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Addressing the economic, social and cultural root causes of Torture in Kenya

**An alternative report to the Committee Against Torture
November 2008**

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with
the International Commission of Jurists - Kenya (ICJ) and Independent Medico-Legal Unit (IMLU)
In the context of the project
“Preventing Torture and Other Forms of Violence by Acting on their Economic, Social and Cultural Root Causes”.



Independent Medico-Legal Unit



International Commission of Jurists-Kenya



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“How to prevent or reduce violence, including torture,
by acting on its root causes often found in
violations of economic, social and cultural rights, ...
goes to the very heart of human rights protection.”

Ms. Louise Arbour,
United Nations High Commissioner for Human Rights ¹

¹ OMCT, *Attacking the Root Causes of Torture: Poverty, Inequality and Violence – An Interdisciplinary Study*, Geneva, 2006, www.omct.org, p.9

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- The Centre for Minority Rights Development (CEMIRIDE), for the part on violence related to land conflict.
- The Coalition on Violence Against Women (COVAW), for the part related to violence against women and property rights.
- Kenyan Alliance for the Advancement of Children Rights (KAACR), for the part related to violence against children.

This report was prepared by Francesca Restifo. Valuable contributions and vital inputs were provided by Tom McCarthy and Michael Miller who reviewed and revised this report. The contents of this report are the responsibility of the authors and do not necessarily reflect the views of the organisations funding this project.

EXECUTIVE SUMMARY

The purpose of this report is to help eliminate torture, cruel, inhuman and degrading treatment and punishment in Kenya by making recommendations to address their economic, social and cultural root causes. OMCT has submitted another report addressing the same issues from a complementary perspective to the Committee on Economic, Social and Cultural Rights in order to enable the Committees to adopt mutually reinforcing recommendations addressing the root causes of torture in Kenya.

The present report is based on documentation provided by national NGOs and on the information gathered during a preparatory mission that OMCT undertook in Kenya during the month of April 2008. The mission also included a number of fora giving local communities and victims of violence the opportunity to express themselves on these issues for transmission to the Committee. These are reflected in *ad hoc* boxes in this report.

This report describes the extensive violence deriving from deep poverty and inequality in Kenya, in this respect the particular case of Westlands is examined. It provides information on how the poor are, on a regular basis, harassed, forced to pay bribes and arbitrarily arrested by the police, particularly in informal settlements. The report demonstrates that Kenyan prisons are predominantly populated by the poor, due to unaffordable and inaccessible justice and analyses the impact of the lack of financial means in terms of congestion and unhealthy and inhuman living conditions in Kenyan prisons. The report discusses land conflicts that generate violence and the Government's inadequate response to address inequitable land distribution. In this respect, the report draws attention to the recent torture allegations in Mount Elgon District. The strong linkages between denials of access to land and violence exacerbate ethnic divisions by increasing tensions, insecurity, dissatisfaction, poverty and powerlessness. Furthermore, the persistence of certain cultural norms, stereotypes and traditions perpetuates discrimination and violence against women and girls in Kenya, and lack of economic and social empowerment prevents women from enjoying their civil and political rights, including access to justice in case of violence. Poverty is the main cause of the high levels of trafficking in women and girls and sexual exploitation in the country.

This report concludes that the Kenyan State is directly responsible for torture and ill-treatment against the poorest, for the economic, social and cultural policies that lead to such treatment, and for violence against the poor by non-state actors.

The report offers a set of recommendations addressing the various economic, social and cultural dimensions that underlie torture and other forms of violence in Kenya, including measures to help ensure the rights of the poor in relation to, *inter alia*, pre-trial detention, access to justice, arbitrary arrests, land conflict, and violence against women and children. This report also includes concrete measures to implement these recommendations, including specific programmes that focus on torture prevention activities and economic and social development actions as well as the establishment of a permanent body to design and monitor these activities.

TABLE OF CONTENTS

- **Acknowledgments**
- **Executive summary**
- **A key to reading this alternative report**
- **Methodology of the reporting process**
- **Introduction: A socio-economic analysis of poverty, inequality and violence in Kenya**
- **1. Criminalisation of the poor: arbitrary arrests and police corruption**
 - ⇒ *1.2. Case-study: police violence against the poor in Westlands*
 - ⇒ *Box 1: Forum On Youth And Socio-Economic Rights*
- **2. Denied access to justice and high costs of legal assistance**
- **3. Bail, remandees, prison congestion and torture**
- **4. Police violence in informal settlements**
 - ⇒ *Box 2: KENGO Forum*
- **5. Extrajudicial killings in poor areas - The Case of Mungiky**
- **6. Police violence against informal sector workers**
- **7. Violence related to land dispute**
 - ⇒ *7.1. Torture allegations in Mount Elgon*
 - ⇒ *7.2. Public forum on denied access to land*
- **8. Violence against women in the socio-economic context of Kenya**
 - ⇒ *8.1. Violence against women due to denials of their property rights*
 - ⇒ *8.2. Denied access to justice for women due to lack of financial resources*
 - ⇒ *8.3. Trafficking in women and children due to poverty*
- **9. Socio-economic dimensions of violence against disadvantage children**
 - ⇒ *9.1. Poverty, child exploitation and child labour*
- **Conclusions and Recommendations**
- **Appendices**
 - ⇒ Appendix I: Action File on Mt Elgon
 - ⇒ Appendix II: Follow-up Mt Elgon: Observatory Urgent Appeal
 - ⇒ Appendix III: Agenda of the OMCT preparatory mission in Kenya

A KEY TO READING THIS ALTERNATIVE REPORT

The effective elimination of torture and other forms of violence requires a multifaceted and integrated approach addressing respect for a wide range of human rights, civil and political as well as economic, social and cultural. To this end, OMCT is submitting the present alternative report that specifically focuses on how to fight torture in Kenya by addressing its economic, social and cultural root causes. In addition to this report to the 41st session of the Committee Against Torture (the Committee), OMCT has also submitted a report on Kenya to the Committee on Economic, Social and Cultural Rights, entitled “*The Lie of the Land*”, addressing torture and other forms of violence from the perspective of the International Covenant on Economic, Social and Cultural Rights. By submitting these two alternative reports, OMCT would like to provide the Committee with a basis for mutually reinforcing recommendations that address a wide range of causes of torture and cruel, inhuman or degrading treatment.

It is important to note that, in order to be more effective, the present report does not follow the traditional division into articles of the UN Convention Against Torture (the Convention), but rather addresses torture on a topic-by-topic basis, by establishing facts and figures, data and case-studies.

The current analysis was conceived in the light of the principles of indivisibility and interrelation of human rights, to which OMCT attributes paramount importance. As noted, the purpose of this study is to elucidate the way in which, in Kenya, torture and other forms of violence are related to disrespect of economic, social and cultural rights. The report was prepared with the intention of providing guidance to the Committee, in particular when considering possible conclusions and recommendations that could promote change in the country. This analysis tries to illustrate the diversified socio-economic dimensions of torture in Kenya by addressing both the issues of the State’s direct involvement in perpetuating torture against the poorest, and the State’s responsibility for economic, social and cultural policies that lead to torture and ill-treatment. In particular, this last aspect shows the extent to which many times the Kenyan Government is accountable for the use of cruel, inhuman or degrading treatment inflicted by actors other than the State.

OMCT firmly considers that, in order to ensure effective preventive actions, any strategy aimed at eradicating torture requires a comprehensive approach that looks into the root causes of the issue. Therefore, if torture is to be effectively eliminated, then its root causes must be, first, understood and, secondly, effectively addressed. OMCT has conducted extensive research² on the link between violence and violations of economic, social and cultural rights. This research demonstrates that the majority of torture victims come from the most disadvantaged social classes. In particular:

- The poor, excluded and other vulnerable groups are often the first and most numerous victims of violence, including torture and cruel, inhuman and degrading treatment, as well as violence against women and children, because

² For more information, see the OMCT study “Attacking the Root Causes of Torture: Poverty, Inequality and Violence – An Interdisciplinary Study”. www.omct.org

of their vulnerability and because their poverty does not allow them to defend themselves and demand their rights.³

- Violence is inflicted on persons because they demand respect for economic, social or cultural rights. Trade unionists, workers, human rights defenders and citizens in general in the exercise of their legitimate human right to demonstrate, strike or otherwise claim respect for basic economic, social or cultural human rights often are subject to violent attacks by official and private forces. Arrested, they also risk being subjected to cruel, inhuman and degrading treatment and even torture.⁴
- Denials of economic, social and cultural rights can be carried out so violently as to be considered ill-treatment under international treaties.⁵
- Policies and programmes by governments, private actors or development and financial institutions can increase poverty and inequalities that can lead to increased official violence, criminal violence and domestic violence.⁶

This report is based on the international legal obligations of Kenya under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” (article 2, §2) and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment” (article 16, §1).

The Committee has been firm in describing the extent of state responsibility to take action to prevent torture and other cruel, inhuman and degrading treatment or punishment. As regards non-state and private actors, the Committee has stated that when “(...) *acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility (...). The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.*”⁷

³ See for example the Argentine case study “The Village” in the OMCT study “Attacking the Root Causes of Torture: Poverty, Inequality and Violence – An Interdisciplinary Study”.

⁴ For a more detailed description see the Paper OMCT Presented to the United Nations Committee against Torture “Torture and violations of Economic, Social and Cultural Rights : Appraisal of the Link and Relevance to the Work of the United Nations Committee Against Torture”, OMCT Geneva (November 2001), in particular sections 2 & 3.

⁵ United Nations Committee Against Torture, Communication No 161/2000: Yugoslavia, submitted by Hajrizi Dzemajl. Document CAT/C/29/D/161/2000

⁶ The OMCT study “Attacking the Root Causes of Torture: Poverty, Inequality and Violence – An Interdisciplinary Study” contains examples of public policies in the economic and social fields that directly increased poverty and inequality in large sectors of the society which, in turn, resulted in a very significant increase in violence, including ill-treatment and torture (see in particular, the chapters and case studies relating to Argentina, Egypt, Nepal and Uzbekistan). Similar links have been reported by other sources, including the United Nations Special Rapporteur on the question of Torture (see section 3 of the OMCT Paper Presented to the United Nations Committee Against Torture “Torture and violations of Economic, Social and Cultural Rights : Appraisal of the Link and Relevance to the Work of the United Nations Committee Against Torture”, OMCT Geneva, November 2001).

⁷ General Comment N. 2: Implementation of article 2 by State parties

Furthermore, the Committee has already established the link between violations of economic, social and cultural rights, in particular the right to adequate housing, and cruel, inhuman and degrading treatment in its views adopted in relation to Communication No. 161/2000 against Yugoslavia.⁸ In that case the Committee found that the violent way in which Roma were evicted from their homes, and their dwellings destroyed and burned in the former Yugoslavia constituted acts of cruel, inhuman or degrading treatment in violation of the Convention. Although the destruction was carried out by private individuals, because the authorities acquiesced in the destruction, the Committee found that the State Party was responsible for the violations of the Convention.

Lastly, the specific vulnerability of the poor, excluded, marginalised and minority sectors of Kenyan society, as well as the vulnerability of women and children to torture and other forms of violence, is clearly described by this report. Kenya, as a State Party to the Convention, has the specific responsibility to protect vulnerable groups. In the words of the Committee: “**Protection for individuals and groups made vulnerable by discrimination or marginalization.** *The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. (...) States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above.*”⁹

⁸ United Nations Committee Against Torture, Communication No 161/2000: Yugoslavia, submitted by Hajrizi Dzemajl. Document CAT/C/29/D/161/2000

⁹ General Comment N. 2: Implementation of article 2 by State parties

METHODOLOGY OF THE REPORTING PROCESS

This alternative report has been developed by OMCT in Geneva in collaboration with the Kenya Section of the International Commission of Jurists (ICJ) and the Independent Medico-Legal Unit in Nairobi (IMLU).

