

Submission to the UN Human Rights Committee's consideration of Kenya's third periodic report

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1. Presentation of the Report

1.1 TRIAL (Swiss Association against Impunity)

1. TRIAL is an association under Swiss law founded in June 2002 and headquartered in Geneva. It is apolitical and non-confessional and has consultative status before the United Nations Economic and Social Council. Its principal goals are in the fight against impunity for the perpetrators accomplices and instigators of genocide, war crimes, crimes against humanity, enforced disappearances and acts of torture. To accomplish its goals, TRIAL coordinates a network of lawyers capable of rapidly and efficiently instituting legal proceedings. These lawyers offer the victims of international crimes the necessary skills for their proper defence including filing of legal complaints at the domestic and international levels as well as liability procedures. TRIAL has also set up litigation programme born from the premise that, despite the existence of legal tools able to provide redress to victims of international crimes, these mechanisms are considerably underused. Accordingly, TRIAL aims at offering victims the requisite professional help to prepare and file their complaints before existing international mechanisms and tribunals.

Contact person: Dr. iur. Philip Grant (Director)

E-mail: philip.grant@trial-ch.org

Address: TRIAL (Swiss Association against Impunity), P.O. Box 5116, 1211, Geneva 11, Switzerland

Tel./Fax No.: + 41 22 321 61 10

Website: www.trial-ch.org/

2. Since 2010, TRIAL works together with Western Kenya Human Rights Watch (WKHRW), a local NGO based in Bungoma, Kenya, which has up to date documented over one hundred cases of enforced disappearance in Mount Elgon district. In April 2011, TRIAL conducted a field mission to Western Kenya during which it met with a number of local lawyers and representatives of local and international organization and, interviewed the next-of-kin of numerous victims of enforced disappearances. In May and July 2011, TRIAL and WKHRW have submitted the first forty cases of enforced disappearance perpetrated in Mount Elgon district to the United Nations Working Group on Enforced or Involuntary Disappearances (UNWGEID) and are currently working on preparing additional cases to be brought to the attention of the UNWGEID by the end of 2011.

1.2 Preparation and Format of the Report

3. In this report, TRIAL submits information to assist the Human Rights Committee in its consideration of Kenya's third periodic report, submitted in August 2010 and due for evaluation in July 2012 (doc. CCPR/C/KEN/3).
4. This report aims at providing a partial review of Kenya's implementation of the International Covenant

on Civil and Political Rights (hereinafter, the Covenant) and focuses on a limited number of issues. In particular, in view of the expertise and field of work of the subscribing association, the report refers to the crime of enforced disappearance and certain specific rights protected under the Covenant which are or may be violated by the State in cases of enforced disappearance. Part of the analysis of this report is also limited to the region of Mount Elgon in Western Kenya and does not refer to the country as a whole. The obligations analyzed are in particular, the right to life (article 6), the prohibition of torture (article 7), the right to liberty and security (article 9), the right to recognition as a person before the law (article 16), the rights of the child (article 24) and the right to an effective remedy (article 2.3). The themes analyzed in this regard correspond to issues of concern identified by the Committee in its previous concluding observations on the second periodic report of Kenya published on 29 April 2005 (doc. CCPR/CO/83/KEN, hereinafter "2005 Concluding Observations"). One specific aim of this alternative report is to convince the Human Rights Committee of the opportunity to include the matters hereby analyzed in the list of issues that the Human Rights Committee Task Force is going to adopt at the 103th session which will take place from 17 October to 4 November 2011 in Geneva. To this end, concrete examples and instances are referred to in order to better substantiate the allegations put forward. The omission of other subjects does not imply by any means that the association submitting this report finds that Kenya fully complies with all its obligations under the Covenant.

5. This Alternative Report to the Human Rights Committee is submitted by TRIAL.¹

2. General Framework

2.1 Background

6. Kenya's third periodic report covers the period from April 2005 to June 2010 and thus includes the period of violence which broke out following the December 2007 elections and which lasted until at least April 2008. Impunity prevails for the numerous human rights violations committed during this period, in particular for the hundreds of cases of enforced disappearance and extrajudicial killings committed in Mount Elgon district in Western Kenya. These violations and the government's non-fulfilment of international obligations spelled out in the Covenant are the subject of this report.
7. The conflict in Mount Elgon district started in late 2006, when the Sabot Land Defence Forces (SLDF), an armed group, emerged to resist what they considered unfair land-allocation attempts by the government. This resistance evolved into criminal activities and over the years, the SLDF increased its control over the villages in Mount Elgon district, chasing out or killing people, occupying the land it claimed and terrorizing those who failed to follow its orders. Numerous cases of inhumane treatment, rape and sexual violence and mutilation by the SLDF have been documented by local and international

¹ The local NGO Western Kenya Human Rights Watch, based in Bungoma provided valuable information for the drafting of this report and fully endorses this submission to the Human Rights Committee.

NGOs.² According to the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, over 700 killings and 120 enforced disappearances perpetrated by the SLDF were documented by local organizations between 2006 and 2009.³

8. In addition to the land-related objectives of the SLDF, funding and support of the SLDF by local politicians also gave way to politically motivated violence. In the presidential election of December 2007, the SLDF supported the Orange Democratic Movement (ODM) candidate, Fred Kapondi, and targeted supporters of rival parties, in particular the Party of National Unity (PNU) through which the then member of parliament, John Serut campaigned. In the aftermath of the elections, forced displacement of the families across Mount Elgon district increased as the SLDF sought to continue driving the unwanted population and political opponents from the mountain completely.
9. Local and international human rights organizations repeatedly called for action against the SLDF but the government ignored these requests.⁴ Finally, on 9 March 2008, in the aftermath of the presidential election held in December 2007, the government launched a joint military-police operation called “Okoa Maisha” (“Save Lives” in Swahili) to clamp down on the activities of the SLDF. The population initially welcomed this operation, considering it long overdue but was quickly alienated by their strategy consisting of indiscriminately rounding up all the men and young boys in Mount Elgon district, taking them to military camps where they were tortured, sometimes to death, to force them to identify SLDF members or the location of weapons.⁵ According to the Special Rapporteur Philip Alston, 3’839 individuals were “screened” during this operation.⁶ Previous to the visit by the Special Rapporteur, reports by a wide range of observers and NGOs including WKHRW, the Kenya National Commission on Human Rights (KNCHR), the Independent Medico-Legal Unit (IMLU), Médecins sans Frontières (MSF) and Human Rights Watch (HRW), conservatively estimated at **over 200 the number of persons killed or disappeared by the security forces.**⁷

² Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, *Mission to Kenya*, A/HRC/11/2/Add.6, 26 May 2009, hereinafter: “Philip Alston report”. For a detailed examination of human rights violations committed by the SLDF and the Kenyan security forces see the following reports: Human Rights Watch (HRW), *All the Men have Gone: War Crimes in Kenya’s Mount Elgon Conflict*, July 2008, hereinafter: “HRW report”; Independent Medico-Legal Unit (IMLU), *Double Tragedy: Report on Medico-Legal Documentation on Torture and Related Violations in Mount Elgon “Operation Okoa Maisha”*, August 2008, hereinafter: “IMLU report”; Médecins Sans Frontières (MSF), *Mount Elgon: Does Anybody Care?*, June 2008, available at: www.msf.org.uk/mount_elgon_report_20080616.news (last accessed 26 July 2011), hereinafter: “MSF report”; Kenya National Commission on Human Rights (KNCHR) “The Mountain of Terror” A report on the investigations of torture by the military in Mount Elgon, May 2008, p. 4, hereinafter: “KNCHR report”, as well as World Organisation Against Torture (OMCT) - International Commission of Jurists, Kenya (ICJ Kenya) - IMLU alternative report to the Committee against Torture, November 2008, available at: http://old.omct.org/pdf/ESCR/2008/CAT_kenya_alt_report.pdf (last accessed 26 July 2011).

³ Philip Alston report, *supra* note 2, para. 44.

⁴ In late 2006 and 2007, the police and the paramilitary police, the General Service Unit (GSU) launched low-level security operations but these operations drew criticism from human rights groups due to allegations that police and GSU members raped women and girls and wantonly destroyed property. Human Rights Watch, *Submission to the 41st Session of the United Nations Committee Against Torture on Kenya*, 15 September 2008.

⁵ KNCHR report, *supra* note 2, p. 8.

⁶ *Ibid.*, para. 51.

⁷ *Ibid.*, para. 52, emphasis added.

10. While there have been efforts by the government to investigate some of the violations committed during the post-election violence, these attempts have not succeeded in practice to promptly, impartially and independently investigate alleged violations nor to try and sanction those found responsible for them.
11. On **22 May 2008**, the government of Kenya established the Commission of Inquiry into the Post-Election Violence Experience in Kenya after the General Elections (CIPEV, or “Waki Commission”). On 15 October 2008, the CIPEV presented a comprehensive report finding that 1,133 people were killed during the post-election violence and issuing a number of recommendations.⁸ Among the recommendations issued by the CIPEV to the government, was the creation of a special tribunal composed of Kenyan and international judges which would seek “accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya”.⁹ If this special tribunal was not established within the deadlines fixed by the CIPEV, a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal *would be forwarded to the Special [sic] Prosecutor of the International Criminal Court. The Special [sic] Prosecutor would be requested to analyze the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons.*¹⁰ In February 2009, the Kenyan Parliament voted against a bill to establish the special tribunal.
12. A second attempt at generating a Bill for the establishment of a national mechanism to deal with accountability for the post election violence was made in **July 2009** when the Minister for Justice proposed the establishment of a Special Division of the High Court to specifically deal with the post-election violence cases. This proposal was rejected by the Cabinet referring to the need for immunity clauses for the Head of State as well as presidential powers to pardon suspects within any such legislation. After this second failure, in July 2009, the ICC Prosecutor was sent the extensive documentation compiled by the CIPEV.
13. Following an analysis of this documentation, on **26 November 2009**, the ICC Prosecutor, invoked for the first time his *proprio motu* powers to initiate investigations granted to him under Article 15(3) of the Rome Statute (right to submit a request for authorization to initiate an investigation without referral from a State Party or the UN Security Council). The Prosecutor’s investigation led him to identify six individuals that he alleged were responsible for crimes against humanity. On **15 December 2010** he publicly revealed he had submitted an application requesting court summonses for these six people, divided into two separate cases. The Pre-Trial Chamber reviewed this evidence and determined that there were reasonable

⁸ Report of the Commission on Inquiry of Post-Election Violence, 15 October 2008, hereinafter “CIPEV report” p. 162, available at: www.communication.go.ke/media.asp?id=738 (last accessed 26 July 2011), p. 383.

⁹ *Ibid.*, p. 473. The deadline for signing an agreement to establish the tribunal was within 60 days of the presentation of the CIPEV report, that is in mid-December 2008. A Statute for the tribunal was also to be enacted and the deadline for its coming into force was set 45 days after the signing of the agreement. The special tribunal was to commence functioning 30 days after the giving of Presidential Assent to the Bill enacting the Statute.

¹⁰ *Ibid.*, emphasis added.

grounds to believe that those individuals had committed the crimes alleged in the Prosecutor's application. The request was therefore granted, and the summonses were issued, on **8 March 2011**. The six people summoned by the ICC are: William Samoei Ruto, Henry Kiprono Kosgey, and Joseph Arap Sang (Case 1)¹¹ and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali (Case 2).¹²

14. In addition to the Waki Commission, the government of Kenya established the Truth Justice and Reconciliation Commission (TJRC) whose mandate and functions are regulated by the TJRC Act, 2008. According to the TJRC Act, 2008, the objective of the TJRC was "to promote peace, justice, national unity, healing and reconciliation among the people of Kenya".¹³ To achieve its objectives the TJRC was to establish "an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired *between 12 December 1963 and 28 February 2008*".¹⁴ The TJRC however faced financial, operational and political bottlenecks since its inception, in addition to a credibility and legitimacy crisis due to the alleged involvement of its initial chair, Mr. Bethuel Kiplagat in the illegal and irregular acquisition of public property, in the Wagalla massacre¹⁵ and the complicity in the murder of the late Dr. Robert Ouko (then the Minister of Foreign Affairs). The Commission was thus forced to delay the beginning of the hearings for one year, from April 2010 to April 2011 and is currently seeking to extend its mandate for 6 more months in order to be able to fulfil it.
15. Both the Waki Commission and the TJRC, as well as the ICC Prosecutor exclude from their investigations some of the worst atrocities committed in the context of the post-election violence. Namely, they exclude the violations committed by the government during the joint military-police operation Okoa Maisha launched on 9 March 2008 in Mount Elgon district in Western Kenya to clamp down on the activities of the SLDF.

