



Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment

KENYA

Alternative NGO report to the UN Committee against Torture (CAT)

Prepared by Physicians for Human Rights (PHR)

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About Physicians for Human Rights

Physicians for Human Rights (PHR) is an independent, non-profit organization that uses medicine and science to stop mass atrocities and severe human rights violations against individuals. We use our investigations and expertise to advocate for the:

- Prevention of individual or small scale acts of violence from becoming mass atrocities
- Protection of internationally-guaranteed rights of individuals and civilian populations
- Prosecution of those who violate human rights

PHR was founded in 1986 on the idea that health professionals, with their specialized skills, ethical duties, and credible voices, are uniquely positioned to stop human rights violations. Today, our expertise is sought by local human rights organizations, governments, the United Nations, international courts, and regional groups like the African Union and the European Union. The power of our investigations allows us to work with others to raise awareness and press for change on the most severe human rights violations of the day.

PHR's Role in Preventing Torture through Training and Documentation

PHR has been instrumental in investigating allegations of torture, calling on states to implement effective measures to protect people from torture, training medical and legal professionals on international standards of investigation for torture, and assisting asylum seekers in the U.S. by connecting them with medical professionals trained to document the signs of torture and ill treatment.

Since 1999, PHR has played a leading role in training medical and legal professionals on implementation of the Istanbul Protocol, a UN document outlining the international standards for effective legal and medical evaluations conducted to investigate allegations of torture and ill treatment. Armed with hard evidence of torture and its effects, survivors of torture are able to help end the cycle of impunity that prevents torturers from being brought to justice and that prevents survivors from healing. PHR's training ensures that medical professionals understand the relevant laws in their home countries as well as common torture methods and their physical and psychological consequences. PHR then teaches these practitioners how to conduct the clinical interview and exam in order to document physical and psychological evidence and adhere to proper ethical guidelines. PHR has trained hundreds of health professionals in fourteen countries on the Istanbul Protocol standards.

In the U.S., PHR-trained clinicians have been able to assist asylum seekers fleeing torture and persecution in their home countries. PHR's Asylum Network is a network of nearly 500 health professionals who offer *pro bono* forensic physical and psychological evaluations to document evidence of torture and persecution for

asylum seekers. The Asylum Network has provided specialized training and expertise in recognizing and documenting the trauma of abuse, discrimination, and oppression using the Istanbul Protocol standards. The medical-legal affidavits the clinicians produce for courts on behalf of survivors are frequently the determining factor in judges' decisions to grant asylum or other immigration relief to those fleeing persecution.

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This report focuses on the torture and ill treatment of women in Kenya and the corresponding acquiescence of the government. The report highlights the government's failure to protect its citizens from torture at the hands of the mungiki, gangs who terrorize and assault Kenyans with flagrant impunity. Over the past five years, PHR's medical experts have conducted more than 25 forensic medical evaluations in support of asylum applications in the U.S. for people persecuted in Kenya. The resulting affidavits document evidence of torture, as defined under CAT, committed either by government officials or with their acquiescence.

Physicians for Human Rights (PHR) urges the authorities of Kenya to:

- Amend the Criminal Procedure Code and Penal Code to specifically mention and forbid torture and cruel, inhuman, or degrading treatment, including a definition of torture consistent with Article 1 of CAT.
- Undertake more comprehensive efforts to train medical personnel and law enforcement personnel on Istanbul Protocol standards, obtaining assistance from international experts as necessary.
- Enact and vigorously enforce legislation to provide protection to victims of torture in a domestic environment as well as victims of gang torture.
- Ensure victim protection in bringing action against those who perform FGM.
- Provide incentives to ensure that law enforcement officers vigorously investigate allegations of torture.

Background

Since Kenya's last report to the Committee against Torture ("Committee") in 2008, some progress has been made legislatively to address gaps in its obligations under CAT as identified by the Committee. In 2010, Kenya ratified a new Constitution, which prohibits psychological torture and mentions constitutional protections from torture and other cruel, inhuman, or degrading treatment or punishment.