In view of submitting this report, OMCT carried out a preparatory mission to Kenya running from the 12 to the 18 of April 2008 organised by ICJ. This mission involved two OMCT staff and a number of Kenya-based organisations. The aim of the preparatory mission was twofold: firstly to consult representatives of Kenyan Government and civil society on how violence is related to denials of economic, social and cultural rights in Kenya, and secondly to give voice to the people directly affected by torture and violence in the country, to record their experiences, to seek their inputs and recommendations, and to bring their voices to the Committee.

The mission had also a rural component which was organised by the Centre for Minority Rights Development (CEMIRIDE) and which included visits, meetings and fora in rural areas. This part was aimed at collecting targeted information for the preparation of the alternative report *The Lie of the Land*.¹⁰ In this respect, the present report frequently refers to the report submitted to the CDESCR as for detailed socio-economic analysis.

In the context of the preparatory mission to Kenya, ICJ organised meetings in Nairobi with national authorities and local NGOs that provided valuable information on specific issue, and in particular with the following organisations and persons:

- Undersecretary on Security – Office of the President of Kenya
- Kenyan National Commission on Human Rights
- Coalition on Violence Against Women (COVAW)
- Independent Medico-Legal Unit (IMLU)
- Kenyan Alliance for the Advancement of Children Rights (KAACR)
- Kenyan Network Grassroots Organisations (KENGO)
- Economic and Social Rights Centre
- Professor Mbote, University of Nairobi, Faculty of Law

In addition, ICJ set up three consultative fora with local communities in Nairobi. These fora addressed the challenges faced by informal settlements dwellers, informal sector workers, landless, pastoralists and indigenous communities. Besides providing first hand information, these fora also offer and eloquent testimony to how these vulnerable groups are systematically exposed to violence and other forms of abuses. All meetings were held in formal or semi-formal settings and were both filmed and photographed, with the communities' approval. Participants spoke Kiswahili or English and interpretation was provided when necessary. By this alternative report OMCT wishes to give voice to these marginalised groups whose conditions frequently remain unheard and unacknowledged. Detailed information on these fora is included in *ad hoc* text boxes throughout this report. These boxes offer a brief overview of the context of the meetings, providing rough estimates on number, gender and age of

¹⁰ For further information, OMCT alternative report *The Lie of the Land*, submitted to the 41st session of the Committee on Economic, Social and Cultural Rights. www.omct.org.

participants. These *had hoc* boxes also summarize the main concerns discussed within the public debates held during the fora. The preparatory mission was carried out by Michael Miller and Francesca Restifo on behalf of OMCT.

This report is the product of the information collected thanks to the commitment of ICJ in conceiving and organising the above-mentioned preparatory mission. The study is also the outcome of the valuable contribution of IMLU. In this respect, the analysis draws its data from a nation-wide survey on torture “*Understanding Torture in Kenya, An Empirical Assessment*”, carried out by IMLU in 2007. The survey was aimed at gathering information from a representative sample of 980 selected respondents. The sampling process has utilised the division of the country into eight provinces, and for each province two districts were selected. A questionnaire was administered to the 980 respondents. The information collected mainly focused on the perception on torture, the experience of suspects within informal and police custody, court processes, and prison life. The survey applied qualitative technique including in-depth interviews with key informants and targeted group discussions.

The survey’s sample population had the following characteristics: among the respondents 76.2% were men and 23.8% women. The age-range varied from 18 to 77 with an average age of 32. The educational level was principally spread between primary (39.1%) and secondary (31.0%) education, followed by the tertiary (12.8%), and by no education (17.1%). The survey also captured the occupation profiles of respondents: self employment accounted for 56.3% of the respondents, those employed comprised 19.6%, farmers (small-holders) comprised 7.8%, and the rest (16.3%) engaged in other livelihood activities.

INTRODUCTION

A socio-economic analysis of poverty, inequality and violence in Kenya

“Torture and other forms of violence continue to increase in Kenya: every year more than 5,000 persons continue to be victim of torture and more than 10,000 are affected indirectly.

This situation will recur year upon year, unless the Government takes concrete steps to eradicate torture by acting at its economic, social and cultural root cause.”¹¹

Despite its prohibition under both international and national law,¹² torture and other cruel, inhuman or degrading treatment and punishment still occur with frequency in Kenya. A report submitted to the Committee by the Kenyan National Commission of Human Rights emphasises that the prime factor that determines the risk of exposure to torture depends on whether “one belongs to the most vulnerable groups, which include, among others, economically marginalized, illiterate, women, youth and children, refugees, persons with disabilities”.¹³ These data are confirmed by the recent torture prevalence survey carried out by IMLU ‘*Understanding Torture in Kenya: An Empirical Assessment*.’¹⁴ The survey’s outcome indicates that the perpetrators of torture are mainly represented by police officers, whereas their victims predominantly belong to the poorest segments of Kenyan society. The study further reveals that torture commonly takes place in informal settlements and/or in overcrowded prisons.

The State Report¹⁵ itself indicates that “Poverty remains the major impediment to both the fulfilment of basic needs and the realization of the full potential of many Kenyans, particularly women and children”.¹⁶ Recent statistics for Kenya show that the country’s wealthiest 10% households control 42% of the total income while the bottom 10% control less than 1%.¹⁷ Disparity refers both to opportunities and actual enjoyment of rights. Hence, the difference between the poor and the rich are to be found, as a matter of fact, in the access to and enjoyment of opportunities, services and infrastructures. It entails discrimination in access to justice, education, health, land and livelihoods as well as the realization of civil and political rights. Uneven wealth distribution is also geographically reflected within and among the eight provinces into which Kenya is divided and this is manifested, again, in terms of life expectancy, wealth, access to basic needs, access to justice, employment opportunities, educational levels, and average incomes. For example, in 2000, the total population living below the poverty line in North-Eastern Province amounted to 73.1%, compared to the 35.3% of the same year in Central Province. The same figures are reflected in access to justice. Central Province has the highest number of courts (20) and the smallest number of people per court (186,208). Conversely, the

¹¹ Statement by IMLU.

¹² The Constitution of Kenya : Protection from inhuman treatment, Section 74:

“No Person shall be subject to torture or to inhuman or degrading punishment or other treatment.”

¹³ Kenyan National Commission on Human Rights, paper submitted to 41st session of the Committee Against Torture.

¹⁴ *Understanding Torture in Kenya: An Empirical Assessment*, IMLU, August 2007

¹⁵ State Report: the initial periodic report submitted by the State Party for the 41st session of the Committee.

¹⁶ State Report, § 10

¹⁷ *Pulling Apart: Facts and Figures on Inequality in Kenya*, Society for International Development, 2004.

North-Eastern Province has the smallest number of courts (2) and the highest number of people per court (481,072).¹⁸

In addition, the plethora of customary laws reflects the variety of cultures, religions, traditions, and languages characterising different ethnic communities. Conflicting elements among different legal systems further challenge the enjoyment of the rights and define the way people relate to institutions. Inequality and discrimination affect the principle of equal access to rights, as enshrined in the International Covenant on Civil and Political Rights.

While data clearly show that in Kenya torture and other forms of violence are inflicted on the poor, in order to prevent torture and violence, it is necessary to go further and to take into account the context, reasons and circumstances under which torture takes place. The economic status of individuals also defines how often one is arbitrarily harassed by the police. Torture and other forms of violence can be inflicted because one cannot afford to pay the bribes demanded; cruel or degrading treatment is systematic in prisons and this is due to congestion of suspects unable to afford bail and legal assistance; police undertake arbitrary actions and other forms of abuses in poor areas; women are unable to address violence due to their lack of financial means; torture is inflicted on street children and on children in conflict with the law; ill-treatment and violence are the consequences of land clashes; police react with excessive use of force to suppress demonstrations against injustices. Poverty has been recognised as the main cause of insecurity and crime in the country, including human trafficking, sexual exploitation and child exploitation, whose levels remain high in the country.

The combination of these factors means that the most common victims of torture in Kenya are persons belonging to economically disadvantaged sectors of society. An understanding of the root causes, as well as of the linkages between the different factors, is crucial to establishing a set of effective recommendations designed specifically to eradicate - or at least reduce - torture, ill-treatment and other forms of violence in Kenya.

¹⁸ *Pulling Apart: Facts and Figures on Inequality in Kenya*, Society for International Development, 2004.

1. Criminalisation of the poor: arbitrary arrests and police corruption

The right to liberty and security of a person is, in principle, guaranteed by the Constitution,¹⁹ however it is, *de facto* systematically challenged by police arbitrary actions carried out, in particular, in overcrowded and poor urban neighbourhoods. It is reported that torture in Kenya takes place in secrecy, through a wide range of police arbitrary actions, including arbitrary arrests grounded on false charges.²⁰

According to the above-mentioned IMLU survey, the 71% of respondents held in informal custody were invited to pay a bribe, either in money or by other kinds of favours, in exchange for liberty.²¹ To engage in bribery in exchange for liberty implies escaping torture and harassment during detention, or simply avoiding the higher costs of legal assistance. Bribery occurs on the streets - upon being stopped by police - or in police stations. In the latter case, bribes may be paid in order to be charged with a lesser offence - irrespective of whether the original charge was grounded or not - or to avoid being taken to court and then staying in remand at length.²² Suspects who refuse bribery are subject to harassment, ill-treatment, and other forms of physical and psychological violence. In addition, ICJ indicates that any attempt to complain to higher authorities is met with harsh reprisals against both complainants and their families, as a warning to the community. According to testimonies, the police also arrest young girls at dusk. These girls are locked in the cell, removed in the middle of the night and, in exchange for forced sex intercourse, set free the morning after. Some of them reported having been raped by male inmates in cells connected by the same corridor.

The connection between police violence and police corruption constitutes an emerging aspect of torture that was already dealt with in the 2005 OMCT Report to the Human Rights Committee. The frequency of this phenomenon suggests that the practice is widespread, common and systematic. This is confirmed by the fact that police officers have set up extortion cartels to obtain money from the community.²³ In legal terms, this practice is also made possible by a legislative framework that allows police to arrest upon mere suspicion.²⁴

Police corruption is more consistent in the poorest areas where police methodically undertake night rounds. In particular, it is a common practice for police to round up the poor, women, hawkers, street children, and then to proceed with massive arrests for the most disparate charges such as drunkenness, disorderliness, prostitution, vagrancy or simply the suspicion of being an illegal alien. Those arrested are

¹⁹ The Constitution of Kenya, Sections 70 and 72.

²⁰ Source: IMLU

²¹ *Understanding Torture in Kenya, an Empirical Assessment*. IMLU, August 2007.

²² *State Violence in Kenya*. OMCT Alternative Report submitted to the Human Rights Committee, 2005.

²³ *State Violence in Kenya*. OMCT Alternative Report submitted to the Human Rights Committee, 2005.

²⁴ Constitution of Kenya, Section 72. (1) e).