¹¹ **William Samoei Ruto**: Senior member of the Orange Democratic Movement (ODM), member of parliament from Eldoret (Rift Valley) and Minister of Higher Education, Science and Technology in the coalition government (though he is currently suspended due to allegations of corruption). **Henry Kiprono Kosgey**: Senior member of the Orange Democratic Movement (ODM), member of parliament from Tinderet (Rift Valley) and former Minister of Industrialization in the coalition government (he stepped down in January 2011 due to corruption allegations). **Joseph Arap Sang**: Current head of operations at Kass FM in Nairobi. At the time of the attacks, Sang was a radio host in Eldoret, Rift Valley Province.

¹² **Francis Kirimi Muthaura**: Senior member of the Party of National Unity (PNU), currently holding the positions of Head of the Public Service and Secretary to the Cabinet of the Republic of Kenya (as he was during the period of post-election violence). **Uhuru Muigai Kenyatta**: Senior member of the Party of National Unity (PNU), currently holding the positions of Deputy Prime Minister and Minister for Finance of the Republic of Kenya. **Mohammed Hussein Ali**: Currently holding the position of Chief Executive of the Postal Corporation of Kenya, and Commissioner of the Kenya Police at the time of the elections. For a thorough overview of the Kenyan cases before the ICC see: www.icckenya.org/

¹³ Truth, Justice and Reconciliation Commission Act, 2008, Article 5.

¹⁴ *Ibid.*, Article 5(a).

¹⁵ The Wagalla massacre occurred on 10 February 1984 in the Wagalla Airstrip, about 15 km away from Wajir in North Eastern Province, Kenya. It was the result of a military operation to disarm the members of Degodia, an ethnic Somali clan inhabiting the area. Allegedly, the military forcibly removed them from their homes and took them to the airstrip where they were interrogated, tortured, left without water or food and then killed. The exact number of people killed in the massacre is unknown. Estimates range from the official government figure of 57, to more than 5,000.

16. The violence in the Mount Elgon district and arbitrary killings in the post-election period triggered a field investigation by HRW during March and April 2008 and a visit by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, in February 2009. The already mentioned reports of both HRW “All the Men Have Gone: War Crimes in Kenya’s Mount Elgon conflict” and of the Special Rapporteur “Mission to Kenya”, made references to hundreds of disappeared persons and extrajudicial executions. HRW called for a criminal investigation into “[...] all claims of unlawful killings, arbitrary arrest and detention, torture, rape, and destruction of property by security forces and prosecute those responsible” and stressed the need for the government of Kenya to “ensure fundamental due process guarantees to persons in detention, including the right to have their detention reviewed by an independent judicial authority with power to order their release; to grant them immediate access to medical attention, family members and legal counsel, as well as to inform families of deaths in custody and return the bodies of their relatives”.¹⁶ The Special Rapporteur, made specific recommendations concerning the killings and disappearances in Mount Elgon. Among others, he called on the government to “immediately set up an independent commission for Mount Elgon modeled on the Waki Commission, to investigate human rights abuses [...] by the police and the military and the reasons for the lengthy delay in government intervention to stop the SLDF”.¹⁷ The Special Rapporteur also recommended that the government “make available to the ICRC and the KNCHR, with assurances of appropriate confidentiality, *the names of all those detained at Kapkota military camp* [...]”. This would facilitate the quest to resolve disappearances and enable a thorough accounting to be undertaken”.¹⁸ The Special Rapporteur considered that the government “should provide funding and other assistance to the families of those who remain disappeared following the police-military intervention”¹⁹ as well as “ensure that evidence of killings, and especially mass graves in Mount Elgon is not destroyed”.²⁰
17. Moreover, in its November 2008 Concluding Observations on the initial report submitted by Kenya, the Committee against Torture (CAT) expressed deep concern about “allegations of mass arrests, persecutions, torture and unlawful killings by the military in the Mount Elgon region during the ‘Operation Okoa Maisha’ conducted in March 2008” and urged the government of Kenya to take “immediate action to ensure prompt, impartial and effective investigation into the allegation of excessive force and torture by the military” during this operation as well as to “ensure that perpetrators are prosecuted and punished..., the victims who lost their lives are properly identified and that their families, as well as other victims are adequately compensated”.²¹
18. Despite the reports and recommendations by HRW, the CAT and the Special Rapporteur, the Kenyan authorities failed to follow-up on the situation of victims of enforced disappearance in Mount Elgon

¹⁶ HRW report, *supra* note 2, p. 8.

¹⁷ Philip Alston report, *supra* note 2, para. 99.

¹⁸ *Ibid.*, para. 100, emphasis added.

¹⁹ *Ibid.*, para. 101.

²⁰ *Ibid.*, para. 102.

²¹ Committee against Torture, Concluding Observations on the initial report of Kenya, doc. CAT/C/KEN/CO/1 of 21 November 2008, para. 21.

district.

19. As already mentioned, human rights violations committed during the operation Okoa Maisha were *not included into the investigations* undertaken by the CIPEV. The reason given by CIPEV for this exclusion was “because the problems associated with violence in Mount Elgon *predated the elections*, the Commission was unable to establish any link with the 2007 PEV and therefore *did not integrate it into investigations of PEV in the region*”.²² The CIPEV also stated that they were of the view that “issues concerning Mount Elgon were *of such magnitude* that the Commission could not delve into them...”.²³ Neither did the TJRC include operation Okoa Maisha into its own investigations. According to the TJRC Act, 2008, the objective of the TJRC was “to promote peace, justice, national unity, healing and reconciliation among the people of Kenya”.²⁴ To achieve its objectives the TJRC was to establish “an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired *between 12 December 1963 and 28 February 2008*”.²⁵ The operation “Okoa Maisha” began on 9 March 2008, thus the mandate of the TJRC does not cover violations committed during this operation. It is unclear and perplexing why the limits of the mandate of the TJRC were set just a few days short of the beginning of operation Okoa Maisha. The investigation launched by the ICC Prosecutor on the other hand, focuses on the persons alleged to be the most responsible for the violations committed in the aftermath of the December 2007 elections and did not include Mount Elgon in the scope of its investigations.
20. Impunity thus remains for the numerous violations committed in the district of Mount Elgon where hundreds of men were arbitrarily killed, tortured or subjected to enforced disappearance.

2.2 International Human Rights Instruments Ratified by Kenya

21. Kenya is a State party to the **International Covenant on Civil and Political Rights** since **1 May 1972**, although **not to its First and Second Optional Protocols**. In addition, Kenya has ratified several other human rights instruments. Among others, it is a State party to the International Convention on the Elimination of All Forms of Racial Discrimination (13 September 2001), however Kenya has not recognized the competence of the Committee on the Elimination of Racial Discrimination to examine individual complaints; to the International Covenant on Economic, Social and Cultural Rights (1 May 1972), although not to its Optional Protocol, allowing the Committee on Economic, Social and Cultural Rights to examine individual communications; to the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1 May 1972); to the Convention on the Elimination of All Forms of Discrimination against Women (9 March 1984), although not to its Optional Protocol allowing the Committee on the Elimination of Discrimination Against Women to examine

²² CIPEV report, *supra* note 8, p. 162, emphasis added.

²³ *Ibid.*, emphasis added.

²⁴ Truth, Justice and Reconciliation Commission Act, 2008, Article 5.

²⁵ *Ibid.*, Article 5(a).

individual complaints; to the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (21 February 1997) although **not to its Optional Protocol (neither has it made a declaration under article 22 of the Convention** allowing the CAT to examine individual complaints); to the Convention on the Rights of the Child (30 July 1990) and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict (28 January 2002); and to the African Charter on Human and Peoples' Rights (23 January 1992).

22. On 6 February 2007 Kenya signed the International Convention for the Protection of All Person from Enforced Disappearance which entered into force on 23 December 2010. According to Article 18 of the 1969 Vienna Convention on the Law of the Treaties, a State that has signed a treaty is under an obligation not to defeat the object and purpose of the treaty prior and after its entry into force.

2.3 Relationship between international and domestic law under Kenyan legislation

23. Since its independence, Kenya has been a dualist State. This means, international instruments ratified by the Executive required Parliament to put in place implementing legislation before they could have domestic legal effect.
24. The lack of implementation of human rights treaties ratified by Kenya had been a matter of concern for the Human Rights Committee. In its 2005 Concluding Observations, the Committee noted that the Covenant had not been incorporated into domestic law and stressed the fact that "implementation of Covenant guarantees and the possibility of invoking the Covenant before domestic courts do not depend on the State party being a party to the first Optional Protocol to the Covenant".²⁶
25. Kenya recognized in its third periodic report that indeed, as a dualist State, "international treaties are not considered part of the law of Kenya and cannot be directly applied by the courts, tribunals or administrative authorities in the absence of domestic legislation".²⁷ However, with the ratification on 27 August 2010 of the new Constitution of Kenya, Kenya went from being a dualist State to being a monist one. According to Article 2 (4) of the 2010 Constitution of Kenya "[...] any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid".²⁸ Article 2 (5) and (6) establishes that "the general rules of international law *shall form part of the law of Kenya*" and that "any treaty or convention ratified by Kenya *shall form part of the law of Kenya under this Constitution*".²⁹

²⁶ Human Rights Committee (HRC), Concluding Observations of second periodic report of Kenya (doc. CCPR/C/KEN/2004/2), doc. CCPR/CO/83/KEN, 29 April 2005, (hereinafter "HRC, 2005 Concluding Observations") para. 8.

²⁷ Third periodic report submitted by Kenya to the Human Rights Committee, doc. CCPR/C/KEN/3, 13 February 2011, para. 24.

²⁸ Constitution of Kenya, Revised Edition 2010, Published by the Attorney-General in accordance with section 34 of the Constitution of Kenya Review Act, 2008 (No. 9 of 2008) available at: www.kenyalaw.org/Downloads/The%20Constitution%20of%20Kenya.pdf (last accessed 26 July 2011). The 2010 Constitution of Kenya replaces the independence Constitution of 1963. It was subject to a referendum which took place on 4 August 2008, approved by 67% of Kenyan voters and promulgated on 28 August 2010.

²⁹ *Ibid.*, emphasis added.

26. Hence, with the new Constitution, any international instrument ratified by Kenya automatically forms part of the law of the country without the need for it to be formally adapted at the domestic level through a specific act. Courts can thus refer directly to a treaty or convention, whether or not it is converted into a bill of Parliament. This is an important development in Kenya's legal system and in the protection of human rights guaranteed by international instruments. However, the wording of Article 2 (6) "*under this Constitution*" leaves questions unanswered concerning the status of international law vis-à-vis the Constitution. The wording of Article 2 (6) seems to imply that the Constitution of Kenya has supremacy over other sources of law, including international law which would contravene Article 27 of the Vienna Convention on the Law of the Treaties establishing that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".³⁰

3. Selected Issues

3.1 Right to Life (article 6)

27. Article 6 of the Covenant establishes that: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". The right to life is protected under Kenyan legislation in article 26 of the 2010 Constitution which states "1. Every person has the right to life. [...] 3. A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law".³¹
28. In its 2005 Concluding Observations, the Human Rights Committee noted with concern the reports of extrajudicial killings perpetrated by police units or other law enforcement personnel. It also deplored the fact that "few instances of unlawful killings by law enforcement officials have been investigated or prosecuted, and that de facto impunity for such acts continues to be widespread".³² In this view, the Committee recommended that Kenya "promptly investigates reports of unlawful killings by police or law enforcement officers and prosecute those found responsible". It also suggested that the State "should actively pursue the idea of instituting an independent civilian body to investigate complaints filed against the police".³³
29. In its third periodic report, the government of Kenya recognizes that unlawful killings by the police are a major challenge.³⁴ However, it also states that "the Government has been *unequivocal* in condemning this whenever it happens as one of the most serious human rights violations. *Any allegation* of unlawful killing is investigated by the authorities and perpetrators are tried and convicted by a competent court if

³⁰ Vienna Convention on the Law of Treaties, Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

³¹ Constitution of Kenya, 2010, *supra* note 28.

³² HRC, 2005 Concluding Observations, *supra* note 26, para. 16.

