

Prepared by



# **Torture and related Violations in Kenya**

## **ALTERNATIVE REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE**

**41<sup>st</sup> Session  
3<sup>rd</sup> to 21<sup>st</sup> November 2008**

### **In collaboration with:**

Amnesty International – Kenya, Coalition on Violence against Women - Kenya, COVAW (K), Centre against Torture, Centre for Human Rights and Civic Education (CHRCE), Children's Legal Action Network (CLAN), Horn of Africa Development Initiative (HODI-Africa), The Kenya Section of the International Commission of Jurists (ICJ Kenya), The Kenya NGO Convention on the Rights of the Child Committee (NGO CRC Committee, Kenya Counselors Association (KCA), Kenya Human Rights Commission (KHRC), Law Society of Kenya (LSK), Legal Resources Foundation Trust (LRF), Muslims for Human Rights (MUHURI), Muslim Human Rights Forum (MHRF), Mwatikho Torture Survivors Organization (MATESO), People Against Torture (PAT), Release Political Prisoners Trust (RPP), Volunteers for Legal Aid Services (VOLASE); and technical input by World Organization against Torture (OMCT)

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The content and views expressed in this report are solely those of the NGO and its partners mentioned herein.

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## **B. Acronyms**

Art	Article
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
CSO	Civil Society Organization
GJLOS	Governance Justice Law and Order Sector Reforms
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Cultural & Social Rights
IOM	International Organization of Migration
IPPG	Inter-parliament Parties Group
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
KWS	Kenya Wildlife Service
MOJCA	Ministry of Justice and Constitutional Affairs
NO	Number
NGO	Non-Governmental Organization
sec.	Section
UN	United Nations

## **General introduction**

1. The Kenyan Government has finally presented the initial report under Article 19 to the Committee against Torture. The initial report was due in 1998 but was submitted on 16<sup>th</sup> August 2007 almost nine years late. Since ratification by Kenya the situation has not drastically changed, as this report reveals, because many of the conditions that facilitate the persistence of torture and other ill-treatment continue to be in place, without substantial changes.
2. The State has taken some action but has done so without a systematic plan that conforms to the obligations established by the CAT Recommendations of the United Nations Special Rapporteur's on Torture **E/CN.4/2000/9/Add.4** (9 March 2000) and the concluding observations by the Human Rights Committee on **CCPR/CO/83/KEN** (24<sup>th</sup> March 2006).
3. After ratifying the CAT, Kenya was bound by the obligation to submit an initial report on the implementation of the Convention, a year after ratifying. The initial report dated the 6<sup>th</sup> of June, 2007 has now been submitted to the Committee against Torture for consideration. Through the report states that the delay has been due to "political, social and economic problems" in the country, no plausible reason has been given for the delay in submitting the report.
4. This is evidenced by a series of recommendations that continue to await concrete action on the part of the Kenya Government and furthermore that the initial report does not contain concrete measures undertaken towards implementations of its obligations.
5. While the state party alludes to having had wide consultations with civil society in the preparation of its report, only IMLU was requested for statistical data and no validation exercise was undertaken on the final content of the state report by civil society.

### **Principle areas of concern For the Alternate Report**

6. Weak Legislative framework and government of Kenya's failure to fully domesticate CAT and failure to define 'torture' under Kenyan law, Persistent and pervasive use of excessive force by police, causing severe mental and physical injury up to and including death;
7. Culture of impunity exhibited by persistent and pervasive use of excessive force by security forces when dealing with civilian population
8. The government's failure to
  - a. Collect data on a national level in order to document, monitor and prevent violations of the Convention,
  - b. provide for thorough and impartial investigation of allegations of violations,
  - c. Punish officers who commit acts of torture or cruel, inhuman and degrading treatment, and to
  - d. Provide for adequate remedies and redress including full rehabilitation of survivors and families of victims.
9. In its report to the Committee, the Government of Kenya concedes that complaints of police violence and abuse continue to be made, but states *"acts of torture can and have been prosecuted under crimes such as assault, assault occasioning bodily harm, assault occasioning grievous bodily harm, rape, sexual assault, murder, attempted murder, etc, which are provided for under the Penal Code, the Police Act and other laws such as the Children Act".*<sup>1</sup>
10. Independent Medico – Legal Unit (IMLU) has in consultation with Organizations described herein below, prepared this report for submission to the Committee against Torture to assist the committee during the consideration of the report submitted by the Kenya Government. It is expected that this report will increase the ability of the committee to

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<sup>1</sup> Paragraph 32 State party report

competently evaluate the Government of Kenya's performance on the implementation of CAT.

### **Report on the Authors**

11. **IMLU** founded in 1992, is a registered non-governmental organization that seeks to promote the rights of torture survivors and victims and protect Kenyans from all forms of State perpetrated torture by advocating for legal and policy reforms, through forensic medical documentation, medical and psychological rehabilitation, advocacy, research, public interest litigation and legislative and policy reforms.
12. **Amnesty International – Kenya** is a section of Amnesty International which is a worldwide movement of people who campaign for internationally recognized human rights for all.
13. **Coalition on Violence against Women - Kenya, COVAW (K)**, founded in 1995, is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women
14. **Centre against Torture** is an organization that conducts advocacy initiatives against torture and other cruel, inhumane or degrading treatment or punishment. It is based in Eldoret in Rift Valley Province of Kenya.
15. **Centre for Human Rights and Civic Education (CHRCE)** is a registered non-political, non-profit making human rights organization founded in 1998 in Mwingi District in Eastern province of Kenya, with a vision of seeing a society aware of human rights and free of human rights abuse and absolute respect for the rule of law in order to enjoy sustainable development.

16. **Children’s Legal Action Network (CLAN)** is a network whose membership includes legal firms, judicial officers, government departments, lawyers, media representatives, counselling centres, and child protection agencies that provides legal assistance to children, advocates for law reform on children matters, engages in community awareness and training of magistrates, advocates and public officials.
17. **Horn of Africa Development Initiative (HODI-Africa)** an organization formed in 2005 with a view of promoting community development initiatives while monitoring human rights in upper eastern and north eastern provinces based in Marsabit District
18. **The Kenya Section of the International Commission of Jurists (ICJ Kenya)**, established in 1959 is a non-governmental, non-partisan, not for profit making, membership organization registered in Kenya. With a membership drawn from the Bar as well as the Bench, it is a National Section of the International Commission of Jurists whose headquarter is in Geneva. It is however autonomous from the ICJ-Geneva.
19. **The Kenya NGO Convention on the Rights of the Child Committee (NGO CRC Committee)** comprises of various organizations working in the children sector. It is hosted by Kenya Alliance for Advancement of Children (KAACR) founded in 1988, as a national body with a primary duty to monitor and evaluate the implementation and non-observance of the principles and provisions of the UN Convention on Rights of Child in Kenya.
20. **Kenya Counselors Association (KCA)** was registered in 1990 as professional body for all persons practicing counseling in Kenya with a mission to promote the understanding of professional counseling and represent the profession at the National level and build linkages at the international level.

21. **Kenya Human Rights Commission (KHRC)** is a non-governmental membership organization founded in 1992 with a mission to promote, protect and enhance the enjoyment of human right by all Kenyans.
22. **Law Society of Kenya (LSK)** is the premier bar association and legal development agency in Kenya. LSK is established by an Act of Parliament; The Law Society of Kenya Act (Chapter 18 of the Laws of Kenya). LSK has an extensive and long standing mandate to advise and assist members of the legal profession, the government and the public in all matters relating to the law and administration of justice in Kenya. It has, among others, a specific statutory mandate to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law.
23. **Legal Resources Foundation Trust (LRF)** is a national human rights non-governmental organization whose mandate is enhancing access to justice for the poor and the marginalized and is the sole civil society organisation working in over 23 prisons and directly monitoring human rights violations.
24. **Muslims for Human Rights (MUHURI)** is a non-governmental organization based at the Coast of Kenya. It began in 1997 to promote the struggle for human rights among marginalized social groups, with a view to contributing towards the national and international struggle to promote and protect the enjoyment of human rights and civil liberties by all. MUHURI is hosted legally by the Kenya Human Rights Commission (KHRC).
25. **Muslim Human Rights Forum (MHRF)** is an organization that seeks to protect persons swept up in the arrests, renditions, secret detentions, torture, and disappearances conducted by the Kenyan government against persons accused of terrorism related activities.

26. **Mwatikho Torture Survivors Organization (MATESO)** is a community based organization formed in 1994 by former torture survivors and it engages advocacy and rehabilitation of survivors of torture in Western Kenya.
27. **People Against Torture (PAT)** is an organization that conducts advocacy initiatives against torture and other cruel, inhumane or degrading treatment or punishment.
28. **Release Political Prisoners Trust (RPP)** is a national human rights organization founded in 1991 with a vision of a prosperous society founded on human dignity, social justice and democratic ideals. Its mission is commitment to rights awareness, the abolition of all forms of repression and persecution with special focus on political, economic and socio-cultural rights and the realization of social transformation through processes that empower the citizens.
29. **Volunteers for Legal Aid Services (VOLASE)** is an organization that offers legal services to survivors and families of victims of human rights violations. It is based in Meru town in the Eastern Province of Kenya.
30. **World Organization against Torture (OMCT)** is a Geneva based coalition of international non-governmental organizations (NGO) fighting against torture, summary executions, and enforced disappearances and all other cruel, inhuman or degrading treatment. With 282 affiliated organisations in its SOS-Torture Network and many tens of thousands correspondents in every country, OMCT is an important network of non-governmental organisations working for the protection and the promotion of human rights in the world.

### **Historical context of torture**

#### **In places of detention in Kenya**

31. The abhorrent practice of torture in Kenya has a long history. Between 1952 and 1960, the colonial government indiscriminately employed the use of torture in the suppression of *Mau Mau* freedom fighters. Torture was

used as a mechanism of interrogation and also as a means of extorting intelligence from *Mau Mau* suspects. However, this was at a historical time when the human rights of the colonized people of Kenya were not recognized and no legal provision was made for their protection.

