



Submission to the United Nations Human Rights Committee

Alternative Report on Kenya

131st session (March 2021)

Introduction

1. The Mathare Social Justice Centre (MSJC) and the University of Edinburgh¹ welcome the opportunity to submit this information to the UN Human Rights Committee (the Committee), ahead of its review of Kenya at the 131st session (1 - 26 March 2021).
2. This submission sets out our key concerns in relation to Kenya's obligations under the International Covenant on Civil and Political Rights (ICCPR) and in particular: to guarantee effective remedies for human rights violations (**Article 2**), and to address impunity in relation to violations of the right to life (**Article 6**) and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (CIDTP) (**Article 7**).
3. In its last review of Kenya in 2012, the Committee expressed concern 'at the slow pace of investigations and prosecutions into allegations of torture, extrajudicial killings by the police and by vigilante groups' and the 'lack of investigations and prosecutions of the other categories of perpetrators which exacerbates the climate of impunity that prevails'.² The Committee recommended that 'police officers suspected of committing extrajudicial killings and other offences are thoroughly investigated and perpetrators brought to justice, and that the victims are adequately compensated'.³
4. Our key concerns focus on (1) whether the state is providing effective protection to victims and witnesses of violations of the ICCPR (Articles 6 and 7) both as a guarantee of the right to justice and to break the cycle of impunity; and (2) whether the state is effectively investigating extrajudicial killings and allegations of torture and CIDTP where the police are the alleged

¹ The Mathare Social Justice Centre (MSJC) and the University of Edinburgh are working on a two-year project 'Protecting survivors of torture (Kenya and Sri Lanka)' which examines the challenges involved in protecting survivors of torture and ill-treatment, focusing on research carried out by local organizations. Mathare Social Justice Centre is the local organization in Kenya participating in this project.

² Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012: Kenya, CCPR/C/KEN/CO/3, paragraphs 11, 13.

³ Ibid, paragraph 11.

perpetrators.⁴ We outline our key concerns and suggest recommendations for the Committee to address to the State party.

The fight against impunity and past human rights violations (arts. 2, 6, 7 and 14)⁵

5. In the following section we outline our key concerns surrounding the obligations on Kenya to guarantee effective remedies for human rights violations (specifically violations of articles 6 and 7) and to address impunity. We are concerned that victims and witnesses of human rights violations are unable to access effective protection in practice which means they are unable to access effective remedies, thus perpetuating the climate of impunity.
6. The existing protection framework centres around the Witness Protection Agency (WPA) which became an independent statutory body in 2010.⁶ In 2014, Parliament adopted the Victim Protection Act which provides for victims to be protected by the WPA.⁷ Despite becoming an independent statutory body with the mandate to protect victims and witnesses, there remain concerns about the WPA's independence and its scope, as well as the lack of funding and political will to improve its functionality.⁸
7. These concerns call into question the WPA's effectiveness as a protection mechanism for victims and witnesses of human rights abuses for the following reasons. Firstly, in terms of the WPA's scope, protection is only available to a person who has made a statement or has agreed to give evidence in relation to an offence or criminal proceedings. We consider that this narrow scope fails to consider that many protection concerns start before a complaint is made or evidence is given, particularly in cases where the alleged offence is perpetrated by a state actor. Secondly, the criteria for accessing witness protection is established in the context of criminal litigation and so fails to sufficiently address the particular challenges faced by victims and witnesses of human rights abuses perpetrated by agents of the state (as opposed to private actors) and their specific protection needs.
8. Research by local actors, such as MJSC, demonstrates that the concerns we detail above, particularly in relation to the independence and scope of the WPA, affect the ability of victims and witnesses of violations perpetrated by state actors to access urgently needed protection services. For example, MSJC documented 55 incidents of police violence in Mathare settlement in Nairobi between 2013 and 2016.⁹ In 39 of these cases, there were witnesses, but they were too afraid to come forward to provide evidence. Similarly, in a survey carried out by the Independent Medico-Legal Unit, only 30 per cent of respondents said that they

⁴ See, e.g. the Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, A/63/313, 20 August 2008, para. 14; the Human Rights Committee, General Comment No. 36 on Article 6 (Right to life), CCPR/C/GC/36, 3 September 2019, paragraphs 23 and 28.

⁵ With reference to the Human Rights Committee, List of issues in relation to the fourth periodic report of Kenya, CCPR/C/KEN/Q/4, paragraph 3.