(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following circumstances:

(...)

e) Upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law of Kenya.

subsequently held in police stations. Most of them are unable to access legal assistance because they lack financial means and/or because they are unaware of their own rights.²⁵ IMLU's research indicates that police regularly beat suspects, particularly those who are unable to pay bribes and lodge complaints against police misbehaviour. Maltreatment may only stop if suspects confess their charges, even when they are ungrounded. Testimonies reported that police bribing methods have common characteristics. Allegedly, police officers generally stop persons individually with petty excuses, frequently at dusk, in their way back home. As persons start enquiring about the reason for their being stopped or simply reply to the allegations, he or she is required to "speak adequately with the police". This constitutes an indirect invitation to pay the bribe in order to avoid being apprehended and taken to a police station.

ICJ indicated that the systematic and recurring nature of these arbitrary arrests may imply the fact that, not rarely, the same person ends up being repeatedly victim of the similar ill-treatment. Indeed, this extortion racket has heavy costs for young people, their families and communities. ICJ emphasised that, given that their meagre resources are routinely transferred to corrupt police officers, victims find themselves in a constant cycle of debts, accumulated to pay bribes. This cycle exacerbates their already poor living conditions and may further mean that families are unable to meet daily subsistence expenses, or even that they are forced out of their rented premises and their household assets are confiscated to cover debts and recover unpaid rents. The resulting psychological impact affects in particular the younger generations who, depending on their individual experiences, gradually lose trust and confidence in public institutions, engage in criminal activities and end up joining the corrupt system. In this respect, ICJ reported a victim who admitted that, "sooner or later, as one becomes acquainted with hardcore criminals who are in the same cells as the innocent young men, one becomes easily recruited into the criminal life".

1.2. Case study: police violence against the poor in Westlands

Striking examples of police violence against the poor emerged during the forum on Youth, Violence and Socio-Economic Rights carried out in the Westlands Constituency. Westlands is an area of Nairobi, with both low- and high-income neighbourhoods, that has been notorious for the 2005 violent eviction carried out in the informal settlement of Deep Sea. The case of Westlands, outlined below, illustrates how violence systematically relates to police corruption and is inflicted against the most marginalised. In particular, it clearly delineates the profile of the victims and contextualises the behaviour of the perpetrators.

²⁵ *Understanding Torture in Kenya, an Empirical Assessment*. IMLU, August 2007.

Box 1

Forum on Youth and Socio-Economic Rights

Nairobi, Wednesday 16 April, 14:30-19:00
Number of participants: approximately 25
Age: 18<30 (but a few older than that); Gender: balanced
Low-income groups - Westlands constituency
Facilitator: Mr Ken Njiru

The aim of the forum consisted in collecting testimonies regarding arbitrary arrests and poverty; Police corruption and bribes against the poor; Violence and corruption in prisons; Access to justice; Hawking and informal sector; Evictions; Violence against women. The forum was also intended to collect, collate and record first hand experiences of victims from the most marginalised sectors whose voices would have otherwise remained unheard. The results of this workshop will be used as a tool to hold government to account and to provide a platform for dialogue on how to better the situation. The information will also be packaged and released to the general public through the media and civil society as a means of raising awareness of and encouraging action against such abuses.

Public debate

The forum's participants reported that the Westlands Constituency of Nairobi is the scene of consistent violations of human rights, including the right to liberty, carried out by the security system. Those most affected are the economically disadvantaged dwellers and in particular youth. Reportedly, it is a common occurrence for any person on the streets after 6.00 pm to be arrested on false charges. On a regular basis the police arbitrarily arrest young people, particularly in informal settlements and in the evening, based on insignificant suspicion or in-existent charges and notwithstanding the absence of curfew. These kinds of arrests are the grounds for police corruption, bribes and extortion. Indeed, the police offer immediate release in exchange for an amount of money or, as concerns women, in exchange for sexual intercourse. Those who cannot pay are taken to the station and have to pay 'bail' if they do not want to be taken to court. Findings indicate that such arrests constitute an extortion racket for the police to raise money and obtain valuables. Those who have money or any other goods are immediately released; those who have not are taken to the police station. Families are then forced to pay bail for the release of a family member and to avoid the trial and the costs of legal assistance. It was reported that young people, who had been remanded for months without charge, were exploited in police stations to do manual and demining jobs.

2. Denied access to justice and high costs of legal assistance

In Kenya access to justice is seriously compromised by the extremely high costs of legal assistance that remains inaccessible considering the fact that, as the State report itself indicates, half of the Kenyan population live below the poverty line. Consequently, beside being exposed to corruption and bribery, Kenyans are also prevented from enjoying their right to *habeas corpus*, because the legal assistance is too costly. In this respect, OMCT already drew attention to the lack of legal aid administrated by the Government and called for the creation of an office of the public defender that would defend all persons against human rights violations, as proposed in the Draft Constitution. As a matter of fact, upon arrest and arraignment in court, most Kenyans are unable to meet the high costs of legal representation and therefore are unable to seek justice. Suspects end up sentenced to prison on false charges.²⁶

Data from the survey conducted by IMLU confirm that the majority of those serving prison sentences are more often the poorest and most economic disadvantaged, and

²⁶ *Understanding Torture in Kenya: An Empirical Assessment*, IMLU, August 2007

are, more commonly, individuals with lower levels of education, who are less aware of their rights.²⁷ Table 1 shows the relationships between different levels of economic resources and the ability to obtain legal services. The data refer to four categories: employed, self employed, farmers and those with other sources of livelihoods. These employment categories indirectly reflect the kind of economic resources available and thus the financial ability to obtain legal service. The table clearly illustrates that the ability to obtain legal services is low for all categories.²⁸ Indeed, even amongst those employed, only the 34.3% are able to obtain legal assistance. This means that the costs for legal services are beyond the financial capability of ordinary Kenyans.

Table 1: economic resources against ability to obtain legal service

<i>Employment categories</i>	<i>Ability to obtain legal service</i>
Employed	34.3%
Self employed	21.8%
Farmers	10.3%
Other sources of livelihoods	13.7%

Source: IMLU

3. Bail, remandees, prison congestion and torture

Torture is further related to lack of financial means in respect to bail requests and to pre-trial arrests conditions. In fact, those who cannot afford to pay bail are remanded in detention for a period reportedly beyond that foreseen by Section 72 (3) of the Constitution.²⁹ Consequently, ‘remandees’, who de facto correspond to those who do not have financial means to pay the bail for release from preventive incarceration, constitute the largest part of detainees. Remandees remain in prison as long as they are not able to pay, and are eventually found guilty on the basis of false charges.³⁰

The ability to seek cash bail also corresponds to the educational level of suspects. IMLU’s survey assesses the relationship between those who seek to pay bail and educational levels. The data shown in Table 2 reveal that as many as 77.6% of detainees who fall under the category of “no education” do not seek for cash bail, followed by 70.9% of those with primary education, the 66.4% of those with secondary education and lastly the figure decreases to 63.6% for those with tertiary education. This outcome suggests that higher educational levels correspond to better opportunities to seek justice and better awareness of personal rights.³¹ However,

²⁷ *Understanding Torture in Kenya: An Empirical Assessment*, IMLU, August 2007

²⁸ *State Violence in Kenya*. OMCT Alternative Report submitted to the Human Rights Committee, 2005.

²⁹ Constitution of Kenya, Section 72.(3)

A person who is arrested or detained-

(a) *for the purpose of bringing him before a court in execution of the order of a court; or*

(b) *upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.*

³⁰ *Understanding Torture in Kenya: An Empirical Assessment*, IMLU, August 2007

³¹ *Understanding Torture in Kenya: An Empirical Assessment*, IMLU, August 2007

regrettably, irrespective of the educational level, those who seek cash bail correspond to a minority ranging from, approximately, one quarter to one third of detainees.

Table 2: relationship between educational level and seek for bail

Education level	Not seeking cash bail
No education	77.6%
Primary	70.9%
Secondary	66.4%
Tertiary	63.6%

Source: IMLU

Frequently courts set strict bail conditions that cannot be met by the accused person. Reportedly, the average bail is out of reach given the average Kenyan salary. As a result, remandees, detained in pre-trial custody at length, further overcrowd the already congested Kenyan prisons.³² In turn, prison congestion compromises decent living conditions for prisoners, including hygiene and health conditions. OMCT already denounced the situation of Kenyan prisons and emphasised that the poor living conditions amount to cruel, inhuman or degrading treatment. The episodes of Meru Prison, concerning the death of five prisoners in September 2004, offer an eloquent example.³³ Inhuman conditions are also to be found in other forms of custody including police stations, where national NGOs report unhealthy congestion in cells. Suspects narrate having slept standing in overcrowded deposits turned occasionally into cells. Such conditions facilitate the spread of airborne diseases such as tuberculosis, and the transmission HIV due to sexual abuse. ICJ reported that frequently, ‘suspects’ leave the cells with diseases ranging from water born diseases to skin diseases.

4. Police violence in informal settlements

Kenyan informal settlements are notorious for their extremely poor living conditions, congestion, lack of basic services and infrastructures, as well as for police violence and arbitrary actions. These elements are further exacerbated by political unwillingness and institutional indifference to address the situation. The marginalisation experienced by residents of Kenya’s informal settlements is compounded by the lack of trustable police and a fair and effective justice system, despite the fact that, as indicated by IMLU, the presence of police is predominant in urban informal settlements.

In addition, those living in informal settlements are constantly at risk of evictions, displacements and the negative impact of up-grading projects.³⁴ On 16 March 2007, the Special Rapporteur on adequate housing addressed a letter to the Government of Kenya, focusing on the negative impact of forced evictions on the poorest and most marginalized groups of society. He also recalled the commitment of the Government to addressing the increase of informal settlements in urban areas, particularly in

³² *State Violence in Kenya*. OMCT Alternative Report submitted to the Human Rights Committee, 2005.

³³ *State Violence in Kenya*. OMCT Alternative Report submitted to the Human Rights Committee, 2005.

³⁴ For further information, OMCT alternative report *The Lie of the Land*, submitted to the 41st session of the Committee on Economic, Social and Cultural Rights.

Nairobi. The OMCT alternative report *The Lie of the Land* - submitted to the Committee on Economic, Social and Cultural Rights - points out that in Kenya urban evictions take place with improper legal procedures, lack of consultation and use of force by officials. An emblematic case is represented by the 2005 eviction carried out in the Deep Sea settlement, near Westlands, when Government-owned bulldozers were used to demolish the homes of 850 families and where armed police and city officials were involved in the brutal action.

Box 2

Public forum on informal settlements

Thursday 17 April, 9.00-13.00

Number of participants: approximately 100; Age: all ranges; Gender: balanced

Low-income groups, informal settlements residents

Facilitator: Ms Wangui Mbatia (Secretary General of KENGO: Kenya Association of Grassroots NGOs)

The forum was aimed at collecting first hand information on: Criminalization of the poor; Police violence against the poor; Access to justice and poverty; Unemployment; Arbitrary arrests; Evictions; Health

Public debate

The participants of the forum reported that dwellers of informal settlements are systematically harassed and bribed by the police. In particular police violence is inflicted upon the poor, poor children and poor women. Participants emphasised that they are victims of arbitrary arrests. They also complained that access to justice is affected by bribery and corruption. Therefore, those who cannot afford bribes are those most vulnerable to arbitrary arrests and other abuses. Chief administrators are unwilling to adequately address these human rights violations in informal settlements and to take preventive measures, including fighting impunity. In reality, residents of informal settlements are victims of extrajudicial structures. It was reported that last year (2007) the police killed many people (by summary shootings) and 75 women were beaten. Informal settlement dwellers are also exposed to evictions and violence inflicted by City Council officers. Police allegedly facilitate evictions processes and are even involved in the destruction of buildings. A witness reported that after having complained about police brutality in evictions, he was arrested and detained several hours.