32. Another spate of rampant torture occurred in Kenya between 1982 and 1991 during the single party regime of former president Daniel Moi. The Moi regime widely deployed torture in suppressing dissenting political opinions particularly the agitation for the return to multi-party politics. This is the period commonly referred to as “the dark days of the Moi era.” Public testimonies of the survivors who went through the notorious Nyayo House torture chambers are still fresh in the Kenyan psyche.

33. But unlike the colonial period, torture in the 1980s was carried out notwithstanding its prohibition by the Constitution of Kenya and the International Covenant on Civil and Political Rights (ICCPR) to which Kenya is a state party.

34. Although the above are the obviously identifiable and notorious periods in the history of Kenya when torture has been wantonly used by the state for political purposes, nonetheless, the practice, both by state actors and private citizens, has been common place throughout the history of Kenya. In purported efforts to suppress ordinary criminal activities in the country, specialized police crime prevention units and citizens vigilante groups, in a bid to extort confessions from suspects, have continued the practice of torture.

- i. As a policy of political repression – the suppression of *Mau Mau*, the entire Emergency Laws and Regulations are classical, then repression of the (multi-party) democracy advocates in the 1980s, the so called *Mwakenya*<sup>2</sup> days and the Nyayo House torture Chambers.

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<sup>2</sup> This was a banned publication that was used by political dissidents between (1983 and 1989)

- ii. As a means of extorting confessions from suspects, as a systematic means of exercising power relation between citizens and the coercive apparatus of state- the police, prisons authorities, provincial administration

**Circumstances under which torture occur**

- 35. The circumstances under which torture occurs include; Shroud of secrecy concerning detention facilities and circumstances of detention persons deprived of liberty, transfer of persons deprived of liberty to various undisclosed places of detention, existence of specialized crack police units apparently unaccountable to the laws and standing orders governing the police force and criminal investigations generally- the Flying Squad, Anti- Terrorism Police Unit and Special Crimes Police Unit and they are allowed to use unorthodox means because, they do not have designated places of confinement.
- 36. For instance a person arrested in Malindi in coast province can be transported and incarcerated in Makuyu Eastern Province over 700 kilometers away or if arrested in Nairobi can be transported and incarcerated in Lodwar Rift Valley Province more than 1000 kilometers away, which contravenes the very core of the CAT which requires that one must have access to legal advise and visitation rights.
- 37. Inadequate internal and external oversight systems on institutions charged with detention of persons – there are no effective complaint systems within the police or the prison’s authorities for victims to channel complaints. Whenever there is a complaint against the security forces, they close ranks such that it is pointless to complain about one officer to the others even across the chain of command. What we need in the force is an independent civilian oversight body.

**Recent Developments Between year 2007 and 2008**

- 38. In the aforesaid period Kenya has witnessed a systematic pattern of torture as witnessed in the crackdown of suspects of the outlawed

*mungiki* sect in Kosovo Mathare valley in June 2007<sup>3</sup>, torture by the military and other security agencies between March and April 2008<sup>4</sup> and the ongoing enforced disappearances and extrajudicial killings of large number of youths in Nairobi and Central provinces<sup>5</sup>. *Mungiki* is one of the sects and criminal gang that were banned and proscribed in November 2001.

39. However, few official statistics regarding the incidence and nature of the use of force by police exist. The Governance Justice Law and Order Sector program (GJLOS) report concluded that “*the incidence of wrongful use of force by police is unknown. Research is critically needed to determine reliably, validly, and precisely how often transgressions of use-of-force powers occur.*”<sup>6</sup> Notwithstanding the reform agenda spanning 5 years of the security sector in Kenya under the GJLOS, the government is yet to institute a data collection system documenting incidents, trends, and patterns of use of excessive force by law enforcement officers, leading to a disturbing lack of statistical information regarding the incidence of torture and cruel, inhuman or degrading treatment in Kenya.

### **Article 1**

40. When Kenya ratified the Convention in 1997, the Kenyan government did not make any reservations and therefore failure to fully domesticate CAT and adopt the Convention definition has not been adequately explained in the state report. The assertion that piecemeal legislation captures the definition of the Convention is untenable. There is no justification as to why

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<sup>3</sup> Annex 2 IMLU Mathare operation Documentation

<sup>4</sup> Annex 3 IMLU “Double Tragedy” A report on medico-legal documentation on torture and related violations in mount Elgon (August 2008)  
<http://www.imlu.org/images/documents/double%20tragedy%20report%20on%20medico-legal%20documentation%20of%20torture%20and%20related%20violations%20in%20mount%20elgon.pdf>

<sup>5</sup> Annex 3 KNHCR “The cry of Blood” <http://www.knchr.org/pidief/overview.pdf> and RPP “ Exertions of protecting Right to life and security in Kenya (july2008)

<sup>6</sup> GJLOS evaluation report  
<http://www.gjlos.go.ke/gjinner.asp?pcat2=agencies&pcat=minjust&cat=klrc>

there is no law in place seeking to give effect to the Convention definition of 'torture' since 1997 because there have been various opportunities when reviewing various criminal laws, yet the state has made no deliberate attempt to effectively utilize them. The inordinate delay in creating a legislative framework within which CAT provisions are domesticated create a lacuna when addressing offences stipulated under Article 4 of CAT.

41. In the first opportunity the Kenyan Parliament enacted Act No. 10 of 1997 (the Inter-Parliamentary Parties Group (IPPG) process), which brought forth section 14A of the Police Act and Section 20 of the Chiefs' Authority Act, which sought to criminalize and prohibit torture by police officers and chiefs. Though there was express prohibition, there was no provision for a definition.
42. The second opportunity was during the enactment of the Children Act (2001)<sup>7</sup> which outlawed torture under Section 18 but failed to define what constitutes torture.
43. The third opportunity arose during the omnibus amendments under the Criminal Law Amendment Act (2003). On 18<sup>th</sup> July, 2003 the Evidence Act,<sup>8</sup> was amended with an insertion of Section 25A<sup>9</sup> and repealed section 28, through the Criminal Law (Amendment) Act which put to an end confession being accepted as evidence unless made before a magistrate in open court.<sup>10</sup>
44. And finally the fourth opportunity arose during the enactment of the Miscellaneous Statute Law Amendment Act (2007) which unfortunately

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<sup>7</sup> Act No. 8 of 2001

<sup>8</sup> Chapter 80 Laws of Kenya

<sup>9</sup> Section 25A provides '...a confession or any admission of a fact tending to proof of guilt by an accused person is not admissible and shall not be proved as against such person unless it is made in court'.

<sup>10</sup> As contained under the Criminal Law (Amendment) Act Sections 99 and 100, this effectively amended the Evidence Act.

retrogressed and reintroduced the powers to obtain confessions to the police but failed to define torture.

45. Lack of a specific definition of torture has posed a challenge in seeking legal redress on behalf of torture survivors and victims. The definition is left to the varied interpretation of judicial officers. Like all other international laws, CAT is not automatically binding to Kenyan courts because Kenya is a dualist state. The definition therein only amounts to a persuasive basis for litigation before courts of law. Furthermore, the Constitution of Kenya outlaws the conviction of persons with criminal offences not defined in written laws (Acts of Parliament). Section 77(8) provides that: ***'No person shall be convicted for a criminal offence unless that offence is defined, and penalty therefor is prescribed, in a written law'***.
46. In civil litigation, survivors and victims remain with the option of lodging claims for compensation in the form of actions for civil wrongs/torts e.g. assault. The only way to specifically seek orders for legal redress for torture is through a constitutional reference which is a rigorous and lengthy process<sup>11</sup>. Torture is such a serious violation of human rights that its definition should not be left for vague inference within a weak legal framework with piece-meal legislation on the same. The absence of a definition under Kenyan law dilutes the gravity of the offence and limits specific focus in combating it in judicial, administrative and legislative processes.
47. Another challenge is that the lack of a definition gives problems to monitoring of human rights in Kenya because there is no legislative framework that can be used to track what the State has done towards addressing CAT provisions.
48. As stated in the state report; *"acts of torture and other cruel, inhuman and degrading treatment or punishment are criminal and/or civil wrongs in*

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<sup>11</sup>Section 84 Constitution of Kenya

*Kenya...in addition, the Kenya National Commission on Human Rights is empowered to monitor and investigate abuses of human rights whether these are inflicted by or at the instigation of public officials or not. Together, these mechanisms ensure that Kenya is at all times in compliance with its obligations under the Convention against Torture. While the laws of Kenya prohibit torture, and other cruel, inhuman, or degrading treatment or punishment, the Constitution of Kenya, does not define torture, thereby creating interpretation problems”...<sup>12</sup>*

49. Thus, without a Convention definition, the KNCHR cannot make proper monitoring and investigations without a legal definition of torture .Moreover, there is no definition of mental pain and suffering due to `prolonged mental harm caused by or resulting from (a) the intentional infliction or threatened infliction of severe physical pain of suffering; (b) the administration or application, or threatened administration of application of pain or any other substances; (c) the threat of imminent death; or (d) the threat that another person will imminently be subjected to death, severe pain of suffering, or the administration or application of pain or any other substance calculated to forcefully elicit submission.

50. In the constitutional case of *Dominic Amolo Arony versus Attorney General* the High court of Kenya attempted to define torture by including psychological pain and suffering to amount to torture<sup>13</sup>

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<sup>12</sup> Paragraph 25, State party report.

<sup>13</sup> High Court Miscellaneous no. 494 of 2003 ( Nairobi)

## Article 2

### Effective legislation

51. One of the key bottlenecks in dealing with the practice of torture in Kenya has been the lack of explicit and enforceable legal provisions. Although Kenya has ratified the CAT, parliament has failed in terms of enactment of a comprehensive law in domesticating CAT to deal with the offence of torture.

52. From 1997, there have been piecemeal and *ad-hoc* attempts that purport to give legal effect to CAT provisions. As mentioned under Article 1 some Acts reviewed were subjective and restrictive in their application of what CAT provisions envisaged. This in effect led to a very fluid judicial application of the concept of torture.