³³ *Ibid.*

³⁴ Third periodic report submitted by Kenya to the Human Rights Committee, *supra* note 27, para. 136.

found to have used unreasonable force”.³⁵

30. This affirmation by the government of Kenya is not backed by any evidence or concrete example. Furthermore, it seems to largely contradict the findings of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, who, in the report of his February 2009 mission to Kenya states “Killings by the police are widespread. Some killings are opportunistic, reckless or personal. Many others are carefully planned. It is impossible to estimate reliably how many killings occur, because the police do not keep a centralized database. But police shootings are reported nearly every day of the week by the press and the total number is certainly unacceptably high. In just a five month period in 2007, the Kenya National Commission on Human Rights (KNCHR) documented approximately 500 people killed or disappeared”.³⁶ Concerning the statement by the State that any allegation of unlawful killing is investigated and the perpetrators tried and sentenced if found responsible, the Special Rapporteur stated that during his mission “Of particular concern was the impunity enjoyed by those responsible for the vast majority of these killings”.³⁷
31. The right to life may also be violated or gravely threatened through enforced disappearances. The Committee has repeatedly stressed that enforced disappearance of a person *inter alia*, “violates or constitutes a grave threat to the right to life”.³⁸ The Committee has also held that the State has a primary duty to take appropriate measures to protect the life of a person, especially detained persons who are in a particularly vulnerable situation.³⁹ In fact, it has emphasized that in situations of detention, the burden of proof to provide a satisfactory and convincing explanation, establishing and disclosing with certainty the fate and whereabouts of the disappeared person in question, rests mostly on the authorities.⁴⁰ The State is thus under an ongoing obligation to investigate alleged violations of the right to life, to identify those responsible and to judge and sanction them, as well as to provide adequate compensation and integral reparation to the victims and their families.
32. Hundreds of men, including children, were victims of enforced disappearance in Mount Elgon during operation Okoa Maisha.⁴¹ Despite the many efforts made to locate them in prisons, police offices, hospitals or morgues, their family members were most of the times unable to learn the fate or whereabouts of their loved ones. Several organizations have also pointed out that many of the men who were deprived of their liberty by the military died as a result of the torture inflicted on them.⁴² Moreover, on 27 March 2009 the *Daily Nation* newspaper quoted a military source describing how bodies had

³⁵ *Ibid.*

³⁶ Philip Alston report, *supra* note 2, para. 5.

³⁷ Philip Alston report, *supra* note 2, para. 1.

³⁸ HRC, Case *Bousroual v. Algeria*, views of 30 March 2006, para. 9.2; Case *Boucherf v. Algeria*, views of 30 March 2006, para. 9.2; and Case *Jegatheeswara v. Sri Lanka*, views of 16 June 2003, para. 9.3.

³⁹ HRC, Case *Hugo Demit Barbato v. Uruguay*, views of 21 October 1982, para. 10.

⁴⁰ HRC, Case *Vicente and others v. Colombia*, views of 29 July 1997, para. 8.8.

⁴¹ Philip Alston report, *supra* note 2, para. 52.

⁴² MSF report, *supra* note 2, p. 9, HRW report, *supra* note 2, p. 5.

been dumped in the forest reserve in Mount Elgon national park.⁴³ HRW also received information from a different military source that eight bodies from Kapkota were flown and dumped in the forests, north of Kaptaboi village on 2 April 2008.⁴⁴ Former detainees also testified that a helicopter was always kept on standby at Kapkota military camp to ferry bodies to the forest.⁴⁵ Some children interviewed by Associated Press described how they were forced to help load bodies of victims of torture onto military helicopters in Kapkota camp.⁴⁶ Government authorities have made no systematic or transparent attempts to protect those sites or have them excavated and the bodies contained therein duly identified and returned to their families. The positive obligation to exhume, identify and return mortal remains to the families as well as the negative obligation not to despoil or mutilate the bodies, is clearly spelled out in the 1949 Geneva Conventions and their Additional Protocols⁴⁷ as well as in the 2007 International Convention for the Protection of All Persons from Enforced Disappearances.⁴⁸ NGOs that attempted to study the sites in the forest where the mortal remains may be located have received veiled threats and been prevented from doing so.⁴⁹

⁴³ *Daily Nation*, 27 March 2008, quoted in HRW report, *supra* note 2, p. 30.

⁴⁴ HRW report, *supra* note 2, p. 30.

⁴⁵ KNCHR, *supra* note 2, p. 12.

⁴⁶ Katharine Houreld, *Hundreds of Kenyan kids caught between brutal militia, Kenyan army*, Associated Press, 21 June 2008.

⁴⁷ See Convention I Geneva for the Amelioration of the Condition of Wounded and Sick in the Armed Forces in the Field (Art. 17); Convention II Geneva for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Art. 20); Convention III relative to the Treatment of Prisoners of War (Art. 120 and 121); Additional Protocol I relating to the Protection of Victims of International Armed Conflicts (Art. 33.4 and 34); and Additional Protocol II relating to the Protection of Victims of Non-international Armed Conflicts (Art. 8).

⁴⁸ See Article 24.3 of the 2007 International Convention for the Protection of All Persons from Enforced Disappearances, which establishes the obligation for States Parties, in the event of death of the victim of enforced disappearance “to locate, respect and return their remains”. Such provision must be read in conjunction with Article 24.2 of the same treaty, which provides that “each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard”. Furthermore, Article 15 of the 2007 Convention sets forth “States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains”. See also: Human Rights Council, *Progress Report of the Human Rights Council Advisory Committee on Best Practices on the Issue of Missing Persons*, doc. A/HRC/14/42 of 22 March 2010, paras. 67-81; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by the Economic and Social Council Resolution No. 1989/65 of 24 May 1989, Principle 10; Principles on the right to a remedy and reparation for victims of gross violations of human rights law and serious violations of humanitarian law (“UN Principles on the Right to a Remedy”), adopted by General Assembly Resolution No. 60/147 of 16 December 2005, Principle 12; and *Guiding Principles on Internal Displacement*, doc. E/CN.4/1998/53/Add.2 of 11 February 1998, Principle 16.3 and 4.

⁴⁹ Philip Alston report, *supra* note 2, para. 63.

Case of Mr. T.G.⁵⁰

On **26 March 2008** Mr. T.G. and his wife were serving customers in the hotel which they were running located in Chepkube market, Cheptais, Mount Elgon district. At approximately 10h00, three soldiers in military uniform entered the hotel. They entered from the kitchen where Mr. T.G. was baking wheat flour to cook Mandasis and Chapatis (local breads). The soldiers ordered him to stop baking and to go with them. He left the hotel with the soldiers and stood on the road about ten meters away from the hotel. After approximately 10 minutes, a military truck came by and took Mr. T.G. Many other people who had also been arrested were in the truck. According to Mr. T.G.'s wife, Mrs. S.G., on previous days, other people had been arrested in Chepkube. Those who were eventually freed said they had been taken to Kapkota Military Camp where they had been screened. The days after her husband's arrest, Mrs. S.G. looked for him at Kapkota military camp and Bungoma prison, but the authorities denied knowing the fate or whereabouts of her husband. On **4 May 2008**, as Mrs. S.G. was going back home from Bungoma village, she met a military officer along the way. He told her not to waste her time and money any more looking for her husband because he was dead and in the forest.

Case of Mr. D.O.

On **13 March 2008** at 13:00 hours, while Mrs. G.O. wife of Mr. D.O. was looking after the cattle at her home, located on Cheptaburur village, Kipsigon location, Cheptais division, Mount Elgon district, eight military officers in uniform approached her and asked for her husband. She replied that he had left in the morning and had not told her where he was going. One of the military officers warned her that if she did not tell them where he was, and they found him themselves, they were going to kill him. Two military officers hit Mrs. G.O. with whips and kicked her on her buttock and on her head. They questioned her about her husband's activities and insisted that she should tell them where her husband was or otherwise they would arrest her. A few minutes later she heard one of the officers who had stayed outside shouting "He is here! He is here!". The soldiers had found her husband who was in a hideout approximately 250 meters from their house in the valley. The officers brought Mr. D.O. to the house and beat with him kicks and gun butts on the back until he collapsed. Then they dragged him to the military truck and bundled him on it. The truck which was parked at Kipsigon market was full of other people who had also been arrested in that area. On **14 March 2008**, Mrs. G.O. went to Kapkota military camp and asked the military officers at the gate to allow her to see her husband. One of them asked her who her husband was. When she gave him the name, the soldier laughed and told her to forget about him "Mama sahu, bwana yako hayuko tena" which in English means "Mummy forget, your husband is no longer. Your husband's body is in the forest, go home and look after your children!". On her way back home, Mrs. G.O. met Mr. M.C., her neighbor who was assisting the military to crack down the SLDF and screening persons at Kapkota military camp. He confirmed to her that her husband had been tortured to death at Kapkota and his body disposed of in the forest. "Hold your heart" Mr. M.C. told her "there is nothing I can do." He further advised her not to let the military fool her by telling her Mr. D.O. was alive. His body, he said, together with many others had been put in helicopters and disposed of in the forest.

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Due to security and privacy reasons, certain victims and witnesses who accepted to render their testimony for this alternative report to the HRC expressly requested that their identity is not disclosed to the wider public. In the present document, letters are used to designate the persons concerned. Their full names could be disclosed to the HRC, upon request, given that guarantees are provided that these data will not be made public in any way. The examples used in this report were referred to TRIAL directly by the family members of the disappeared during interviews conducted in Bungoma, Western Kenya in April 2011; and/or referred to TRIAL by the local organization Western Kenya Human Rights Watch.

33. Under article 6 of the Covenant, the State has a primary duty to take appropriate measures to protect the life of a person, especially detained persons. The State is also under an ongoing obligation to investigate alleged violations of the right to life, to identify those responsible and to judge and sanction them.

34. **Suggestions for questions to be included in the List of Issues to be prepared by the Country Report Task Force:**

- ▶ There have been numerous reports of extrajudicial killings perpetrated by the police units or other law enforcement personnel in the context of the operation Okoa Maisha in Mount Elgon District. How many of these instances have been investigated? What has been the outcome of these investigations? Has any State agent been found responsible and been sanctioned for these crimes? What are the sanctions established for those law enforcement officials found responsible for extrajudicial killings? What are the sanctions established for those law enforcement officials found responsible for having used excessive force?
- ▶ Has the State taken any step towards instituting an independent ordinary body to investigate complaints filed against the police?
- ▶ There have been numerous reports of enforced disappearances perpetrated by the military in the context of operation Okoa Maisha in March-April 2008. How many of these instances have been investigated? What has been the outcome of these investigations?
- ▶ Please comment on the reports that the military have been disposing of bodies in the forest in Mount Elgon.
- ▶ What measures has the State undertaken to comply with its positive international obligations to exhume, identify and return mortal remains to the families as well as the negative obligation not to despoil or mutilate the bodies that are buried in the forest?

3.2 Prohibition of Torture (article 7)

35. Article 7 of the Covenant establishes that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [...]”. The prohibition of torture is enshrined under Kenyan legislation in section 29 of the 2010 Constitution. The prohibition of torture is in fact contained within the right to liberty and security of the person. Namely, section 29 of the Constitution establishes that “Every person has the right to liberty and security of the person, which includes the right not to be [...] d) subjected to torture in any manner, whether physical or psychological; e) subjected to corporal punishment; f) treated or punished in a cruel, inhuman or degrading manner”.⁵¹

36. In its 2005 Concluding Observations, the Committee noted with concern the reports that police custody is frequently resorted to abusively, and that torture is frequently practised in such custody. In particular,

⁵¹ Kenya Constitution, 2010, *supra* note 28.

the Committee signalled the extremely high number of deaths in custody and by the reports that enforcement officials responsible for acts of torture are seldom prosecuted. In this sense, it recommended that the State party takes “more effective measures to prevent abuses of police custody, torture and ill-treatment” and that allegations of such incidents are “promptly and thoroughly investigated by an independent body so that perpetrators are brought to justice”.⁵²

37. As a reply, the State party in its third periodic report indicates that it has drafted a Bill on Torture which defines the crime of torture and also provides for punishment for such act, thus criminalizing within the domestic legal framework the offence concerned, as requested by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵³ The State party also argues that “The Kenya Law Reform Commission is also conducting a review of other related legislation, such as the Penal Code, Evidence Act and the Criminal Proceedings Act to ensure that there [sic] are in conformity with the obligations assumed under the Convention against Torture”.⁵⁴
38. The Bill on Torture was apparently not adopted and no definition of torture currently exists under Kenyan legislation. The provision related to torture in the 2010 Constitution, which contains the prohibition of torture within the right to liberty and security, seems to be a step backwards with respect to the independent provision on torture established in the repealed 1963 Constitution which states in section 74(1) that “No person shall be subject to torture, or to inhuman or degrading punishment or other treatment”.⁵⁵ Beside the prohibition of torture in the new Constitution, section 18 of the Children Act, 2001 established that “18. (1) No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty.” Moreover, under Chapter 14A of the Police Code, it is stated that “(2) No police officer shall subject any person to torture or to any other cruel, inhuman or degrading treatment. (3) Any police officer who contravenes the provisions of this section shall be guilty of a felony.”
39. Furthermore, the legislation reforms mentioned by the State party in its third periodic report have not been implemented yet. Both the Penal Code and the Code of Criminal Procedure are completely silent in what respects the prohibition of torture. They do not contain a definition of torture nor do they provide for any penalties applicable to this crime. This has already been subject of concern to the Committee against Torture, which referred to it in its 2008 Concluding Observations to Kenya’s initial report.⁵⁶
40. Up to now, despite the numerous allegations of instances of torture from different sources, namely the Kenya National Commission on Human Rights, the Committee against Torture, the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the NGOs HRW, the Independent Medico-Legal

⁵² HRC, 2005 Concluding Observations, *supra* note 26, para. 18.