However, Kenya has not made significant progress in meeting its obligations under CAT with respect to other forms of violence, especially in ending impunity for torture and violence inflicted by the mungiki throughout the country and for perpetrators of domestic violence. Although there are laws that prohibit violence inflicted by the hands of nonstate actors (such as the mungiki), there are no

guidelines that specifically address torture. The most serious human rights problems in Kenya are abuse by the security forces, including unlawful killings, torture, rape, and use of excessive force.¹

Further, even if there are laws under which torturers may be prosecuted, the Kenyan government is notoriously slow to investigate or pursue such crimes. In 2012, government military agencies have been identified as perpetrating mass violence and rape against thousands of citizens. The attacks were aimed at villages allegedly involved in attacks on the military. NGOs from inside and outside of Kenya have called upon the government to investigate this torture and violence, though no investigation or prosecutions have yet been initiated.²

Domestic violence is a major problem in Kenya as well. Despite laws that allow victims to pursue justice against their attackers, police frequently choose not to investigate cases even when victims report the abuse, as police consider it a purely “family matter.” There are no laws specifically preventing the type of torture experienced in a domestic environment.

Female genital mutilation (FGM), although officially outlawed, has continued to pose a serious threat against the health and welfare of thousands of Kenyan girls and women (*see* The Story of Ms. G, below). The mungiki threaten and perform circumcision on women without their consent as a form of torture, terror, and control, claiming a return to more traditional Kenyan values. The government has been unable and/or unwilling to stop the mungiki’s violence, which is often disproportionately aimed at women.

Finally, Kenya has also failed to adequately address the violence that often follows elections in the country. After the 2007 elections, rampant violence left 1,150 people dead and more than 350,000 displaced between December 2007 and February 2008. The government has thus far failed to thoroughly and expeditiously investigate the violence and provide redress to the victims. In fact, ongoing torture and cruel, inhuman, and degrading treatment has resulted for those who have attempted to investigate the violence (*see* The Story of Mr. P, below).

Compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment Kenya

Article 1 – Definition of Torture

Although Kenya’s Constitution, revised in 2010, provides for the right to be free from torture (including both physical and psychological torture) and cruel, inhuman, or degrading treatment, the Constitution does not provide a definition of

¹ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: KENYA, *available at* <http://www.state.gov/documents/organization/186418.pdf>.

² HUMAN RIGHTS WATCH, “Kenya: End Security Force Reprisals in North” (Nov. 22, 2012), <http://www.hrw.org/news/2012/11/22/kenya-end-security-force-reprisals-north>.

torture. Perhaps more worrisome is the fact that neither the Penal Code nor the Criminal Procedure Code (both revised in 2009) mention torture at all, let alone provide a definition of what treatment constitutes torture or inhuman, cruel, or degrading treatment.³ Acts of torture or cruel, inhuman, or degrading treatment may only be considered per laws addressing assault, assault causing bodily harm, rape, sexual assault, murder, and attempted murder in the Penal Code, the Criminal Procedure Code, and the Police Act. Although the new Constitution specifically prohibits psychological torture (as compared to the previous Constitution which did not), there are still no working definitions of what constitutes psychological torture for purposes of prosecution or other law enforcement actions.

A positive development with respect to international law is that Kenya's new Constitution incorporates international law into domestic law, stating in Article 2 § 6 that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution."

However, despite the incorporation of international law into Kenyan law per the new Constitution, there is still no recognition under the laws that domestic violence can amount to torture and should be prosecuted as such. Therefore, individuals in abusive relationships must face not only the indifference of the police in investigating claims of violence within the home but also a justice system that is equipped only to consider that type of violence (no matter how extreme or permanently damaging) as merely assault.

The Story of Ms. K: Domestic Violence

The following narrative is excerpted from a medical-legal affidavit submitted in support of an asylum application based on allegations of torture in Kenya. It was prepared following a forensic evaluation conducted by a physician in the winter of 2010. Key details have been changed or omitted in order to shield the identity of the asylum applicant.

³ CONSTITUTION, art. 29 (2010) (Kenya); The Penal Code, (2009) Cap. 63 (Kenya); The Criminal Procedure Code, (2009) Cap. 75 (Kenya).