53. The Kenyan Parliament enacted Act No. 10 of 1997 (the Inter-Parliamentary Parties Group (IPPG) process) in the context of calls by opposition political parties for a fair platform to conduct campaigns it being an election year. The Act brought forth section 14A of the Police Act and Section 20 of the Chiefs' Authority Act, which sought to criminalize and prohibit torture by police officers and chiefs. Though there was express prohibition, there was no provision for a definition and while the Police Act classified the offence as a felony it failed to prescribe a specific penalty allowing the offence to be punishable under the general penalty clause which inter alia; stipulates *"Any person who is guilty of an offence under this Act for which no other penalty is expressly provided shall be liable to imprisonment for a term not exceeding three months or to a fine not exceeding five hundred shillings or to both"*<sup>14</sup>.

54. The Chiefs' Authority Act inter alia prescribes the penalty as *"3) A chief who contravenes any of the provisions of this section or the provisions of any code of conduct prescribed under subsection (2) shall, without prejudice to any other penalty prescribed by law, be guilty of an offence*

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<sup>14</sup> Section 63 Police Act CAP 84 LOK

*and liable to a fine not exceeding ten thousand shillings, or to imprisonment for a term not exceeding one month, or to both.*"<sup>15</sup>

55. Both the Police and the Chiefs Authority Acts do not apply to the Kenya Wildlife Services, other Provincial Administration officials, Administration Police, Kenya Army, Kenya Prison Department and other security agencies who are all potential perpetrators of torture.

56. The Children Act outlaws torture *'...No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty.'*<sup>16</sup> This provision fails to classify the offence as a felony and does not prescribe a specific penalty allowing the offence to be punishable under the general penalty clause in Part II of the Act which inter alia stipulates; *"Notwithstanding penalties contained in any other law, where any person willfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in sections 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine"*<sup>17</sup>

57. Due to lack of definition of torture the provisions of the Children Act, the Police Act, the Chiefs' Authority Act and the Children Act are unconstitutional to the extent that they contravene Section 77(8) which inter alia states *'No person shall be convicted for a criminal offence unless that offence is defined, and penalty therefor is prescribed, in a written law'*

58. Between the year 2003 and 2007, Kenya has grappled with the question of who should take a confession from an accused person. In 2003, the Evidence Act (Chapter 80 of the Laws of Kenya) was amended to take

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<sup>15</sup> Section 20(3) Chiefs' Authority Act CAP 128 LOK

<sup>16</sup> Section 18 Children Act No 8 of 2001

<sup>17</sup> Section 20 Children Act No 8 of 2001

away the powers of police officers to obtain confessions from suspects. Section 28 of the Act, which hitherto empowered the court to admit a confession against an accused person if the accused made the confession before a police officer of the rank of inspector and above, was deleted. The power to take confessions from criminal suspects was given to court by section 25A of the Act.<sup>18</sup> The Memorandum of Objects and Reasons accompanying the Bill that brought forth these amendments expressed the view that the power of the police to take confessions from suspects was the foremost motivation for torture of suspects.<sup>19</sup>

59. The 2003 amendments were met with disquiet within the police force with the police complaining that the amendments had taken away one of their vital tool of investigations. The judiciary was equally opposed to the procedure arguing that judicial officers would waste a lot time doubling as witnesses having initially recorded confessions that are retracted.<sup>20</sup>

60. In 2007, section 25A was again amended to relax the complete ban of the power of police to take confessions. Under the re-amended section, the power to take confessions is now shared between the court and the

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<sup>18</sup> Section 25 of the Evidence Act as inserted in 2003 provided that; “25A. 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 court.”

<sup>19</sup> On suggested amendments to the Evidence Act regarding confessions, the Memorandum of Objects and Reasons stated; “The provisions which allow the admission in evidence of confessions made before the police are proposed to be repealed. Only confessions made in court will be admissible. The bulk of complaints of torture made against law enforcement authorities are related to attempts to obtain confessions from the victims of torture. By repealing these provisions, a major motivation for torture will have been removed.”

<sup>20</sup> Annex 4 IMLU’ s report on the 3<sup>rd</sup> National Criminal Justice Agencies workshop February 2007  
<http://www.imlu.org/images/documents/final%20workshop%20report%20%285th%20%20march%2007%29.pdf>

police.<sup>21</sup> The Attorney General is required to make rules of safeguards to govern the taking of confessions by the police.

61. Since the enactment of section 25A of the Evidence Act, the Attorney General is yet to make rules governing the taking of confessions by the police.

62. The State Report states that; *“the Committee has thus made recommendations for the inclusion of the definition of torture in our laws in conformity with the definition of torture in the Convention. The Kenya Law Reform Commission has been seized of this deficiency”*.<sup>22</sup>

63. The last report of the Kenya Law Reform Commission (KLRC), under the Governance Justice Law and Order Sector (GJLOS) reforms programme, gave an outline of all the laws that need review, setting out the urgent bills/laws for review and legislation as well as setting short-term and long-term targets in a bid to prioritize those laws that require enactment. Noteworthy, none of the urgent or priority bill and reviews relate to the domestication of CAT.<sup>23</sup>

### **Administrative measures**

64. The military has its own mechanisms for addressing torture and in the given example of Mount Elgon torture cases; the Armed Forces Act does not

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<sup>21</sup> Section 25A now reads; “25A. 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 court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, **and a third party of the person’s choice**. (2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”

<sup>22</sup> Paragraph 63 of the state report

<sup>23</sup> The KLRC Chairman’s report available at <http://www.gjlos.go.ke/gjinner.asp?pcat2=agencies&pcat=minjust&cat=klrc>. the report setting out priority Bills will help Members of Parliament and the office of the Attorney-General in their work to ensure their legislation.

contemplate engagement between the military and civilians. Therefore civilians are not subject to Armed Forces Act and have no *locus standi* to bring a complaint of torture under this Act. The mechanisms of torture are dealt with within the ranks, and thus not open to public scrutiny.

65. The Police have guard rooms proceedings for internal disciplinary measures that are held in camera and the civilians are not party to the proceedings and where a punishment is meted there exist no feed back mechanism on the outcome.

66. The State Report at paragraphs 38 and 39 is in essence a misrepresentation as these procedures do not comply with the spirit of Article 2 of CAT.

#### **Judicial measures**

67. Under Section 89 Criminal Procedure Code<sup>24</sup>, a magistrate is empowered to entertain complaint from any person. Where the complaint discloses a known offence the court shall proceed to reduce the same into a charge sheet and issue summons against the person whom such a complaint is made or issue warrants of arrest and commence appropriate criminal proceedings.

68. The courts seldom use the provision mentioned on paragraph 66 above, even where torture survivors exhibiting clear physical injuries in open court upon arraignment. According to a research on the prevalence of torture in Kenyan prisons 54% of the complaints of torture by prisoners were made before magistrates and judges and no action was taken in 81% of the complaints.<sup>25</sup>

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<sup>24</sup> CAP 75 LOK

<sup>25</sup> Annex 10 LRF "Who is Responsible for my pain"(2006) pg 26-27

69. The Court of Appeal in the case of *Paul Mwangi Murunga Vs Republic*<sup>26</sup> has ruefully regretted its role in the torture of the so called *Mwakenya* suspects by allowing the prosecution to hold suspects beyond the constitutionally permissible pre-arraignment detention period and failing to ask questions regarding obvious injuries to an accused at the time of plea the court said “ *In the case of Ndede vs Republic(1991)KLR 567 this court dealing with a similar situation held as follows- where as has happened in this case, at the time of plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused to court from the date of arrest etc, then an explanation of the circumstances must form an integral part of the facts to be stated by the prosecution to the court, the appellant in the above case had been brought to court some thirty days after his arrest. It was one of the cases that were called the Mwakenya cases*”. “*The courts then chose to see no evil and hear no evil and sought no explanation as to where the accused persons involved in those cases had been before being brought to court. The consequence of the silence on the part of the courts was the infamous “NYAYO HOUSE TORTURE CHAMBERS”. It is a history about which the courts of this country can never be proud of*”

#### **Other measures**

70. The Mandate of the Commission under KNCHR Act 9 of 2002, includes; “*Investigate, on its own initiative or upon a complaint made by any person or any group of persons, the violation of any human right*”. “*Visit prisons and places of detention or related facilities with a view to assessing and inspecting the conditions under which the inmates are held and make appropriate recommendations thereon*”.

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<sup>26</sup> Court of Appeal Criminal Appeal no 35 of 2006

71. However, on numerous occasions the KNCHR has been reported to have been denied entry to places of detention or access to critical information relating to its work and mandate<sup>27</sup>.
72. The state has an obligation to prevent acts of torture by private individuals. Illegal groupings, local militia and other marauding groups<sup>28</sup> have been reported to torture, inflict injuries and in some cases caused death resulting in what the state has called 'operations' to stem out such groups without success. This is in violation of Articles 1 and 16 of the Convention based on the State's failure to protect individuals including women and children, minorities and marginalized groups from mob violence motivated by ethnicity, illegal groups or perceived organized crime gangs.
73. The state report makes no mention of its obligation to act to prevent acts of torture by private actors in the domestic context. However, it maintains that all acts that would constitute torture are criminalized. Given the power relations underlying acts of violence based on gender, religion and homophobia. Criminalization alone has not proven to be effective in ensuring safety from such violence or providing redress where such acts of violence are committed. This is more so with regard to children who due to their vulnerability are often at the receiving end of acts of violence. In most cases these are meted out under the guise of discipline.
74. The assertion at paragraph 47 of the state report that Nyayo house torture chambers are open to Public scrutiny is untrue as the premise remains under lock and key with the National Security Intelligence Service (NSIS) - formerly Special Branch that used the facility for torture and the office of the president being in-charge. Whenever civil society has sought to access the place, they have to request for permission which is subject to

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<sup>27</sup> Report of the special rapporteur on torture and other cruel inhuman degrading treatment or punishment Addendum follow-up to the recommendations made to Kenya, A/HRC/4/33/Add.2 15<sup>th</sup> March 2007 <http://daccessdds.un.org/doc/UNDOC/GEN/G07/119/15/PDF/G0711915.pdf?OpenElement>

<sup>28</sup> Annex 12 RPP " Exertions of protecting Right to life and security in Kenya (July 2008)"

the discretion of the said government agencies, this facility presents an opportunity to make peace with the past where the documentation of the facility will act as a deterrence from future systemic torture and offer an informative and educational platform to future Kenyans, unfortunately the public apology of 2003 remains just that, without implementation.