⁵³ Third periodic report submitted by Kenya to the Human Rights Committee, *supra* note 27, para. 143.

⁵⁴ Third periodic report submitted by Kenya to the Human Rights Committee, *supra* note 27, para. 144.

⁵⁵ 1963 Constitution, section 74(1).

⁵⁶ Committee against Torture, Concluding Observations on the initial report of Kenya, *supra* note 21, para. 8.

Unit, Médecins Sans Frontières, the World Organisation against Torture, and the International Commission of Jurists, the government has not seriously investigated any instance of torture or ill-treatment allegedly perpetrated in Mount Elgon in the contexts of the operation Okoa Maisha.

41. The Committee has pointed out that “The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual”.⁵⁷ In this sense, the State party has a positive obligation to adopt legislative or other measures as may be necessary to protect everyone against acts prohibited by article 7, whether committed by people acting in their official capacity, outside their official capacity or in a private capacity. The Committee has further observed that no derogation from article 7 is allowed and that its provisions must remain in force even in situations of public emergency. In order to fully comply with the obligations under article 7, the State party must include in its domestic legislation, provisions which “penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons”.⁵⁸ In addition, the State party has the obligation to investigate all allegations of torture and to ensure that alleged perpetrators are tried and sanctioned if found responsible for violating article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts.
42. The Committee has also recognised that any act of enforced disappearance amounts *per se* to a violation of the right to be free from torture or to cruel, inhuman or degrading treatment or punishment.⁵⁹ In fact, it has stated that “the disappearance of persons is inseparably linked to treatment that amounts to violation of article 7”.⁶⁰ In doing so, the Committee recognizes that the mere act of being taken away by State agents for an unspecified or indefinite period of time, followed by a lack of acknowledgement of the act itself and the fate or whereabouts of the person, amount to torture, cruel, inhuman or degrading treatment or punishment.
43. During operation Okoa Maisha, both military and former SLDF members turned government informants violated systematically article 7, either by perpetrating acts of torture or by tolerating them. Inasmuch as hundreds of acts of enforced disappearance were committed, article 7 was also systematically violated.

⁵⁷ CCPR, General Comment No. 20, para. 2.

⁵⁸ CCPR, General Comment No. 20, para. 13.

⁵⁹ See *inter alia*, HRC, Case *Ana Rosario Celis Laureano v. Peru*, views of 25 March 1996, para. 8.5; Case *Katombe L. Tshishimbi v. Zaire*, views of 25 March 1996, para. 5.5; Case *Sarma v. Sri Lanka*, views of 16 July 2003, para. 9.3; and Case *Grioua v. Algeria*, views of 10 July 2007, para. 7.6.

⁶⁰ HRC, Case *Rafael Mójica v. Dominican Republic*, views of 10 August 1994, para. 5.7.

Selection of cases of enforced disappearance perpetrated in Mount Elgon

Mr. T.R. was abducted on 16 March 2008, while he was at home located in Cheptais village with his wife and underage children. Five military officers came into the house, two officers hit him on the head and started beating him severely while they dragged him and pulled him on the ground. As he was being beaten in front of his wife and children, a military truck arrived; he was pulled inside the truck which drove off in the direction of Chepkube where there was a military base.

On 25 March 2008 at approximately 23h00, while *Mr. Q.S.* was at home located in Cheptais village, a group of military officers came to his house and demanded to see a list of “criminals” [people belonging to the SLDF] and immediately started beating him. Shortly after, they took him away on a military truck. The following morning, his wife went to Chepkube military base. From a distance, she managed to see her husband lying on the floor, surrounded by three military officers. He was covered with blood and his clothes were bloodstained. She knew he was not dead because his legs were moving. This is the last time she saw her husband.

On 15 March 2008, while *Mr. B.L.* was visiting his brother who lived in Kutere villages, he was abducted by a group of five military officers in uniform. As soon as the military officers saw him, they started beating him and then dragged him onto a military truck which took off to an undisclosed location.

On 27 April 2008 *Mr. L.L.* was abducted from his home located in Cheptais village by a group of 20 military officers in uniform from his home located in Chwele village. Four days later he was released. He had multiple injuries on his body. He narrates that the military had interrogated and tortured him at Banantega military camp where there were more than 200 people being interrogated and tortured in turns.

On 13 March 2008, *Mr. X.Z.* was abducted by a group of military soldiers while he was at home waiting to take coffee. The soldiers asked him to produce his national ID and when they checked it, they began kicking him and beating him with gun butts until he fell down unconscious. They picked him and put him on a military truck, but it seemed that he had passed away according to his wife, who witnessed the beatings.

44. Under article 7, the State is under the absolute obligation to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The provisions under article 7 do not allow any exception, nor can they be derogated from under any circumstances.
45. **Suggestions for questions to be included in the List of Issues to be prepared by the Country Report Task Force:**
- ▶ Please comment on allegations that police custody is frequently resorted to abusively, that torture is frequently practised under police custody and that those responsible for such acts are seldom prosecuted and sanctioned.
 - ▶ What steps have been taken to prevent instances of police abuse and of deaths in custody?
 - ▶ Has there been any formal investigation into cases of deaths in custody? Has there been any formal investigation into cases of torture in custody, in particular those reported in the context of

operation Okoa Maisha? If so, what has been the outcome of the investigations? Has any State agent accused of torturing or mistreating detained ever been prosecuted and convicted and sanctioned?

- ▶ What is the status of the draft Bill on Torture?
- ▶ What is the status of the review by the Kenya Law Reform Commission of the Penal Code, Evidence Act and Criminal Proceedings Act? How will the envisaged reforms bring the legislation in line with obligations under the Covenant?

3.3 Right to Liberty and Security (article 9)

46. Article 9 of the Covenant establishes that “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention [...]”.
47. The Kenyan Constitution of 2010 guarantees “the right to freedom and security of person, which includes (a) the right not to be (a) deprived of freedom arbitrarily or without just cause, (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58”.⁶¹
48. In its 2005 Concluding Observations, the Committee noted with concern that most suspects in Kenya did not have access to a lawyer during the initial stages of detention and recommended that Kenya guarantees “the right of persons in police custody to have access to a lawyer during the initial hours of detention.” The Committee also expressed concern over the fact that those accused of a capital offence do not fully benefit from the guarantees of article 9.3 of the Covenant since the time limit for being brought before a judge is 14 days rather than 24 hours stipulated for those accused of having committed an offence.⁶²
49. In its third periodic report, the government of Kenya recognizes that “there is no stipulation on the period within which an accused person can contact a lawyer or his family” and simply states in this regard that “In practice, it is difficult to exercise their right largely due to poor infrastructure in police cells and the socio-economic circumstances of the arrested person. Where communication facilities exist, the right to a phone call is guaranteed. This had been made easier by the fact that a considerable number of people now own mobile phones and are usually allowed to use them in front of the police officers to contact persons of their choice before they are surrendered to the arresting authority”.⁶³
50. This cannot be considered an acceptable response to the recommendations made by the Committee as it does not really address the issue at stake but merely attempts to provide a justification as to why the right to access to a lawyer is still not guaranteed. Lack of infrastructure or the socio-economic

⁶¹ Constitution of Kenya, 2010, *supra* note 28, Article 29 (a), (b) and (d). Article 58 (6) states: Any legislation enacted in consequence of a declaration of a state of emergency (a) may only limit a right or fundamental freedom in the Bill of Rights to the extent that (i) the limitation is strictly required by the emergency; and (ii) the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency.

⁶² HRC, 2005 Concluding Observations, *supra* note 26, para. 17.

⁶³ Third periodic report submitted by Kenya to the Human Rights Committee, *supra* note 27, para. 50.

circumstance of the arrested person should not be a reason to deny this fundamental right which the Committee has deemed to be “an essential right under the Covenant”.⁶⁴

51. The Committee has pointed out that “The right of access to legal counsel begins from the moment an individual is deprived of his freedom”.⁶⁵ The Committee has further observed that State parties must ensure that all persons arrested “have immediate access to a lawyer”.⁶⁶ The Committee has also stated that “Free access to lawyers, doctors and family members should be guaranteed immediately after the arrest and during all stages of detention”.⁶⁷ “The State party should guarantee the right of persons in police custody to have access to a lawyer in the initial hours of detention, to inform their family members of their detention and to be informed of their rights...”.⁶⁸ The Committee has also pointed out that “The likelihood of commission of acts of torture or of other cruel, inhuman or degrading treatment would be limited if suspects had easy access to a lawyer, doctor or family member during the 48 hours of police custody”.⁶⁹
52. The right to liberty and security enshrined in article 9 of the Covenant is also violated or at least threatened in cases of enforced disappearance. An act of enforced disappearance in fact always begins with a deprivation of liberty. Enforced disappearance is not codified under Kenyan legislation as a separate offence. The Penal Code of Kenya merely provides the definition of kidnapping and abduction.⁷⁰ Kidnapping is classified into kidnapping from Kenya and kidnapping from lawful guardianship.⁷¹ Regarding the definition of abduction, Article 256 provides that “Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person”.⁷² Kidnapping committed in any of the forms foreseen in the Kenyan Penal Code (kidnapping a person from Kenya, Article 254 or kidnapping someone from lawful guardianship, Article 255) is considered a felony under Kenyan legislation and is subject to a penalty of imprisonment for seven years according to Article 257 of the Penal Code. No specific punishment is provided for the offence of abduction. In addition, the Kenyan Penal Code provides for the offence of kidnapping or abduction “*with the intent to cause the person kidnapped or abducted to be secretly and wrongfully confined*”.⁷³ According to Article 259, this offence is also considered a felony and liable to imprisonment

⁶⁴ Ireland, ICCPR, A/48/40 vol. I (1993) 119 at para. 605.

⁶⁵ Concluding Observations on Senegal, ICCPR, A/48/40 vol. I (1993) 23 at para. 104.

⁶⁶ Concluding Observations on Algeria, ICCPR, A/53/40 vol. I (1998) 52 at para. 360.

⁶⁷ Concluding Observations on Uzbekistan, ICCPR, A/56/40 vol. I (2001) 59 at para. 79(7).

⁶⁸ Concluding Observations on Benin, ICCPR, A/60/40 vol. I (2004) 30 at para. 83(16).

⁶⁹ Concluding Observations on Poland, CAT, A/52/44 (1997) 18 at para. 110.

⁷⁰ Kenya Penal Code, Cap. 63, Ch. XXV Offences Against Liberty, Articles 254 and 256.

⁷¹ According to Article 254 of the Penal Code, “Any person who conveys any person beyond the limits of Kenya without the consent of that person, or of some persons legally authorized to consent on behalf of that person, is said to *kidnap that person from Kenya*”. According to Article 255 “Any person who takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of a lawful guardian of the minor or person of unsound mind, without the consent of the guardian, is said to *kidnap the minor or person from lawful guardianship*” Kenya Penal Code, Cap. 63, Ch. XXV Offences against Liberty, Articles 254 and 255.

⁷² *Ibid.*, Article 256.

⁷³ *Ibid.*, Article 259, emphasis added.

for seven years. Article 261 extends this punishment to those who perhaps did not commit the kidnap or abduction with the intention of wrongfully concealing or confining the person kidnapped or abducted but who are aware of it. Namely, Article 261 establishes that “Any person who, *knowing* that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person is guilty of a felony and shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose, as that with or for which he conceals or detains such person in confinement”.⁷⁴ The offence provided for under Article 259 of the Penal Code seems to be the closest to a definition of enforced disappearance in Kenyan legislation. However, the term wrongful confinement is not defined and in fact, its commission is deemed to be a misdemeanour and liable to imprisonment for one year or to a fine of fourteen thousand shillings.⁷⁵

53. The fact that enforced disappearance is not defined nor sanctioned under Kenyan legislation leads to an environment susceptible to violations of article 9 of the Covenant. This problem was exemplified during operation Okoa Maisha, where hundreds of men were arbitrarily deprived of their freedom and subsequently subjected to enforced disappearance. Some of them were charged with criminal offences, while most were tortured and arbitrarily killed. Up to now, the State party has not undertaken any investigation into the arbitrary deprivation of liberty of those men and children arrested during operation Okoa Maisha and taken to military camps for “screening”. No one has been investigated or tried for the violations committed. Over three years after the events took place, the family members of those who were subjected to enforced disappearance still ignore the fate and whereabouts of their loved ones.