Furthermore, participants reported that in police stations information is obtained under torture and ill-treatment by the police. Women and children are victims of sexual abuse and rape, both by the police and the family. In the case of family involvement, police treat domestic violence as a private matter. Single mothers living in informal settlements with their children face particularly harsh conditions: lack of shelters for victims of domestic violence and for single mothers exposes them to risk of further violence, including sexual exploitation. In this respect, women complained that the Gender Desk programme has been poorly implemented, if at all. In many police stations, the programme is still unknown. A number of participants also denounced forced detentions in hospitals for inability to pay bills. Allegedly, hospitals often detain people until they are able to pay their bills (this occurs in particular in Kenyatta Hospital). The longer persons are detained the more they have to pay, as their costs accumulate. New mothers and women victims of violence are prevented from seeing their children and family as long as they are unable to pay their bills.

5. Extrajudicial killings in poor areas - The Case of the Mungiki

The Mungiki is a sect that has been described by authorities as “a criminal gang” for its involvement in organised crime and a series of killings and murders. The sect was banned in 2002. The Mungiki are made up primarily of militants from Kenya's biggest ethnic group, the Kikuyu.³⁵ The Mungiki leadership has openly claimed to have two million members around the country. Currently, their influence is principally

³⁵ BBC news, 17 September 2007, <http://news.bbc.co.uk/2/hi/africa/6998446.stm>

manifested in urban poor areas and informal settlements, in particular in Mathare, Nairobi's second largest informal settlement. In informal settlements they are entrenched in and mixed with the poorest segments of society, and there they find fertile grounds for corruption, bribery and other criminal activities. In this respect, the Mungiki are also allegedly connected with police corruption and extortion rackets. Mungiki members have also been involved in demanding protection levies from public transport operators and informal settlement dwellers in and around Nairobi,³⁶ in particular residents of certain areas had to pay a levy to the sect to be able to access communal latrines and for security at night.³⁷

In order to respond to and suppress the Mungiki's illegal activities, the police have recently carried out a zero-tolerance policy against the sect entailing extra-judicial killings and other arbitrary actions. A harsh illustration is provided by the police response to episodes of violence instigated by the Mungiki during 2000. On that occasion the Rift Valley provincial commissioner, Peter Raburu, issued a shoot-on-sight order to the Kenyan police force, and none of the Government officials in charge of provincial administration or constitutional affairs opposed the order.³⁸ In 2002, more than 50 people died in clashes between Mungiki and the owners of *matatus*, a local shared taxi system. Similar clashes with *matatus* owners occurred in 2007 and involved the intervention of security forces. During the operation 100 people died because of the violence and excessive force employed.³⁹ In November 2007, a Kenyan human rights organisation, the Oscar Foundation Free Legal Aid Clinic-Kenya, claimed that the Kenyan police have killed as many as 8,040 people "by execution or torture during a crackdown on a banned sect" adding that "a further 4,070 people had gone missing as security forces tried to wipe out the Mungiki sect." The organisation emphasised that these deaths and disappearances occurred over five years, up to August 2007.⁴⁰

Informal settlements dwellers are therefore not only directly exploited and threatened by the Mungiki criminality, but their lives are also seriously jeopardised by police violent reprisals against the Mungiki. A series of police shootings took place in 2007, when Mathare informal settlement was closed off in a clampdown of the sect.

6. Police violence against informal sector work

In Kenya, informal sector work such as hawking, street trade and other casual labour constitute an important economic source that significantly influences the daily revenues of the poorest sectors of society. Especially in urban areas, many Kenyans find their daily livelihoods and subsistence in a variety of informal activities. However, in Nairobi the needs of this unofficial sector are consistently challenged by corruption, and harassment from police and city council guards.

³⁶ BBC news, 17 September 2007, <http://news.bbc.co.uk/2/hi/africa/6998446.stm>

³⁷ For further information, OMCT alternative report *The Lie of the Land*, submitted to the 41st session of the Committee on Economic, Social and Cultural Rights. www.omct.org.

³⁸ *State Violence in Kenya*. OMCT Alternative Report submitted to the Human Rights Committee, 2005.

³⁹ BBC news, 17 September 2007, <http://news.bbc.co.uk/2/hi/africa/6998446.stm>

⁴⁰ BBC news, 25 November 2007, <http://news.bbc.co.uk/2/hi/africa/7112183.stm>

The Government has always minimised the importance of this sector, and has failed to establish clear policies to regulate the situation of informal workers; workers on the margins of society are more vulnerable to arbitrary actions and ill-treatment by local authorities. The Kenyan National Commission on Human Rights reported that violence against informal sector workers is an unsolved issue that needs to be adequately addressed.⁴¹

During the preparatory mission to Nairobi, OMCT collected testimonies on how informal workers are systematically at risk of abuses and arbitrary actions by city council guards (*askaris*). According to witnesses, hawkers pay a fee corresponding to 25 shillings per week, however, their activities are neither recognised nor regulated, and no licence is provided. The lack of any recognition implies the absence of any right to association; consequently, any attempt to protest is met with violence and brutality.⁴² Kiosk owners and hawkers also reported that they are frequent victims of unannounced clean-ups, often carried out early in the morning. Informal sector workers further claim to be harassed by police and city council *askaris*, who extort bribes, destroy their property, steal their goods, or hold them in prison until they are able to buy their way out.⁴³

7. Violence related to land disputes

Historical injustices, marginalization, and political manipulation are among the factors that contribute to interethnic conflicts and violence rooted on the issue of land. This is further exacerbated by the manipulation of political power at local levels, exclusion of and discrimination against certain groups and the unwillingness of police to intervene and adequately address violent clashes deriving from land disputes.

The issue of land conflict is also to be found in the consistent unwillingness of the Government to undertake a land reform leading to a more equitable land distribution and to solve confusion over land titles. In addition, the Government has failed to implement the recommendations included in the so-called Ndungu Land Report (*Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*).⁴⁴ The Ndungu Commission was set up in 2003 to investigate the irregular allocation of public land; the recommendations issued by the Commission highlighted, *inter alia*, the urgent need for establishing a Land Titles Tribunal dealing with the rectification - on a case by case basis - of the illegal allocation of lands, with the development of a comprehensive land policy, and with the establishment of an inventory of public land. CEMIRIDE emphasised that the reluctance of the Kenyan

⁴¹ OMCT preparatory mission to Kenya, Nairobi, Tuesday 15 April

⁴² Testimony from Forum on Economic Social and Cultural rights

⁴³ *Kenya: Unfinished Democracy*: Human Rights Watch.

⁴⁴ The official title is *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*. The 20-member Commission, chaired by Paul Ndungu was appointed by President Kibaki in June 2003 as one of a series of measures to tackle corruption. It comprehensively details illegal land allocation and investigates how public procedures have been manipulated for political and private interests. It contains important recommendations, including the setting-up of an inventory of public land, the development of a comprehensive land policy, and the establishment of a Land Titles Tribunal charged to examine complaints and conflicts regarding land allocation. For further information: see OMCT alternative report *The Lie of the Land*, submitted to the 41st session of the Committee on Economic, Social and Cultural Rights. www.omct.org .

Government to design a legal framework that could address historical injustices related to land has resulted, over the years, in many families and communities being deprived of their basic needs, evicted and even massacred.

The strong linkages between violence and access to land have particularly affected ethnic divisions by increasing tensions, insecurity, dissatisfaction, poverty and powerlessness. In turn, land clashes have exacerbated the already poor economic conditions of affected communities⁴⁵ and compromised the enjoyment of their basic rights.⁴⁶ This vicious circle also has a devastating effect on children. In August 2007, it was reported that poverty and frequent clashes among pastoralist communities in northern Kenya have prevented thousands of children from enrolling in school and made them more likely to commit acts of violence. Children of school age had been involved in inter-community violence, and conflicts between the Pokot and Samburu communities were reported to have adversely affected education in the Samburu and Laikipia Districts over the last two years.⁴⁷

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people points out that in Kenya “communities claim that the Government’s response to these situations has been inadequate, and that in many instances it has led to human rights abuses by security forces. In most cases, these abuses have not been seriously investigated and the victims have found no redress, leading to a widespread sense that impunity prevails”.⁴⁸ The Special Rapporteur has further drawn attention to police abuses in relation to social protests associated with land rights claims involving the ill-treatment and arrest of community members “In Laikipia, in 2004, Maasai protesters marking the expiration of leases under the 1904 treaty with the British were severely repressed, resulting in the killing of an elder and serious injury to four people. Rape of women and looting in local villages were reported as a result of the security operation that ensued.”⁴⁹ In addition, on that occasion, a number of organizations active in denouncing abuses against indigenous communities have allegedly been the object of systematic harassment and intimidation by the authorities.⁵⁰

⁴⁵ Minority Rights Groups International and CEMIRIDE: “Kenya: Minorities, Indigenous Peoples and Ethnic Diversity” <http://www.minorityrights.org/?lid=645>

⁴⁶ For further information, see OMCT alternative report *The Lie of the Land*, submitted to the 41st session of the Committee on Economic, Social and Cultural Rights. www.omct.org.

⁴⁷ “Kenya: Insecurity, conflict affect education in northern region”, IRIN, August 2007, www.irinnews.org/printreport.aspx?reportid=73834

⁴⁸ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen Addendum - Mission to Kenya - A/HRC/4/32/Add.3, 26 February 2007, § 55

<http://daccessdds.un.org/doc/UNDOC/GEN/G07/110/43/PDF/G0711043.pdf?OpenElement>

⁴⁹ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen Addendum - Mission to Kenya - A/HRC/4/32/Add.3, 26 February 2007, § 60.

⁵⁰ Including the Kenya Land Alliance, Osiligi in Laikipia and MPIDO. “In 2005, the director and two other staff members of MS Kenya, a branch of the Danish Association for International Cooperation that supports the promotion of land rights, were accused of ‘subversive activities’.” Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen Addendum - Mission to Kenya - A/HRC/4/32/Add.3, 26 February 2007, § 61.

7.1. Torture allegations in Mount Elgon

On 4 June 2008, OMCT, IMLU and ICJ issued an urgent appeal (see appendix I) concerning ongoing torture and extrajudicial killings by the Kenyan Army and Police in the Mount Elgon District in the Western Province of the country. These represent a concrete manifestation of the economic, social and cultural dimensions of torture, related to land conflict. The fierce violence that continues to be carried out in Mount Elgon, has its roots in the issue of poor land allocation, forced evictions and the consequent impact on livelihoods of local communities.

The Mount Elgon District was the scene of an extended violent conflict over land allocation involving the Sabaot Land Defence Force (SLDF), a guerrilla militia. The SLDF was formed in 2005 to resist government attempts to evict population in the Chebyuk area of Mount Elgon as part of a resettlement programme. It has since been accused of killing more than 600 people, terrorizing local populations through physical assaults and threats and committing a variety of atrocities including torture, rape, and the theft and destruction of property. It is estimated that more than 66,000 people were displaced in an 18 month period due to the activities of the SLDF. In March 2008, the Kenyan Army was deployed in the Mount Elgon area to clamp down on the activities of the SLDF in an action called “Operation Okoa Maisha”. This military operation has been conducted under a veil of secrecy. Between early March and June of this year, it resulted in mass arrests and the subsequent prosecution of over 1200 persons.