75. Notwithstanding calls by organizations advocating for women and children's rights to enact specific legislation guaranteeing protection of these vulnerable groups of persons including women and children, minorities and marginalized groups who suffer violence in the private sphere, to date the state has heeded to this call.

### **Article 2(2)**

76. Though Section 74 of the Constitution regard the protection from torture as a non-derogable right the government has in a number of instances justified the use of torture to combat militia such *Mungiki* and *Sabaot Land Defence Force (SLDF)*, arguing that the militia are committing heinous crimes that include torture and hence deserve no mercy.<sup>29</sup>

77. During *Madaraka Day*<sup>30</sup> celebrations on 1<sup>st</sup> June 2007, President Mwai Kibaki warned that Mungiki sect members should expect no mercy. Two days later, on 3<sup>rd</sup> June 2007 about three hundred suspected *Mungiki* members were arrested and at least twenty killed when they were reportedly caught administering oaths to recruits Muranga District Central Province. After this incident Hon. John Michuki, the Minister in charge of Internal Security at the time, publicly remarked: *‘Tutawanyorsha Na tutawamaliza. Hata wenye wameshikwa Kwa kuhusiana Na mauaji ya hivi majuzi, siwezi nikakwambia wako wapi Leo. Nyinyi tu mtakuwa mkisikia mazishi ya fulani ni ya kesho. (We will pulverize and finish them off. Even*

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<sup>29</sup> Annex 3 IMLU “Double Jeopardy” A Report on Medico-Legal Documentation of torture and related violations in Mt. Elgon  
<http://www.imlu.org/images/documents/double%20tragedy%20report%20on%20medicolegal%20documentation%20of%20torture%20and%20related%20violations%20in%20mount%20elgon.pdf>

<sup>30</sup> Commemorates the *day* that Kenya attained internal self- rule in 1963

***those arrested over the recent killings, I cannot tell you where they are today. What you will certainly hear is that so and so's burial is tomorrow).***

On 7<sup>th</sup> June 2007 the government mounted the Mathare operation in Nairobi, the justification that it was against this militia group and they seeking to recover firearms stolen police officers<sup>31</sup>.

### **Article 2(3)**

78. There is no legal guarantee for protection of officers of disciplined forces who disobey unlawful orders from their superiors. There are also no specific legal provisions prohibiting superior officers from issuing unlawful orders to junior officers within the disciplined forces. For instance a Cabinet Minister in charge of Internal Security<sup>32</sup> without following the tenets of the rule of law gave a 'shoot to kill' order which was aired by electronic and print media, he subsequently refused retract his directive.

### **Article 3 (1)**

79. The State Report notes that "*in practice, Kenya does not extradite persons when there is reasonable belief that they will suffer torture and other cruel, inhuman or degrading treatment or punishment*"...<sup>33</sup> There is overwhelming evidence that this statement is untrue as current policy and practice are inconsistent with Kenya's obligations under the Convention.

80. The cited case of Ms Alice Lakwena cannot be used to justify the assertion above under paragraph 53 of the state report. Ms. Lakwena arrived in Kenya before the enactment of the Refugee Act and was accorded refugee status by the United Nations High Commission for Refugees (UNHCR). She remained in a UN refugee camp until her death and even if

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<sup>31</sup> See Annex 2 IMLU Mathare operation Documentation

<sup>32</sup> The Hon. Michuki directive was followed by mass killings by the police. Reported by Human Rights House Network, available at < <http://www.humanrightshouse.org/dllvis5.asp?id=6876> >

<sup>33</sup> See Paragraph 53, State report.

there was desire to return her to Uganda it would have been legally impossible for the Kenya government to do so.

81. Though Kenya enacted the Refugee Act in 2006<sup>34</sup> it still remains to be implemented, the requisite Gazette Notice giving active legal effect has not been published, thus no rights accrues to refugees, and even under its provisions it does not guarantee freedom from torture or non-refoulement. The legislation provides guarantees with respect to capital punishment, but not torture.

82. Under the Immigration Act <sup>35</sup>when an immigration officer is ordered to remove an 'unlawful non-citizen' from Kenya 'as soon as reasonably practicable', the officer does not consider whether the removal and return of an unlawful non-citizen to a particular country would violate Article 3 of the Convention or Article 33 of the Refugees Convention. An immigration officer can only consider matters of non-refoulement if the unlawful non-citizen applies for a Visa, and under Kenya Immigration Act, the Minister for Immigration has wide powers that are unfettered and not subject to judicial authority.

83. Extradition law (The Extradition (*Contiguous and Foreign Countries*) Act and The Extradition (*Commonwealth Countries*) Act) do not expressly prohibit extradition to a country where a person might be tortured.

84. There is de facto application of the Prevention Suppression of Terrorism Bill, 2003 which is now re-named Prevention of Terrorism Bill 2007 even before its legislation, having been rejected by Parliament twice after concerted efforts and lobbying by various civil society groups and human rights

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<sup>34</sup> Act Number 13 of 2006

<sup>35</sup> CAP 172 LOK

NGOs with MPs to reject this bill on account of condoning gross human rights violations.

85. In practice the government has in the past illegally expelled, returned and extradited individuals without due process and/or the right to appeal or review. Several cases have been filed in court for *habeus corpus* of Kenyan citizens, renditioned and detained in Ethiopia, the courts have ruled that these persons are outside the legal jurisdiction and thus cannot intervene despite a clear indication that their removal from the legal jurisdiction of their country was done by state officials. Thus Kenya is assisting other states, deliberately to have its citizens placed in places where torture can be committed. This judicial position thus implies that the unlawful extraditions are done with the knowledge of the Attorney-General and the Commissioner of Police who has the legal and custody of the suspects respectively<sup>36</sup>.

### **Article 3(2)**

86. There is no legal framework addressing procedures in determining whether a person being expelled, returned and extradited shall be exposed to danger of being subjected to torture in the country of destination.

87. In practice Kenyan law accrues to the Minister in charge of immigration the power to make decisions about extradition, returning, and mutual legal assistance and deportation matters. Often there is no independent review mechanism for these decisions.

88. *Ms. Chande (Tanzanian National) and her husband Mr. Salim Awadh Salim (Kenyan) were arrested at the Kenyan border town of Kiunga after crossing into Kenya having fled the fighting in Somalia. They were*

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<sup>36</sup>Annex 11 MHRF “Horn of Terror” (September 2008)

*detained there by the Kenyan authorities for a week and then flown to Nairobi where she was interrogated by the ATPU (Anti Terrorism Police Unit). She and her husband were in a group of at least 38 detainees removed from various police cells in Nairobi in the wee hours of January 27, 2007 and subsequently rendition to Mogadishu (Somalia) where they were held for a week before being moved to Baidoa and onwards to Ethiopia...in particular, she highlighted the many disturbing methods that were used by the agents of rendition. In one such instance, the captives were arbitrarily ordered to kneel on the runway at the Jomo Kenyatta International Airport at 3 am.<sup>37</sup>*

89. All their movements from one country to another never complied with the due process, protocols of passenger consent and immigration rules or by an order of the court. The inter-state operations to rendition these persons is therefore illegal and against Article 5 of the Convention.

*90. In the case of Mr. Osman Yassin (Swedish) was detained in Kenya, Somalia, and Ethiopia with his wife and their three children. However, when he was eventually released and returned to Sweden, his Somali wife Sophia Abdinassir and the children were left behind in Addis Ababa (Ethiopia).<sup>38</sup>*

*91. Wilfred Onyango Ngangi and 11 others Kenyan citizens were on the 16<sup>th</sup> December 2005 arrested in Maputo, Mozambique on suspicion of being in the country illegally and having intent to commit a felony. The Mozambique Interpol circulated a communication which the Kenyan police responded to with instructions to hold on the suspects. On the 6<sup>th</sup> January 2006 the twelve Kenyans were arraigned before a Maputo court on charges of being there illegally of which they were absolved with*

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<sup>37</sup>.ibid

<sup>38</sup> As above, 35

*appropriate release orders being made. Meanwhile Kenya police dispatched five police officers to Maputo who re-arrested the twelve and while air borne handed them over to the Tanzanian police who proceeded to subject them to untold torture to confess to multiple offences of armed robberies and eventually they were charged in a Moshi court in criminal cases numbers 674/05, 811/05 and 2/06 which are pending in court. On their part they challenged their illegal removal through judicial review at the High Court of Tanzania Moshi Miscellaneous Criminal Cause Number 7 of 2006 which is still pending.*

92. The Kenyan government is responsible for violating a number of international human rights treaties by allowing, condoning and participating in transport, transfer and deportation of various persons back and forth to Somalia, Ethiopia and Guantanamo Bay. Kenya is a state party to the 1951 Refugee Convention, and as mentioned earlier has enacted a law on Refugees (though the latter is not operational as cited earlier in paragraph 75 herein).

93. As detailed in the state report; *"Kenya will extradite a person accused of offences contained in the Extradition Act within the country to his country of origin under the provisions of its extradition Acts. The basic ingredients surrounding extradition would apply, such as the fact that the act must be an offence in both countries"*<sup>39</sup>The above position in the State Report seems not to have been respected in the cases cited as the due process of the law was not followed and inter-state protocols as regards provisions of the Extradition Act were not observed.

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<sup>39</sup> Paragraph 67, State Report.