Ms. K met and married her husband in the early 1990s, eventually having four children together. From the time of her first child's birth, however, her husband's behavior became increasingly aggressive, violent, and threatening. Until Ms. K managed to get to the United States in early 2009, she suffered repeated regular monthly beatings all over her body, experiencing terror and extreme pain. She was punched, kicked, and sometimes beaten with a stick. Her husband whipped her with the thin steel belt of a radial tire, causing her to bleed profusely and requiring medical care. She was burned with boiling water, forced to have three abortions, and was repeatedly threatened with death. She was unable to report the abuse to the police, fearing that no action would be taken and that she would be seriously injured for pursuing action against her husband. He was well connected to influential people and served as a member of the Police Reserves. Ms. K's in-laws and sisters housed her when she was forced to seek protection but their efforts to diffuse her husband's violence were in vain. When Ms. K sought to attend a niece's graduation in the U.S., he forbade the trip and tracked her to the Embassy. She was forced into hiding, but she was eventually able to board the plane to the U.S. Her family members have told Ms. K that if she returns to Kenya, her husband will kill her. In the meantime, she continues to suffer from the severe physical and psychological abuse and trauma inflicted upon her by her husband.

Article 2 – Legislative, Administrative, and Judicial Measures to Prevent Torture

Article 2 requires states parties to implement “effective” legislative, administrative, judicial, or other measures to prevent torture. The operative word in this article is “effective.” For example, although the Kenyan government outlawed the practice of FGM in 2011⁴, no cases have yet been brought under the law. The practice continues unabated, and those who perform the circumcisions are free to do so with impunity. Traditional FGM is not stymied by the legislation, nor are attacks by the mungiki performing FGM on women against their will. The criminal gang operates with impunity, committing sexual violence and torture despite “paper” measures to prevent torture and inhuman, cruel, or degrading treatment.

The Story of Ms. G: Mungiki Brutality and Impunity

The following narrative is excerpted from a medical-legal affidavit submitted in support of an asylum application based on allegations of torture in Kenya. It was prepared following a forensic evaluation conducted by a psychiatrist in the spring of 2011. Key details have been changed or omitted in order to shield the identity of the asylum applicant.

⁴ Prohibition of Female Genital Mutilation Act, No. 32, (2011), Kenya Law Reports, http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/ProhibitionofFemaleGenitalMutilationAct_No32of2011.pdf.

In 2009, Ms. G was living alone in an area of Kenya outside of Nairobi. She had recently moved there to avoid the gang harassment and violence she experienced as she attempted to operate a Christian ministry dedicated to helping women and children. The gang violence to which she was subjected in her new neighborhood was horrific. In October 2009, she was shot in the shoulder with an arrow. One week later, she was attacked by a group of mungiki armed with knives and threatening to kill to her. She was held down and forcibly circumcised with a razor blade. Her screams brought the neighbors' attention, and the gang ran off. Ms. G did not report the attack to the police as any of her previous reports of attacks or threats went unheeded and uninvestigated by local police. When Ms. G's son, with whom she shared details of her attack, was killed after being beaten and thrown into a well, she borrowed money to buy a plane ticket to the U.S. She has been diagnosed with dissociate disorder and post-traumatic stress disorder, likely requiring years of psychotherapy to deal with the trauma of the attacks she experienced in Kenya.

Article 10 – Information and Training on the Prohibition of Torture

Article 10 requires that law enforcement personnel, medical personnel, and public officials involved in the custody, interrogation, or treatment of any person subjected to arrest, detention, or imprisonment be trained on the prohibition against torture. The new Kenyan Constitution requires that police staff be trained “to respect human rights and fundamental freedoms and dignity.”⁵ In addition to this constitutional provision, other efforts such as the passage of the National Police Service Commission Act (2011) and the National Police Service Act (2011) show that Kenya is making efforts to address the role of law enforcement in perpetuating torture. The National Police Commission Act established the creation of a commission responsible for a variety of measures and oversight, including oversight of police training to enhance the capacity of police officers to deliver high-quality policing with respect for human rights.⁶

Although this legislation is certainly progress in line with the requirements of Article 10, there has been little action made towards achieving this goal. Whether it is a lack of political will to ensure that the training is provided or a lack of resources to ensure adequate, comprehensive training, the fact remains that law enforcement personnel in Kenya are in need of instruction as to international standards with respect to preventing torture.

Ill-trained police officers coupled with prevalent corruption means that torture at the hands of law enforcement officials can continue with impunity. Although Article

⁵ CONSTITUTION, art. 244 (2010) (Kenya);

⁶ Amnesty Int'l, <http://www.amnesty.org/en/library/asset/AFR32/001/2013/en/ceb38da9-d2c7-43f2-b270-fb8d52f5539e/afr320012013en.html>.

10 does not specifically require training in the Istanbul Protocol, such training is necessary to ensure that law enforcement officers not only recognize what torture is but can understand their obligations under international agreements in preventing and investigating torture.

