refrain from using torture during interrogations, detentions or arrests;⁸⁴
- promptly investigate any allegation of torture,⁸⁵
- include in their laws regulations guaranteeing suitable compensation for victims of torture as an additional measure to the right of compensation of the victim;⁸⁶
- outlaw the use of evidence obtained through the use of torture except as used against the perpetrators of torture;
- extradite persons accused or convicted of torture⁸⁷; and
- to ensure there is universal jurisdiction over the offence of torture.⁸⁸

3.5.2. African Human Rights system on the Prevention of Torture

Generally, torture and other cruel, inhuman or degrading treatment or punishment is a common occurrence in Africa. Cases of torture are reported every year by international and national human rights organisations. From humanitarian crisis in Darfur to civil wars that have ravaged parts of the continent coupled with political instability in countries like Liberia, Somali and Democratic Republic of Congo just to mention a few, torture remains a big challenge to Africa in the 21st century.

Curiously, all this is happening and yet most African countries are signatory to international human rights African Conventions Convention prohibiting Torture. The situation in Africa has rightly been summarised as follows:

80 **Article 2.**
81 **Article 5.**
82 **Article 4.**
83 **Article 6.**
84 **Article 7.**
85 **Article 8.**
86 **Article 9.**
87 **Article 11.**
88 **Article 12.**

All reports by human rights organisations point to the same thing: torture is still a major problem in African society. Few African countries are free of this practice, employed by governments to counter all dissent, and by individual groups to impose their ideas or authority on others, to demand observance of a regime, to impose a reign of terror among entire population....”⁸⁹

Whereas, torture is still a problem in Africa, there are a number of instruments prohibiting the same.

3.5.2.1. The African Charter on Human Rights

The Charter protects the right to freedom from torture under article 5 which provides that; “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

It is important to note that unlike the American Convention on Human Rights and the European Convention on Human Rights, the African Charter is not limited to the right to freedom from torture, inhuman or degrading treatment or punishment but also extends to ‘respect of the dignity inherent in a human being’. Further, the African Charter treats torture in the same category as slavery and slave trade, and categorises them as ‘forms of exploitation and degradation.’

3.5.2.2 African Charter on the Rights and Welfare of the Child

The Charter which has been ratified by 37 out of the 53 African States also prohibits torture. It requires state parties to take ‘specific legislative, administrative, social and educational measures to protect the child from all forms of torture....’⁹⁰

States Parties are also required to ensure that ‘no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment.’⁹¹

3.5.2.3 Robben Island Guidelines (RIG)

African countries realised that there was need to develop a torture-specific instrument and that the prevention of torture is dimensional, a workshop duly sanctioned by the African Commission was held. The workshop developed the above guidelines which were later adopted by African Commission at its 32nd Ordinary Session. The Commission adopted the *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa*. Thus the RIG guidelines were passed.

RIG approaches the question of torture in three ways: prohibition, prevention, and response to the need of victims. African Countries are required to adopt six measures to

⁸⁹ Statement made at an international seminar ‘African cultures and the fight against torture’ which was held from 29th July 2005 - 1st August 2005 at Dakar, Senegal available at http://www2.fiacat.org/en/article.php?id_article=41 accessed on 14th May, 2010.

⁹⁰ Article 16(1).

⁹¹ Article 17(2) (a).

prohibit torture: ratification of regional and international instruments; promotion and support of cooperation with international mechanisms; criminalisation of torture; and non refolement. RIG also requires States to combat impunity for both nationals and non-nationals who commit acts of torture; and to establish complaints and investigation procedures to which all persons can bring their allegations.

As for prevention, States are required to establish basic procedural safeguards for those deprived of their liberty (right to an independent medical examination and access to a lawyer);⁹² to establish safeguards during pre-trial process; take steps to ensure that conditions of detention comply with international standards; establish mechanisms of oversight; and train and empower law enforcement officers so that they refrain from using torture.

Last but not least RIG require States to ensure that all victims of torture and their dependents are offered appropriate medical care, have access to appropriate social and medical rehabilitation, and are provided with appropriate levels of compensation and support. In addition, families and communities which have also been affected by the torture and ill-treatment received by one of its members can also be considered as torture victims.⁹³

3.6 Conclusion

At the international and regional level, prohibition against torture holds a specific status under international human rights law. It is a non-derogable right and therefore cannot be justifiably violated under any circumstances. A state of war, a threat of war, internal political instability or other public emergency are not grounds to justify torture. Further, prohibition of torture constitutes a peremptory norm of customary international law, from which states can never derogate. All countries are therefore required to comply at all times with the unconditional prohibition of all forms of torture and ill-treatment. Kenya is no exception and therefore in enacting a legislation to prohibit torture, the proposed law must prohibit torture absolutely.