54. **Suggestions for questions to be included in the List of Issues to be prepared by the Country Report Task Force:**

- ▶ What measures have been taken to ensure that access to a lawyer for all persons deprived of their liberty is guaranteed immediately after the arrest and during all stages of detention?
- ▶ Has there been any formal investigation undertaken into the arbitrary deprivation of liberty of the men and children arrested in the context of the operation Okoa Maisha? If so, what has been the outcome of these investigations?
- ▶ What measures have been undertaken by the State to prevent arbitrary deprivations of liberty? Please provide detailed information about the laws, regulations and practice governing arrest and detention before trial.

3.4 Right to recognition as a person before the law (article 16)

55. Article 16 of the Covenant establishes the inderogable right of everyone to be recognized as a person before the law. The Human Rights Committee has in numerous cases recognized that enforced

⁷⁴ *Ibid.*, Article 261, emphasis added.

⁷⁵ *Ibid.*, Article 263.

disappearances violate the right to be recognized as a person before the law.⁷⁶ The crime of enforced disappearance is of such nature that it places the victim outside the protection of the law, which in turn hinders his or her possibility to exercise and enjoy all other human rights and freedoms.

56. In the words of the Committee, enforced disappearance

"[...] may constitute a refusal to recognize that person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of their relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded. In such situations, disappeared persons are in practice deprived of their capacity to exercise entitlements under law, including all their other rights under the Covenant and of access to any possible remedy as a direct consequence of the actions of the State, which must be interpreted as a refusal to recognize such victims as persons before the law".⁷⁷

According to the Committee, enforced disappearance is essentially a denial of the right to be recognized as a person before the law insofar as a refusal by the perpetrators to disclose the fate or whereabouts of the person concerned or to acknowledge the deprivation of liberty places *de facto* such a person outside the protection of the law,⁷⁸ and, further,

"if a person is arrested by the authorities and there is subsequently no news of that person's fate, the failure by the authorities to conduct an investigation effectively places the disappeared person outside the protection of the law".⁷⁹

57. In Mount Elgon, hundreds of men and children were forcibly disappeared by State agents in the context of the operation Okoa Maisha. Having no access to the outside world, they were effectively placed outside the protection of the law. Furthermore, most of the men and children who were arrested and subsequently forcibly disappeared were taken along with all their identity documents. This, together with a lack of investigation into their enforced disappearance creates an additional problem for the family by preventing the latter to access to compensation that would come with official recognition of their relatives' deaths or to regulate their legal situation with regard to social welfare, financial matters, family law and property rights.

58. Under Kenyan legislation, a person is presumed to be dead when he or she has been missing for seven

⁷⁶ HRC, Case *Zohra Madoui v. Algeria*, views of 28 October 2008, para. 7.7; and Case *Grioua v. Algeria*, views of 10 July 2007, para. 7.8. So has the Inter-American Court of Human Rights analyzed the violation of the right to a juridical personality in cases of enforced disappearance: see IACHR, Case *Anzualdo Castro v. Peru*, judgment of 22 September 2009, Ser. C No. 202 paras. 87-101.

⁷⁷ *Ibid.*, Case *Zohra Madoui v. Algeria*, para. 7.7.

⁷⁸ See, *inter alia*, HRC, *Concluding Observations – Algeria*, doc. CCPR/C/79/Add.95 of 18 August 1998, para. 10.

⁷⁹ HRC, Case *Grioua v. Algeria*, *supra* note 76, para. 7.9. See also IACHR, Case *Anzualdo Castro v. Peru*, *supra* note 76, paras. 87-101.

years.⁸⁰ The only avenue whereby the seven-year requirement can be circumvented, according to Kenyan law, arises when an inquest is conducted into the case of a missing person presumed to be dead; the magistrate can, on the basis of the inquiry, order that the victim's family be issued with a death certificate.⁸¹

59. In the case in Mount Elgon, where inquiries have not been undertaken, death certificates have been impossible to be issued to families of the victims. Now, a death certificate is important in accessing a number of benefits. For instance, death certificates are needed for widows or widowers to be able to secure ownership of property in their deceased spouse's name. Proof of the death of a spouse or parent can assist in accessing certain benefits such as scholarships; it is also necessary to gain legal title to land and other property held in the name of the deceased. But according to WKHRW, none of the families of those who were subjected to enforced disappearance in the context of the operation Okoa Maisha, have been able to obtain death certificates or burial permits, which are required in addition to death certificates in order to access some benefits. Thus, the State's failure to conduct inquiries has not only deprived victims' families of truth and justice – it has also prevented them from accessing material assistance.
60. Indeed, when dealing with this matter, it must be considered that the UNWGEID has declared that the fact that relatives, in order to obtain reparation, must apply for a death certificate, “re-victimizes families by making them go through the process of having a death certificate, although neither the fate nor the whereabouts of the disappeared person are known”.⁸² The CAT observed that requiring the families of missing persons to certify the death of a family member in order to receive compensation could constitute a form of inhuman and degrading treatment for such person, by laying them open to additional victimization.⁸³ The Human Rights Committee considered that obliging the families of disappeared persons to have the family member declared dead in order to be eligible for compensation raises issues under Articles 2, 6 and 7 of the Covenant. Accordingly, it clarified that the responded State had to abolish the obligation in cases of disappearance which makes the right to compensation dependent on the family's willingness to have the family member declared dead; and to ensure that any compensation or other form of redress adequately reflects the gravity of the violation and of the harm suffered.⁸⁴
61. Article 16 of the Covenant establishes the inderogable right of everyone to recognition everywhere as a person before the law. In fact, enforced disappearance of persons places the victim outside the

⁸⁰ The Evidence Act Chapter 80, 2009, <http://www.kenyalaw.org/Downloads/GreyBook/10.%20The%20Evidence%20Act.pdf>, Section 118A (“Presumption of death”).

⁸¹ Criminal Procedure Code, art. 388.

⁸² WGEID, *Annual Report for 2008*, doc. A/HRC/10/9 of 6 February 2009, para. 113.

⁸³ CAT, *Concluding Observations on Algeria*, doc. CAT/C/DZA/CO/3 of 26 May 2008, para. 13. The Committee accordingly reminded that a State shall “[also guarantee the right of such families to seek redress or be fairly and adequately compensated, including by giving them the necessary psychological, social and financial support so that they may make the fullest possible readjustment (*ibid.*)”.

⁸⁴ *Ibid.*

protection of the law, thus suspending the enjoyment of all other human rights and freedoms of the disappeared person, who is confined in a condition of absolute defencelessness.

62. **Suggestions for questions to be included in the List of Issues to be prepared by the Country Report Task Force:**

- ▶ What steps has the State undertaken to regulate the legal situation of victims of enforced disappearances and their families and allow the latter accessing material assistance?
- ▶ What is the legal framework that regulates the right to compensation in Kenya in cases of human rights violations and in particular in cases of enforced disappearance?

3.5 Rights of the Child (article 24)

63. Article 24.1 of the Covenant establishes that every child has the right to such measures of protection as are requested by his or her status as a minor, on the part of the family, the society and the State. The Human Rights Committee has observed that

*“[...] the implementation of this provision entails the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. [...] The right to special measures of protection belongs to every child because of his status as a minor [...]”*⁸⁵

In particular, the international obligations of a State to grant to all individuals under its jurisdiction the right to life, the right not to be subjected to torture or to other cruel, inhuman or degrading treatment, the right to liberty and the right to juridical personality have special features in the case of minors, as follows from reading the relevant provisions in conjunction with Article 24.1 of the Covenant. It therefore becomes an obligation of the State to prevent situations that might lead, by action or omission, to negatively affect the mentioned rights.⁸⁶ Further, when the alleged victims of human rights violations, including ill-treatment, are minors, the highest standard in determining the seriousness of the actions that violate their right to humane treatment must be applied.⁸⁷

In cases of enforced disappearance, even when children are not direct victims, the United Nations independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances considered that “experience shows that children are often particularly affected by the crime of enforced disappearance. They suffer most if their mother, father or even both parents disappear, and they may live all their

⁸⁵ CCPR, *General Comment No. 17*, paras. 1 and 4. See also *Case Celis Laureano v. Peru*, *supra* note 59, para. 8.7.

⁸⁶ See, *inter alia*, IACHR, *Case Hermanos Gómez Paquiyaui v. Peru*, judgment of 8 July 2004, Ser. C No. 110, para. 171; and *Case Bulacio v. Argentina*, judgment of 18 September 2003, Ser. C No. 100, para. 138. See also ECtHR, *Case H.R., Z. v. United Kingdom*, judgment of 10 May 2001, paras. 73-75.

⁸⁷ *Case Hermanos Gómez Paquiyaui v. Peru*, *supra* note 86, para. 170.

childhood in a constant situation of uncertainty, between hope and despair”.⁸⁸

64. During operation Okoa Maisha, children were both direct and indirect victims of enforced disappearance. They were also subjected to arbitrary deprivation of liberty, torture and ill-treatment, and to arbitrary killings. Furthermore, many were charged of crimes as if they were adults despite their status as minors. HRW draws attention to the fact that during the interviews conducted in its field investigation in March 2008, victims described “how military and police units rounded up *nearly all males in Mount Elgon district, some of them children as young as 10*. At military camps, most notoriously one called Kapkota, *every detainee appears to have been tortured and forced to identify members of the SLDF or the location of weapons*”.⁸⁹ The Kenya National Commission on Human Rights (KNCHR) describes the operation in the following way: “All the men and young boys *from the ages of 13* were taken away by the military to their operational bases that they set up in Kaptama and Kapkota where *they were all subjected to torture as a method of interrogation by the military*. A number of the people taken away died as a result of the alleged torture inflicted upon them”.⁹⁰ Furthermore, according to journalistic investigation, during operation Okoa Maisha, dozens of children were tortured by the Kenyan army because they were suspected of aiding rebels; the army beat them, squeezed their genitals and made them crawl through barbed wire and shake hands with corpses.⁹¹ Dozens of children were held in detention on charges of promoting warlike activities.⁹² According to a report by a visiting justice officer for Bungoma High Court, 32 school-age children were in detention on 21 May 2008.⁹³
65. In its 2005 Concluding Observations, the Human Rights Committee had noted with concern the “extremely low age of criminal responsibility, namely 8 years, which cannot be considered compatible

⁸⁸ See United Nations, Commission on Human Rights, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances*, doc. E/CN.4/2002/71 of 8 January 2002, para. 91. Finally, it is noteworthy that on 30 July 1990 and on 25 July 2000 Kenya ratified respectively the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Both treaties reiterate the existence of an obligation to afford a special degree of protection to minors.

⁸⁹ HRW report, *supra* note 2, p. 5, emphasis added.

⁹⁰ KNCHR report, *supra* note 2, p. 8, emphasis added.

⁹¹ Katharine Houreld, *Hundreds of Kenyan kids caught between brutal militia, Kenyan army*, Associated Press, 21 June 2008.

⁹² *Ibid.*

⁹³ Visiting justice officer, Bungoma High Court, *Research Report on Bungoma Prison as per 21 May 2008*, on file with Human Rights Watch. In particular, in cases of enforced disappearance involving minors both as direct victims and as relatives of a disappeared person, the European and the Inter-American Court of Human Rights noted that States are under an obligation to adopt special measures of protection owing to the stage of physical and emotional development of the minor and his or her special vulnerability. In fact, in order to determine the suffering of a victim, due regard must be paid to his or her personal conditions, such as age, sex and other personal characteristics which may increase the physical pain and the mental anguish: the personal features of an alleged victim of torture or cruel, inhuman, or degrading treatment should be taken into consideration when determining whether his or her personal integrity has been violated, for such features may change the insight of his or her individual reality and, therefore, increase the suffering and the sense of humiliation when the person is subjected to certain types of treatment. See *inter alia*, IACHR, *Case Masacres de Ituango v. Colombia*, judgment of 1 July 2006, Ser. C. No. 148, para. 244; and ECtHR, *Case Aydin v. Turkey*, judgment of 25 September 1997, para. 84 and IACHR, *Case Ximenes Lopes v. Brazil*, judgment of 4 July 2006, Ser. C No. 149, para. 127.

with article 24 of the Covenant” and had urged the State party to raise the minimum age of criminal responsibility.⁹⁴ In response to this recommendation, the State party which in its third periodic report states that it is “in the process of reviewing the Children’s Act, 2001. The review among other things, seeks to address the issue of the age of criminal responsibility in order to bring it in line with international standards”.⁹⁵ This reply cannot be considered satisfactory to the recommendation made by the Committee. In its 2007 Concluding Observations on Kenya’s second periodic report, the Committee on the Rights of the Child reiterated “its previous concern that the minimum age of criminal responsibility, still set at 8 years of age, is too low”.⁹⁶ Similarly, the CAT in its 2008 Concluding Observations also expressed its deep concern “that the age of criminal responsibility in the State party was still set at eight years despite recommendations by the Human Rights Committee and by the Committee on the Rights of the Child and called the State party to “as a matter of urgency, raise the minimum age of criminal responsibility to bring it in line with generally accepted international standards”.⁹⁷ Despite numerous appeals, the age of criminal responsibility has not been raised and no other measure of protection has been adopted by the State party as requested by his or her status as a minor. Furthermore, no investigation has been undertaken with regard to arbitrary killings, enforced disappearances, torture and ill-treatment of minors in the context of operation Okoa Maisha.

