



Ending Torture. Seeking Justice for Survivors



Independent Medico-Legal Unit
A Just World Free From Torture



KITUO CHA SHERIA
LEGAL ADVICE CENTRE
we care for justice



Submission to the United Nations Committee against Torture regarding the Periodic Review of Kenya

List of Issues Prior to Reporting (LOIPR)

29 June 2015

1. REDRESS, International Rehabilitation Council for Torture Victims (IRCT), Independent Medico-Legal Unit (IMLU), Kituo cha Sheria - Legal Advice Centre, Open Society Justice Initiative, Physicians for Human Rights (PHR), and Coalition on Violence Against Women (COVAW) write to bring the Committee against Torture’s attention to a number of key concerns in relation to Kenya in advance of the adoption of the List of Issues Prior to Reporting (LOIPR) at the 56th Session of the Committee to be held from 9 November to 9 December 2015.

Definition of torture and appropriate penalties for acts of torture

2. Notwithstanding the inclusion of the prohibition of torture in Kenya’s new Constitution of 2010, torture and other forms of cruel, inhuman and degrading treatment or punishment (other ill-treatment) continue to persist. These violations are reportedly committed primarily by the police and other security personnel, often in the context of combating crime and counter-terrorism.¹
3. In its 2013 Concluding Observations on the second report of Kenya, the Committee against Torture stated that it “remain[ed] deeply concerned that the draft Prevention of

¹ IMLU/IRCT, Briefing note: Kenya, *Torture and Ill-Treatment in Kenya: Anti-torture law, impunity and counter terrorism measures*, December 2014. Available at: <http://www.imlu.org/2011-06-30-23-44-4/reports/finish/2-reports/278-kenya-briefing-note-upr/0.html>

Torture Bill (2011) has still not been enacted” and urged the State party “to table, as a matter of urgency, the Prevention of Torture Bill (2011) in Parliament, so that its provisions, which include a comprehensive definition of torture in line with article 1 of the Convention and render all acts of torture punishable by appropriate penalties, become the applicable law.”²

4. The Bill has not yet been tabled - at the time of writing this submission, the Bill was with the Attorney General’s Office awaiting presentation to the Cabinet.

We urge the Committee against Torture to include the lack of progress regarding the tabling and adoption of the Prevention of Torture Bill (2011), now known as the Prevention of Torture Bill (2014), in its LOIPR. Specifically, we urge the Committee to request the State to

- ***Provide detailed information on the steps it has taken in order to progress the enactment of the Prevention of Torture Bill (2014) since the Committee’s 2013 Concluding Observations were adopted; and***
- ***Provide a detailed timetable, which we believe should set out: a) when the requisite steps to table the Bill in Parliament will be completed; b) a commitment to table the Bill in Parliament as soon as those requisite steps are completed; c) when it is anticipated that the Bill will be adopted and enacted; and d) Government plans for dissemination and implementation of the new law.***

Security Laws Amendment Act (2014)

5. In its 2013 Concluding Observations, this Committee urged Kenya “to ensure that all police and military operations, including counter-terrorism activities, are carried out in full compliance with the Convention and the State party’s obligations under international law.”³
6. The Security Laws Amendment Act was passed on 18th December 2014 as a measure of the state to strengthen the legislative framework to fight terrorism among other security issues. The Act amended various acts of parliament including the Prevention of Terrorism Act of 2012, the Prisons Act, the Evidence Act and the National Police Service Act.
7. The provisions of the Act were subject to a constitutional petition challenging the Act as unconstitutional as some of the provisions violated human rights standards and were contrary to the letter and spirit of the Constitution.⁴ Several of the new provisions contained in the Act posed serious challenges to the legal protection against torture and ill-treatment. The Court declared most of the problematic provisions of the Security Laws Amendment Act of 2014 unconstitutional, but allowed Section 66. Section 66 had amended Section 33(10) of the Prevention of Terrorism Act 2012 by replacing the words *ninety (90) days* with *three hundred and sixty (360) days*. The

² CAT, Concluding observations on the second periodic report of Kenya, UN Doc. CAT/C/KEN/CO/2, 19 June 2013, para. 6.

³ *Ibid*, para. 19.