4.0 THE PROHIBITION OF TORTURE IN KENYA

Kenya has provisions in its legal systems that aim at prohibiting torture and other cruel, inhuman or degrading treatment or punishment. However, the provisions were not geared towards the domestication of CAT and therefore fall far short of the expectations and obligations imposed on state parties to CAT. The laws that prohibit torture include:

4.1. The Constitution

Article 29 of the Constitution forms the basis for the prohibition of torture and other cruel, inhuman or degrading treatment. The Article guarantees the freedom and security of the person. It provides that:

“Every person has the right to freedom and security of the person, which includes the right not to be—

⁹² Part II A (20 a-d).
⁹³ Part III (49-50 a-c).

- a) *deprived of freedom arbitrarily or without just cause;*
- b) *detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;*
- c) *subjected to any form of violence from either public or private resources;*
- d) ***subjected to torture in any manner, whether physical or psychological;***
- e) ***subjected to corporal punishment; or***
- f) ***treated or punished in a cruel, inhuman or degrading manner.***

The provisions are however not sufficient. The same merely declares a right but it is far short of protecting persons from torture and inhuman treatment. The constitutional principle does not have accompanying remedies and are thus impotent. Further the constitution does not define torture or cruel, inhuman or degrading treatment or punishment. To this end the constitution remains but a declaration of statement of intention that has not been applied.

The constitution provides for the absolute prohibition of torture and gives room for the development of an enabling legislation to give effect to the provisions of Article 29.

Further under Article 2(6) any treaty or Convention ratified by Kenya shall form part of the law of Kenya under this Constitution. It is therefore clear that the Convention against Torture has the direct effect of law and thus the need to urgently develop a legislation to give effect to the Convention.

4.2 The Police Act (Cap 84)

The Police Act also makes reference to torture. Section 14 prohibits torture by police officers. It provides that:

“...any police officer who engages in torture is guilty of a felony.”

Further Police Regulations part 11 (3) (17) makes it an offence against discipline for a police officer to unlawfully strike any person, or use any unlawful violence to any person. The provisions cited trivialises torture and related offences. It treats torture as a felony and further makes it an offence of discipline. The biggest handicap however is that the Act does not give a comprehensive definition of Torture.

The reforms being undertaken under the Constitution however provides for the definition of Torture under the Draft National Police Service Bill, 2010⁹⁴. The Bill among other things reconstitutes the National Police Service in accordance with the Constitution and aims at

⁹⁴ The Bill is still at its nascent stage and is being developed by the Police Reform Implementation Committee. The Committee has prepared the Draft Bill and has been holding consultations with stakeholders. On 21st and 22nd November 2010, the Committee held consultations with relevant parliamentary Committees and the provisions on Torture were considered not contentious. The members of parliament however had a view that the provisions were too strict.

providing for a Service that is governed by the Constitution and the Rule of Law. Clause 2 of the National Police Service Bill defines Torture and Cruel, Inhuman and Degrading Treatments in terms of the Convention. It proceeds to provide for the absolute prohibition of torture and the penalty.

4.3 The Chiefs Act (Cap 28)

The Chiefs Act does slightly better than the previous mentioned legislations. Section 20(1) (b) merely prohibits chiefs from engaging in torture while subsection (1) (c) prohibits a chief from maintaining a cell or other place of confinement of persons. Section 20(3) then prescribes the penalty by stating that any chief that subjects any person to torture, inhuman and degrading treatment is guilty of an offence and is liable to a fine of Kenya shillings 10,000 or imprisonment for a term not exceeding one month or to both imprisonment and fine.

The only challenge with the Act is that it does not define torture or inhuman and degrading treatment. It further trivialises torture through the penalty proposed.

A new section 23(A) was introduced in the Evidence Act which outlaws confessions obtained by the police. The provision however does not expressly mention torture and therefore there is need to amend the Act to expressly outlaw the admission of evidence obtained by torture.

4.4 The Kenya National Commission on Human Rights Act

Section 16 of the Act permits the Commission to visit prisons and places of detention. The powers are good but are not sufficient. The Commission generally acts as an office that takes cognisance of human rights violations in general and torture in particular.

4.5 Conclusion

Whereas Kenya is a signatory to virtually all international and regional instruments prohibiting torture, her legal regimes fall short of the requirements of the Convention. The legal regimes as it exists barely prohibit torture but do not provide sufficient punishment. Indeed the law at worst trivialises torture. It is therefore important that Kenya dully fulfil her commitment to her international commitments by enacting legislation to criminalise.

5.0 BEST PRACTICE FOR DOMESTICATING THE CONVENTION AGAINST TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT AND THE PROPOSED PREVENTION OF TORTURE BILL IN KENYA

Any legislation that gives effect to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and other international instruments that prohibit torture must provide for the following aspects;

5.1 Preventive measures;

Prevention of torture is paramount. The devastating physical and psychological impact means that its effects cannot be easily redressed. The UN Convention Against Torture require states to put in place effective legislative, administrative, judicial or other measures to prevent acts of torture on its territory. Thus a good legislation must put in place a number of preventive measures as provided for in various international instruments. The preventive measures include direct interventions, such as ensuring that no one is removed to a country where they are at risk of torture, and monitoring mechanisms for places where torture may be most likely to occur.