Torture and Enforced Disappearance of N.B. (12 years old)

N.B. was born in 1996. At the time when his enforced disappearance took place, he was 12 years old. N.B. attended class six at Chemondi Primary School in Chemondi village in Mount Elgon District.

*On **24 March 2008** at approximately 13h30, N.B. was heading back to school after having taken lunch. Suddenly a military helicopter landed in the school playground located right next to his house in Chemondi village. N.B. was approximately 50 meters away from the house, when six members from the so called “Rungu Boys” (former SLDF members turned government informants) and four military officers in uniform descended from the helicopter, ambushed the boy and arrested him. Mrs. D.D., his aunt and caretaker was standing close by when all this happened. She ran towards the boy as they were beating him and recognized two of the officers as they were her neighbours. One of the former SLDF members shouted at the boy “you are the one who has been taking food to the SLDF militias in the forest! You will see!”. Before the boy could say anything to defend himself, they hit him with a club on the back, as others grabbed him and tied him with a rope made from banana fibre. They told him to produce guns or that he would see fire. They carried him on their shoulders and handed him to the military officers who were standing next to the helicopter. He was beaten and was crying as he was taken to the military officers.*

⁹⁴ HRC 2005 Concluding Observations, *supra* note 26, para. 24. The age of criminal responsibility is established in article 14(1) of the Penal Code which states “A person under the age of eight years is not criminally responsible for any act or omission.”

⁹⁵ Third periodic report submitted by Kenya to the Human Rights Committee, *supra* note 27, para. 67.

⁹⁶ UN Committee on the Rights of the Child, Concluding Observations on the second periodic report of Kenya, doc. CRC/C/KEN/CO/2, 19 June 2007, para. 67.

⁹⁷ UN Committee against Torture, Concluding Observations on the initial report of Kenya, *supra* note 21, para. 11.

*The following day **25 March 2008** at about 10h30, four military officers in a land rover came back to Mrs. D.D.'s home with the boy. He was in terrible conditions, his clothes were blood stained and he could not speak properly. The military officers asked him to show them where he kept the guns. They moved with him in the compound asking him to show them the guns and ammunitions. When the boy denied knowing what they were talking about, one soldier hit him with a gun boot on the head and he fell down. His aunt looked away and when she looked back at him, she saw blood coming out from his nose, mouth and ears and started to cry. One soldier asked her whether she knew that her child had been involved in the activities of the militia. She told him that the boy had been going to school and that she had never seen him in the company of the militia. They did not reply, instead, they bundled him into their land rover and drove off towards Kapkota. N.B. was never seen or heard of since.*

Despite his aunt's efforts to look for him at police stations and prisons, the police officers denied knowing his fate or whereabouts. There were rumours that he had been killed at Kapkota military camp and his body dumped in a mass grave in the forest.

66. Article 24.1 of the Covenant establishes that every child has the right to such measures of protection as are requested by his or her status as a minor, on the part of the family, the society and the State. The implementation of this provision entails the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant.

67. **Suggestions for questions to be included in the List of Issues to be prepared by the Country Report Task Force:**

- ▶ Please comment on the allegation that during operation Okoa Maisha, dozens of children were held in detention on charges of promoting warlike activities.
- ▶ Has any of these children been tried and sanctioned for the charges held against them?
- ▶ What is the status of the review of the Children's Act 2001? How does this review envisage bringing the Act in line with Kenya's international obligations regarding the minimum age of criminal responsibility?
- ▶ What measures have been adopted by the State party to protect minors held in detention?
- ▶ Has any investigation been undertaken with regard to arbitrary killings, enforced disappearances, torture and ill-treatment of minors in the context of operation Okoa Maisha?

3.6 Right to an Effective Remedy (article 2.3)

68. Article 2.3 of the Covenant establishes that States parties shall ensure that any person whose rights or freedoms are violated shall have an effective remedy; to ensure that any person claiming such a remedy shall have his or her right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State; and to ensure that the competent authorities shall enforce such remedies when granted.

69. The Human Rights Committee has pointed out that Article 2 defines the scope of the legal obligations undertaken by States parties to the Covenant, thus establishing a general obligation to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction.⁹⁸ The Committee clarified that:

*“Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. [...] The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways [...]. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy. [...] Where the investigations [...] reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. [...] Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility. [...]”*⁹⁹

70. On 22 May 2008 the government of Kenya tasked the Commissioner of Police to investigate allegations of human rights violations committed in Mount Elgon, to identify the perpetrators and make appropriate recommendations to ensure that such abuses are not repeated, as well as to compile a report and submit it within two to four weeks.¹⁰⁰ The police did not publish any formal findings, but an undated and untitled internal report was leaked to journalists and NGOs in August 2008, at the time when several NGO reports into the abuses were published. The report responds to a series of NGO reports on torture, enforced disappearances and other abuses in Mount Elgon, including reports by Kenyan NGOs WKHRW and Independent Medico-Legal Unit, the quasi-governmental Kenya National Commission on Human Rights (KNCHR) and the international organization Médecins sans Frontières. The report alleges that “Though most of the atrocities on the residents have been perpetrated by the SLDF, these organizations [ICRC, IMLU, KNCHR and HRW] lay emphasis on the alleged violations of human rights by the security forces”.¹⁰¹ The report focuses on justifying the operation in Mount Elgon alleging that its proximity to the Ugandan border made it “all the more necessary” to protect “National Security”.¹⁰² The report also focused on criticizing and

⁹⁸ CCPR, *General Comment No. 31*, para. 3.

⁹⁹ CCPR, *General Comment No. 31*, paras. 15 and 18.

¹⁰⁰ Kenya Police, *A Report on Human Rights Violations in Mount Elgon* (2008), available at: www.scribd.com/doc/6337563/Kenya-Police-Inquiry-into-the-Mt-Elgon-violence (last accessed 17 April 2004), p. 45, hereinafter: “Kenya Police report”, p. 1.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

minimizing the reports and information compiled by the NGOs as well as their methodology.¹⁰³ According to the Police report “All the human rights organizations that purported to document the alleged reports on human rights violations lack investigation ability, mandate, expertise and capacity. The allegations were found to be mischievous, baseless and compounded on hearsay”.¹⁰⁴ Concerning torture allegations in particular, according to the police “the alleged reports on torture were found to be unreliable, misleading, obnoxious, unsubstantiated, and made in bad faith. They are therefore a nullity and of no evidentiary value”.¹⁰⁵ Concerning enforced disappearances, no explanation is given as to the whereabouts of those alleged to be disappeared. The police report claimed that some unidentified bodies that were found in morgues were “awaiting DNA analysis to help in identification”.¹⁰⁶ Up to date however, it is unclear whether this analysis was ever carried out.

71. Most of the report concentrates on the abuses committed by the SLDF giving numerous case-studies and it highlights the “normalcy and tranquility” which is back in the region thanks to the Operation Okoa Maisha: “Normalcy and tranquillity has returned to Mount Elgon region as residents are embarking on their daily activities peacefully. Residents are happy with the presence of the military in the District. The proposed establishment of a permanent military camp in Kopsiro Division, Mount Elgon district to deter reorganization and future attacks by SLDF was well received by the residents”.¹⁰⁷ In general, the report is a mere justification of the operation which categorically denies the commission of any violations of human rights by State agents: “The security forces did not commit human rights violations on the residents of Mount Elgon region during the operation “Okoa Maisha” as documented in the alleged human rights reports”.¹⁰⁸ The Police report in fact states in its recommendations that “The operation ‘Okoa Maisha’ *should be intensified*, all SLDF members arrested and charged in court”.¹⁰⁹ The report concludes by saying that “The Government has a duty under the constitution of Kenya to protect life and property of its citizens. To achieve this noble responsibility, the Government has established various security forces in line with enabling statutes

¹⁰³ Regarding the report compiled by the KNCHR, the Kenya Police report establishes that “The KNCHR was found to have neither had the capacity, ability nor expertise to carry out investigations for prosecution purposes. The three instances of alleged torture victims captured earlier attest to this as the cited identity card numbers were confirmed from the Registrar of Persons to belong to other people. The KNCHR report is neither authentic nor analytical but based on unsubstantiated hearsay. It is at best a public relations write-up passed off as an investigation report.” See Kenya Police report, *supra* note 2, p. 34. With regard to the report by the ICRC, they state “ICRC has no mandate to comment on Kenyan internal crime trends/situations. Again Kenya is not at civil war or total war with any country to warrant ICRC intervention. In the Kenyan scenario, there were no prisoners of war and all persons arrested have since been arraigned before court. The report on alleged Mount Elgon human rights abuses is therefore null and void, ab initio”. See Kenya Police report, *supra* note 100, p. 38. Regarding the report by WKHRW, the Police Reports determines that “The organization has neither mandate nor capacity to carry out any investigations and its alleged report is therefore a nullity”. See Kenya Police report, *supra* note 11, p. 40. About the report by MSF, they say “Médecins Sans Frontières is not an investigation agency and alleged torture victims who attend their Health Care Clinics may not necessarily be genuine victims of human rights abuses but mischievous opportunists out to get sympathy and humanitarian assistance from the organization”. See Kenya Police report, *supra* note 100, p. 42. Similar conclusions are drawn about the IMLU report.

¹⁰⁴ Kenya Police report, *supra* note 100, p. 30.

¹⁰⁵ *Ibid.*, p. 49.

¹⁰⁶ *Ibid.*, p. 37.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, p. 47.

noted earlier in this report... The several Human Rights Organizations have come up with reports on alleged human rights violations which turned to discredit the good work being performed by the security forces backed by the military in the region”.¹¹⁰

72. The Police report reflects the lack of self-criticism by the government and the absolute lack of will to investigate the alleged violations of human rights committed by the security forces, in violation of article 2 of the Covenant.
73. The military also claimed that it had conducted its own internal investigation into the Mount Elgon atrocities. In an undated statement by the Ministry of State for Defence entitled “Allegations against the Military Unfounded,” which appears from its content to have been produced in 2008 while operation Okoa Maisha was ongoing, the Ministry claims:

*“Our troops have investigated the allegations of torture (where this is possible) and found no evidence whatsoever to support the claims. It has also been alleged that people arrested during the operation are being held in military camps and prisons. It is emphasized that this is a police operation and therefore all arrests are made by the police and where the military and civilians make arrests; the people are handed over to the police who process them through the judicial system. It is clarified here that the military has no military camps or prisons in the operation area”.*¹¹¹

74. The Ministry claimed that reports of human rights violations were the result of a smear campaign “which [the SLDF] finance and orchestrate.” In response to claims from a local activist that he was threatened by the military, the Ministry of Defense responded with sarcasm that “hunting for petty criminals is a police, not a military function”.¹¹²
75. According to the report of the Special Rapporteur on Extrajudicial Executions, “Given the official responses to the allegations, it is clear that a credible investigation cannot be conducted either by the police or the military”.¹¹³
76. In a more serious effort to investigate alleged human rights violations than that undertaken by the police and the military, the Kenyan Members of Parliament conducted a “fact finding visit” to Mount Elgon from August 17 to 20, 2008.¹¹⁴ Although the report concluded that operation Okoa Maisha “restored peace and calm in the area,” it also found that “There are cases of human rights abuses by the security forces in Mount Elgon which should be investigated further to ascertain which arm of the security forces

¹¹⁰ *Ibid*, p. 32.

¹¹¹ Ministry of State for Defense, “Allegations against the Military Unfounded,” para. 4, undated statement, available at: http://www.mod.go.ke/?page_link=Mt%20Elgon%20%28SLDF%29 (last accessed 24 July 2011).

¹¹² *Ibid*.

¹¹³ Philip Alston report, *supra* note 2, para. 62.

