



**Convention against Torture
and Other Cruel, Inhuman
or Degrading Treatment
or Punishment**

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Committee against Torture

**Consideration of reports submitted by States parties
under article 19 of the Convention**

**Follow-up responses of Kenya to the concluding observations of the
Committee against Torture (CAT/C/KEN/CO/1)***

[30 November 2009]

* In accordance with the information transmitted to State parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

Introduction

1. The Government of Kenya has given serious consideration to the Committee's concluding observations on Kenya's initial report under the Convention and has held a number of stakeholder fora not only for dissemination but also to consult on the same. The culmination of these was a workshop which the Ministry of Justice, National Cohesion and Constitutional affairs held in September 2009, to draw up an action plan to implement the Committee's recommendations.

2. Though the Government will submit in due course, a comprehensive report on all the issues that the Committee raised, the Government heeds the Committee's request that Kenya provide, within one year, information on measures taken in response to the Committee's recommendations, as contained in paragraphs 8, 11, 12, 19, 21 and 25 of the concluding observations.

Response to the recommendation contained in paragraph 8 of the concluding observations (CAT/C/KEN/CO/1)

3. The Government of Kenya in response to the Committee's recommendation and public concern on the high levels of torture amongst police officers in the country has drafted a bill on torture. The crime on torture bill has been drafted by the Kenya Law Reform Commission and is currently being disseminated amongst stakeholders for further analysis and recommendations in order to gain feedback and ownership. The bill not only provides a definition of the crime of torture, which had been lacking in our legal framework, but also makes provisions for the punishment of crimes of torture and domesticates the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

4. The Law Reform Commission is also conducting a review of other related legislation like the Penal Code, The Evidence Act and the Criminal Proceedings Act to ensure conformity with the Convention against Torture. It is important to note that Section 8 of the Children's Act specifically criminalizes the use of torture on children. The Act also provides for penalties for the offence, although it does not provide for a definition of torture.

Response to the recommendation contained in paragraph 11 of the concluding observations

5. In Kenya various legislation provide for different age of maturity for children. A review of the Act under the Children's Law (Amendment) Bill is currently being undertaken to harmonize the age of criminal liability with other laws as well as to bring it more in line with international standards. The bill proposes to revise the age of criminal responsibility from the current 8 to 12 years.

Response to the recommendation contained in paragraph 12 of the concluding observations

6. While there had been some Government attempts at reforming aspects of policing in Kenya from time to time, no in-depth and comprehensive evaluation of policing in Kenya had been undertaken. Following the post-election violence witnessed in the country after the 2007 presidential elections, there was a newly recognized urgency accorded to police reform under Agenda Item IV of the National Dialogue and Reconciliation Agreement. This was further reinforced by recommendations made by the Waki Commission of inquiry into post-election violence. The Commission, in its report dated October 2008, recommended: "The Parties shall initiate urgent and comprehensive reform of the Kenya

Police and the Administration Police. Such reforms shall be undertaken by a panel of policing experts and...”

7. Against this background, the President established the National Task Force on Police Reform in May 2009. The Task Force has already presented its report to the President and on 7 October, 2009, a team was appointed by the Police Commissioner to start implementing police reforms contained in the report.

8. To enhance accountability, the Task Force has recommended the setting up of a National Policing Council. This is a new structure aimed at ensuring that the police services work harmoniously and that they are effective, efficient and accountable. The National Policing Council will also ensure that unhealthy competition between the Kenya Police Service and the Administration Police Service does not occur and that resources and facilities are shared.

9. The National Policing Council will provide the structure for the heads of the two police services to enable the development of the National Policing Plan. Among its other functions will be:

- Formulating and determining policing policy;
- Reviewing, rationalizing and coordinating the budgeting and National Policing Plans;
- Setting national priorities, objectives and targets for police performance;
- Setting and enforcing unified policing standards across the country;
- Providing strategic management and support;
- Ensuring policing accountability at all level;
- Financial management and oversight;
- Coordinating procurement activities; and
- Appointing and managing a secretariat to execute its mandate.