Secondly, it is important that the law enacted must provide for exhaustive definition of torture and cruel, inhuman or degrading treatment in the wordings of the Convention. The legislation must make it an offence for a public official acting on behalf of the government, to carry out torture, whether the torture occurs inside or outside the State. Similarly, the law must make it an offence for a person to carry out torture at the instigation of, or with the consent or acquiescence of a public official inside or outside the State. All acts of torture must be criminalized and punishable by appropriate penalty.

Finally, governments must ensure that law enforcement officials, who deal with people in custody such as prisons officers, receive training and education in relation to torture prevention.

5.2 Refoulment

Refoulment is another of the international principles regarded as preventive mechanisms in the prevention of torture. Refoulment is the prohibition against removing a person from the State where there are substantial grounds for believing that a person would be in danger of being subjected to torture. The prohibition against 'refoulment' is a core part of States obligation under the UN Convention against Torture. In the case of *Saadi v. Italy*,⁹⁵ the European Court of Human Rights insisted that the absolute prohibition on torture entails the principle of *non-refoulment*. The court emphasized that this applies irrespective of the conduct of the person the authorities wish to remove or the crime they are alleged to have committed.

5.3 Monitoring of places of detention

⁹⁵ Judgement of 28th February 2008, 24 BHRC 123, para. 127.

Monitoring is also considered a key component of preventing torture and cruel, inhuman or degrading treatment or punishment. Inspection of all places of detention is regarded as having an important deterrent effect for officials working in such institutions and as providing an opportunity for the inspecting authority to monitor conditions of detention and the general detention regime.

The Optional Protocol to the UN Convention against Torture (OPCAT) provides for a system of regular visits by independent international and national bodies to all places where persons are deprived of their liberty. The focus of the optional protocol is on prevention of torture, rather than on complaints-receiving or investigation role. OPCAT provides for the inspection of:

- Prisons;
- Police stations;
- Psychiatric institutions;
- Care institutions;
- Airports;
- Places of asylum/immigration detention; and
- Places of secret detention.

Kenya is yet to ratify OPCAT. In order to ratify, Kenya will have to designate one or more bodies as National Preventive Mechanism. The State can either assign the functions of the national preventive mechanism to an existing body, or establish an entirely new body as the national preventive mechanism. This is a mandate which already vests with the Kenya National Commission on Human Rights. However, the same need to be enhanced. The Commission must monitor this area and remain engaged to ensure that an effective national preventive mechanism is put in place in Kenya that best suits Kenya's context.

5.4 Compensation and rehabilitation of victims

The area of redress and rehabilitation of victims is another core principle in international law that national legislation must meet. Article 14 of the UN Convention Against Torture provides that the State responsible for the infliction of torture should ensure that victims of torture obtain redress and have an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. There is need to provide specialised medical and psychological support to victims of torture, promotion of their well-being, self reliance and integration in the society in order for States to fulfil the ideal expressed in

Article 14 of the Un Convention against Torture that victims of torture be provided with the means for ‘ as full rehabilitation as possible’.

5.5 Investigation

All complaints and reports of torture and other ill-treatment must be investigated promptly, impartially and effectively by a body independent of the alleged perpetrators. The scope, methods and findings of such investigations should be made public. Officials suspected of committing torture or other ill-treatment should be suspended from active duty during investigations. Complainants and other witnesses at risk should be protected under the witness protection programmes.

5.6 No use of statements extracted under torture or other ill-treatment

Governments are further required to ensure that statements and other evidence obtained through torture or other cruel, inhuman or degrading treatment or punishment are not used in any proceedings, except against a person accused of torture or other ill-treatment. Accordingly, the Evidence Act should be amended to prohibit such statements or information. Further, any person relying on such statements must be held criminally liable.

5.7 Kenya’s Prevention of Torture Bill, 2010

In an attempt to meet her obligations under international law, Kenya has prepared a draft Prevention of Torture Bill, 2010. The Bill captures all the principles required under the Convention against Torture together with other international instruments. The object of the bill is to prevent, prohibit and punish torture and other cruel, inhuman or degrading treatment or punishment and to further provide for compensation for victims of torture and ill-treatment. It makes provisions for the punishment of persons committing acts of torture and other cruel, inhuman or degrading treatment or punishment and provide for the compensation of victims of torture and for connected purposes.

The proposed legislation provides for;

- Definition of torture in the words of the convention; the said definition mirrors the internationally accepted definition and further provides for some of the acts that may amount to torture.
- It criminalises torture and inhuman, cruel or degrading treatment; the Bill further criminalises torture by making it punishable a term of imprisonment of twenty five years. It further recognises the aggravating circumstances such that if death occurred as a result of torture, the penalty is life imprisonment. The Bill further criminalises attempts, aiding and abetting and other inchoate offences related to torture and cruel, inhuman or degrading punishment or treatment.
- Provides for the trial of offences and remedies for the victim of torture; the bill provides for that offences under this Act shall be tried by the Director of Criminal Prosecution and investigated by the Directorate of Criminal Investigation. It clarifies that a person can report the commission of an alleged offence to any institution that has jurisdiction. Where the same is reported, the person receiving the complaint must reduce into writing and forward the same to the Directorate of Criminal Investigation for prompt investigation.
- It establishes the National Fund for victims of torture; the Bill establishes the Victims of torture Fund to assist in some basic start up and treatment when the victim is still pursuing their rights in court. The Fund is administered by a Board of Trustee.
- It restricts extradition and deportation of a torture victim; torture is made an extraditable offence and further provides for the principle of refoulement.
- Provides for extra-territorial jurisdiction.