¹¹⁴ Kenya National Assembly, “Report of the Joint Visit to Mount Elgon Region by the Committees on Defence and Foreign Relations, and Administration, National Security and Local Authorities, 17th to 20th August, 2008,” published November 2008, p. 18.

perpetrated the abuses”.¹¹⁵

77. The parliamentary report further referred to a lack of collaboration from the police: “There are reports of disappearances of people in custody of security agencies which should be investigated to establish the whereabouts of these people. Attempts by the Committee to verify these allegations in the OB [Order Book] were frustrated by the Police”.¹¹⁶ Moreover, the parliamentary report recommended that the government investigate and prosecute allegations of human rights abuses and enforced disappearances, further investigate SLDF activities, and disarm the militia.¹¹⁷
78. The government did not implement these recommendations. It dismissed the parliamentary report as being based upon the allegations of “handpicked SLDF sympathizers”.¹¹⁸ Indeed, one prominent former SLDF leader, Fred Kapondi, who was jailed in 2007 on charges related to SLDF activities and was elected into Parliament after being acquitted, was co-chair of the Parliamentary delegation that conducted the inquiry into events at Mount Elgon. While the government may have good reason to question Kapondi’s neutrality, it did not produce any evidence that any of the report’s findings – which echoed those previously published by human rights organizations – were flawed.
79. In addition to the investigations made by the police, military and the Parliament, there are other available avenues for further investigation into the atrocities committed in Mount Elgon, in particular with regard to enforced disappearances and deaths in custody which the government did not use. Article 386 (1) (d) of the Criminal Procedure Act Cap. 75 establishes that “The *officer in charge of a police station*, or any other officer especially empowered by the Minister in that behalf, on receiving information that a person *is missing and believed to be dead*; shall immediately give information thereof to the nearest magistrate empowered to hold inquests, and, unless otherwise directed by any rule made by the Minister, shall proceed to the place where the body of the deceased person is, and *shall there make an investigation and draw up a report on the apparent cause of death*”.¹¹⁹ Article 387 (1) states that “When a person dies while in the custody of the police, or of a prison officer, or in a prison, the nearest magistrate empowered to hold inquests shall, and in any other case mentioned in section 386 (1) a magistrate may, but *shall in the case of a missing person believed to be dead* hold an inquiry into the cause of death, either *instead of or in addition to the investigation held by the police or prison officer*, and if he does so he shall have all the powers in conducting it which he would have in holding an inquiry into an offence”.¹²⁰ The problem with these provisions is obviously that there is no independent investigation as it is the police who are responsible for investigating possible human rights violations. The Kenya National Commission on Human Rights had already issued recommendations in this regard:

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* p. 20.

¹¹⁸ Government of Kenya, “Response to the Report of the Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions, Professor Philip Alston, on his Mission to Kenya from 16-25 February, 2009,” <http://www.communication.go.ke/documents/KenyaGovernmentsResponseToAlstonReport.pdf> (last accessed 24 July 2011), p. 16.

¹¹⁹ Criminal Procedure Act, Cap. 75, Article 386(1)(d), emphasis added.

¹²⁰ Criminal Procedure Act, Cap. 75, Article 387(1), emphasis added.

“Parliament should urgently enact legislation de-linking the investigation function of the Police with that of the prosecution...the Police should not be investigator and prosecutors, particularly given the numerous opportunities for collecting rents that this entails”.¹²¹ This deficiency is meant to be addressed with the introduction of the Independent Policing Oversight Authority Bill (establishing police oversight authority), the National Police Service Bill (providing a new legal framework for policing) and the National Police Service Commission Bill (establishing a police service commission), however these Bills have not been discussed in Parliament yet. Even when approved, these Bills will not bring change overnight and there will have to be continued evaluation to assess the progress being made. Article 388 (1) states that the Attorney-General may also at any time “direct a magistrate to hold an inquiry, in accordance with section 387, into the cause of a particular death to which the provision of that section apply and *shall* in the case of a missing person believed to be dead *give such directions as he deems fit*”.¹²² The wording of Article 388 adds an element of ambiguity regarding the obligation to order investigations into the cases of enforced disappearances. It is not clear from the wording “give such directions as he deems fit” if the Attorney-General has indeed the obligation to order an inquiry to be held in the case of a missing person.¹²³ What happens often in reality is that an Attorney General will take over an investigation or plainly put an end to it.¹²⁴ This is supposed to change with the implementation of the 2010 Constitution which establishes the figure of Director of Public Prosecutions (DPP). The DPP is an independent figure with the power “to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction”.¹²⁵ Its mandate is to exercise State powers of prosecution and may a) “institute and undertake criminal proceedings against any person before any court (other than court martial) in respect of any offence alleged to have been committed; b) take over and continue any criminal proceedings commenced in any court (other than court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority...”.¹²⁶ The DPP may also discontinue proceedings but only with the permission of the Court.¹²⁷ However, the law is still currently being revised to be brought in line with the new Constitution and today, as such, there is no independent investigator. The Special Rapporteur on extrajudicial, summary or arbitrary executions established that with regard to police investigations, “Currently, the *modus operandi* is that when the media highlights a case of extrajudicial killing by the police, the suspected perpetrators are suspended, a public announcement is made that the case will be investigated, and no further action is taken on the matter.

¹²¹ KNCHR, “The Cry of Blood” Report on Extra-Judicial Killings and Disappearances, September 2008, p. 7.

¹²² Criminal Procedure Act, Cap. 75, Article 388(1), emphasis added.

¹²³ In addition to the provisions regarding investigation for violations in the Criminal Procedure Act, Cap. 75, the TJRC Bill includes as one of the functions of the Commission to “investigate violations and abuses of human rights relating to killings, abductions, *disappearances*, detention, torture, ill-treatment and expropriation of property suffered by any person between 12 December and 28 February 2008. As previously indicated, operation “Okoa Maisha” in the Mount Elgon District began on 9 March 2008, thus falling outside the scope of the investigations with which the TJRC was tasked.

¹²⁴ Interview with Stella Ndirangu from the International Commission of Jurists - Kenya, 14 April 2011, Nairobi, Kenya.

¹²⁵ 2010 Constitution of Kenya, Article 157(4).

¹²⁶ *Ibid.*, Article 157(6).

¹²⁷ *Ibid.*, Article 157(8).

Only in a few cases will the matter be taken to court for prosecution”.¹²⁸

80. The government’s approach to the investigations of abuses committed in Mount Elgon, their quickness to dismiss the NGO reports and their failure to use other avenues available to them to prevent, investigate, judge and sanction those responsible for committing human rights violations reveals a complete lack of willingness to investigate and to bring to justice the perpetrators of such violations, elements which as such can amount to breaches of article 2 of the Covenant.
81. Due to the nature of the violations committed in the wake of the operation Okoa Maisha, complying with the obligations under article 2.3 of the Covenant would also necessarily require undertaking exhumations of the mass graves in Mount Elgon. Up to date, no independent forensic analysis of mass graves in Mount Elgon has taken place. According to NGOs reports and the testimonies of victims and families of the disappeared, in the forests of Mount Elgon there are mass graves and sites where bodies were simply dumped.¹²⁹ Not only have NGO’s not been able to access these sites, but they have in fact documented how State officials have tampered with crime scenes, in the absence of any legal process to record what was found or where the bodies were subsequently taken,¹³⁰ despite requests from human rights organizations to preserve the crime scene for independent documentation.¹³¹
82. Article 2 of the Covenant also requires that access to justice is guaranteed. Regarding Kenya, the Committee has noted with concern that “because of, inter alia, widespread corruption, the access of citizens to domestic courts and to judicial remedies is limited in practice. The frequent failure to enforce court orders and judgments is an additional cause of concern” and recommended that the State party ensure that “all individual subject to its jurisdiction have equal access to judicial and other remedies”.¹³²
83. Not only are citizens limited in their access to domestic courts because of widespread corruption but also because of inefficiency, lack of means and lack of witness protection resulting in threats and harassment to members of civil society willing to come forward and report violations. Regarding inefficiency, the Kenyan courts had an estimated backlog in 2009 of 800,000 cases.¹³³ Regarding the lack of means people in rural areas such as Mount Elgon have very little possibilities of availing themselves of local judicial remedies due to lack of financial means. Most of the villages in Mount Elgon have neither water nor electricity. Roads are not paved and become impassable any time it rains. Few people have motorcycles which may take people from the villages in Mount Elgon to the

¹²⁸ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum, Follow-up country recommendations Kenya, A/HRC/17/28/Add.4, 26 April 2011, hereinafter: “Christof Heyns report”, para. 25.

¹²⁹ See *supra* para. 32.

¹³⁰ IMLU report, *supra* note 2, p. 17 and HRW interviews with the wife of a victim of enforced disappearance.

¹³¹ IMLU report, *supra* note 2, p. 17. The positive obligation to exhume, identify and return mortal remains to the families as well as the negative obligation not to despoil or mutilate the bodies, is clearly spelled out in the 1949 Geneva Conventions and their Additional Protocols as well as in the 2007 International Convention for the Protection of All Persons from Enforced Disappearances. See *supra* notes 47 and 48.

¹³² HRC, 2005 Concluding Observations, *supra* note 26, para. 9.

¹³³ Antonina Okuta, *National Legislation for Prosecution of International Crimes in Kenya*, Journal of International Criminal Justice (7), 2009, p. 1072.

lowlands but their scarceness makes this only means of transportation prohibitively expensive for the majority of people. As such, access to a lawyer is impossible for most people. Rates of illiteracy are high and thus the possibility of filing a *habeas corpus* petition is practically unfeasible. Proof of this is that out of the alleged hundreds of cases of enforced disappearance resulting from the 2008 military-police operation in Mount Elgon, only one *habeas corpus* application has reached the High Court of Kenya at Bungoma. The application dated 31 July 2008 containing the names of the police officers allegedly responsible for the enforced disappearance of Mr. Q.S. was replied to on 4 August 2009. The alleged arrest, detention and torture of the person were categorically denied by the State Counsel on behalf of the Respondents. The High Court of Bungoma hence directed the Attorney-General, the Chief of General Staff and the Commissioner of Police on 24 March 2010, to initiate an investigation into the enforced disappearance of the alleged victim within 30 days. More than one year after this order was issued, no investigation has been launched.

84. Access to justice in Kenya, in violation of article 2(3) of the Covenant, is further limited due to the threats and harassment to human rights defenders, including witnesses of gross human rights violations, in particular those related to the operation Okoa Maisha. According to Amnesty International, in late 2010, up to 22 witnesses who testified before a 2008 official inquiry mechanism into the post-election violence and who might be called to testify in future at the ICC or other court trials, were reported to be living in fear as a result of threats to their lives or security. An unknown number of other potential witnesses had to flee Kenya in the last three years because of similar threats against them.¹³⁴ According to the Special Rapporteur, “witness and civil society representatives were intimidated, harassed and threatened by police, military and government officers. Individuals were told not to speak with me about police/military abuses, and only to mention abuses by the SLDF”.¹³⁵
85. Furthermore, families of victims of human rights violations in Mount Elgon are also discouraged from reporting abuses due to the government’s use of informers, sometimes called “brokers” by local residents. During operation Okoa Maisha, the government heavily relied on informants to identify members of the SLDF. According to the Special Rapporteur on extrajudicial, arbitrary or summary executions, “With the assistance of local informants, police and military cordoned villages, detained and frequently beat the male residents, and took them to one of several temporary military bases, the largest of which was Kapkota military camp. There, men were stripped, tortured and interrogated. They were screened before local informants. Those identified as SLDF were taken to the local police station and charged, the others were let go”.¹³⁶
86. To give but a few examples of cases of harassment in Mount Elgon district, **Mrs. S.D.**, wife of **Mr. E.D.** who was abducted by the military on March 2008, was told by the military that she would be arrested too if she did not keep quiet. Similarly, **Mrs. M.X.**, wife of **Mr. T.X.** who was abducted by the military, was threatened by the military to never return to Kapkota Military Camp, where she went to inquire on his fate or whereabouts. **Mrs. W.D.**, biological mother of **Mr. R.D.** who was also taken by the military, was

¹³⁴ Amnesty International, Public Statement, *Kenya’s Application before the International Criminal Court: A Promise is Not Enough to Pre-empt the Court’s Jurisdiction*, 6 April 2011, AI Index: AFR 32/003/2011.

¹³⁵ *Ibid.*, p. 6.