#### **Article 4**

94. There is express admission in the State Report of non-compliance with this article. The Kenyan government maintains that existing legislation provides sufficient protection and redress to those against whom torture is committed.
95. These pieces of legislation existed before CAT came into force and so do not reflect the spirit of the Convention.
96. The varied penalties of the offence of torture as stipulated under The Police Act, The Chiefs Authority Act and The Children Act do not take into account the grave nature of torture as a crime.
97. Section 14A of the Police Act prohibits the use of torture by police officers in the discharge of their duties. However, torture is not defined and the penalty provided under general penalty clause (sec.63) is only three (3) months imprisonment or a fine of Kshs.500 (EUR 5).
98. Section 20(1) of the Chiefs Act protects persons from torture or any other cruel, inhumane or degrading treatment by chiefs but does not define it. The penalty prescribed is a fine Kshs.10, 000 (EUR 100) or one month imprisonment.
99. Section 18 of the Children Act protects children from torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty it does not stipulate a penalty and the penalty provided under general penalty clause Part II provides a fine not exceeding Kshs 50,000 (EUR500) or 1 year imprisonment or to both such imprisonment and fine.
100. According to Kenyan Law the above offences are all misdemeanors because the penalties stipulated amount to imprisonment of less than three years.
101. In any event these laws remain inconsistent with section 77 (8) of the Kenyan Constitution *as stated earlier under Article 1 and 2*, thereby

rendering them null and void as under section 3 which inter alia provides; *“This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void”*<sup>40</sup>

102. In the State report it is stated that acts that constitute torture are inferred from criminal offences that attract lawful sanctions. For instance, though assault, rape and murder remain criminal offences under Kenyan’s national legislation whether or not they constitutes torture<sup>41</sup>. The motivation to outlaw them is not a specific attempt to comply with this Article but only a general expression of the need to protect and preserve the dignity and security of human beings.

#### **Article 5**

103. Failure by the state to domesticate Article 1 and 4 inhibits the implementation of this article.

104. Though, Kenya has ratified the Rome Statute on the International Criminal Court, to date no legislation has been passed to give it legal effect.

#### **Article 6**

105. Non-compliance with Article 4 and 5 inhibits the implementation of this article. In paragraph 69 and 70 of State report, the processes stated therein are all illegal as they are not based on any law and are extra-judicial measures, the offences that are cognizable are known within the law and none relate to what is stated in the state report.

106. The State Report does not give any clear information or data of cases that have been handled under this provision in order to prove its compliance. IMLU in conjunction with other CSO’s have documented

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<sup>40</sup> Constitution of Kenya

<sup>41</sup> Paragraphs 27 and 32 of the state report

cases, where this state obligation has not been observed and attempts to invite judicial remedies have largely remained frustrated by the Attorney-General and Commissioner of Police.

107. *The MHRF filed 34 habeas corpus applications in the Court of Nairobi, while another 6 were filed in Mombasa by families of the Kenyan detainees. However apart from the said Sheikh Adallahi and Sheikh Mohammed Salat (Kenyan), Sheikh Abubakar Omar Adan and his son Omar Abubakar Omar (Somali) who were taken to court, no one else was ever formally charged in Kenya. All the other detainees remained in detention in Kenya and beyond the legally permissible period of 24 hours (under the Constitution, time for bailable offences and 14 days for non-bailable capital offences and were never tried in court.”*<sup>42</sup>

108. Constitutional safeguards have not been respected even under other national laws that seek to deal with criminal offenders; the fair trial rules have been entirely ignored in a majority of cases relating to both nationals and non-citizens.

#### **Article 7**

109. Non-compliance with Articles 4, 5, and 6 inhibits the implementation of this article.

110. The obligation of the State to initiate prosecutions relating to acts of torture whenever it has jurisdiction, unless it extradites the alleged offender is paramount. However the State Report has not offered what measures there are in Kenya to ensure the fair treatment of the alleged offenders at all stages of trial proceedings, including the right to legal counsel, the right to be presumed innocent until proven guilty, the right to equality before the law, or measures to ensure that the standards of evidence required for

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<sup>42</sup>Annex 11 MHRF “Horn of Terror” (September 2008) Pg, 22. Abdullahi, one of the suspected produced in court was acquitted when the court held that he could not enter a plea to a non-existent offence, that of enrolling to fight in a foreign army. Similarly, the court dismissed charges of being in Kenya illegally for Mr. Adan as well as his son since they are Kenyan nationals. This affirms the attempts made by state security agencies to use the judicial system against its own citizen to justify their inhuman and degrading treatment of suspects.

prosecution and conviction apply equally in cases where the alleged offender is a foreigner who has committed acts of torture abroad.

111. Section 72 of the Constitution provides that any person arrested on suspicion of having committed a criminal offence shall be produced in court within a reasonable time. This is not usually the case and severally the courts have had to release suspects even in ordinary criminal cases, for failure by investigating officers to respect these constitutional safeguards.<sup>43</sup>

### **Article 8**

112. Non-compliance with Articles 4, 5, 6 and 7 inhibits the implementation of this article.

113. As detailed in the state report *“The Extraditions Acts provide that a fugitive shall not be surrendered to another country if such surrender will prejudice him at trial, or cause him to be punished or restricted in his personal liberty by reason of his race, religion, nationality or political opinion. This is provided for in section 6(1) (3) of Chapter 7. Section 16(3) of chapter 76 permits the court to deny surrender if the fugitive will suffer a punishment too severe, unjust or oppressive.”*<sup>44</sup>

114. In Practice Kenya has, even without due process or consideration as to whether torture and related crimes are considered as extraditable offences, renditioned and extradited various persons to foreign states<sup>45</sup>.

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<sup>43</sup> High Court Criminal Case number 105 of 2005 Republic Vs Joseph Zakayo Maithya and 4others

<sup>44</sup> Paragraph 78, State Report.

<sup>45</sup> Annex 11 MHRF “Horn of Terror” (September 2008)

## Article 9

115. Kenya has not enacted legislation creating offences of torture contained in Article 4 of the Convention as is admitted in the state report, which makes the compliance of this article impossible.

116. The existing extradition statutes in Kenya i.e. the Extradition (Contiguous and Foreign Countries) Act (Chapter 76 of the Laws of Kenya) and the Extradition (Commonwealth Countries) Act (Chapter 77 of the Laws of Kenya) both pre-date the Convention and do not provide for Article 4 offences. The two extradition statutes were first enacted in 1966 and 1968 respectively.

117. Despite the existence of extradition statutes and a constitutional provision barring the expulsion of a Kenyan citizen from the country, the Kenya Government has on several occasions forcibly and without extradition orders removed its own citizens from Kenya and handed them over to foreign governments for prosecution or interrogations. This has happened in cases of Kenyans suspected of committing economic, armed or terror related crimes abroad.

118. *Moses Tengeya omweno a Kenyan Citizen and former employee of the International Organization for Migration (I.O.M) in Pristina Kosovo was on the night of 2<sup>nd</sup> June 2000 arrested from his house in Langata Estate Nairobi by a heavy contingent of police officers, he was not informed on the reason of his arrest and was held incommunicado for four days until the 6<sup>th</sup> June 2000 when he was informed that a request had been made to the Interpol Kenya by Interpol Kosovo for his arrest on allegation of theft of unspecified colossal sums of money and removed from Kenya on the same night aboard a flight to Amsterdam where he was transferred to Pristina under the escort of two Kenyan police officers. Kenya never had an extradition treaty with the former Yugoslavia and in this instance no judicial proceedings were followed. Upon arrival he was arraigned before*

*a District Court in criminal case no 9 of 2000 but his case was reviewed by the United Nation Mission in Kosovo (UNMIK) Department of human rights, rule of law and the legal systems monitoring section that held his presence in Kosovo to be illegal and that due process had been breached in disregard to the extradition process and that an executive decision be made directing his immediate release from custody and assistance be accorded for his return home. Subsequently he filed a constitutional reference in the Kenyan High Court Miscellaneous Application Number 265 of 2001 that is still pending.*

119. To lawfully comply with her obligations under Article 9, Kenya should legislate for Article 4 offences and make appropriate amendments to the two extradition statutes to incorporate Article 4 offences as extraditable offences.

#### **Article 10**

120. Kenya's security organs, civil and military are governed by the respective and distinct statutes that create them, provide for their management and regulate their conduct in terms and as regards civilians. The regular police force is created under the Police Act (Chapter 84 of the Laws of Kenya, the administration police is created under the Administration Police Act (Chapter 85 of the Laws of Kenya), the prison service is created under the Prisons Act (Chapter 90 of the Laws of Kenya) and the armed forces are created under the Armed Forces Act (Chapter 199 of the Laws of Kenya). Other security agencies with less interaction with civilians who may be deprived of liberty are similarly created<sup>46</sup>.

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<sup>46</sup> Such as the Kenya Wildlife Service (KWS) created under the Wildlife (Conservation and Management) Act (Chapter 376, Laws of Kenya) and Forest Officers/Guards created under the Forests Act (Chapter 385, Laws of Kenya)

121. The statutes creating the security agencies of the Republic of Kenya all pre-date the Convention and have not been amended to include the duty of the security or law enforcement agencies to carry out educational programmes against torture and to provide information on the prohibition of torture.

122. The police force and the prisons' service are the primary custodians of arrested persons and persons deprived of liberty yet, at present, there are only countable qualified medical officers attached to the institutions countrywide. In deed, there is only one qualified police medical surgeon in the Capital City/District/Province of Nairobi.<sup>47</sup> Similarly, except in Nairobi, there are no qualified doctors attached to the dispensaries inside the prisons countrywide. Prisons outside Nairobi rely on the District Medical Officer (DMO) of the district where the prison is situated.<sup>48</sup> The police and prison doctors and, the medical personnel attached to the District Medical Officer do not have specific training on issues of torture, cruel, inhuman or degrading treatment or punishment.

123. Kenya does not have a freedom of information or access to public information law. In Kenya, the training of law enforcement personnel is secret and the training grounds are prohibited areas from the public under the Protected Areas Act (Chapter 204 of the Laws of Kenya). It is therefore difficult to independently verify Kenya's compliance with her obligations under Article 10 of the Convention.

124. Since the election of the NARC government in December 2002, several non-governmental organizations and the Kenya National

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<sup>47</sup> Dr. Zephania Kamau is the only police doctor who examines persons in need of or in conflict with law in the whole of Nairobi with a population of over 3 million people.

<sup>48</sup> See Report of the UN Special Rapporteur on Torture, Sir Nigel Rodney, Paragraphs 39 & 40, Page 12.