10. Complaints against police conduct, ranging from corruption, arbitrariness, harassment of members of public, lack of political neutrality, engaging in criminal activity, abuse of power and the use of excessive force including extra judicial executions, have in the past not been dealt with exhaustively. This lack of transparency and accountability has been one of the main contributing factors leading to the low levels of trust in the police, particularly the Kenya Police. The report recommends the establishment of a new institution, composed of civilians that will focus on monitoring and investigating police conduct, namely an Independent Policing Oversight Authority. The report recommended that this should be established under the Constitution and will provide clear legislative powers to enable the body to execute its mandate. It will therefore be protected from political, executive and police interference.

Corruption, Code of Ethics and Conflicts of Interests

11. Corruption amongst junior and senior police officers has been rife and has had a debilitating impact on policing and on public trust. Some recommendations in the Task Force report aim at tightening controls and supervision mechanisms. One important means of doing so is for the police to adopt a set of key values and principles and to strictly adhere to them in their policing work.

12. A Code of Ethics is therefore recommended to, among other things, address conflict of interests that police officers face. The report recommends that, for example, direct or

indirect involvement by police officers in certain business activities, such as operating *matatus* (minibuses) and other public transport enterprises, be prohibited.

13. The Traffic Department of the police seems to have been particularly prone to corruption. Many complaints to the Task Force related to the numerous roadblocks in Kenya. Many of these roadblocks have virtually become permanent features used by traffic police officers to extort money from motorists and members of the public. In its Interim report the Task Force recommended the removal of all roadblocks unless they serve legitimate operational policing purposes. Since submitting the Interim Report, the number of police roadblocks has been substantially reduced but the Task Force has reiterated that roadblocks should be laid for a particular legitimate policing purpose only and removed once that purpose is achieved.

14. The Task Force also addressed itself to the unethical practices that Kenyans have come to associate with the recruitment process in both the Kenya Police and Administration Police. These exercises have often been riddled with corruption. An important new structure that is recommended, namely the Police Service Commission, will have an important role in adding professionalism and transparency to the recruitment process.

Response to the recommendation contained in paragraph 19 of the concluding observations

15. While Kenya has experienced political violence since the re-introduction of multiparty politics in early 1990s, the disputed elections of 2007 precipitated an unprecedented crisis and violence that left about 1,500 Kenyans dead and hundreds of thousands internally displaced. This brought to the fore the weaknesses in many legal and institutional frameworks governing elections in Kenya as well as the need to address long-standing grievances. The setting up of the transitional justice mechanisms were necessitated by this state of affairs. Specifically, having investigated into the actions and omissions of the State Security Agencies, the Commission on Post Election Violence made recommendations for a special tribunal to seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya.

16. The report of the Commission of Inquiry into Post-Election Violence (CIPEV), released on 15 October 2008, recommended, among other things: the creation of a special tribunal for Kenya to seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, the investigation of conduct of State security agencies in their handling of it, and on measures to eradicate impunity.

17. It is important to note that the CIPEV recommended that since there were allegations against the law enforcement officers, it was desirable that other investigative mechanisms be put in place. The investigations were then halted awaiting the mechanisms.

18. The Special Tribunal Bill tabled in Parliament to set up a legal system to try perpetrators for the post-election violence was not accepted by parliament. The government is now undertaking radical reforms in the judiciary, the police force and the Attorney – General’s Office to enable the institutions deal effectively with cases of post- election violence.