⁶ The WPA was first established as a department of the Attorney General's Office. See: Witness Protection Act 2012, section 3A. Available at: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/WitnessProtectionAct_No16of2006.pdf

⁷ Kenya, Law No. 17 of 2014 entitled The Victim Protection Act, section 4(3). Available at: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/VictimProtectionAct17of2014.pdf>

⁸ Institute for War & Peace Reporting, 'Big Questions About Witness Protection in Kenya', 27 May 2014. Available at: <https://iwpr.net/global-voices/big-questions-about-witness-protection-kenya>

⁹ Mathare Social Justice Centre, 'Who is Next? A Participatory Action Research Report Against the Normalization of Extrajudicial Executions in Mathare' (MSJC report), pages 15-33. Available at: https://drive.google.com/file/d/0B2NZry_SioNhZHRVQmd6RW1CVWs/view

would report incidents of torture and ill-treatment to the police.¹⁰ These examples demonstrate that victims and witnesses are reluctant to come forward to register complaints against the police, due in part to the fear of intimidation and threats to life that they will suffer and their lack of trust in – or inability to effectively access – the witness protection mechanisms provided by the WPA which are more relevant to victims of crime.¹¹

9. The failure on the part of the state to provide trusted and effective mechanisms for the protection of victims and witnesses of human rights violations perpetrated by state actors impacts on the fight against impunity as incidents of serious human rights violations, including torture, ill-treatment and extrajudicial killings remain unreported or unsubstantiated, making it harder to effectively investigate and prosecute perpetrators and provide effective remedies to the victims.

Considering this, **we suggest that the Committee recommends that the State takes the following action -**

- a. The state party should take further action to ensure that, where appropriate, victims and witnesses of human rights violations, including torture and ill-treatment, and extra-judicial killings are provided with immediate, independent and effective protection, including from reprisals. In all contexts, the state should consider whether to extend protection to other associates, including family members and individuals representing the victims and witnesses.
- b. The state party should evaluate whether the Witness Protection Agency is providing effective protection to victims or witnesses of torture and ill-treatment and witnesses of extra-judicial killings. This includes by collecting and analysing data on: (1) the numbers of victims or witnesses of torture and ill-treatment and witnesses of extra-judicial killings, who have been offered protection by the agency since it was established; (2) the stage at which the protection was offered; and (3) the type of protection and length of time offered.
- c. The state party should put in place additional specialised measures to ensure victims of torture and ill-treatment and other human rights violations, their families and witnesses are able to access protection before, during and after judicial, administrative or other proceedings so as to ensure victims are able to file complaints and seek a remedy in a confidential environment and without fear of intimidation or reprisals.
- d. The state party should support non-governmental organisations and other non-state actors to provide alternative independent protection mechanisms and support to victims of torture and ill-treatment and other human rights violations to lodge complaints, including by providing additional financial and other resources to ensure the ability of these organisations to offer and promote protection services.

¹⁰ For the full report, see P Kiama *et al.* Violence against the urban poor in Nairobi. (2016), <https://torturedocumentationproject.files.wordpress.com/2014/05/violence-amongst-the-urban-poor-in-nairobi.pdf>

¹¹ MSJC report, page 14.

Right to life (Article 6) and Prohibition of torture and CIDTP (Article 7)¹²

10. In the following section we outline our key concerns relating to whether Kenya is fulfilling its obligations to guarantee protection of the right to life and prohibition against torture and CIDTP by effectively investigating extrajudicial killings and allegations of torture and CIDTP and where appropriate prosecuting the perpetrators. The obligation to investigate includes the obligation to 'take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any act of retaliation.'¹³
11. The extent of torture, ill-treatment and extrajudicial killings perpetrated by the Kenyan police is widely documented by non-governmental organisations, including MSJC. Between January 2013 and December 2016, MSJC documented killings in the Mathare settlement in Nairobi. The documentation collected by MSJC shows that a total of 156 men were killed by police over a three-year period. This is on average one person per week.¹⁴ Due to the risks and the reluctance of the community to come forward to verify information or act as witnesses, MSJC believes these numbers are hugely underestimated. In addition, Mathare is just one of 158 urban settlements in Nairobi and it is known that similar killings happen in other settlements in other cities throughout Kenya meaning that the actual number of incidences of police killings is significantly higher. Of the 156 killings documented by MSJC, only thirty cases were raised as an official complaint to the IPOA and only one of these complaints has resulted in legal proceedings before a court.¹⁵
12. MSJC has documented cases that demonstrate how the state is failing in practice to protect victims and witnesses who are named in complaints that allege extra-judicial killings, torture or ill-treatment by the police. For example, in the case of Christopher Maina killed by the police in February 2017, two witnesses to the killing reported the perpetrator - a local policeman - to the IPOA.¹⁶ In 2018, one of the witnesses was killed by the same policeman whom he had lodged the report against. The IPOA has not investigated the killings of Christopher Maina or the witness, and the alleged perpetrator continues to work as a policeman.
13. Under the National Police Service Act 2012, actions by police that result in injury or death must be reported to the IPOA which is mandated to investigate all cases of alleged police killings and prosecute accordingly. Failure to record and report a complaint against a police officer is an offence.¹⁷ However, evidence from the IPOA, suggests that it does not investigate all cases of alleged police killings in practice. The IPOA's 'End-Term Board Report 2012-2018' documents that out of the 9,878 cases reported to IPOA in this period, there were only three successful convictions; the vast majority of these cases had not been fully investigated by the IPOA yet.¹⁸ This evidence is backed up by the experiences of non-governmental