The Bill takes cognisance of the fact that other aspects of prevention of torture can be handled in related legislations including the Prisons Act, the Kenya National Commission on Human Rights Act, the Penal Code and the Criminal Procedure Code among others. All these legislations are set for review in the event that the Proposed New Constitution is passed into law.

5.7.1 The Police Act and the Administrations Police Act;

Currently there are ongoing reforms in Kenya. Part of the reforms as proposed by the National Task Force on Police Reform includes enacting a single legislation to apply to both Kenya Police Force and the Administration Police. The proposed Police Service Bill, 2010 is already being drafted and is at an advanced stage. Thus in order to ensure that police are not involved in the commission of torture and other inhuman and degrading treatment, we propose that a provision be inserted in the Police Reform Bill to prohibit torture and other inhuman treatment and to expressly provide for punishment in terms of the proposed Prevention of torture Bill 2010.

The Task Force has also recommended the preparation of a Coroners Bill. Again the Bill is already being drafted. We thus propose that the Coroners Bill should deal with issues of deaths arising in police stations or such other places of detention.

5.7.2 The Independent Police Oversight Bill, 2010

The independent Police oversight Bill, 2010 is already in place and the Police Reform Implementation Committee is already holding stakeholder validation workshops on the same. The Bill establishes an independent oversight mechanism for the police. This will ensure that individuals who are subjected to torture and their cases not properly investigated can complain to the oversight body.

5.7.3 Kenya National Commission on Human Rights Act

The Kenya National Commission on Human Rights is set for revamping under the proposed constitution. The Commission is now established as a constitutional body with wider oversight mandate on matters relating to human rights. We thus propose that in the drafting of the new legislation to implement the new constitution, the Commissions powers to undertake monitoring of places of detention should be enhanced.

5.7.4 The Prisons Act;

The Proposed Constitution also makes provision for the renaming the Prisons Services to Correctional Services. It further requires that a new legislation be enacted within three years to rename and rebrand the prisons service. We thus propose that in redrafting the Prisons Act, provisions on how to handle and transfer prisoners and detainees be included as part of implementation of the Convention against Torture.

5.8 CONCLUSION

With the promulgation of the Constitution into law sooner or later, Kenya will open a new chapter in meeting her obligations under international Conventions. Accordingly, a lot of Kenya's obligation under international instruments as relates to prevention of torture can safely be met and taken care of in the on-going reform initiatives. Reforms are taking place in the police, military and all legal sectors including the judiciary. It is therefore critical that whenever new laws are be enacted; respective laws should take into account Kenya's obligation and commitment under international law.

Johnson Okello

Kenya Law Reform Commission

Annexure 2

THE PREVENTION OF TORTURE BILL, 2011

ARRANGEMENT OF CLAUSES

Clauses

PART I—PRELIMINARY

- 1 — Short title and commencement
- 2 — interpretation
- 3 — No justification for torture, etc.

PART II—CRIMES OF TORTURE AND ILL-TREATMENT

- 4 — Offence of torture.
- 5 — Offence of cruel, inhuman or degrading treatment or punishment
- 6 — Aiding and abetting, etc.
- 7 — Offence of using information obtained through torture, etc.
- 8 — Jurisdiction of court.

PART III—TRIAL OF OFFENDERS AND REMEDIES FOR VICTIMS OF TORTURE

- 9 — Procedure for reporting and registration of torture offence etc.

- 10 — Procedure of investigation, inquiry etc.
- 11 — Victim impact statement
- 12— Vulnerable witness.
- 13 — Restitution
- 14 — Civil action
- 15 — Support for and protection of victims
- 16 — Medical treatment and counseling of victim

PART IV—NATIONAL FUND FOR VICTIMS OF TORTURE

- 17 — Establishment of Trust Fund.
- 18 — Sources of Fund.
- 19 — Trustees to manage Fund.
- 20 — Reporting arrangements.

PART V —GENERAL PROVISIONS

- 21 — Transfer of detainees.
- 22 — Restriction on extradition or deportation where person is likely to be tortured.
- 23 — Extra-territorial jurisdiction
- 24 — Other penalties
- 25 — Limitation of action
- 26 — Assistance to communicate with representative

PART VI— MISCELLANEOUS

- 27 — Regulations
- 28 — Amendment of schedules
- 29 — Amendment of Cap 76.
- 30 — Amendment of Cap 77.