Commission on Human Rights (KNCHR) have from time to time been allowed to carry out human rights educational programmes for law enforcement agencies particularly the administration police, prison officers, lawyers and judicial officers. However, this report maintains that the duty bearer for such educational programmes is the state which has thus far failed to comply with its obligations under Article 10 of the Convention and no training curricular on torture has been made public in Kenya.

125. The trainings offered by non governmental organizations to security agencies has been upon goodwill of respective commanders as opposed to policy and has been on ad hoc basis often depending on uncertain donor funding with instances of NGO's being denied permission to conduct the trainings on torture without adequate explanations.<sup>49</sup>

126. The state has not made any efforts at disseminating information on the prohibition on torture except an initiative by the KNHCR to mount over 200 information bill-boards in police stations around the country in 2004 which received opposition by the Kenya police resulting in the mounting of only a handful of bill boards to date.

### **Article 11**

127. In Kenya, rules and regulations governing the treatment of persons subjected to arrest and detention are contained in the statutes creating the various law enforcement agencies and standing orders made by the heads of such agencies. The statutes are enumerated under Article 10 above.

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<sup>49</sup>Annex 4 IMLU Letter dated 12<sup>th</sup> January 2006 Kenya police.

128. All the statutes creating the law enforcement agencies, the rules, regulations and standing orders promulgated pursuant to those laws all predate the Constitution of Kenya and the Convention. The statutes, the rules, regulations and standing orders were promulgated during colonialism and before the enactment of the Bill of Rights contained in Chapter V of the Constitution of Kenya. For example, the Kenya Police Standing Orders were promulgated in 1962, a year before Kenya attained independence and have not been reviewed ever since while the Kenya prisons rules were lastly reviewed in 1975.

129. The Bill of Rights under the Constitution of Kenya contains some of the basic rights of suspects. In particular, the Constitution requires that 'a person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.'<sup>50</sup>

130. The Constitution also provides for the period within which suspects must be arraigned in court to answer charges. Suspects arrested for suspicion of involvement in non-capital offences should be presented to court within twenty four (24) hours of arrest or detention while those charged with capital offences should be arraigned in court within fourteen (14) days.<sup>51</sup>

131. The same provision described in paragraph 127 above obtains under the Children Act, that "Where a child is apprehended with or without a warrant on suspicion of having committed a criminal offence he shall be brought before the court as soon as practicable".<sup>52</sup>The High and

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<sup>50</sup> Section 72(2) of the Constitution of Kenya

<sup>51</sup> Section 72(3) of the Constitution of Kenya

<sup>52</sup> Section 4 (1) Child Offender Rules, the Children Act

the Court of Appeal have in numerous decisions reiterated this constitutional position.

132. However, there are no other constitutional rights provided for suspects or detained persons and there is no law, regulation or standing order that provides for interrogation rules, instructions, methods and practices. At present, there is no manual that provides for standards of interrogations of suspects and there has been no attempt to codify the UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment or the UN Standard Minimum Rules for the Treatment of Prisoners.

133. Since 1995, the Commissioner of Police has created several special police units mandated to deal with specialized areas of crime. The existence of the unit's impacts directly on the need for Kenya's law enforcement agents to have a clear written manual containing the rules, regulations and instructions on interrogation and the treatment of arrested or detained persons generally. There are at present Four known special police units i.e. the Flying Squad, (charged with investigating violent crime) the Special Crimes Prevention Unit (SCPU),(also charged with investigating violent crime particularly carjacking) the Kwe Kwe Squad (charged with investigating unlawful societies and organized criminal gangs) and the Anti-Terrorism Police Unit (ATPU) (charged with investigating terror related crimes).

134. Since these units do not have specially designated detention facilities for arrested persons, they have developed the practice of arresting, dumping and transferring suspects to different police stations and other detention places of their choice over 33.6% of suspects arrested

are held in more than one police station<sup>53</sup>. Such persons are detained for inordinately long periods and their detentions invariably unacknowledged. The units have also developed the standard practice of the holding suspects incommunicado.<sup>54</sup> The units are also responsible for the rendering of suspects, especially terror suspects, to foreign countries without following the extradition process<sup>55</sup> and enforced disappearance of suspects arrested and detained for being members of proscribed societies or societies perceived to be criminal gangs.<sup>56</sup>

### **Article 12**

135. Kenya has not enacted legislation empowering or conferring on any authority the specific obligation to promptly and impartially investigate allegations of torture, cruel, inhuman and or degrading treatment or punishment. Consequently, no law provides access to immediate medical examination and forensic expertise to victims of torture at state expense. Similarly, there are no specialized procedures for lodging complaints of torture, cruel, inhuman or degrading treatment or punishment and, there are no laid down rules on suspension from duty of alleged perpetrators of torture while investigations are going on.

136. In 2006, Kenya enacted the Sexual Offences Act<sup>57</sup> which provides for punitive and deterrent sentencing including the aspect of minimum sentencing that was not adequately provided for in Kenyan laws before. However, the remedies available under the Act for genuine survivors whose cases have weak evidence are negated by Section 38 which provides inter alia...*Any person who makes false allegations against*

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<sup>53</sup> See Annex 7 IMLU "Understanding Torture In Kenya" an empirical assessment pg 37(August 2007).

<sup>54</sup> See the Report of the Special Rapporteur on Torture, Sir Nigel Rodney, submitted pursuant to Commission on Human Rights resolution 1999/32 (Pg 10 – 11, paras 31 – 32),

<sup>55</sup> See Annex 11 MHRF "Horn of terror "(September 2008).

<sup>56</sup> See Annex 9 KNCHR "The cry of Blood" (September 2008).

<sup>57</sup> Act No. 3 of 2006

*another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.*

137. It is noteworthy to state that all acquittals of persons charged with sexual offences whether resulting from false allegations, poor investigations or corruption are potentially likely to result in criminal prosecution and conviction of complainants. This is a major setback in Kenyan legislation especially with regard to protection of women and children who are the most vulnerable targets of sexual violence

The Act also states that

*(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.*

*(4) The dangerous sexual offenders databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.*

To date no forensic laboratory exists in Kenya and hence, no data bank has been created to store samples from dangerous sexual offenders. This exhibits poor implementation of the Act.

138. However, the Kenya National Commission on Human Rights (KNCHR), the country's national human rights institution, is bestowed with the functions of; (a) investigating, on its own initiative or upon complaint made by any person or group of persons, the violation of any human rights and; (b) to visit prisons and places of detention or related facilities

with a view to assessing and inspecting the conditions under which the inmates are held and make appropriate recommendations thereon.<sup>58</sup>

139. The obligation of the KNCHR to investigate allegations of human rights violations and to visit prisons and other places of detention is a broad function to be carried out in the ordinary course of the business of the Commission and lacks the specificity and promptness required under article 12 of the Convention. The KNCHR has on numerous occasions been publicly denied access while attempting to exercise their mandate in visiting various places of confinement.

140. The KNHCR is not the competent and impartial authority contemplated by article 12 of the Convention and Kenya needs to legislate for a competent authority tasked with the fulfillment of her obligations under the article.

141. In practice victims and survivors of torture are expected to lodge complaints of violations with the police at a police station where the police officer who is accused of committing the crime is still in active service, this presents an opportunity to frustrate the complainant and interfere with investigations, in cases of custodial death and suspicious death in the hands of the security forces, the Criminal Procedure Code<sup>59</sup> requires the matter to be promptly investigated and the inquiry file be forthwith submitted to the nearest magistrate for the institution of an inquest.

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<sup>58</sup> Section 16 of the Kenya National Commission on Human Rights Act, 2002.

<sup>59</sup> Section 386 and 387 CAP 75 LOK

142. In Practice Most at times the police will deliberately frustrate the process by failing to avail the inquiry files to the nearest magistrate IMLU documentation in this regard dates back to 1999 and these are yet to see the light of day in court despite persistent communications and appeals with relevant criminal justice agencies.<sup>60</sup>

143. *"On 27<sup>th</sup> February 2005 **John Birgen 44** a father of six, was arrested by administration police officers (Mr Yagan and Mr Lokower) attached to the chief's camp in Lutiet North Nandi district, after they failed to get his friend whom they were looking for. He was tortured by the officers, was beaten with wooden planks, his legs broken leaving him critically injured. He was rushed to Kapsabet Hospital where he stayed for 2 days and later transferred to Eldoret hospital where he was taken to theatre for external fixation. He was in a wheelchair for a period of 2 months. The matter was reported to the Kapsabet police station **OB42/27/2/05** with inquiry file no. **4/05**. Witnesses wrote statements, the file was sent to the Attorney General's office and the same was directed to the OCPD to effect arrest and to date the perpetrators are yet to be arrested"*

144. Although the P3 form is now online the number of Kenyans accessing the internet is quite limited and furthermore upon down loading one is still expected to have the same stamped by the police and referred to a government medical practitioner for filing and in most instances the medical practitioners still charge Fee to fill the same up to Ksh 1000/- or EUR10.

145. The police Documentation Forms namely P3 form and A23 in cases of death have the following shortcomings as instruments of documenting torture;

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<sup>60</sup> Annex 6 IMLU Compilation of torture related deaths without inquests.