IMLU and ICJ report that most of the persons arraigned in court as a result of Operation Okoa Maisha have complained that they were tortured by the Kenyan military and exhibited injuries that remain to be accounted for by the State. According to media reports, army officers have also assaulted journalists who attempted to cover the operation. IMLU indicated that “the Government is undertaking massive infringements of fundamental rights on the civilian population in the Mount Elgon District and its surroundings” in its efforts to identify SLDF members. IMLU also indicates that there are reports of minors who have been interrogated and subjected to torture. IMLU’s findings from a medico-legal investigation into torture by the military in the Mount Elgon District points out that police officers have carried out mass arrests – often at dawn - accompanied by acts of physical violence in Sabaot communities. According to the Kenya National Commission on Human Rights report *The Mountain of Terror*⁵¹, the military is responsible for the execution of thousands of men and boys from the Sabaot community in Mount Elgon District. It is believed that many have died while undergoing torture, and that others have subsequently died in prison due to injuries received during their interrogation. The bodies of those who die in the military camps are reportedly taken to Kamarang, a hill in a forest area in Mt. Elgon District, where they are buried in unmarked graves. Other bodies are dumped on farmland, with attendant risks to public health (further information on Mount Elgon issue is included in Appendices I and II).

⁵¹ Released on 15 May 2008.

<http://www.humanrightshouse.org/assets/1000KNCHR%20report%20on%20the%20Mt%20Elgon%20violence.pdf>

7.2. Public forum on access to land

Box 3

Forum on Access to Land

Monday 14 April, 14:30 - 17:30,

Venue: Stanley Hotel, Nairobi

Number of participants: approximately 70

Age groups: all ages; all income groups; gender: predominantly men

Interventions:

- Mr George Kegoro – ICJ Kenya director
- Mr Wilfred Nderitu
- Hon. Wanyiri Kihoro (Advocate of the High court of Kenya and Land Economist)
- Mr Davies Malombe
- Mr Ken Njiru

Public debate

The participants of the forum discussed the role of land in Kenyan society and the link between land and violence. They pointed out that the land issue should be regarded from a more comprehensive perspective, and it should be associated with the overall uneven distribution of wealth that creates conflict. Participants underlined that land is important and remains a crucial issue for Kenyans. The land issue is not only linked to the problem of denied access to property rights, but also to the general uneven distribution of wealth. Participants highlighted that since the end of colonialism, clashes over land have been predominantly a war among the poorest. They added that the Kenyan Government is unwilling to adequately address the land issue and undertake a land reform that would reduce unequal land distribution. In this respect, denied access to ownership constitutes a political issue. Unequal access to land perpetuates poverty, marginalisation and conflict for the majority of poor Kenyans, to benefit the most privileged. The participants also discussed the root causes of land-related violence, and indicated that violence is due to confusion over land plots and to lack of legal certainty as regards ownership. Title deeds have been unevenly and selectively distributed since the start of the post-colonialism period. The Government still has an inconsistent attitude that allocates land and title deeds on a personal basis. The allocation of land plots has also been manipulated for political purposes. The Government is unwilling to change the *status quo* and to move towards a more equal distribution of lands. Participants emphasised the fact that the land issue in Kenya is closely linked to other important dimensions, such as informal settlements, HIV, child protection, and IDPs.

Participants also discussed feasible solutions that effectively address the land issue, and highlighted that Section 75 of the Constitution of Kenya does not properly acknowledge land and ownership rights. Participants suggested that the Government undertake a land reform and establish a 'Land-Use Inspectorate Department' monitoring the optimal use of lands. Furthermore, all land grants should be revised, updated, redistributed, and scrupulously registered for a better use. Lastly, the Government should envisage a resettlement plan in those unsettled areas that need little investment to provide adequate infrastructures.

Participants concluded that in order to prevent further violence and conflict, the issue of land should be persistently and regularly tackled to maintain systematic awareness and encourage concrete measures that can effectively address the issue.

8. Violence against women in the socio-economic context of Kenya

The persistence of certain cultural norms, practices and traditions, coupled with entrenched stereotypes regarding the roles of women, perpetuates discrimination against women and girls in Kenya. Women are still extremely dependent on men and face cultural, economic and social challenges to articulate themselves as individuals. This lack of women's social and economic empowerment is due to a variety of elements, including poverty, lack of education, unemployment, and a patriarchal system that perpetuates dependence on men and prevents women from enjoying a wide-range of opportunities related to self development.

Discrimination and violence against women will not decline so long as these dimensions remain unaddressed, institutionalized and publicly accepted. The legal framework itself institutionalises these stereotypes, as the Constitution permits the use of customary law as regards personal laws, and this compromises women's enjoyment of their human rights which are central for their personal advancement and autonomy. The Kenyan criminal code does not contain any specific provision against domestic violence (Sections 250 and 251 deal with the crime of the assault) despite the fact that it remains a serious and widespread issue in Kenya. Police normally do not investigate cases of domestic violence because it is generally regarded as a private family matter. Many women end up suffering torture and other abuses silently, unaware of their rights. In this respect, the Committee on the Elimination of Discrimination against Women expressed concern that the "State party has not taken sustained and systematic action to modify or eliminate stereotypes and negative cultural values and practices".⁵² A further challenge is presented by the multifold legal regime and the consequent coexistence of conflicting elements between formal and customary laws that create uncertainty as regards their civil status, with a devastating affect on the full realisation of their rights.

8.1. Violence against women due to denials of their property rights

In Kenya there is a plethora of customary laws, reflecting the country's ethnic diversity. In many cases, the conflict between customary and formal law can seriously compromise women's property rights, including rights to inheritance and to dispose of property. For example, the Kenyan legal framework in respect to the marriage system involves five different schemes: civil, customary, Christian, Islamic, and Hindu. These systems are not coordinated and the legal regime does not foresee any common registry mechanism corresponding to a record of family property co-ownership. Whereas women are *de jure* not prevented from the right to own and dispose of property, this right is *de facto* compromised by a system that privileges the interests of men coupled by discriminatory rules as concerns the control over property;⁵³ this economic limitation, in turn, prevents women from enjoying also their civil and political rights.⁵⁴ The decision of the Kenyan Court of Appeal '*Peter Mburu Echaria*

⁵² Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁵³ For further information, see Human Rights Watch *Double Standards, women's property rights violations in Kenya*, 2003. <http://www.hrw.org/reports/2003/kenya0303/kenya0303.pdf>

⁵⁴ OMCT preparatory mission to Kenya. Meeting with Prof. Mbote, University of Nairobi, Law Faculty. Nairobi: Friday 18 April 2008.

Vs Priscilla Njeri Ehcaria constitutes an emblematic case of manifest gender discrimination. On that occasion, the Court ruled that neither the status of marriage nor the performance of domestic duties would entitle women to a beneficial interest in matrimonial property upon dissolution of marriage.⁵⁵ Despite being the main food producers, women only hold 5% of land titles in Kenya.⁵⁶ This situation causes the denial of basic provisions like food and shelter to single women, such as single mothers and widows.

The violations and denials of women's property rights are exacerbated by cultural practices and traditions. Many widows and abandoned wives are excluded from inheritance, thrown out their homes and deprived of their belongings by in-laws. They may have to resort to commercial sex work in order to make a living. This, in turn, exposes them to a high risk of HIV infection. Women and girls in this situation are also at a higher risk of being trafficked. In addition, under some customary laws, widows must submit to the practice of "wife inheritance" or ritual "cleansing". In this case, the widow becomes the property of her late husband's in-laws, and this invariably involves also sexual intercourse with members of the husband's family. Widows in this situation are subjected to violence and ill-treatment by relatives and communities. CEMIRIDE reported that they are frequently denied livelihood, food and shelter and are forced to live in inhuman conditions. Widows who protest against their treatment are often subjected to further violence by their in-laws.

The Special Rapporteur on adequate housing has noted that women in urban informal settlements tend to live in poorer housing than men. As a consequence, and in an attempt to secure adequate housing, single mothers may turn to unsafe or exploitative occupations, including commercial sex work. In addition, women are constantly exposed to the risk of sexual violence, especially after dark when they look for basic services, such as sanitation and water.⁵⁷ The Special Rapporteur also emphasised that violence against women and housing violations are "inextricably linked as causes and consequences of each other"; in fact, "inadequate housing in the slums leads to risk of violence, and a situation of domestic violence can lead to a woman being deprived of housing."⁵⁸

In rural areas, especially in situations of insecurity, women's property rights are still more at risk: their belongings are easily appropriated by others, and in some cases women may lose evidence of co-ownership with their husbands.⁵⁹

⁵⁵ Nairobi Civil Appeal No. 75 of 2001.

⁵⁶ Kenya is a country of episodes by Odenda Lumumba coordinator of Kenya Land Alliance. Interview by Ian Gatere <http://www.ms.dk/sw7766.asp>

⁵⁷ Adequate housing as a component of the right to an adequate standard of living, Report by the Special Rapporteur, Miloon Kothari Addendum - Mission to Kenya (9-22 February 2004) E/CN.4/2005/48/Add.2, 17 December 2004, § 45

<http://daccessdds.un.org/doc/UNDOC/GEN/G04/168/86/PDF/G0416886.pdf?OpenElement>

⁵⁸ Adequate housing as a component of the right to an adequate standard of living, Report by the Special Rapporteur, Miloon Kothari Addendum - Mission to Kenya (9-22 February 2004) E/CN.4/2005/48/Add.2, 17 December 2004, § 45.

<http://daccessdds.un.org/doc/UNDOC/GEN/G04/168/86/PDF/G0416886.pdf?OpenElement>

⁵⁹ Women's land and property rights in situation of conflict reconstruction: http://www.unifem-easternafrica.org/global_inner.asp?pcat1=mediacentre&pcat=resources&cat=books&sid=

Vulnerability to any kind of abuse, disease, violence, is a direct consequence of the violation of women's property rights, and this, in turn, has a serious impact on Kenya's overall social development, including on future generations.

8.2. Denied access to justice for women due to lack of financial resources

In Kenya, the systematic denial of women's property rights also affects women's access to justice. Women's economic dependence on men prevents them from being able to afford a lawyer to protect their rights, to denounce sexual violence, defend their property, or initiate a divorce file in case of domestic violence.⁶⁰ This economic obstacle, accompanied by other social dimensions, often induces women victims of violence to remain with the perpetrator. Women have a clear disadvantage, in comparison to men, in seeking redress for torture largely due to their limited or inexistent financial capabilities. The IMLU survey indicates that the majority of women have limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

Reporting sexual or domestic violence is still a challenge in Kenya. Many women do not report violence because of the fear of revenge, reprisals, social stigma and fear of losing custody of their children. Reporting violence is also a challenge in legal terms since the procedure to file a complaint requires the submission of three documents: a police abstract, a "P3" form, and a medical report. In addition, despite the fact that Sections 250 and 251 of the Criminal Code provides for penalties in case of 'assault' - and as such, cases of domestic violence are supposed to be prosecuted under these provisions - law enforcement officers continue to treat domestic assault and battery as "*private affairs*."⁶¹ The Government positive initiative to set up "gender desks" has been so far poorly implemented and police stations still lack female officers to treat cases of violence against women. These factors undeniably represent a further obstacle to denouncing sexual and domestic violence.