⁴ Petition No. 628 of 2014 consolidated with Petition No. 630 of 2014 and Petition No.12 of 2015.

effect of this provision is that persons suspected of having committed acts of terrorism can be detained for almost a year without a hearing and with no guarantees against being held incommunicado. This is contrary to Article 50 (2) (e) of the Constitution, which provides for the right to a fair trial, and significantly enhances the risk of torture and ill-treatment since there is no provision for checks on the welfare of such person.

We urge the Committee against Torture to include questions pertaining to the possible negative effect of this amendment on the protection against torture and ill-treatment, in its LOIPR. We suggest that these questions should focus on

- ***Steps taken to ensure compliance of the Prevention of Terrorism Act 2012 with the Constitution and other human rights instruments; and***
- ***How the implementation of the amendment is monitored for human rights compliance.***

Impunity for post-Election Violence, including Sexual Violence

8. In its 2013 Concluding Observations, this Committee expressed concern “at the delay in effectively and impartially investigating the 2007 and 2008 post-election violence, with the result that perpetrators continue to be at large.”⁵ The Committee urged the State party to “[s]trengthen its efforts to ensure prompt, impartial and effective investigation of all allegations of excessive force, torture and extra-judicial killings by the police and the military during the post-election violence, that perpetrators are prosecuted and, on conviction, appropriately punished.”⁶
9. State agents, including the police and special military forces, were allegedly involved in committing, aiding and abetting crimes during the post-election violence, including torture and sexual violence against women and men.⁷ Several assessments have demonstrated a significant spike in the occurrence of rape and other sexual violence, in particular gang rape, during the post-election violence.⁸ Reports indicate that in a large number of cases the perpetrators were state agents; police officers reportedly committed more than one quarter (26 per cent) of the recorded rapes.⁹ However, there has been a lack of progress in the investigation and prosecution of state agents, resulting in the absence of accountability.¹⁰ While President Uhuru has acknowledged

⁵ CAT, Concluding observations on the second periodic report of Kenya, UN Doc. CAT/C/KEN/CO/2, 19 June 2013, para. 18.

⁶ *Ibid.*

⁷ See for example, Report of the Findings of the Commission of Inquiry into the Post-Election Violence in Kenya, 2008; Report of the Truth Justice and Reconciliation Commission, 2013.

⁸ Anastario, et al. (2014), *Time Series Analysis of Sexual Assault Case Characteristics and the 2007-2008 Period of Post-Election Violence in Kenya*, PLoS ONE 9(8); Johnson et. al., *A national population-based assessment of 2007-2008 election-related violence in Kenya*, Conflict and Health 2014, 8:2.

⁹ Human Rights Watch, *“Turning Pebbles”: Evading Accountability for Post-Election Violence in Kenya*, 2011, p. 22. See also, Anastario et al. (2014) *Time Series Analysis of Sexual Assault Case Characteristics and the 2007-2008 Period of Post-Election Violence in Kenya*, PLoS ONE 9(8).

¹⁰ See for example, Amnesty International, *Crying for Justice: Victims’ Perspectives on Justice for the Post-Election Violence in Kenya*, 2014; ICTJ, *The Accountability Gap on Sexual Violence in Kenya: Reforms and Initiatives Since the Post-Election Crisis*, 2014; Brown and Sriram, *The Big Fish Won’t Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya*, African Affairs (2012), 111/443, 244-260.

challenges in this regard, the Government has failed to give a clear indication of how it is planning to meet these challenges and discharge its obligations to investigate promptly, impartially and effectively allegations of serious human rights violations.¹¹

10. The State's inaction in this regard has been challenged in a constitutional petition (case no. 122/2014) which argues that Kenyan authorities failed to protect civilians during the post-election violence and that authorities have not fulfilled their obligation to investigate and prosecute sexual and gender-based (SGBV) crimes and to provide reparations to the victims.¹²

We urge the Committee against Torture to include the need to effectively investigate the 2007 and 2008 post-election violence, and to address the ongoing impunity of perpetrators, in its LOIPR. Specifically, we urge the Committee to request the State to

- ***Provide detailed information on the steps that it has taken since the Committee's 2013 Concluding Observations were adopted, and its plans for future measures, to investigate this violence promptly, impartially and effectively, and hold perpetrators, in particular state agents, accountable;***
- ***Provide specific information regarding targeted steps that have been taken, or will be taken, to investigate and punish acts of sexual violence which were committed against women, men, and children during the post-election violence; and***
- ***Provide specific information on measures that the State party has taken to monitor and assess the adequacy of its investigative and prosecutorial mechanisms in the context of post-election violence, and sexual violence during that period.***