**Form 23A**

The limitations of the Kenya Government official Post-mortem form include:

- A. Limited space for noting the basic biographic data, e.g Place of Origin, Date of Birth, Occupation, Place of residence, etc.
- B. Does not allow for contact details of Next of kin
- C. No section for details on the next of kin &/or person providing identification of the body.
- D. Does not allow for a description of the place of post-mortem examination. E.g. the Nature of lighting, etc.
- E. Limited space to document external findings
- F. Limited space to document method of dissection
- G. Limited space to document internal findings.
- H. No specified space to summarize findings of the examination
- I. Limited space to note the cause of death. Does not cater for differentiating between the immediate and secondary cause

**Form P3**

The limitations of the Kenya Police Medical Examination Report

- A. Does not cater for the victims written consent
- B. Does not allow for a detailed description of the circumstances under which the examination is taking place.
- C. The space to note down findings is limited. This applies to history, general appearance, physical examination.
- D. Does not cater for psychological trauma
- E. Does not cater for diagrammatic representation of injuries.
- F. Does not cater for annexation of photographs

146. The State has highlighted the Akiwumi Commission of Inquiry report to reflect the strides taken regarding torture, in recommending that acts constituting torture be investigated and those involved prosecuted. This is a complete misconception of its responsibility to the Kenyan citizens because this Report was released pursuant to a Court order dated 12<sup>th</sup>

July 2002.<sup>61</sup> Immediately upon releasing the report the Kenyan Government issued a statement disowning it and the position remains the same to date.<sup>62</sup>

147. This article envisions a system that springs to action even where no specific complaint has been made, in April 2008 (*posterior information*) following police and military operations in Mount Elgon District, there were numerous allegations of torture by both local and international Non-Governmental organizations which were highlighted by domestic and international media and instead of investigating, the government dismissed the allegations and demanded that individuals who claim to have been tortured should report for the investigations to be conducted .

148. Subsequent thereto a three-man team comprising police officers was constituted to conduct a purported independent inquiry and upon interviewing witnesses and survivors and reviewing NGO concluded that torture never occurred notwithstanding the overwhelming evidence available and maliciously recommended investigations on NGOs and medical personnel involved in the documentation process.<sup>63</sup>

### **Article 13**

149. There is no legal barrier in Kenya against an individual who has been subjected to torture, inhuman or degrading treatment or

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<sup>61</sup> See Pradhan Vs the Attorney General High Court at Mombasa Misc Application no.216 of 2000

<sup>62</sup> See Human Rights Watch report, on the Akiwumi Commission of Inquiry into the Tribal Clashes in Kenya (highlighted) at < <http://www.hrw.org/update/2002/11.html#3> >

<sup>63</sup> See Annex 3 IMLU "Double Tragedy" A medico-legal investigation into torture in Mt Elgon, (August 2008) <http://www.imlu.org/images/documents/double%20tragedy%20report%20on%20medico-legal%20documentation%20of%20torture%20and%20related%20violations%20in%20mount%20elgon.pdf>

punishment from lodging a complaint with the police or the KNCHR or the courts.

150. However, as discussed under article 12 above, there is no specially designated authority charged with investigating allegations of torture, inhuman or degrading treatment or punishment. Survivors of torture and families of victims of torture therefore find themselves complaining to members of the same police force that is invariably alleged to have committed the torture. The Kenya Police force does not have specially trained officers nor designated desks for investigating allegations of torture, inhuman or degrading treatment or punishment.

151. Further, Kenyan law does not provide for special procedures of lodging torture related complaints nor does the law provide for distinct remedies for redressing complaints of torture. Indeed, under the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) all unnatural deaths whether from suicide, poisoning, and extra-judicial killings by mobs or security agents or from torture etc are all subject to the same procedure of judicial inquests to establish the cause of death.

152. There are no specifically laid down remedies open to complainants against refusal by the authorities to investigate allegations of torture.

153. Survivors of torture and families of victims of torture are left to pursue the complaints in the courts as common law torts or personal injury claims. Admittedly, every Kenyan has a right of access to the courts on any justiciable claim.

154. Moreover, while a plaintiff may be successful in asserting a claim against a police officer in their official capacity by suing the government, there are few measures taken for individual responsibility, additional barriers may preclude a finding of liability on the part of the government that employs them or a grant of injunctive relief, both of which are essential tools for obtaining systemic changes necessary to prevent future violations of individual rights by police officers, noting the Government Proceedings Act provisions that has a time bar if notice to sue is not given within ninety (90) days.<sup>64</sup> Also, even when claims are successful, they do not always provide adequate remedy or redress for violations of the Convention. Very few cases have reported successful outcomes and those that have, the compensations are negligible.

155. *"High Court Judge Roselyne Wendoh has compensated the first batch of seven victims who sought redress four years ago and came up with a ruling that awards them Sh1.5 million each for their troubles, namely torture, false imprisonment and malicious prosecution...In addition, there are 24 pending cases and 58 others to be filed by detention and torture victims seeking justice for the days they spent in dark, underground cells where solitude and hunger were only exchanged for brutality at the hands of officers from the then Directorate of State Intelligence, also known at the time as the Special Branch".<sup>65</sup>*

156. Kenya does not have a law that protects victims of torture, cruel, inhuman and degrading treatment or punishment from intimidation, ill-treatment or procedures and practices that avoid re-traumatization of the

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<sup>64</sup> The Government Proceedings Act stipulate that all claims against the government must be lodged in court only after a notice to the Attorney-General (AG) has been issued Ninety days prior, and the suit must include the AG, the sector employer and the individual employee. Most cases of torture commence as criminal cases and by the time of conclusion to give liability, time lapse on civil cases affect the statutory limitation period.

<sup>65</sup>See High Court Miscellaneous Application no. 1408 of 2004 Rumba Kinuthia & 6 others Vs the Attorney General.

victims. However, in December 2006, Kenya enacted the Witness Protection Act, 2006 which makes provisions for a witness protection programme in criminal cases. Witnesses of gross incidents of torture may take advantage of the protection offered by the Act.

157. The failure to have a distinct competent and impartial authority to investigate torture and related ill treatment has resulted in inordinate delays in investigations and prosecutions.<sup>66</sup>

#### **Article 14**

158. Kenyan legal system does not provide for an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible as a means of redress specific to survivors of torture and dependents of victims who have died as a result of torture.<sup>67</sup>

159. The legal system of Kenya places responsibility on the Government of Kenya for all actions done by its agents in their official capacity. However, there are no provisions for the compensation of torture survivors or dependants of dead victims of torture administratively or through executive orders. Compensation is recoverable only through court action.

160. Torture and the use of excessive force by law enforcement officers against unarmed individuals, often leading to death or serious injury, remains endemic across Kenya. While the government acknowledges the existence of police brutality in its current report to the CAT, it maintains that existing judicial remedies are sufficient to meet its obligations under Convention.<sup>68</sup>

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<sup>66</sup> See Annex 6 IMLU Compilation of torture related deaths without inquests.

<sup>67</sup> See Annex 7 IMLU "Understanding Torture in Kenya" an empirical assessment pg 43-49 (August 2007).

161. Without making a distinction between detention by a state actor and detention by a private citizen, section 72(6) of the Constitution of Kenya places legal responsibility for unlawful detention of a person on the detaining person.<sup>69</sup>

162. As discussed under Article 13 above, survivors of torture and dependants of victims who have died as a result of torture can only take recourse to judicial remedies through court action in criminal and civil processes. Families and dependants of victims who have died from torture can press for judicial inquests into such deaths or manslaughter or murder charges against the perpetrators while survivors may press for offenses against the perpetrators related to personal injuries suffered such as assault. However, recourse to these remedies diminishes the legal gravity and seriousness of the torture and its related offenses.

163. Survivors of torture and dependants/families of victims who have died as a result of torture may also bring civil suits against the state and the individual perpetrators. Under section 84 of the Constitution of Kenya, every individual whose fundamental rights and freedoms have been violated has a right of direct access to the High Court for redress.<sup>70</sup>

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<sup>68</sup> See Paragraph 40, State Report

<sup>69</sup> Section 72(6) of the Constitution of Kenya provides that; “A person who is unlawfully arrested or detained by another person shall be entitled to compensation thereof from that other person.”

<sup>70</sup> Section 84 of the Constitution provides that; “(84)(1).....if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress. (2) The High Court shall have original jurisdiction – (a) to hear and determine an application made by a person in pursuance of subsection (1);.....and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).

164. Although the High Court has divisions in every province of Kenya, the right of direct access to the court has since been diminished by the issuance of a directive by the Hon. Chief Justice of the Republic of Kenya on 10<sup>th</sup> January 2008 directing that all Judicial Review and Constitutional matters be filed within the High Court Central Registry based at Nairobi.<sup>71</sup> In view of the attendant cost of filing court action in Nairobi by survivors and dependants/families of victims of torture who are invariably far flung from Nairobi, the effect of the directive was to extinguish the right of direct access to the High Court.

165. Even without the crippling directive of the Hon. Chief Justice, the right of direct access to the High Court for a remedy is a right that can only be exercised by the survivors and dependants/families of dead victims who have the means of hiring counsel and filing the court action. In view of Kenya's social-economic situation, this right, without provision of legal aid, is a pipe dream. Yet there is no functional legal aid scheme for victims of torture or other violations of human rights.

166. Survivors of torture and dependants/families of dead victims may also take out regular civil suits in tort for personal injuries, pain and suffering occasioned by the infliction of torture. Such suits entail substantial cost on the part of the victim in filing fees and legal fees. Under the Public Authorities Limitations Act, regular civil suits founded on tort are subject to one year limitation period.<sup>72</sup> Extension of time may be granted but only within the permissible exceptions under the law.

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<sup>71</sup> Gazette Notice No. 300 of 19<sup>th</sup> January 2007. Practice directions (4) reads; "All Judicial Review proceedings under Order LIII of the Civil Procedure Rules and Constitutional applications and references must be filed at the Central Office Registry of the High Court in Nairobi except where leave of the Chief Justice is obtained for filing in any District Registry."

<sup>72</sup> Section 3 of the Public Authorities Limitation Act (Chapter 38 of the Laws of Kenya) provides; "3(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date the cause of action accrued."

167. Regular suits are prone to delays occasioned by huge backlog of cases in courts. The minimum period a civil suit against the state will take to conclude is four years.<sup>73</sup> The options of going to court either by Constitutional application or through a regular civil suit in tort are therefore not means to an effective and prompt remedy.

168. The last recourse survivors and dependants/families of dead victims may take is to file a complaint with the KNCHR. By its statute, the KNCHR has full powers of court to receive complaints, to investigate and inquire into complaints and issue compensation. However, just like the court system, the KNCHR is inundated with complaints of all forms of human rights violations and is therefore bedeviled with the same problem of delay in settlement of complaints since inception in 2003 it has heard and determined only one case of torture.<sup>74</sup>

169. There exists no public health scheme and or scheme or system to offer public rehabilitation to torture survivors and as mentioned in paragraph 13 of the state party report, the rehabilitation program in prisons is directed towards only convicted criminal offenders and is corrective and deterrent in nature and by all means it does not constitute rehabilitation of torture as envisioned by the convention.