8.3. Trafficking in women and children due to poverty

Poverty, illiteracy and absence of viable economic opportunities, accompanied by the geographic position of Kenya, encourage the use of the country as a transit hub for trafficking and sexual exploitation around the region. Kenya has been defined by the International Organisation for Migration (IOM) as country of origin, transit and destination for human trafficking. Women, men, girls and boys are trafficked in Kenya for domestic and agriculture labour and sexual exploitation.⁶² Persons are trafficked both internally and internationally. According to IOM estimates, internal trafficking runs from rural to urban areas. On the other hand, international trafficking is mainly due to sexual exploitation and includes destinations such as the EU (among others Germany, the Netherlands and the UK), USA, Arab Emirates and Saudi

⁶⁰ Adequate housing as a component of the right to an adequate standard of living, Report by the Special Rapporteur, Miloon Kothari Addendum - Mission to Kenya (9-22 February 2004) E/CN.4/2005/48/Add.2, 17 December 2004, § 46.

⁶¹ *State Violence in Kenya*. OMCT Alternative Report submitted to the Human Rights Committee, 2005.

⁶² <http://www.iom.int/jahia/Jahia/pid/380>

Arabia. As noted, Kenya is also a destination country for trafficking. Women from Rwanda, Uganda, Ethiopia, the Democratic Republic of Congo and Burundi are trafficked to Kenya for sexual exploitation, while women from Tanzania are mainly trafficked for agricultural labour. IOM also indicates that Kenya is used as a transit country for trafficking victims from South East Asia, Pakistan and Ethiopia bound for South Africa and Europe.⁶³

Despite measures undertaken to combat trafficking of human beings, the problem persists and the Kenyan legal framework - especially the Children Act - has failed to address the large range of reasons for which trafficking can occur.⁶⁴ This phenomenon is intimately linked to poverty, and requires to be fought by implementing policies that ensure the respect of women's economic, social and cultural rights. As the Committee on the Elimination of Discrimination against Women has explicitly underlined: "trafficking and sexual exploitation affect women from the poorest and most disadvantaged backgrounds".⁶⁵

9. The socio-economic dimension of violence against disadvantaged children

High levels of poverty and the high number of children orphaned due to the HIV and AIDS pandemic leave many children without protection and therefore vulnerable to exploitation, including sexual exploitation and harmful forms of child labour. This in turn has implications for children's enjoyment of their rights to health, education and development. Children who drop out of school are often vulnerable to sexual exploitation.⁶⁶ According to UNICEF, 26 per cent of children in Kenya are involved in child labour activities and approximately 30 per cent of girls living in coastal cities - and aged between 12 and 18 - work as part-time informal sex workers, or regard sex work as a full-time income generating activity.

Harsh economic conditions and the spread of HIV/AIDS exacerbate the problem of child-headed households, homeless and children living on the street.⁶⁷ In order to meet their daily needs, children affected by HIV/AIDS may engage in theft, prostitution, forms of hazardous labour and street activities such as begging. Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.⁶⁸ Most of the children in conflict with the law belong to the poorest

⁶³ Reported by International Organisation for Migration

<http://www.iom.int/jahia/Jahia/pbnAF/cache/offonce/lang/en?entryId=17760>

⁶⁴ It does not include, for example, all persons that actually may be involved in trafficking especially as regards transnational trafficking. *State Violence in Kenya*. OMCT Alternative Report submitted to the Human Rights Committee, 2005.

⁶⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 29

<http://daccessdds.un.org/doc/UNDOC/GEN/N07/459/89/PDF/N0745989.pdf?OpenElement>

⁶⁶ *State Violence in Kenya*. OMCT Alternative Report submitted to the Human Rights Committee, 2005.

⁶⁷ "During the year the children's rights NGO ANPPCANN estimated that approximately 750,000 children lived on the streets." Country Reports on Human Rights Practices, Kenya 2006

⁶⁸ "For example, in January street children who had allegedly stabbed a bus driver were beaten by residents in Eldoret who argued that the children posed a security threat in the community."

Country Reports on Human Rights Practices, Kenya 2006.

<http://www.state.gov/g/drl/rls/hrrpt/2006/78740.htm>

strata and cannot afford legal assistance. The remands homes are not adequate and *de facto* children end up remaining in remand for more than the three months provided by the law even for petty offences.⁶⁹

Despite the positive measure undertaken by the Government, the issue of police violence against children is still a serious challenge. A recent programme undertaken by the Government has established the figure of 'Child Officer' in police stations. Child Officers are in charge of dealing with children's issues. However, many police stations in poor neighbourhoods do not dispose of enough financial resources to introduce this position.

9.1. Poverty, child exploitation and child labour

Poverty is recognised as the major factor contributing to child labour in Kenya. Frequently, extreme poverty leads parents to send their children to engage in agriculture, mining, domestic, or manufacturing work in order to supplement the family income. In addition, despite the fact that under Kenyan law children under the age of 16 are prohibited from working, this restriction does not apply to the agricultural sector. This makes children vulnerable to being taken out of school to work on family plots, particularly in periods of economic difficulty. The high levels of illiteracy and lack of clear goals on education on the part of the parents is also a leading factor in child labour. Lack of government support systems force many children to turn to the streets to beg or to work as domestic helpers or farmhands.⁷⁰

Other times, child labour is due to the fact that employers cannot afford to pay adult workers and therefore opt to employ children, as their remuneration will not be as high.⁷¹ As noted, also the HIV/AIDS pandemic increased the number of child headed families, and that, in turn, has forced children to seek employment to be able to meet basic needs. Children affected by HIV/AIDS live with stigma and discrimination that can be manifested in physical and psychological violence. Discrimination against girls can be particularly severe and includes abandonment by caregivers and school drop-out, with the consequent vulnerability to sexual violence and exploitation.

⁶⁹ The CRADLE Annual Report 2003, page 26

⁷⁰ *State Violence in Kenya*. OMCT Alternative Report submitted to the Human Rights Committee, 2005.

⁷¹ *State Violence in Kenya*. OMCT Alternative Report submitted to the Human Rights Committee, 2005.

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

In Kenya, extreme poverty, inequality and discrimination are the grounds for systematic human rights violations, including the use of torture, whose first victims are the poorest, the economic disadvantaged and the marginalised. Poverty has been recognised as the main cause of insecurity and crime in the country, as well as human trafficking, sexual exploitation and child exploitation, whose levels remain high in the country.

This report illustrates the various socio-economic dimensions of torture in Kenya by describing, on the one hand, the State's direct involvement in perpetrating torture and other forms of violence, and, on the other, State responsibility for economic, social and cultural policies that systematically lead to torture and other forms of ill-treatment.

The Government is both directly and indirectly responsible for the systematic use of torture and other forms of ill-treatment.⁷² The Government is also accountable for the lack of commitment and the failure to take concrete measures to address violence and other abuses, in particular as concerns the poorest strata of society. On many occasions, small focused changes may suffice in order to have a clear impact on levels of torture. Regrettably, the positive initiatives undertaken by the Government, especially as regards women and children, have been so far poorly implemented. The Government has shown reluctance or unwillingness to implement policies aimed at ensuring the equal enjoyment of rights to everybody, be they civil and political or economic, social and cultural rights, nor has it taken adequate steps to address violations of the rights of the poorest, the excluded and marginalised sectors of society.

Irrespective of whether torture is the direct or indirect consequence of the State's misconduct, OMCT deems that the obligation to address torture also implies the commitment to address its root causes. An understanding of the economic, social and cultural root causes, as well as other interrelationships, is crucial to establish a set of effective recommendations designed to eradicate levels of torture, ill-treatment and other forms of violence in Kenya.

⁷² "Torture may in fact be of a systematic character without resulting from directed intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the Central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice." Committee Against Torture Activities, A/48/44Add.1, para. 39 and A/56/44, para.163, also in <http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/cat.c.39.2.doc>

Multi-faceted responses to human rights violations

This report develops multi-faceted recommendations for preventing torture and other forms of violence, directed, in particular, against the most vulnerable people in Kenya. These recommendations are based on experience that shows the potential effectiveness of broad based initiatives to protect human rights.

One such initiative was described in the OMCT Interdisciplinary Study “*Attacking the Root Causes of Torture Poverty, Inequality and Violence*” in relation to a marginalised informal settlement in Buenos Aires⁷³. That settlement, called the “Village” was a systematic target of official and private violence and the object of a very violent forced eviction. The people returned to the settlement after the eviction and efforts were begun to address the wide range of human rights violations to which they were subjected.

Box 4

Marginalised informal settlement in Buenos Aires

The inhabitants of the Village, with the assistance of civil society organisations, contacted official organizations and authorities and slowly the existence of the Village began to be recognized and some assistance began to be provided. The Office of the Ombudsman of the City of Buenos Aires and that office notified the relevant health authorities and organized meetings with representatives of the Village with health agencies and provided health related information.

The overall situation of the inhabitants of the Village improved somewhat, the most positive changes were the transformation of the relationship between the inhabitants and the security forces and the establishment of links with the local political authorities.

These changes were the result of the interaction of diverse factors, among which the following are outstanding: the official acknowledgement of the existence of the village, the capacity of the inhabitants to organize in the pursuit of their common objective, and the articulation of alliances with other social actors which helped to strengthen their negotiation capacity.

The fact that the location acquired an official status –in 2001- forced the local authorities to recognise and act upon a series of responsibilities regarding the inhabitants of the Village.

Similarly, the Ad Hoc Working Group of Experts on Extreme Poverty of the Sub-Commission on the Promotion and Protection of Human Rights reported in 2004 on a coordinated effort in Pune, India to address a wide range of basic human rights of women living in informal settlements that had a very positive effect on their situation and that of their families.⁷⁴

⁷³ See, “Attacking the Root Causes of Torture: Poverty, Inequality and Violence – An Interdisciplinary Study”, Chapter 4 Argentina: Country Profile and Case Study. www.omct.org

⁷⁴ See E/CN.4/Sub.2/2004/25, Annex, paras. 14-18

Box 5

Pune Urban Community

The Pune Urban Community Development programme was a government initiative targeting selected communities to alleviate poverty. The programme supported the establishment of women (only)-centred neighbourhood groups in all targeted urban informal settlements, each consisting of 50 members. Since the members come from the same community, the programme fostered close links, attachments and intimate knowledge about each family.

During a visit to one of these areas, the Sub-Commission members met with over 100 women of the neighbourhood group. Several women related their experiences as a result of the project. The study visits showed how women's groups that began as savings associations could raise the social status of women, including by literacy trainings that enable them to conduct business with local government and extend their activities to income generation, cultural activities, and health and neighbourhood improvement. The women were able to negotiate with the authorities themselves instead of going through intermediaries to obtain electricity connection, etc. and they knew their rights. They now had the courage to leave their homes because they were literate and could read the bus numbers and road names, etc.

Recommendations

Based on this experience, OMCT wishes to draw the Committee's attention to the following recommendations.

Preventive measures

- *Fighting poverty and inequality*: acknowledge that inequality and poverty are frequently the prime cause of many human rights violations. Promote better and more equitable allocation of natural and financial resources. Establish an employment generating programme to provide employment opportunities and training for residents of poor areas.
- *Preventive actions*: protect vulnerable and marginalized groups from violence, through human rights education and awareness rising. Fair and just application of the law based on the principle of non-discrimination. Train police officers on human rights, encourage sensitization on torture and ensure that cases of torture are legally brought forward, publicly condemned, and perpetrators duly prosecuted. Ensure that the principle of non discrimination as enshrined in Section 82 of the Constitution is properly applied.
- *Improving the legal framework*: draft and agree upon a new Kenyan Constitution that adequately addresses issues of property and land rights, takes a clear position on customary law consistent with international human rights standards, and recognises the rights of minority and indigenous populations.
- *Preventing torture*: Ratify without delay the Optional Protocol to the Convention against Torture (OPCAT).
- *On human rights in general*: agree on a blueprint document on the National Policy and Action Plan (NAP) for the promotion and protection of human rights in Kenya that is consistent with international human rights standards.