Redress regarding post-election violence and historic injustices

11. In its Concluding Observations regarding Kenya in 2009, this Committee recommended that the "State party should ensure that the victims of post-election violence obtain redress and adequate compensation."¹³ In 2013 this Committee recalled its previous recommendations regarding post-election violence and recommended that "All victims should obtain redress."¹⁴

12. In March 2015, President Kenyatta announced that he had instructed the Treasury to establish a Fund of 10 Billion Kenyan Shillings "over the next three years to be used

¹¹ See also, "[T]here were 6,000 reported cases and 4,575 files opened. It is the opinion of the Director of Public Prosecutions that there are challenges to obtaining successful prosecutions. These challenges range from inadequate evidence, inability to identify perpetrators, witnesses' fear of reprisals, and the general lack of technical and forensic capacity at the time." State of the Nation address by President Uhuru Kenyatta, 26 March, 2015, para 80. Available at: <http://m.news24.com/kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326>

¹² *COVAW, IMLU et al. v. Attorney General of the Republic of Kenya et. al*, See: <http://www.redress.org/cases/kenyan-sgbv-petitiona>

¹³ CAT, Concluding observations on Kenya, UN Doc. CAT/C/KEN/CO/1, 19 January 2009, para. 19.

¹⁴ CAT, Concluding observations on the second periodic report of Kenya, UN Doc. CAT/C/KEN/CO/2, 19 June 2013, para. 18(a).

for restorative justice.”¹⁵ He stated that “This will provide a measure of relief and will underscore my government’s goodwill.”¹⁶ This Fund is intended to provide reparation for victims of past injustices from 1963, including victims of post-election violence, as recommended in the report of the Truth, Justice and Reconciliation Commission (TJRC). However, lack of clarity regarding the Fund has been highlighted by stakeholders. Thus, the Kenya Human Rights Commission stated that the Fund “must be based on a clear understanding of who the victims are and what their needs are.”¹⁷

13. This Fund, once established, could provide a mechanism for the State party to implement some of the Committee’s previous recommendations regarding redress. However, the Fund will not provide a mechanism for victims of torture and other ill-treatment committed since the post-election violence.

We urge the Committee against Torture in its LOIPR to request the State to

- *Identify any reparation for victims of torture and other ill-treatment that it has put in place; and*
- *Provide detailed information regarding the operationalization of the Fund referenced by President Kenyatta in his State of the Nation address.*

Impunity for torture

14. In its 2013 Concluding Observations this Committee recommended that the State party “should ensure that, in the presence of evidence of acts of torture, public officials should be prosecuted for the crime of torture, in accordance with the definition contained in article 1 of the Convention.”¹⁸ The Committee further recommended that “the State party take all necessary measures to ensure that the National Police Service Act (2011) is effectively implemented, ascertain that all allegations of acts of torture or ill-treatment by police officials are promptly, effectively and impartially investigated, duly prosecuted under the offence of torture or other cruel, inhuman or degrading treatment or punishment and if convicted, punished appropriately.”¹⁹

15. We are concerned that, notwithstanding continued allegations of torture and ill-treatment,²⁰ no state agent has been charged with offences relating to these violations,

¹⁵ State of the Nation address by President Uhuru Kenyatta, 26 March, 2015, para 83. Available at: <http://m.news24.com/kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326>

¹⁶ *Ibid.*

¹⁷ Kenya Human Rights Commission, *Pledge must have real meaning for victims*, April 1, 2015. Available at: <http://www.khrc.or.ke/media-centre/press-releases/277-pledge-must-have-real-meaning-for-victims.html>.

¹⁸ CAT, Concluding observations on the second periodic report of Kenya, UN Doc. CAT/C/KEN/CO/2, 19 June 2013, para. 7.

¹⁹ *Ibid.*, para. 11.

²⁰ See for example, Human Rights Watch, *World Report 2014: Events of 2013*, 2014, p. 130-131; Kenya National Human Rights Commission, 11th Annual Report: 2013/2014, para 2.3.4.

including officers of the National Police Service, the National Intelligence Service, and the Kenya Defence Forces, despite the fact that their various statutes prohibit torture and other ill-treatment.