¹² With reference to the Human Rights Committee, List of issues in relation to the fourth periodic report of Kenya, CCPR/C/KEN/Q/4, paragraphs 12 and 14.

¹³ HRC, General Comment no. 36 (2019), paragraph 28.

¹⁴ Mathare Social Justice Centre, 'Who is Next? A Participatory Action Research Report Against the Normalization of Extrajudicial Executions in Mathare', page 35 (MSJC report). Available at: https://drive.google.com/file/d/OB2NZry_SioNhZHRVQmd6RW1CVWs/view

¹⁵ The case of Nura Malicha who was killed by the police in 2015 was the only one to reach the court. See MSJC report, page 25, case no. 11.

¹⁶ MSJC report, page 16.

¹⁷ National Police Service Act 2012, section 50(3) and 50(4), Fifth Schedule, paragraph 13, Sixth Schedule, paragraph 5. Available at: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/97347/115467/F-467123398/KEN97347.pdf>

¹⁸ Independent Police Oversight Authority: End-Term Board Report 2012- 2018, pages 59-61. Available at:

organisations, including MSJC, who find that the cases they report to the IPOA for investigation are usually delayed and that the IPOA is often unresponsive, even turning cases away.¹⁹

14. Considering the limited number of cases investigated by the IPOA, we are concerned that Kenya is not meeting its obligations to effectively investigate and prosecute extrajudicial killings and allegations of torture and ill-treatment perpetrated by the police. In addition, the state is failing to take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any act of retaliation. This protection is essential to the investigation of these human rights abuses, and successful investigations and prosecutions are required if the right to an effective remedy or to justice is to be fulfilled.

In light of this, **we suggest that the Committee recommends that the State takes the following action -**

- a. The State party should strengthen its efforts to ensure that police officers suspected of committing extrajudicial killings and other offences, including torture and CIDTP, are thoroughly investigated by the IPOA, that the perpetrators are brought to justice, and that the victims are adequately compensated.²⁰
- b. The State party must ensure that police officers who are accused of extra-judicial killings or other offences such as acts of torture or ill-treatment are immediately removed from their responsibilities, pending a prompt and impartial investigation into the allegations by the IPOA.

END

February 2021

<http://www.ipoa.go.ke/wp-content/uploads/2018/05/IPOA-BOARD-END-TERM-REPORT-2012-2018-for-website.pdf>

¹⁹ MSJC report, page 37. Available at: https://drive.google.com/file/d/0B2NZry_SioNhZHRVQmd6RW1CVWs/view

²⁰ This recommendation was previously made by the Committee in its last review of Kenya (July 2012), CCPR/C/KEN/CO/3, paragraph 11.

Information about the organisations

Mathare Social Justice Centre (MSJC) is an initiative by young members of the community to promote social justice in Mathare. For years Mathare has been a place where much violence has been allowed to go on without any redress for its residents. These forms of violence include, but are not limited to, land grabbing, forced evictions, police abuse and extrajudicial killings, political impunity and other economic, social and psychological violations.

<https://www.matharesocialjustice.org/>

The University of Edinburgh's research is funded by the British Academy under the Global Challenges Research Fund. The research aims to examine the challenges involved in protecting survivors of torture and ill-treatment. The project engages with human rights activists, lawyers and policy makers, and focuses initially on two country case studies, Kenya and Sri Lanka, before broadening out to draw more global lessons for the protection of survivors living in poor communities.