Specific issues:

- *On arbitrary arrests:* address allegations of arbitrary actions against the poor with particular emphasis on the situation in informal settlements and poor areas. Revise Section 82 (1) e) of the Kenyan Constitution, that currently allows arrest upon mere suspicion.⁷⁵
- *On corruption and bribery:* Take concrete steps to eradicate institutional corruption and bribery; ensure that corrupted police officers and any other public officials are duly prosecuted and that the poor are no longer affected by extortion rackets. Introduce national and local watchdog mechanisms that monitor corruption, bribery and rackets in specific areas, and in particular, in informal and poor settlements.
- *On access to justice:* Establish a system of State-administrated legal aid, through the creation of an office of public defender that *in primis* serves the poorest.
- *On pre-trial detention:* Persons awaiting trial, as a general rule, should not be detained in custody.⁷⁶ Ensure the proper implementation of Section 72 (3) of the Constitution, providing timeframes and conditions for pre-trial detention.
- *On bail:* Bail should be required for release from pre-trial detention only in exceptional cases. In cases in which bail is required for release, clear criteria should be set for reasonable and affordable bail that refer to specific offences and better reflect the average income of Kenyans. Take seriously into account the fact that setting more affordable bail implies the immediate decrease of the number of remandees in prisons. This measure would lead to the effective decongestion of prisons and consequently would concretely reduce the risk of cruel, inhuman or degrading treatment in prisons.
- *On torture in custody:* Establish an independent body that monitors the situation in all detention facilities and that reports any act of violence on detainees. Ensure that torture threats are not used as an instrument for obtaining bribes.
- *On impunity:* Take concrete measures to address the climate of distrust towards the legal and justice system and to address impunity for violence inflicted by public enforcement officials.
- *On violent evictions:* ensure that evictions are carried out as the last possible resort and are conducted in the full respect of international human rights standards.
- *On Mungiki and other criminal organisations:* Stop any shoot-on-sight order and any other act of arbitrary and summary execution. Ensure that Mungiki members involved in violence and other criminal activities are duly prosecuted, without the involvement of innocent persons.
- *On informal sector workers:* acknowledge the importance of the informal sectors for the national economy, set standards in order to regularise informal

⁷⁵ Constitution of Kenya, Section 72. (1) e).

(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following circumstances:

(...)

e) Upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law of Kenya.

⁷⁶ International Covenant on Civil and Political Rights, article 9, paragraph 3.

trade with minimal cost for the poor, recognise the right to assembly, stop and prosecute any intimidation and harassment.

- *On Mount Elgon* (see also recommendations included in appendix I): Stop immediately torture and other forms of violence in Mount Elgon. Set up an inquiry committee that assesses responsibilities. Finalise and adopt the National Policy on Peacebuilding and Conflict Management of 2005-6, which will provide a framework for addressing security issues in Mount Elgon and elsewhere and end the reactive and crisis-driven approach to conflict management and resolution.

Violence related to land conflict:

- Recognize that land issues are often at the root of community violence in Kenya and take concerted steps to reach fair and just resolutions to land disputes, independent of political and ethnic interests.
- Properly implement section 75 of the Constitution dealing with land rights and, in particular, ensure that the notion of “public benefit” is not manipulated to serve personal and political interests.
- Initiate a process of land reform aimed at resolving the land issue in Kenya. The process should address the highly fragmented pattern of land use, and involve the consultation with representatives of all groups concerned and affected by land conflict. This reform should also foresee the possibility of establishing an independent inspectorate to monitor land use under the provisions included in the reform.
- Implement without delay the recommendations included in the Report issued by the Ndungu Commission, set up in 2003 to investigate the irregular allocation of public land; in particular, implement the recommendations highlighting the urgent need for a Land Titles Tribunal that deals with the rectification of the illegal allocation of lands on a case by case basis, the development of a comprehensive land policy, and the establishment of an inventory of public land.
- Establish a transparent and clear system of registration of land titles in order to avoid further episodes of conflict deriving from uncertainty over land allocation.

Violence against women and children:

- Ensure that the principle of non-discrimination on the basis of gender, enshrined under Section 82 of the current Kenyan Constitution is applied without exception, and that no form of personal or customary law compromises this principle in any way.
- Undertake a general revision – including, when necessary, the abolition – of all legal provisions that have a negative impact on women’s enjoyment of rights. Introduce legislation to criminalise marital rape and domestic violence.
- Identify and address specific cultural values that compromise the human rights of women and children, including their rights to protection from all forms of violence and to own property, through community awareness raising and discussion.

- Raise awareness of women and children's human rights among the public at large, and in specific groups, including the police and judiciary. Advocate that violence against women and children is unacceptable.
- Undertake a strategy of confidence-building aimed at encouraging women to denounce violence. Improve the implementation of the Gender Desk Programme in every police station, including the presence of a policewoman in charge of the Gender Desk.
- Ensure that all births and marriages, including customary marriages, are registered. Further ensure that the minimum age of marriage under Kenyan law is respected in customary marriages.
- Work with communities to reinforce the positive dimensions of customary law, including as regards the care of children and, at the same time, to address violations of women and children's human rights inherent in customary law.
- Promote creative measures to keep children - especially girls - in school, including school feeding programmes. Ensure that resources assigned to education are assigned equitably.
- Undertake trainings to sensitize police officers to violence against children. Increase the number and capacity of child officers and ensure their presence in every district police station.

Measures of implementation

- A concerted multidimensional effort is needed to deal with the poverty, inequality and violence in the urban and rural areas of Kenya. The vast majority of the victims of torture and other forms of violence, in particular victims of violence by state officials, can be identified in terms of their economic, social and cultural situations and in particular their place of residence.
- The Committee may thus wish to recommend to the State Party that it undertake preventive measures to protect those groups by identifying the areas where persons are at risk of violence and establishing programmes aimed at economic development and poverty reduction (employment creation, education initiatives, health services, enhancing the status of women etc) and respect for the rule of law (strengthening and training the judiciary, training the police and local administrators in human rights as well as for military units and personnel). A permanent monitoring function should be established in those areas to ensure official compliance legal standards and good practices.
- The elements of the programme should be designed and implemented with the participation of representatives of the different communities concerned and the programme should be directed by an independent body composed of government officials, representatives of the different communities that are directly concerned and civil society. Regular public reports should be issued on the progress made and obstacles encountered.
- The Committee may wish to suggest to the State Party that it seek assistance from the Advisory Services and Technical Cooperation Programme of the Office of the High Commissioner for Human Rights and consider requesting the advice and assistance of relevant United Nations human rights experts.

APPENDIX I

OMCT ACTION FILE: KEN040608.ESCR (ANNEX)
KENYA: MILITARY ACTION AGAINST THE SABAOT LAND DEFENCE
FORCE IN MOUNT ELGON INVOLVES SERIOUS HUMAN RIGHTS
VIOLATIONS AGAINST CIVILIANS

**The Kenyan army is responsible severe violations of human rights in the District
of Mount Elgon**

The International Secretariat of the World Organisation Against Torture (OMCT) has received information from the Kenyan Independent Medico-Legal Unit (IMLU) and the International Commission of Jurists (ICJ), Kenya, members of the SOS Torture Network, concerning ongoing torture and extrajudicial killings by the Kenyan Army and Police in the Mount Elgon District in the Western Province of the country.¹

It is reported that since the start of operations in March 2008, the military has been responsible for the execution of thousands of men and boys from the Sabaot community in Mt. Elgon District. It is believed that many have died while undergoing torture, and that others have subsequently died in prison due to injuries received during their interrogation. To date the Government of Kenya has taken no steps to halt this situation.

The human rights abuses by the police and army are carried out in the context of operations against the Sabaot Land Defence Force (SLDF), an organization that has itself been responsible for grave human rights abuses in the Mount Elgon area. At the root of this conflict lies the question of land ownership and competing claims over land title, particularly in the Chebyuk settlement area of Mount Elgon District. The deaths, injuries and displacement that are a direct result of the military operations also have a serious impact on the socio-economic wellbeing of the population of the affected areas.

OMCT joins with IMLU and ICJ Kenya in calling on the *Government of Kenya* to order an immediate suspension of the military operation in the Mount Elgon area and to establish an independent commission to ensure that all those responsible for human rights violations are brought to trial and that victims of torture and their families receive just and adequate reparation. OMCT, IMLU and ICJ Kenya also call on the Government to take concerted steps to reach fair and just resolutions to land disputes in Mount Elgon and elsewhere, independent of political and ethnic interests.

The situation

The Mount Elgon District in the Western Province of Kenya is the scene of an extended violent conflict over land allocation involving the Sabaot Land Defence Force (SLDF), a guerrilla militia. The SLDF was formed in 2005 to resist government attempts to evict population in the Chebyuk area of Mt. Elgon as part of a resettlement programme. It has since been accused of killing more than 600 people, terrorizing local populations through physical assaults and threats and committing a variety of atrocities including torture, rape, and the theft and destruction of property. It is estimated that more than 66,000 people were displaced in an 18 month period due to the activities of the SLDF. In March 2008, the Kenyan Army was deployed in the Mount Elgon area to clamp down on the activities of the SLDF in an action called “Operation Okoa Maisha”. This military operation has been conducted under a veil of secrecy. Since early March of this year, it has resulted in mass arrests and the subsequent prosecution of over 1200 persons.

IMLU and ICJ report that most of the persons arraigned in court as a result of Operation Okoa Maisha have complained that they were tortured by the Kenyan military and exhibited injuries that remain to be accounted for by the State. There have been several reports in the media accusing army officers of using torture and excessive force against civilians in a bid to recover illegal weapons used by the SLDF. According to media reports, army officers have also assaulted journalists who attempted to cover the operation. According to IMLU, “the Government is undertaking massive infringements of fundamental rights on the civilian population in the Mount Elgon District and its surroundings” in its efforts to identify SLDF members. IMLU also indicates that there are reports of minors who have been interrogated and subjected to torture.

IMLU’s preliminary findings from a medico-legal investigation into torture by the military in the Mount Elgon District released on 27 April 2008 indicate that police officers have carried out mass arrests – often at dawn - accompanied by acts of physical violence in Sabaot communities. On arriving in a village, police officers typically separate the men and boys from the women and children, informing the former that they are being taken away in order to determine whether they have guns in their possession or if they are associated with the SLDF. The men and boys are then transported to bases set up by the military in the Kapkota, Saandet and Kaptama areas of Mount Elgon where they are stripped and subjected to systematic torture. Subsequently individuals suspected of being SLDF members are taken to police stations and arraigned in court on charges of promoting warlike activities. The high number of arrests and the consistent denial of bail have, in addition, led to the serious overcrowding of prisons around Mt. Elgon District.

According to the Kenya National Commission on Human Rights report ‘*The Mountain of Terror*’⁷⁷, the military is responsible for the execution of thousands of men and boys from the Sabaot community in Mount Elgon District. It is believed that many have died while undergoing torture, and that others have subsequently died in prison due to injuries received during their interrogation. The bodies of those who die in the military camps are reportedly taken to Kamarang, a hill in a forest area in Mt.

⁷⁷ Released 15 May, 2008

Elgon District, where they are buried in unmarked graves. Other bodies are dumped on farmland, with attendant risks to public health.