SCHEDULES

First schedule

THE PREVENTION OF TORTURE BILL, 2011

A BILL FOR

AN ACT of Parliament to provide for; the prevention, prohibition and punishment of acts of torture and other cruel, inhuman or degrading treatment or punishment; rehabilitation of victims of torture and other cruel, inhuman or degrading treatment or punishment; and for connected purposes.

ENACTED by the parliament of Kenya, as follows —

PART I—PRELIMINARY

Short title and commencement. 1. This Act may be cited as the Prevention of Torture Act, 2011 and shall come into operation on the date of assent.

Interpretation. 2. (1) In this Act, —

“Board” means Board of Trustees appointed in accordance to section 19;

“Commission” means the Kenya National Human Rights and Equality Commission established in accordance with Article 59 of the Constitution.

“Fund” means National Fund for Victims of Torture established by section 17 of this Act;

“Cruel, inhuman and degrading treatment or punishment” includes a deliberate and aggravated treatment or punishment not amounting to torture, inflicted by a person in authority or the

agent of the person in authority against a person under his custody, causing suffering, gross humiliation or debasement to the person;

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for human rights matters.

“Public officer” means a public officer as defined under Article 260 of the Constitution;

“torture” includes any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes of:

- (i) obtaining from the person or from a third person information or a confession;
- (ii) punishing the person for an act which that person or a third person has committed or is suspected of having committed;
- (iii) intimidating or coercing the person or a third person; or
- (iv) for any reason based on discrimination of any kind.
- (v) Without limiting the effect of paragraphs (i) to (iv), the acts constituting torture include the acts set out in the First Schedule to this Act.

Provided that torture does not include any pain or suffering arising from, inherent in or incidental to lawful sanctions; and

“victim” means the person subjected to torture or other cruel, inhuman or degrading treatment or punishment or any other person who has suffered harm as a result of such act of torture, or cruel, inhuman and degrading treatment or punishment.

No justification for torture, etc.

3. (1) Notwithstanding anything in this Act and in accordance with article 29 (d), (e) and (f) of the constitution, there is no derogation from the enjoyment of the right to freedom from torture.

(2) For the avoidance of doubt, no exceptional circumstances including—

(a) a state of war or a threat of war;

(b) internal political instability; or

(c) public emergency,

may be invoked as justification of torture.

(3) An unlawful order from a superior officer or a public authority may not be invoked as justification for torture.

PART II—CRIMES OF TORTURE AND ILL-TREATMENT

Offence of torture.

4. (1) A person who—

(a) is a public officer;

(b) is acting in an official capacity; or

(c) at the instigation or with the consent or acquiescence of a public officer;

by an act or omission intentionally inflicts severe pain or suffering, whether physical or mental, on another person for purposes of—

(a) obtaining from the other person or from a third person information or a confession;

(b) punishing the other person for an act which that person or a third person has committed or is suspected of

having committed;

(c) intimidating or coercing the other person or a third person; or

(d) for any reason based on discrimination of the other person or the third person;

commits the offence of torture.

(2) A person who commits the offence of torture is liable on conviction to a term of imprisonment not exceeding twenty five years.

(3) If as a result of the act or omission referred to under subsection (1) the other person or third person dies, the person is liable on conviction to imprisonment for life.

Offence of
cruel, inhuman
or degrading
treatment or
punishment.

5. A person who—

(a) being a public officer;

(b) is acting in an official capacity; or

(c) while acting at the instigation or with the consent or acquiescence of a public officer,

(i) commits or induces another to commit other cruel, inhuman or degrading treatment or punishment; or

(ii) cooperates in the execution of other cruel, inhuman and degrading treatment or punishment,

commits an offence and is liable on conviction to a term of imprisonment not exceeding fifteen years or a fine of shillings one million, or both.

Aiding and
abetting.

6. A person who attempts, aids, abets, counsels, procures, or conspires with another to commit an offence under this Act commits an offence and is liable upon conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding fifteen years, or both.

Offence
of using
information

7. (1) Any information, confession or admission obtained from a person by means of torture is inadmissible in evidence against that person.

obtained
through torture,
etc.

(2) A person who knowingly uses information which is obtained through torture and other cruel, inhuman or degrading treatment or punishment commits an offence and is liable on conviction to a term of imprisonment not exceeding seven years, or to a fine not exceeding five hundred thousand, shillings, or both.

(3) Notwithstanding subsections (1) and (2), information, confession or admission may be admitted against a person accused of torture as evidence that the information, confession or admission was obtained by torture.

Jurisdiction of
courts.

8. This Act shall apply to an offence of torture and other cruel, inhuman or degrading treatment or punishment where the —

(a) person to be charged is a Kenyan citizen;

(b) person to be charged is resident in Kenya;

(c) offence was committed—

(i) in any territory under the control or jurisdiction of Kenya;

(ii) on board a vessel flying the Kenyan flag registered in Kenya at the time the offence is committed;

(iii) on board an aircraft operated by the Government of Kenya, or a body in which the government of Kenya holds a controlling interest, or which is owned by a body corporate in Kenya;

(d) victim is a Kenyan citizen; or

(e) offence is committed by a person who for the time being is present in Kenya or in a territory under the control or jurisdiction of Kenya.