19. At the time of submitting these responses, the Government has agreed in principle to cooperate with The International Criminal Court as efforts to establish a local mechanism to try perpetrators continue. The International Crimes Act which also domesticates the Rome Statute will largely facilitate this process. In the meantime, apart from Commission of Inquiry on Post-election Violence (CIPEV) (the Waki Commission) the Government has also put in place the following:

An Independent Review Electoral Commission (IREC)

20. This Commission was soon after the post-election violence that followed the 2007 elections to come up with recommendations to reform the electoral process in Kenya. It gave recommendations on the establishment of the two new Commissions: the Interim Independent Electoral Commission (IIEC) and the Interim Independent Boundary Review Commission (IIBRC). The IIEC is overseeing electoral reforms and in particular the creation of a new voter register, development of modern system for collection, collation, and transmission and tallying of electoral data, promotion of voter education and efficient conduct of elections and referenda. The IIBRC is in the process of establishing, reviewing and drawing up new administrative and constituency boundaries. It will also make recommendations for delimitation of constituencies and local authorities' electoral units and recommend the optimal number of constituencies on the basis of equality of votes.

A Truth, Justice, and Reconciliation Commission (TJRC)

21. The Act establishing this Commission recognizes that since independence, there has occurred in Kenya gross violations of human rights, abuse of power and misuse of public office and that some of these cannot be properly addressed by the already existing institutions due to procedural and other hindrances. The Commission has the mandate to address the past in order to prepare for the future by building a democratic society based on the rule of law; giving the people a fresh start by according justice to the victims of injustice by adequately addressing past violations and awarding compensation for the same.

National Cohesion and Integration Commission

22. This Commission is an instrument for the reform of the State and for creating a more perfect, peaceful and cohesive nation. It has the mandate to identify and analyse factors inhibiting the attainment of harmonious relations between ethnic communities, particularly barriers to the participation of any ethnic community in social, economic, commercial, financial, cultural and political endeavours and make recommendations on how to reconcile the nation by promoting arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace.

Response to the recommendation contained in paragraph 21 of the concluding observations

Background

23. The security operation in Mt. Elgon was mounted in order to eliminate security threats posed by the Sabaot Land Defence Force (SLDF) a notorious and ruthless gang which was using torture and murder on innocent people who did not support their course. At the height of the violence in March 2008 SLDF activities had led to murder of 400 innocent people, displacement of 30,000 people and closure of 16 schools.

24. Police teaming up with the military were able to stop the mayhem. During the security operation, about 1200 suspects were arrested and most of them arraigned in court. The arrests were effected by security agents, members of the public and some voluntarily surrendered to the authorities. Some are believed to have fled to Uganda and some are still at large. However, there were allegations of torture of innocent people by security forces.

25. On 22 May, 2008, the Commissioner of Police appointed a team whose terms of reference were:

- To investigate all allegations of human rights abuses in Mt Elgon;
- To identify the perpetrators;
- To make appropriate recommendations;
- Make such other recommendations necessary to ensure that such abuses are not repeated in future.

26. The team analysed the various reports which had been compiled by the Independent Medical Legal Unit (IMLU), Western Kenya Human rights Watch (WKHRW), the International Committee of the Red Cross (ICRC) and the Kenya National Commission on Human Rights (KNCHR). The IMLU and the WKHRW were found to have documented overly generalized allegations of the purported victims and did not have the victims' particulars to facilitate further inquiries.

27. The KNCHR and the ICRC reports documented victims of alleged torture which were inquired into and most of them could not be traced even after locating their homes. According to the investigation team, the reports therefore did not conclusively establish that the security officers did torture victims as claimed. This is given credence by the findings of the United Nations Special Rapporteur on extrajudicial, arbitrary or summary executions, Mr. Philip Alston, on his Mission to Kenya from 16-25 February 2009 who noted instances where the military had been falsely accused of committing atrocities, for example in the case of one Mr. Mokoit, where the individual concerned voluntarily retracted his version of the story.

28. There were, however, confirmed cases of torture of SLDF members and sympathizers by members of the public who engaged in revenge attacks. Apart from that, SLDF torture methods have been well documented, the torture included chopping off of ears, fingers and other body parts with many victims succumbing to the serious injuries inflicted on them.