16. In addition to the failure to adequately respond to individual cases of torture or other ill-treatment, the State party has not adequately addressed persistent patterns of torture, such as at particular police stations and targeting particular groups.²¹ Recent reports indicate that “police reforms – including measures to improve accountability for police abuses – have lagged,”²² which fails to meet the State party’s obligation to take all measures to prevent torture and guarantee non-repetition.

Recalling its recommendations at paras 7, 11 and 24 of its 2013 Concluding Observations, we urge the Committee against Torture in its LOIPR to request the State to provide information regarding the measures it has taken to prosecute perpetrators of alleged torture and other ill-treatment and to prevent future violations, including sexual violence, committed by state agents. Specifically we suggest that the Committee seek information regarding:

- *the adequacy of any vetting in relation to state agents who are accused of participation in sexual violence or other serious violations during post-election violence. As vetting undertaken to date has been restricted to police and judicial officers we also suggest that the Committee seek information regarding future plans for vetting of state agents accused of such violence who remain employed by the state;*
- *what training has been provided to police and military forces with a view to effectively investigating torture or other ill-treatment and holding perpetrators to account;*
- *what training has been provided to police and military forces with a view to effectively investigating sexual violence and preventing future sexual violence; and*
- *what training has been provided to oversight bodies, in particular the Independent Police Oversight Authority, in order to ensure effective investigation of, and accountability in, cases where allegations of torture or other ill-treatment, including sexual violence have been raised against state agents.*

Effective access to complaint mechanisms and adequate investigations for victims of torture or other ill-treatment

17. In its 2013 Concluding Observations the Committee expressed concern regarding the “P3” form and “the impediments inhibiting its effective use by a victim of torture or ill-treatment”; it urged the State party “to take effective measures to ensure that all

²¹ See for example, IMLU, *A Cry for Justice: torture and ill-treatment of Hawkers and Small Scale Traders in Nairobi City County*, 2014. Available at: <http://www.imlu.org/2011-06-30-23-44-4/reports/summary/2-reports/279-torture-and-ill-treatment-of-hawkers-and-small-scale-traders-in-nairobi-city-county.html>.

²² Human Rights Watch, *World Report 2014: Events of 2013*, 2014, p. 131.

victims of torture and ill-treatment have effective access to complaint mechanisms and their cases are promptly, effectively and impartially investigated.”²³

18. In the experiences of a number of the NGOs providing this submission, the use of “P3” forms continues to pose a serious obstacle for victims of torture or other ill-treatment, including sexual violence, to access justice.²⁴ For example, although officially available free of charge, there have been instances in which police have asked victims of rape for money for the “P3” form; when the victim could not afford to pay this money the police reportedly refused to undertake investigations.²⁵ In other cases medical officers require victims to pay them in order to fill out the forms. Although medical officers are supposed to fill in “P3” forms for free they claim that the money they are asking for is to facilitate court attendance. Those victims who cannot afford to pay the amount requested end their pursuit of justice at that point. If a victim cannot present this “P3” form, police refuse to investigate their cases despite the victim’s complaint. There also appears to be a misunderstanding among some judges that the accused can only be convicted where the “P3” form was completed.

19. In the context of sexual violence, “P3” forms are inadequate for documentation purposes and post rape care (PRC) forms have been introduced. These are more comprehensive forms for the purpose of documenting sexual offences. However, similar challenges have arisen regarding these forms as they are often inaccessible to victims of sexual violence, thus limiting access to justice for many.

We urge the Committee in its LOIPR to request that the State party provide information regarding the measures it has taken to implement the Committee’s previous recommendations to improve access to complaint mechanisms for victims of torture and ill-treatment, in particular victims of sexual violence. Specifically, we urge the Committee to ask the State party to provide detailed information regarding:

- ***Steps it has taken to assess and improve the use of the “P3” form in practice, in particular costs associated with its use;***
- ***Steps it has taken to ensure that PRC forms are readily available for victims of sexual violence; and***
- ***Steps it has taken to ensure that all complaints of torture and other ill-treatment are investigated promptly and effectively and that perpetrators are identified and prosecuted.***

²³ CAT, Concluding observations on the second periodic report of Kenya, UN Doc. CAT/C/KEN/CO/2, 19 June 2013, para. 22.