PART III — TRIAL OF OFFENDERS AND REMEDY FOR VICTIMS

Procedure for reporting and registration of torture, etc.

9. (1) A person alleging that an offence under this Act has been committed, may complain to the police, Commission or any other relevant institution or body having jurisdiction over the offence.

(2) Where a report under subsection (1) is made to the Commission or any other institution or body having jurisdiction over the offence, the institution must —

(a) reduce the complaint into writing; and

(b) forward the matter to the police or other investigatory authorities or Directorate of Prosecutions, for investigation.

(3) A police officer may receive complaints of offences under this Act and forward such complaints without delay to the Officer-in-charge of the police station in whose jurisdiction the offence has taken place for initiating investigations.

(3) Notwithstanding anything in the Criminal Procedure Code as to reporting and investigation of crimes, whenever a complaint of torture and other cruel, inhuman or degrading treatment or punishment is received, the person receiving the complaint, must register the complaint in writing.

Cap 75.

(4) Offences under this Act shall be investigated promptly by the Directorate of Criminal Investigation.

(5) Where allegations of torture are made, the person to investigate the alleged offence must be drawn from another police station, unit or county of the police as the case may be.

(6) Where a complaint regarding an offence under this Act is reported to a court, or raised in the process of a trial, the court shall record the complaint and order investigation within fourteen days.

Procedure of investigation, inquiry etc.
Cap 75.

10. An offence under this Act shall be investigated in accordance with the provisions of the Criminal Procedure Code.

Victim impact statement.

11. The prosecution in criminal proceedings to a trial of an offence under this Act, may adduce evidence relating to the circumstances surrounding the commission of an offence and the impact of the offence under this Act upon a victim—

(a) in order to prove whether an offence was committed; and

(b) for purposes of imposing an appropriate sentence, that relates to the extent of the harm suffered by the victim.

Vulnerable witness.

12. (1) A court, in criminal proceedings involving the alleged commission of an act of torture, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -

(a) the alleged victim in the proceedings pending before the court;

(b) a child; or

(c) a person with A mental disability.

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be

vulnerable on account of -

- (a) age;
- (b) intellectual, psychological or physical impairment;
- (c) trauma;
- (d) cultural differences;
- (e) the possibility of intimidation;
- (f) race;
- (g) religion;
- (h) language;
- (i) the relationship of the witness to any party to the proceedings;
- (j) the nature of the subject matter of the evidence; or
- (k) any other factor the court considers relevant.

(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -

- (a) allowing such witness to give evidence under the protective cover of a witness protection box;
- (b) directing that the witness shall give evidence through an intermediary;
- (c) directing that the proceedings may not take place in open court;
- (d) prohibiting the publication of the identity of the complainant or of the complainant - s family, including the publication of information that may lead to the identification of the complainant or the complainant - s family; or
- (e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may -

- (a) convey the general purport of any question to the relevant

witness;

(b) inform the court at any time that the witness is fatigued or stressed; and

(c) request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including -

(a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;

(b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

(c) the need to protect the witness's dignity and safety and protect the witness from trauma; and

(d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) The court may, on its own initiative or upon the request of the prosecution, at anytime revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

(11) Any person, including a juristic person, who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatsoever reveals the identity of a witness in contravention of a direction under this section, is guilty of an offence and liable on conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both if the person in respect of whom the publication or revelation of identity was done is under the age of eighteen years and in any other case to imprisonment for a term of not less than three years or to a fine of not less than two hundred thousand shillings or to both.

(12) Any juristic person convicted of any offence under this section shall be liable to a fine of one million shillings.

(13) An accused person in criminal proceedings involving the alleged commission of an offence under this Act who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness.

- Restitution. **13.** Where a person is convicted of an offence under this Act, the court may, on its own motion or on the application of the victim, order that person to make restitution or compensate the victim for —
- (a) the costs of medical and psychological treatment; and
 - (b) any other relief that the court may consider just.
- Civil action. **14.** Notwithstanding any order made under section 13 as to restitution or compensation, a person may institute civil proceedings for compensation.
- Support for and assistance of victims. **15.** (1) The Cabinet Secretary shall develop plans and put in place arrangements and programmes necessary for the provision of appropriate services to victims including—
- (a) psychological support;
 - (b) appropriate medical assistance;
 - (c) legal assistance or legal information on relevant judicial and administrative procedures; or
 - (d) any other necessary assistance that a victim may require.
- (2) When developing the plans and programmes under subsection (1), the Cabinet Secretary shall consider the age, gender, and the special needs of children, persons with disabilities and the personal circumstances of the victim.
- Medical treatment and counseling of victim **16.** (1) A court may, anytime at the request of a victim of torture or cruel, inhuman or degrading treatment or an intermediary, grant an order for the treatment or counselling of a victim of torture, inhuman or degrading treatment or punishment.
- (2) The expenses incurred for the treatment or professional counselling of a victim granted under this section shall be charged on the Fund established under section 17.
- (3) All treatment in respect of a treatment order or professional counselling granted under this Act shall be undertaken at a public hospital or institution or any other institution approved or gazetted by the Cabinet Secretary responsible for health matters.