### **Article 15**

170. Between the year 2003 and 2007 Kenya has grappled with the question of who should take a confession from an accused person. In 2003, the Evidence Act (Chapter 80 of the Laws of Kenya) was amended to take away the powers of police officers to take confessions from

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<sup>73</sup>See Annex 5 IMLU list of torture cases pending in court

<sup>74</sup> See Peter Makori Vs the AG & 10 others Complaint No. KNCHR/CHP/1/2006

suspects. Section 28 of the Act, which hitherto empowered the court to admit a confession against an accused person if the accused made the confession before a police officer of the rank of inspector and above, was deleted. The power to take confessions from criminal suspects was given to court by section 25A of the Act.<sup>75</sup> The Memorandum of Objects and Reasons accompanying the Bill that brought forth these amendments expressed the view that the power of the police to take confessions from suspects was the foremost motivation for torture of suspects.<sup>76</sup>

171. The 2003 amendments were met with disquiet within the police force with the police complaining that the amendments had taken away one of their vital tool of investigations. The judiciary was equally opposed to the procedure arguing that judicial officers would waste a lot time doubling as witnesses having initially recorded confessions that are retracted.<sup>77</sup> In 2007, section 25A was again amended to relax the complete ban of the power of police to take confessions. Under the re-amended section, the power to take confessions is now shared between the court and the police.<sup>78</sup> The Attorney General is required to make rules of safeguards to govern the taking of confessions by the police.

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<sup>75</sup> Section 25 of the Evidence Act as inserted in 2003 provided that; “25A. 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 court.”

<sup>76</sup> On suggested amendments to the Evidence Act regarding confessions, the Memorandum of Objects and Reasons stated; “The provisions which allow the admission in evidence of confessions made before the police are proposed to be repealed. Only confessions made in court will be admissible. The bulk of complaints of torture made against law enforcement authorities are related to attempts to obtain confessions from the victims of torture. By repealing these provisions, a major motivation for torture will have been removed.”

<sup>77</sup> See Annex 8 IMLU 3<sup>rd</sup> National Criminal justice agencies Workshop report <http://www.imlu.org/images/documents/final%20workshop%20report%20%285th%20%20march%2007%29.pdf>

<sup>78</sup> Section 25A now reads; “25A. 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 court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person’s choice. (2) The

172. Since the enactment of section 25A of the Evidence Act, the Attorney General is yet to make rules governing the taking of confessions by the police.

173. Kenya has not made law to provide for the admission of a confessionary statement as evidence against a person accused of torture that the statement was made.

#### **Article 16**

174. There is no statute of general application in Kenya defining and outlawing incidents of cruel, inhuman or degrading treatment or punishment.

175. The Children Act 2001 abolished harmful cultural practices inflicted on children including female genital mutilation. Further, the Act makes provision for separate detention of child offenders from adults and also provides for expeditious disposal of criminal cases involving children, provides for grant of bail to child offenders in all cases and abolishes the death sentence as a lawful sentence to be meted out on children. The rationale and spirit of these provisions was to safeguard the enjoyment of rights to education, proper physical and psychological development. However, on 21<sup>st</sup> July 2006, the Court of Appeal, the highest court in Kenya, ruled that the provisions of the Children Act that fixed the trial duration of criminal cases involving children to a maximum of six (6) months and the grant of bail to children in capital cases as unconstitutional since the Constitution of Kenya has not been amended

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Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”

to accommodate the provisions of the Children Act.<sup>79</sup> Kenya's parliament is yet to enact the necessary constitutional amendments to comply with the judgment of the Court of Appeal.

176. Kenya has an official prison capacity of 16,886 inmates being both convicts and pre-trial detainees however over population in prison has over the years remained a chronic situation as at mid-2006 the prison population stood at 47,036 representing a 284.3 % occupancy level of which 45.6% of the population consisted of pre-trial detainees/remand prisoners which clearly exceeds the official prison capacity.<sup>80</sup>The aforementioned prison overcrowding is contrary to international standards and amounts to cruel, inhuman and degrading treatment or punishment.

177. At paragraph 37 of the state party report it is alleged the Community Service Order Act has been used as a tool to decongest penal facilities thereby preventing cruel, inhuman and degrading treatment, it is quite apparent that this Act relates to minor offenders who have been convicted and does not address the plight of the pre-trial detainees/remand prisoners who constitute almost 50% of the prison population and are unable to post prohibitive bail bond terms as set by the courts.

### **Conditions of Detentions**

178. Kenya's police and prison facilities are characterized by overcrowding and lack of basic facilities such as beddings,

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<sup>79</sup> See Kazungu Kasiwa Mkunzo & another –vs- Republic, Court of Appeal Criminal Appeal No. 239 of 2004.

<sup>80</sup> Kings College London International Center for Prison Studies World Prison Brief(2007)  
[http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb\\_country.php?country=25](http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=25)

clothing/uniforms, toiletries, medicines, food and water.<sup>81</sup> Deaths from overcrowding have been reported from both police and prison cells.<sup>82</sup>

179. The crowding strain on prison capacity presents challenges on social amenities, hygiene sleeping space, general health coupled with lack of adequate health personnel thereby leading to spread infectious diseases, high prison mortality and increased levels of violence<sup>83</sup>

180. Kenya has also abolished corporal punishment as a lawful punishment for convicted persons. However, Kenya still retains the death penalty and hard labour as lawful punishments for convicted persons.

181. While Kenyan continues to sentence to death persons convicted of capital related offences the last known official executions in Kenya were in 1987 during The Former President Daniel Arap Moi's time in office. Among those hanged then were Hezekiah Ochuka and Pancras Oteyo Okumu, accused of masterminding the Aug. 1, 1982 attempted coup.

182. In the five years from 2001 to 2005, 3,741 were sentenced to be hanged, an average of 748 a year, according to the department's statistics.

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<sup>81</sup>See Report of Special Rapporteur, Sir Nigel Rodley  
<http://daccessods.un.org/access.nsf/Get?Open&DS=E/CN.4/2000/9/Add.4&Lang=E>  
Situation has not significantly changed since his report.

<sup>82</sup>See Annex 1 IMLU Meru Prison report.

<sup>83</sup> See Meru prison report and Dr. Kibosia's Prisons health presentation in the Annex 8 IMLU report on the 3<sup>rd</sup> National criminal Justice agencies workshop February 2007 pg 10- 13  
<http://www.imlu.org/images/documents/deaths%20in%20meru%20prison%2023-11-04%20final%20report.pdf>  
<http://www.imlu.org/images/documents/final%20workshop%20report%20%285th%20%20march%2007%29.pdf>

In the same period less than 200 death sentences were commuted to life sentences on appeal<sup>84</sup>.

183. Though torture and other cruel inhuman and degrading treatment is primarily targeted towards Adult male persons in Kenya cases of violence against women by security forces have been documented.<sup>85</sup>

### **Recommendations**

1. A law comprehensively domesticating CAT must be enacted. It must provide a clear definition of torture, prescribe punishment for offenders, and establish a clear procedure whereby complaints can be made, investigated and prosecuted. This law should guarantee full rehabilitation and make provision for adequate compensation where torture occurs.
2. The state should urgently consider ratifying the optional protocol to the Convention against Torture as a proactive way of putting in place internationally acceptable standards of prevention.
3. The state should consider ratifying the 2<sup>nd</sup> optional protocol to the ICCPR as a proactive way of abolishing the death sentence while commuting all current death sentences to life imprisonment.
4. The police Act and Acts regulating all disciplined forces should be amended to create clear and transparent internal safeguards against torture, which should include human rights acceptable interrogation rules and procedure, holding and transfer of suspects in places of confinement. These systems must be subject to review by judicial mechanism.

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<sup>84</sup> <http://ipsnews.net/news.asp?idnews=38474>

<sup>85</sup> See Annex 3 IMLU "Double Tragedy" A Report on medico-legal documentation and related Violations in Mount Elgon.

5. The state should take all necessary measures to ensure the requirement of article 3 of the convention is taken into consideration when deciding on expulsion, return or extradition of foreigners.
6. The state should at all times ensure that non of its citizens are renditioned without due process of law and where such occurs then the state must put in place a system to afford justice to the victims while holding to account individual perpetrators.
7. An independent police oversight board anchored in law must be set up to investigate complaints of torture. It must have real powers to question all relevant persons and gather evidence without fear of hindrance. It should have power of prosecution. This Board should have Independent civil society as expert members.
8. The state must immediately and in line with progressive realization of rights improve conditions in penal facilities including police stations cells providing adequate minimum requirements which includes, space, beddings, clean running water and proper ventilation.
9. The state should implement Article 10 by including a specific component on the absolute prohibition of torture in the training curricular of all disciplined forces including Police, Armed Forces, Prisons, Forest Guards, Kenya wild life Services and Administrative police and other agencies with powers of arrest and detention. Such curricular should be made public.
10. The state should forthwith ensure that the over 200 information bill-boards with information on the rights of citizens and where to complain if aggrieved by police are immediately mounted in police stations without delay.
11. The state should through the office of the Attorney General take steps to ensure all torture related deaths both past and present are forthwith presented to relevant courts for institution of inquests to determine the circumstances of the deaths.

12. The state should immediately comply with inquest rulings by effecting arrests and prosecuting cases where courts have indicted named persons in torture related deaths and recommended for arrest and prosecution.
13. The state should Provide data on: (a) the number of persons held in prisons and places of detention disaggregated by age, gender, ethnicity, geography and type of crime; (b) the number, types and results of cases, both disciplinary and criminal, of police and other law enforcement personnel accused of torture and related offences.
14. The state should amend Section 38 of the Sexual Offences Act 2006 to protect survivors and witnesses of sexual violence whose cases do not succeed on account of poor investigation and prosecutions from intimidation, repression and criminal prosecution.
15. The state should ensure the wide distribution of the conclusions and recommendations of the committee throughout Kenya, in all the major languages.