¹³⁶ UN Special Rapporteur on extrajudicial, arbitrary or summary executions, Mission to Kenya 16-25 February 2009, Press Statement, p. 4.

warned on 27 April 2008 by the Provincial Administration not to follow the truck which had taken her husband because she risked being raped. This seems to be in line with what was stated by **Mrs. B.P.**, wife of **Mr. Q.U.**, another victim of enforced disappearance by the Kenyan military, who said the military in Mount Elgon district were making it public that any women who took legal actions to find their missing husbands or sons would be arrested and killed. When **Mr. K.L.** was taken by the military, his wife, **Mrs. J.B.** was warned by the men who took her husband not to report the abduction to any police station. These threats as well as information circulating in the village that people who went to look for their loved ones in military camps and prisons had also been arrested, prevented her from taking action to look for her husband.

87. Human rights defenders who have been documenting violations occurred in the context of the post-election violence have also been the subject of threats and harassment as the following example shows:

Threats to Mr. Job Bwonya, Executive Director of Western Kenya Human Rights Watch

After the visit by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston to Kenya on February 2009, Mr. Job Bwonya, who had been documenting atrocities committed both by the SLDF and the government since 2006 decided to flee to Uganda. He took this decision after having received numerous death threats and after government officials demanded that he gave them a list of witnesses he arranged to be interviewed for the report.¹³⁷ Previously, the premises of WKHRW had been broken into twice, in 2004 and 2007 and during these raids, the organization lost all of the office equipment that had been acquired through donations as well as many files documenting violations. In April 2008, WKHRW received a grant from the organization Frontline Protection of Human Rights Defenders, with which they reinforced their doors, front middle and rear and the windows with double steel grills. The new security measures allowed WKHRW employees to continue documenting human rights violations and assisting victims.

Deaths of Mr. Oscar Kamau Kingara and Mr. John Paul Oulu, respectively Chief Executive and Advocacy Director of the Oscar Foundation

After having met with the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, on his visit to Kenya in February 2009, Mr. Oscar Kamau Kingara and Mr. John Paul Oulu were killed in Nairobi on March 2009. The Oscar Foundation had been critical of the Kenyan government for its use of extrajudicial killings. During the meeting with the Rapporteur, Kingara and Oulu provided him evidence of alleged police abuses.¹³⁸ The Special Rapporteur said the way the Oscar Foundation's officials were killed was likely to raise suspicion upon the police. "It is extremely troubling when those working to defend human rights in Kenya can be assassinated in broad daylight in the middle of Nairobi ... this constitutes a major threat to the rule of law, regardless of who might be responsible for the killings" and called for independent investigations "It is imperative, if the Kenyan Police are to be exonerated, for an independent team to be called from somewhere

¹³⁷ Lucas Tanglen, *Kenya rights activists fleeing country after UN report release*: AP, 15 March 2009 available at: <http://jurist.org/paperchase/2009/03/kenya-rights-activists-fleeing-country.php>.

¹³⁸ Devin Montgomery, *Kenya rights activist killings must be investigated: UN special Rapporteur*, 6 March 2009, available at: <http://jurist.law.pitt.edu/paperchase/2009/03/kenya-rights-activist-killings-must-be.php>. See also: Adam Myott, *Rule of Law Reels in Kenya*, 6 March 2009, available at: <http://news.bbc.co.uk/2/hi/africa/7928519.stm>.

like Scotland Yard or the South African Police to investigate”.¹³⁹ However, the Police Commissioner Hussein Ali said that the local police had previously cracked other murder cases and that these latest ones should not be accorded “special treatment”. He also said that the Special Rapporteur portrayed “activist mentalism” and his ideas should not be proscribed to.¹⁴⁰ Human Rights Watch noted in its World Report 2011 that “There were no developments in finding the killers of Oscar Kamau Kingara and John Paul Oulu, human rights defenders from the Oscar Foundation Free Legal Aid Clinic...”¹⁴¹

Killing of police officer Mr. Bernard Kirinya

When the National Commission on Human Rights was in the process of conducting investigations, it recorded the confessions of police officer Mr. Bernard Kirinya in June 2008, who said he witnessed extra-judicial killings of 58 suspects by his colleagues, under orders from his superiors. Kirinya was shot dead three months later as he was coming out of his safe house.¹⁴² Up to date, no investigation on the case has been undertaken and no one has been tried or sanctioned for the murder of Mr. Bernard Kirinya.

88. The Witness Protection Amendment Act 2010, which became law in June 2010, substantially modified and improved the previous Witness Protection Act of 2006. The 2010 Act expanded the definition of a witness in need of protection and established an independent Witness Protection Agency (WPA), effectively removing the previous witness protection programme from the office of the Attorney-General. However the law is not yet fully operational and it is too soon to determine whether it will offer effective protection for victims and witnesses of the post-election violence. The Witness Protection Agency has also faced a lack of funding receiving only 35 million Kenyan Shillings out of the 1.2 billion requested by the Attorney-General to implement it. In this regard, Special Rapporteur Christof Heyns stressed that “it is crucial that the agency receives sufficient capital to fund its operations and that it be independent from external influence”¹⁴³ Protection to witnesses is key in the fight against impunity for crimes committed in the aftermath of the December 2007 elections and the crimes committed in Mount Elgon district.
89. In its 2011 World Report, Human Rights Watch noted “Witness protection emerged as a challenge to investigations. Threats against individuals who witnessed post-election violence, including some who testified before the CIPEV, increased after the prosecutor announced that he would seek to open a Kenya investigation”.¹⁴⁴
90. Article 2.3 of the Covenant imposes on the State the obligation to ensure to any victim of violations of

¹³⁹ Mutahi Rukanga, UN's Alston urges independent probe over deaths, Daily Nation, 16 March 2009, available at: www.nation.co.ke/News/-/1056/542438/-/u32wc5/-/

¹⁴⁰ *Ibid.*

¹⁴¹ Human Rights Watch, World Report 2011: Kenya (hereinafter “HRW World Report”), p. 134, available at: www.hrw.org/en/world-report-2011/kenya, p. 134.

¹⁴² KNCHR, Press Release, Extra-judicial Executions: The testimony and subsequent execution of the late Bernard Kirinya Ikunya, March 2009, available at: www.marsgroupkenya.org/pdfs/2009/03/KNCHR_Press_Release.pdf.

¹⁴³ Christof Heyns report, *supra* note 128, para. 55.

¹⁴⁴ Human Rights Watch, World Report 2011: Kenya (hereinafter “HRW World Report”), p. 134, available at: www.hrw.org/en/world-report-2011/kenya, p. 134.

his or her protected rights and liberties an effective and enforceable remedy for these breaches. This includes the obligation to thoroughly investigate, without undue delay alleged violations of human rights, with a view to holding accountable those proven to be responsible therefore. Indeed, the notion of “effective remedy” enshrined in article 2.3 of the Covenant also includes the right of victims of gross human rights violations and their relatives to obtain prompt, fair and adequate compensation as well as integral reparation (including restitution, rehabilitation, satisfaction and guarantees of non-repetition) for the harm suffered.

91. **Suggestions for questions to be included in the List of Issues to be prepared by the Country Report Task Force:**

- ▶ Does the State party have in place a system for providing effective legal remedies, including compensation and other forms of reparation (including restitution, rehabilitation, satisfaction and guarantees of non-repetition), to victims of human rights violations and their families?
- ▶ Has the DNA analysis been carried out on the unidentified bodies found in morgues in the aftermath of the operation Okoa Maisha?
- ▶ The conclusions of the fact-finding visit conducted by the members of parliament to Mount Elgon district on August 2008 indicate that “There are cases of human rights abuses by the security forces in Mount Elgon which should be investigated further to ascertain which arm of the security forces perpetrated the abuses”. Have these cases been investigated? If so, what has been the outcome of these investigations? Has any security force been investigated and prosecuted for such violations?
- ▶ Please comment on the conclusions of the parliamentary report which refer to a lack of collaboration from the police: “There are reports of disappearances of people in custody of security agencies which should be investigated to establish the whereabouts of these people. Attempts by the Committee to verify these allegations in the OB [Order Book] were frustrated by the Police”.
- ▶ What is the status of the discussions concerning the introduction of the Independent Policing Oversight Authority Bill (establishing police oversight authority), the National Police Service Bill (providing a new legal framework for policing) and the National Police Service Commission Bill (establishing a police service commission)? When are they meant to be discussed in Parliament and how, specifically, will they bring Kenyan legislation in conformity with international standards?
- ▶ Please comment on the allegations that State officials have in fact tampered with crime scenes from operation Okoa Maisha, removing bodies that had been found in the forest in the absence of any legal process to record what was found or where the bodies were subsequently taken, despite requests from human rights organizations to preserve the crime scene for independent documentation.
- ▶ What measures have been taken by the State party to reduce incidences of harassment to witnesses and to human rights defenders? Have those cases of harassment or attacks to witnesses of human rights abuses, families of victims of human rights abuses and human rights

defenders been thoroughly and duly investigated? If so, what was the outcome of the investigation? Has anyone been tried and convicted for such episodes?

4. Conclusions and Recommendations

Regarding Article 6 of the Covenant:

- ▶ The State party shall take actions to ensure that allegations of extrajudicial killings and enforced disappearances are ex officio, promptly, impartially and effectively investigated and to ensure that alleged perpetrators are tried by a competent ordinary court.

Regarding Article 7 of the Covenant:

- ▶ The State party shall take steps to amend the Penal Code and the Code of Criminal Procedure to include a definition of torture which is in accordance to international standards and to provide penalties which are proportionate to the gravity of the crime.
- ▶ The State party shall ex officio, promptly, impartially and effectively investigate all allegations of torture and ensure that alleged perpetrators are tried by competent ordinary courts;
- ▶ The State party shall sign the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment without further delay;
- ▶ The State party shall recognize the competence of the CAT to receive and examine individual complaints pursuant to article 22 of the Convention against Torture.

Regarding Article 9 of the Covenant:

- ▶ The State party shall take immediate action to ensure that arbitrary deprivation of liberty is criminalized in accordance with international standards;
- ▶ The State party shall codify the crime of enforced disappearance as a separate offence.
- ▶ The State party shall take immediate action to ensure that those persons arrested and charged with criminal offences have access to a lawyer, doctor and family and are guaranteed the right to challenge the legality of their detention;
- ▶ The State party shall ensure that a person who has been unlawfully detained is immediately released and that their right to compensation is guaranteed, this shall be applied in particular to those who were subjected to arbitrary deprivation of liberty in the context Okoa Maisha;
- ▶ The State party shall take immediate action to ensure that prompt, impartial and independent investigation over cases of arbitrary deprivation of liberty, in particular those perpetrated in the context of the operation Okoa Maisha, are carried out and that those responsible are identified, judged and sanctioned by a competent ordinary tribunal.

Regarding Article 16 of the Covenant:

- ▶ The State party shall undertake without any further delay investigations into the enforced disappearances perpetrated in the wake of the operation Okoa Maisha with a view to establishing with certainty the fate and whereabouts of the persons subjected to enforced disappearance and to disclose it to their families in order to guarantee the latter's right to know the truth.
- ▶ Amend the current legal framework so that providing social benefits and measures of reparation to relatives of persons subjected to enforced disappearance is not subjected to the obligation to obtain a decision certifying the death of the victim. In cases where enforced disappearance is involved, replace the certificate of death with a "certificate of absence due to enforced disappearance" that, while recognizing the gravity and real nature of the crime without treating it as a direct death, nonetheless allows to regulate the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

Regarding Article 24 of the Covenant:

- ▶ The State party shall conclude the process of reviewing the Children's Act 2001 and amend the Kenyan Penal Code to raise the minimum age of criminal responsibility currently set at 8 years old under article 14(1) and to bring it into accordance with international standards.
- ▶ The State party shall take immediate action to ensure the prompt, impartial and effective investigation of all allegations of arbitrary detention, ill-treatment, torture or enforced disappearance of minors in the context of the operation Okoa Maisha.
- ▶ The State party shall take immediate action to ensure that all minors deprived of their liberty within the operation Okoa Maisha currently detained are released.
- ▶ The State party shall take immediate action to ensure that all minors deprived of their liberty and charged with a criminal offence are ensured a fair trial within the shortest delay and in accordance to international standards relating to juvenile justice.
- ▶ The State party shall ensure that minors who were victims of torture or ill-treatment, or their families if they were subjected to enforced disappearance or arbitrary killings obtain redress and adequate compensation, taking into account their status as minors and the related aggravated responsibility by the State.

Regarding Article 2.3 of the Covenant:

- ▶ The State party shall undertake a prompt, impartial and independent investigation into the abuses committed in Mount Elgon taking into consideration the information provided by local NGOs and using all avenues available to prevent further abuses and to investigate judge and sanction those responsible for committing human rights violations.
- ▶ The State party shall ensure the proper implementation of the Witness Protection Amendment Bill 2010 to prompt potential witnesses to come forward and denounce the crimes and alleged perpetrators of the post-election violence in Kenya, including that occurred in the wake of the operation Okoa Maisha.