²⁴ Kenya Forum, *Being Raped in Kenya; Reluctant Doctors, Insensitive Policing and Crooked Courts*, 2 January, 2014, Available at: <http://www.kenyaforum.net/2014/01/02/being-raped-in-kenya-reluctant-doctors-insensitive-policing-and-crooked-courts/>; Claire McEvoy, *Battering, Rape and Lethal Violence – A Baseline of Information on Physical Threats against Women in Nairobi*, 2012, pp. 52-55.

²⁵ See for example, Claire McEvoy, *Battering, Rape and Lethal Violence – A Baseline of Information on Physical Threats against Women in Nairobi*, 2012, p.50.

Implementation of the Right to Reparation, including the right to rehabilitation

20. In its 2013 Concluding Observations, this Committee recommended that the State party “...(c) Enact the Victims of Offences Bill with a view to establishing a comprehensive legislative framework to give effect to the right to redress, including compensation and medical rehabilitation; (d) Consult with relevant stakeholders to properly and effectively regulate the National Fund for Victims of Torture as soon as possible; and (e) Ensure that the right to rehabilitation is included in the Prevention of Torture Bill (2011), that adequate resources are allocated for effective rehabilitation treatment and programmes, including medical and psychological programmes as well as those provided by non-State services. Rehabilitation services should be duly covered under the National Hospital Insurance Fund.”²⁶
21. During the 2015 Universal Periodic Review, the Kenyan Government accepted recommendations to ensure that reparation is included in the Prevention of Torture Bill (2014).²⁷
22. The most recent draft of the Prevention of Torture Bill (2014) includes provisions on the right to rehabilitation but, as noted above, at the time of writing the Bill has not been tabled.
23. In the instances where victims are awarded damages by courts, little is done by the office of the Attorney General to execute the decisions of the court. In June 2014 the Cabinet Secretary in Charge of Interior Security acknowledged that the court had awarded about Kshs 250,000,000.00 (approximately 2.238.000 EUR) in damages for cases of torture and extrajudicial killings but noted that victims would have to wait for the implementation of the ruling as there was no budget to pay the compensation awards. In the 2015/2016 budget the State party once again failed to allocate funds to pay compensation awards to victims and survivors of torture.
24. Statements taken by REDRESS and its partners from female victims of sexual violence in 4 regions in Kenya have shown that these women have not been able to access rehabilitation services and are still in need of reparative measures, in particular socio-economic, medical and psychological rehabilitation.
25. This comes against the background of a lack of information available from the Government on existing rehabilitation services, if any. This includes the absence of official data on the estimated number of victims of serious human rights violations, including torture and other ill-treatment, in the country, their identified needs and existing services that could possibly be directed towards those needs.

²⁶ CAT, Concluding observations on the second periodic report of Kenya, UN Doc. CAT/C/KEN/CO/2, 19 June 2013, para. 23.

²⁷ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Kenya, UN Doc. A/HRC/29/10, 26 March 2015, paras 142.79 and 142.102

We urge the Committee against Torture, in its LOIPR, to request the State to provide information regarding the measures it has taken to put in place an adequate legal framework to ensure the right to an effective remedy and reparation for victims of torture and ill-treatment, including the timely implementation of any awards made.

Considering the absence of available information regarding the implementation of the right to rehabilitation and the time between the submission of the LOIPR and the deadline for the State report, we encourage the Committee to focus its LOIPR questions on obtaining the following basic information from the State:

- *Whether the right to rehabilitation is included in future and possibly final versions of the Prevention of Torture Bill (2014).*
- *Whether the State has conducted a needs assessment to identify the number of victims of torture and ill-treatment and their rehabilitation needs.*
- *Whether a rehabilitation programme specifically supporting torture victims exists. If it does:*
 - a. *Who performs the services?*
 - b. *What funds are available from the State and how is funding structured?*
 - c. *How many psychologists/psychiatrists are there per capita in the country and how many have the necessary skills to work with severe trauma?*
- *Whether there is a system to monitor and evaluate the State's delivery of the right to rehabilitation.*
- *What measures are being taken to ensure that rehabilitation services are accessible and appropriate to the needs of victims of sexual violence.*