

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) Contribution to the List of Issues Prior to Reporting to the Committee against Torture on of Kenya’s Third Periodic Report

29th June 2015

With the support of the World Organisation Against Torture (OMCT)



**Introduction**

1. ICJ Kenya submits this Contribution to the List of Issues Prior to Reporting (LOIPR) ahead of Kenya’s third periodic report to the Committee against Torture.
2. The Contribution to the LOIPR adopts two specific thematic issues namely: the need to define torture within the domestic legislative framework and specific concerns on select fundamental legal safeguards as provided under Article 1, 2, 4, 11 of the Convention.
3. The Contribution to the LOIPR is based on the Committee’s Concluding Observations[[1]](#footnote-1) and is further derived from the State’s response to follow up questions submitted to the Committee in August 2014.[[2]](#footnote-2)

**About ICJ Kenya**

1. ICJ Kenya[[3]](#footnote-3) is a non-governmental, non-partisan, not for profit, membership organization registered in Kenya. Founded in 1959, it is an autonomous national section of the International Commission of Jurists, with its own separate board and membership. ICJ Kenya’s vision is to be a premier organization promoting a just, free and equitable society. Its mission is to protect human rights, and promote the rule of law and democracy in Kenya and across Africa through the application of legal expertise and international best practices.

**Articles 1 and 2**

***Defining Torture and preventative measures***

1. The Committee’s previous Concluding Observations[[4]](#footnote-4) have included and consistently advised the State to take concrete steps to enact legislation and administrative measures that not only defines torture but also criminalizes acts of torture in Kenya. In previous alternative reports, we have drawn the attention of the Committee to need for this legislation severally. Despite this and State’s numerous indication that the law would be prioritized for enactment[[5]](#footnote-5), the proposed Prohibition against Torture Bill has neither been tabled before parliament nor administrative measures been put in place to fulfill the requirements of Articles 1 and 2.
2. Additionally, Kenya has not ratified the Optional Protocol to the Convention which would be a useful preventative tool to combat torture in detention facilities. At the same time, ratifying the OPCAT would fulfil and strengthen Kenya’s constitutional provisions provided under Article 2(5) and (6)[[6]](#footnote-6) of the Constitution of Kenya, 2010.
3. We therefore strongly urge the Committee to request updated information from the state specifically on:
4. The concerted steps the State has taken to enact the Prohibition Against Torture legislation;[[7]](#footnote-7)
5. Information on additional legislative and administrative measures the State has taken to criminalise torture, cruel and degrading treatment in order to fulfil the principles and obligations under the Convention and other international human rights instruments;
6. Institutional mechanisms for the support, compensation and assistance of victims of torture, cruel, inhuman and degrading treatment.

**Article 4 and 11**

***Fundamental legal Safeguards***

1. In Kenya, belief in witchcraft is deeply rooted in the cultures of some communities.[[8]](#footnote-8) Instead of those accused or suspected of practicing witchcraft being tried as required by the law in line with constitutional due process[[9]](#footnote-9), communities have resorted to ‘taking the law’ into their own hands, brutally and unlawful killing ‘suspect witches.’ International human rights reports[[10]](#footnote-10) as well as anthropological studies[[11]](#footnote-11) have also documented and highlighted these violent incidents. Majority conclude that victims are mainly elderly women.[[12]](#footnote-12) There are several cultural reasons provided to justify these arbitrary and unlawful killings amongst the concerned communities. As a result, the lack of State intervention has legitimized and institutionalized a pattern of violence that has a disproportionate impact on women as compared to men, specifically elderly women.
2. In light of the Committee’s previous Concluding Observations and noting the State party’s response to amend the Witchcraft Act , 1925 to conform to constitutional provisions and international human rights standards[[13]](#footnote-13), we urge the Committee to ask the State to please provide updated information on:
3. Efforts being made to educate the public that lynching of elderly persons accused of or suspected of witchcraft is a violation of State obligation under CAT;
4. Specific measures taken to commence consultations on revision of the law prohibiting practice of witchcraft;
5. The number of investigations and prosecutions of perpetrators of violence against elderly women accused of witchcraft;
6. Clarify what has been done to ensure just and effective punishment of these offenders.

**Others Issues**

1. With respect to the Committee’s request for follow up information regarding legislation on Persons deprived of liberty and State’s response that the law had to become law before August 2014, the State has failed to enact the law. Although the Persons Deprived of Liberty Bill 2014[[14]](#footnote-14) was last tabled for second reading on the 18th November 2014, it is yet to be scheduled for a third reading. At the same time, the government has since set aside a 10 billion budget to implement the recommendations of the Truth, Justice and Reconciliation Commission of Kenya (TJRC) Report[[15]](#footnote-15).
2. We urge the Committee to inquire of the State as follows:
3. Why the Persons Deprived of Liberty Bill has not been forwarded for a third reading or submitted to the stakeholders for further input in the spirit of public participation;
4. The specific measures the state party has taken measures to implement the recommendations of the TJRC Report regarding reparations for victims of torture.

1. CAT/C/KEN/CO/2 [↑](#footnote-ref-1)
2. Follow Up Information to Concluding Observations on Kenya’s Second Periodic Report, August 2014 [↑](#footnote-ref-2)
3. For additional information on ICJ Kenya, please visit website www.icj-kenya.org [↑](#footnote-ref-3)
4. CAT/C/KEN/CO/1 para 8 and CAT/C/KEN/CO/2 para 6 respectively [↑](#footnote-ref-4)
5. ibid [↑](#footnote-ref-5)
6. These articles provide that application of general rules of international law, including customary international law and those which Kenya ratifies, are directly applicable in national courts [↑](#footnote-ref-6)
7. Although Article 29 of the Constitution of Kenya provides for Freedom and Security of Persons and specifically, Article 29( d) prohibiting torture while Article 29(f) cruel, inhuman and degrading treatment, no express definition of what constitutes torture is provided [↑](#footnote-ref-7)
8. These communities include the Kamba and Miji Kenda found living on the eastern and coastal regions respectively [↑](#footnote-ref-8)
9. Article 50 of Constitution of Kenya, 2010 [↑](#footnote-ref-9)
10. Phil Alston; *Of witches and Robots: the diverse challenges of responding to diverse unlawful killings in the twenty- first century* 28 Macalester International pg. 7 [↑](#footnote-ref-10)
11. Justus M Ogembo: *Cultural Narratives, Violence and Mother Son Loyalty: an exploration into the Gusii personification of evil* , American Anthropological Association, Ethos 29 (1) 3-29 (2001 [↑](#footnote-ref-11)
12. Report of the Special Rapporteur on Violence against Women para 46 available at http://www2.ohchr.org/english/issues/women/rapportuer/annual.html [↑](#footnote-ref-12)
13. Follow Up State Report , August 2014, available http://tbinternet.ohchr.org/\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=KEN&Lang=EN [↑](#footnote-ref-13)
14. See http://kenyalaw.org/kl/index.php?id=4250 [↑](#footnote-ref-14)
15. See Para 83, Full State of the Nation Address by President Uhuru Kenyatta, available <http://m.news24.com/kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326>. The Truth, Justice and Reconciliation Commission of Kenya (TJRC) was set up in 2008 after the post-election violence in 2007. [↑](#footnote-ref-15)