(4) All medical records relating to treatment pursuant to subsection (1) shall be kept and may be used as evidence before any court with regard to any offence under this Act.

PART IV— NATIONAL FUND FOR VICTIMS OF TORTURE AND ILL-TREATMENT

Establishment of Trust Fund **17.** (1) There is established the National Assistance Fund for Victims of Torture.

(2) The Fund is established as a permanent Fund and the funds therein shall be used for the rehabilitation of victims of torture.

(3) The Fund shall be administered by a board of trustees as provided under Section 19.

Sources of the Fund **18.** (1) The sources of the fund shall be —

(a) such moneys as may be appropriated by Parliament;

(b) income generated by investments made by the trustees;

(c) fines; and

(d) any gifts, grants, donations and bequests received by the Fund for purposes of the Fund.

(2) Without limiting the generality of section 17(2), the Board may out of the Fund —

(a) pay the expenses arising out of rehabilitation to the victims in the manner referred to in section 20; or

(b) make payments or contributions for such other purposes as the Board may recommend.

Trustees to manage the Fund **19.** (1) The Fund shall be administered by a Board of Trustees which shall consist of —

(a) one person with knowledge of and ten years proven experience in financial management; and

(b) one person with knowledge of and ten years proven experience in matters relating to torture; and

- (c) a commissioner from the Commission.
- (2) The members of the Board of Trustees under subsection (1) (a) and (b) shall be appointed by the Cabinet Secretary on such terms and conditions prescribed in the instrument of appointment.
- (3) The Chairperson of the Fund shall be appointed by the Cabinet Secretary from members appointed in accordance with subsection (1) (a) and (b).
- (4) The persons appointed to the Board shall be —
 - (a) citizens of Kenya; and
 - (b) persons of integrity and who meet the requirements of chapter six of the constitution on leadership and integrity.
- (5) In selecting members to the Board, the Cabinet Secretary must—
 - (a) ensure that at least one third of the members is of either gender;
and
 - (b) take into account the professional competence of the persons to
be appointed.
- (6) The Board of Trustees shall conduct its affairs in accordance with regulations prescribed by the Board in consultation with the Cabinet Secretary and subject to the law relating to trustees.

Reporting arrangement.

- 20.** (1) The Board shall—
- (a) impose conditions as to the use to be made of any expenditure authorized by the Board and may impose any reasonable prohibitions, restrictions or requirements concerning such use or expenditure;
 - (b) cause to be kept proper books of account and other books and records in relation to the Fund as well as to all the various activities and undertakings of the Fund;
 - (c) transmit to the Auditor-General in respect of each financial year, a statement of account relating to the Fund specifying

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income to the Fund in such details as the Treasury may from time to time direct in accordance with section 6 of the Public Audit, including any investment or deposit and shall furnish such additional information as maybe deemed sufficient and necessary for the purpose of examination and audit, and every statement of account shall include details of the balance between the assets and liabilities of the Fund, and indicate the financial status of the Fund, as to the end of the financial year concerned.

PART V —GENERAL PROVISIONS

Transfer of detainees.

21. (1) A person shall not intentionally or recklessly abandon a prisoner or detainee, in any place where there are reasonable grounds to believe that the prisoner or detainee is likely to be tortured.

(2) Subsection (1) applies to any prisoner or detainee in the custody of any public official irrespective of the—

(a) citizenship of the prisoner or detainee;

(b) location in which the prisoner or detainee is being held in custody or control; or

(c) location in which or to which the transfer or release is to take place or has taken place.

Restriction on extradition or deportation where person is likely to be tortured

22. (1) Torture is an extraditable offence.

(2) A person shall not be expelled, returned or extradited to another country where there is reason to believe that such person is in danger of being subjected to torture or other cruel, inhuman or degrading treatment.

(3) When determining whether there is reason to believe that a person is likely to be tortured or in danger of being subjected to torture under sub section (2), the court shall take into account all factors including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the state seeking extradition or deportation of the person.

(4) Where a person is not extradited or deported as a consequence of the provisions of this section, that person must be tried in Kenya.

Extra-territorial jurisdiction **23.** A person may not be convicted of an offence under this Act if such a person has been convicted or acquitted in the country where that offence was committed.

General penalty. **24.** A person who commits an offence under this Act for which a penalty is not prescribed, is liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years, or to both.

Limitation of action
Cap 22. **25.** (1) Notwithstanding the provisions of the Limitation of Actions Act, an action for damages under this Act in respect of an act of torture or death caused by an act of torture may be brought at any time within the period of six years beginning with the date when it first became reasonably practicable for the person concerned to bring an action.