29. It is important to note that, as stated above, the CIPEV recommended that since there were allegations against the law enforcement officers during this operation, it was desirable that other investigative mechanisms be put in place apart from those conducted by the police themselves. The investigations were then halted awaiting the mechanisms that would deal exhaustively with violence including that which was experienced after the presidential elections.

30. In the meantime, the Government continues to resettle those persons who were displaced in the Mt. Elgon region. A Task Force on the resettlement of beneficiaries of Chepyuk phase III was gazetted in December 2008 and officially inaugurated on 13 January 2009. Terms of reference for the Task Force are:

- To coordinate and oversee the resettlement in Chepyuk Phase III Settlement Scheme in Mt. Elgon
- Identify and ascertain the list of 1732 beneficiaries and cause the resettlement in their respective duly allocated parcels of land
- To advise the Minister on availability of land for purchase by the Government to settle the remaining 352 unsettled persons
- Concurrently liaise with the Ministry of Forestry and Wildlife on the degazettement of Chepyuk Phase I and II
- To continuously sensitize and engage the local communities on the progress of the programme

- Receive memoranda and expert opinion, evaluate, monitor hear and determine memoranda, complaints and concerns of the 1,732 beneficiaries, the 352 unsettled persons and any other stakeholders.
- The membership included private citizens and representatives of Permanent Secretaries of the Ministries of:
 - Education;
 - Forestry and Wildlife;
 - Health and Sanitation;
 - Finance;
 - Provincial Administration & Internal Security; and
 - The Ministry of Lands was the Secretary to the Task force.
- It was chaired by a private citizen.

31. The term of the Task Force expired in April 2009 when its chairman was appointed to the Independent Boundaries Commission. A new Task Force was constituted and gazetted on 30 October 2009 under the chairmanship of Mr. Solomon Ouko. The Task Force has been given a timeframe of 60 days beginning 1 November 2009 within which to complete its work.

Response to the recommendation contained in paragraph 25 of the concluding observations

32. As had been reported in the initial report, any person who has suffered damage as a result of any injury sustained in circumstances in which torture is alleged, may, in addition to filing a criminal case, institute a civil suit for compensation. This is guaranteed by the Constitution of Kenya. Where a victim of torture wishes to sue the State, the *Statute of Limitations of Actions Act, Chapter 22 Laws of Kenya in section 4* provides that the period for instituting such a suit is six years. Currently, there are 24 ongoing cases and 58 others filed by detention and torture victims seeking justice.

33. In 2008, the High Court awarded Sh1.5 million each to the following seven victims who had sought redress four years ago for torture, false imprisonment, and malicious prosecution.

- Rumba Kinuthia
- Adrew Mureithi Ndirangu
- Njuguna Mutahi
- Margaret Wangui Gachau
- Alex Okoth Ondewe
- Naftal Karanja Wandui
- Joseph Gichuki Karanja

34. In September, 2009, the Attorney-General Amos Wako directed the Internal Security permanent secretary to pay the amount for the seven, whose cases were had already been determined. The payments are at the final stages of processing and the victims will receive their money soon. The Government has already paid Sh. 12 million to a Kisumu doctor. The family of another victim from Kisumu also received Ksh. 4.6 million resulting from a court verdict in 2006.

35. Another one is *Wanyiri Kihoro v. Attorney General*: The brief background to this case is that the appellant, a lawyer was arrested without a warrant and held in detention for more than the constitutional days without being charged with any offence. The appellant alleged that during this time, he was tortured and subjected to inhuman and degrading treatment by the police thus suffering great pain. He brought an action in the High Court seeking a declaration that his fundamental rights under SS. 72, 74 and 81 of the Constitution of Kenya had been contravened and aggravated compensation. The Court of appeal awarded Ksh. 400, 000 with interests and the costs of the suit. It is envisaged that, once the State party is able to define torture through an Act of Parliament, it will be easy for the courts to determine such cases.