Article 13 – Right to Complaint and Investigation, Protection of Complainants

Article 13 requires states parties to ensure that people who alleging torture must have their cases promptly and impartially examined by competent authorities. The article also requires protection of the complainant from ill-treatment or intimidation as a result of making the complaint. In Kenya, as mentioned above, authorities routinely fail to investigate or follow-up on allegations of torture and/or ill-treatment. In particular, authorities are reluctant to investigate allegations of torture at the hands of government military bodies or torture that occurs in the domestic environment.

The failure to investigate these allegations is further compounded by corruption within law enforcement agencies. Individuals who complain of having suffered bodily harm are required to obtain a P3 Form at police stations. This form, which is to be provided free of charge at all police stations, is used to request and access a medical evaluation determining the nature and extent of any injury. However, there are reports that police stations illegally charge people for obtaining the forms, in fact excluding poor, marginalized populations from exercising their rights to report torture and to an investigation.

The Story of Mr. P: Unchecked Gang Violence

The following narrative is excerpted from a medical-legal affidavit submitted in support of an asylum application based on allegations of torture in Kenya. It was prepared following a forensic evaluation conducted by a psychiatrist in the summer of 2009. Key details have been changed or omitted in order to shield the identity of the asylum applicant.

Mr. P became affiliated with a human rights organization in Kenya focusing on providing support to people living with AIDS and to poor people. Following post-election violence in 2007, the army arrived in Mt. Elgon, indiscriminately killing people, bombing the land, and torturing people for information about an armed group that had controlled the area. Mr. P's organization interviewed people living in the area and created a report about the truth of the national army's actions. The government denied the report, creating tension and insecurity for the organization. Mr. P at that time also became involved in researching the mungiki who roamed uncontrolled, killing people and intimidating rivals for not adhering to what they believed were traditional practices. The government allegedly created a secret death squad to kill members of the mungiki on sight, which Mr. P's organization also investigated and wrote about. One day in 2009, Mr. P received two threatening text messages, and when he went to the police station to seek help in investigating who was responsible for sending the messages, he himself was taken for questioning about his actions with his organization. He was beaten, burned with cigarettes, and had his scrotum pulled and torn with pliers and wires. He was tortured for over an hour then left alone and told he would be killed if he did not produce copies of videotapes related to his organization's investigation of the secret police. He was then placed on the floor of an SUV, driven some distance, and then thrown into a ditch. He managed to seek help from passerby who took him to a doctor to suture his wounds. Mr. P did not leave his house for five days out of fear and then managed to board a plane to the U.S. It took him three months of recuperating to recover from his extensive injuries – in the meantime, his wife in Kenya was threatened with rape and circumcision if she did not tell the police where Mr. P was. While Mr. P awaits determination on his application for asylum, he suffers from chronic-type post-traumatic stress disorder as well as major depressive episodes. He worries for his family, but knows if he returns to Kenya, the government will be unable to protect him from further torture and possible death.

Conclusion

Although Kenya has made some important strides to bring its laws and practices in line with its obligations under CAT, it still has much to do with respect to ending impunity for torturers. The legislation that has been passed in the past three years is a step in the right direction, but lack of political that hampers the effective implementation and follow-through with the mandates of the legislation. Torture continues to plague the people of Kenya, including torture at the hands of state actors and with the acquiescence of the government. The laws must protect individual rights and must also adequately punish torturers in order to end the cycle of impunity.

Physicians for Human Rights (PHR) urges the authorities of Kenya to:

- Amend the Criminal Procedure Code and Penal Code to specifically mention and forbid torture and cruel, inhuman, or degrading treatment, including a definition of torture consistent with Article 1 of CAT.

- Undertake more comprehensive efforts to train medical personnel and law enforcement personnel on Istanbul Protocol standards, obtaining assistance from international experts as necessary.
- Enact and vigorously enforce legislation to provide protection to victims of torture in a domestic environment as well as victims of gang torture.
- Ensure victim protection in bringing action against those who perform FGM.
- Provide incentives to ensure that law enforcement officers vigorously investigate allegations of torture.

PHR applauds the efforts of the Committee against Torture to assist states parties in eliminating torture and ill treatment and ending the cycle of impunity for torturers. It is hoped that this report will assist the Committee in drafting further recommendations to Kenya to implement in order to end torture.