(2) Notwithstanding the limitation of proceedings against the Government as provided in the Government Proceedings Act, an action for damages or claim against the government or any public body in respect of an act of torture or death cause by an act of torture may be brought at any time within the period of six years beginning with the date when it first became reasonably practicable for the person concerned to bring an action.

Assistance to communicate with representative. **26.** (1) A person who is in custody in respect of an offence that is alleged to have been committed under this Act, must be assisted by the detaining authority to communicate with the nearest representative of the person or State of which he or she is a national.

(2) If the person in custody is stateless, he or she must be assisted by the detaining authority to communicate with the representative of the state where he or she usually resides.

PART V— MISCELLANEOUS

Regulations **27.** The Cabinet Secretary in consultation with the Commission may make regulations for the better carrying into effect the provisions of this Act.

Amendment of Schedules **28.** The Cabinet Secretary may by order in the Gazette and with approval of Parliament, amend the First Schedule to this Act.

Amendment to **29.** The schedule to the Extradition (Commonwealth Countries) Act is

Cap 76. amended by inserting before the matter relating to “Criminal Homicides and Similar Offences” the following matter –

‘Offences of Torture and Other Cruel, Inhuman or Degrading Treatment’

Amendment of Cap 77. **30.** The Schedule to the Extradition (Contiguous and Foreign Countries) Act is amended by inserting before the matter relating to “Criminal Homicides and Similar Offences” the following matter –

‘Offences of Torture and Other Cruel, Inhuman or Degrading Treatment’

FIRST SCHEDULE

Se

Section 2

1. Acts Constituting Torture include but are not limited to:

Physical Torture including:

- (a) Systematic beating, head banging, punching, kicking, striking with truncheons, rifle butts, jumping on the stomach;
- (b) Gunshots;
- (c) Food deprivation or forcible feeding with spoiled food, animal or human excreta or other food not normally eaten by the victim;
- (d) Electric shocks;
- (e) Cigarette burning, burning by electrical heated rods, hot oil, acid, by rubbing of pepper or other chemical substances on mucous membranes, or acids or spices;
- (f) The submersion of the victim’s head in water or water polluted with excrement, urine, vomit or blood;
- (g) Being tied or forced to assume a fixed and stressful body posi-

tion;

- (h) Rape and sexual abuse, including the insertion of foreign bodies into the sexual organs or rectum or electrical torture of the genitals;
- (i) Mutilation, such as amputation of parts of the body such as the genitalia, ears, tongue;
- (j) Dental torture or forced extraction of the teeth;
- (k) Harmful exposure to elements such as sunlight and extreme cold;
- (l) Administration of drugs to induce confession or reduce mental competence;
- (m) The use of drugs to induce extreme pain or certain symptoms of diseases;
- (n) Other forms of deliberate and aggravated cruel, inhuman or degrading pharmacological treatment or punishment; or
- (o) The use of plastic bags and other materials placed over the victim's head with the intention to asphyxiate.

Mental or psychological torture including:

- (a) Blindfolding;
- (b) Threatening the victim or his family with bodily harm, execution or other wrongful acts;
- (c) Confining a victim *incommunicado*, in secret detention place or other form of detention;
- (d) Confining the victim in a solitary cell or a cell put up in public place;
- (e) Confining the victim in a solitary cell against his or her will without prejudice to his security;

- (f) Prolonged interrogation of the victim so as to deny him normal length of sleep or rest;
- (g) Maltreating a member of the victim's family;
- (h) Witnessing the torture sessions by the victim's family or relatives;
- (i) Denial of sleep or rest;
- (j) Simulation of killing;
- (k) Making noise to the victim;
- (l) Shame infliction such as stripping the victim naked, parading the victim in a public place, shaving the head of the victim, or putting a mark on the body of the victim against his will;
- (m) Any other act that degrades.

MEMORANDUM OF OBJECTS AND REASONS

The principal object of this Bill is to implement Kenya's obligations under the UN Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment and all other relevant international conventions to which Kenya is a party. The Bill criminalises torture and other cruel, inhuman or degrading treatment. This Bill further seeks to establish the necessary institutional mechanisms for the support and assistance of victims of torture and cruel, inhuman or degrading treatment or punishment to ensure just and effective punishment of offenders convicted of offences under this Act.

PART I provides for preliminary matters.

PART II prohibits the offence of torture and other cruel, inhuman or degrading punishment or treatment. It provides for the liability of both primary and secondary

offenders and prescribes the penalty of life imprisonment or fifteen years for torture and cruel, inhuman or degrading treatment or punishment respectively.

PART III provides for the trial of offenders and remedies for victims of torture. The part makes provisions for reporting of offences of torture, procedure for investigation, restitution, civil action and support for and protection of victims.

PART IV establishes the National Fund for Victims of Torture and establishes a Board of Trustees to manage the Fund. The Fund shall be housed at the Kenya National Human Rights and Equality Commission.

PART V deals with general provisions including issues of extra-territorial jurisdiction, restriction on extradition or deportation where a person is likely to be tortured and limitation period in cases of torture.

PART VI provides for miscellaneous matters.