The SLDF activities and the police and military operations that have followed in their wake not only violate the civil and political rights of the inhabitants of the area, but also compromise their enjoyment of a range of economic, social and cultural rights. Military action is leading to the abandonment of farms, impeding food supply and access to markets and thus contributing to food insecurity. In addition to the question of land allocation, population displacement and the consequent implications for the possibility of earning a livelihood from traditional activities, the mass arrest, torture and killing of Sabaot men and youth in itself threatens the economic and social wellbeing of this community. The government sponsored operation is also causing women and children severe psychological distress as they have no way of learning of the fate of their male family members.

For its part, the Government has termed allegations of torture as “propaganda” and argued that no complaints have been lodged with relevant agencies.

The Root Causes of the Violence in Mount Elgon District

The extreme violence currently being carried out in Mount Elgon, together with the violence perpetuated by the SLDF, has its roots in the issue of land allocation and forced evictions and their consequent impact on the livelihood of local communities. The Mount Elgon District, with an estimated population of 135 033, is predominantly occupied by the Sabaot, Iteso and Bukusu communities. The Sabaot, who are indigenous to Mount Elgon, are divided into the Soy and Mosop¹ clans.

Various communities have laid claim to land in Mount Elgon and have lobbied political representative to have their claims recognized. IMLU reports that the contested land was first occupied by the Mosop community: in 1971 some 109 Mosop families were moved off their land to the Chebyuk settlement scheme, however the scheme was never degazetted from its status as forest land, effectively rendering the community landless. In 1979, proposals were made for the formalization of the scheme, however by this time the number of Mosop families had increased to over 2000 and they had been joined by members of the Soy community and the exercise was abandoned. In 1989 the government again tried to complete the resettlement but the process was marred by political interference, nepotism and corruption.

Further efforts initiated in 1990 were abandoned in 1992 due to the land clashes that affected large parts of the Rift Valley. These clashes resulted in an influx of displaced persons to Mount Elgon, most of whom were not original inhabitants of the area. There was also an attempt at resettlement in 1997 but this was also abandoned due to a lack of political will.

The most recent attempt at resettlement was started in 2000 and, despite tensions between the Soy and Mosop clans over allocation, and the political instrumentalisation of the issue during the 2002 elections, the land survey for phases I and II began in 2003 and identified a total of 2166 5-acre plots. To date a total of 2157 plots have been allocated to the registered beneficiaries. The third phase of the resettlement has, however, been particularly contentious, and both the Soy and Mosop clans lay claim to the land in question. In particular, the Soy clan expresses its

dissatisfaction at having been allocated only 40% of land in the first two phases of resettlement. It was during the contentious discussions on land allocation under Phase III that the SLDF, founded in 2005, began its violent campaign, ostensibly to defend Soy land under the Chebyuk allocation scheme. It engaged in executions of civilians, rape, mutilation, theft and a range of criminal activities including extortion. Interventions by the police, the Kenyan Rapid Deployment Unit and the provincial administration all proved ineffective in preventing this violence. Initially, the arrival of the military in March 2008 was widely welcomed by the population of Mount Elgon, however military atrocities soon replaced those of the SDLF.

Requested Actions

While unconditionally condemning the strategy of violence employed by the SLDF, OMCT, IMLU and ICJ Kenya join in stating that torture is a wholly unacceptable response to the human rights violations perpetuated by groups such as this.

*Please write to the **Government of Kenya** asking it to:*

- **Respect** its obligations under the international human rights instruments it has ratified, including the Convention Against Torture;
- **Suspend** forthwith Operation Okoa Maisha in Mount Elgon District;
- **Establish** an independent commission to ensure that all those responsible for human rights violations, including army officials, are brought to trial;
- **Take** all necessary steps to ensure that victims of torture and their families receive just and adequate reparation and are given all necessary support for their reintegration into their communities;
- **Begin** immediate documentation of all those who have died or been injured as a result of the Okoa Maisha Operation and notify family members regarding the whereabouts and status of their next of kin;
- **Use** non-violent investigative methods to identify members of the SLDF responsible for human rights abuses and other crimes;

*Please also call on the **Government of Kenya** to:*

- **Finalise and adopt** the National Policy on Peacebuilding and Conflict Management of 2005-6, which will provide a framework for addressing security issues in Mount Elgon and elsewhere and end the reactive and crisis-driven approach to conflict management and resolution;
- **Recognize** that land issues are often the root cause of community violence in Kenya and take concerted steps to reach fair and just resolutions to land disputes in Mount Elgon and elsewhere, independent of political and ethnic interests;
- **Properly** implement section 75 of the Constitution dealing with property and land rights;
- **Initiate** a process of land reform aimed at resolving the land issue in Kenya. The process should involve the consultation of representatives of all groups concerned and affected by land conflict. This reform should also foresee the possibility of establishing an independent inspectorate to monitor land use under the provisions included in the reform;
- **Implement** without delay the recommendations included in the Report issued by the Ndungu Commission, set up in 2003 to investigate the irregular allocation of public land; in particular, implement the recommendation

- highlighting the urgent need for a Land Titles Tribunal that deals with the rectification of the illegal allocation of lands on a case by case basis;
- **Establish** a transparent and clear system of registration of land titles in order to avoid further episodes of conflict deriving from uncertainty over land allocation.

APPENDIX II

The Observatory for the Protection of Human Rights Defenders

L'Observatoire
pour la Protection des défenseurs des droits de
l'Homme

EL OBSERVATORIO
para la Protección
de los Defensores de Derechos Humanos

URGENT APPEAL - THE OBSERVATORY

New information
KEN 002 / 0808 / OBS 135.1
August 19, 2008

The Observatory for the Protection of Human Rights Defenders, a joint programme of the World Organisation Against Torture (OMCT) and the International Federation for Human Rights (FIDH), has received new information and requests your intervention in the following situation in **Kenya**.

New information:

The Observatory has been informed by the Kenyan Independent Medico-Legal Unit (IMLU) about the release of Dr. **Walter Wekesa Nalianya**, who participated in documenting human rights violations in Mount Elgon Hospital Kitale (Western Province of Kenya) in regard to Mount Elgon torture cases¹.

According to the information received, on August 14, 2008, Dr. Walter Wekesa Nalianya went to the Provincial Criminal Investigations Officers in Kakamega, where he had been summoned (See background information). The police then told him to write a report on his involvement in the Mt. Elgon torture allegations made by the Kenya National Commission on Human Rights (KNCHR). It has to be noted that it is not procedural for police to summon someone in a different province from the one he is based (Eldoret is in Rift Valley Province while Kakamega is in the Western Province). The police therefore should have summoned him in Eldoret town if it was a genuine case, which makes one believe that these acts only intended to intimidate and prevent him from carrying out his human rights activities.

The police later took his report and after consultation they let him leave the police station at 7 pm. They added that they would contact him in case they needed any additional information. Dr. Nalianya was forced to spend the night in Kakamega as Eldoret, his home town, is about 200 kilometers away.

The Observatory welcomes the release of Dr. Walter Wekesa Nalianya, and wishes to thank all the persons, organisations, and institutions that intervened in his favour.

Background information:

Early on 14 August 2008, Dr. Wekesa Nalianya, a registered doctor with the Medical Practitioners and Dentist Board (registration number A. 4018) practising at Moi Teaching and Referral Hospital, was summoned by police and taken to Kakamega's Provincial Criminal Investigation Office (PCIO). The police allege that Dr. Wekesa Nalianya is not registered

under private practice and thus ought not to have documented the Mount Elgon torture allegations.

Dr. Wekesa Nalinya reportedly documented human rights violations in Mount Elgon Hospital Kitale for the Kenya National Commission on Human Rights' (KNCHR) report, which was released in May 2008. He has also actively collaborated with IMLU, a registered NGO working for the rights of torture victims in Kenya, on examining torture cases.

APPENDIX III



ICJ-KENYA



WORLD ORGANISATION AGAINST TORTURE



Centre for Minority Rights Development

Joint Preparatory Mission for an Alternative Report to CESCR on “Addressing the Economic, Social and Cultural Root Causes of Torture and other forms of Violence” Kenya, 12-18 April 2008

Sat. 12 am	Sun. 13 am	Mon. 14 am	Tue. 15 am	Wed. 16 am	Thur. 17 am	Fri. 18 am
	<p>07.00: MM&Cemiride, depart for rural visit</p>	<p>06.30: FR arrive Nairobi</p> <p>MM&Cemiride, Mr. Kipruto Kimosop, Endorois Welfare Council</p> <p>MM&Cemiride, Visit to Division Office, Mochongoi</p> <p>MM&Cemiride, Chief Inspector Kiche, Mochongoi Police Station</p> <p>12.00 FR at ICJ</p>	<p>08.30: MM&Cemiride, Mr Charles Kamuren, Chair of Endorois Welfare Council and Executive Secretary, Kenya NUT, Nakuru (Marigat)</p> <p>10.30 – 13:30 FR&ICJ, Office of the President: Under Secretary/ Security</p>	<p>08.30 FR&ICJ, Coalition on Violence Against Women</p> <p>09.30 MM&Cemiride, Interview by Kass Community Radio Station, Nakuru</p> <p>10.30: FR&ICJ, Independent Medico Legal Unit</p> <p>10.30 MM&Cemiride, Mr. Zablon Kuria, Chair of Management Committee of IDP Camps, Nakuru and Ms. Nancy Kimemia, Committee member</p> <p>12.30 FR&ICJ, Kenya Alliance for the Advancement of Children Rights</p>	<p>09.00-13.30 OMCT&ICJ, Kengo public forum, informal settlements (100 participants)</p>	<p>8.00-10.00 OMCT&ICJ, Mr Odindo Opiata, expert on evictions – Economic & Social Rights Centre</p> <p>11.00-13.00 OMCT&ICJ, Prof. Mbote, Law Faculty, University of Nairobi (Women and Land Rights)</p>

Addressing the economic, social and cultural root causes of torture in Kenya

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	<p>MM&Cemiride, Mr. John Letai, Pastoral Land Advocate, Nanyuki</p> <p>14.00 MM&Cemiride, Community meeting with Maasai, nr Nanyuki</p> <p>16.30 MM&Cemiride, Video interview with Mr. John Letai, Pastoral Land Advocate, Nanyuki</p>	<p>14.30-17.30 FR&ICJ, public forum on right to land (Stanley Hotel)</p> <p>12.30 MM&Cemiride, Community meeting with Endorois, Mochongoi - Arabal</p> <p>15.30 MM&Cemiride Community meeting with Illchamus</p>	<p>13.00 MM&Cemiride, Daniel M. Kobei, Executive Chairman, Ogiek Peoples' Development Program, Nakuru</p> <p>14.30-17.30: FR&ICJ, Kenya National Commission of Human rights</p> <p>14.30 MM&Cemiride Video interview with Mr. Leonard Mindore, Field Officer OPDP, Mau Forest</p> <p>15.00: MM&Cemiride Community meeting with Ogiek, Mau Forest</p> <p>17.30 MM&Cemiride Mr Kimonjo Kiburi lawyer and IDP activist, Nakuru</p>	<p>14.30-19.30 OMCT&ICJ, Forum on youth and socio- economic rights (AACC House)</p>	<p>14.30-15.30: FR Finnish Embassy</p> <p>15.00-16.00 MM Swiss Embassy</p> <p>18.00: Meeting OMCT- ICJ-Cemiride</p>	<p>22.05: FR depart 22.50: MM depart</p>
<p>22.15 MM arrive Nairobi</p>						

