



FOLLOW- UP ALTERNATIVE REPORT TO THE CONCLUDING OBSERVATIONS OF THE UNITED NATIONS COMMITTEE AGAINST TORTURE IN CONNECTION WITH THE CONSIDERATION OF THE SECOND PERIODIC REPORT OF KENYA ON THE INTERNATIONAL CONVENTION AGAINST TORTURE, AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT.

Prepared by Independent Medico-Legal Unit (IMLU) in partnership with the International Rehabilitation Council for Torture Victims (IRCT).

for submission to the

Committee Against Torture and Other Cruel, Inhuman

and Degrading Treatment or Punishment

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Abbreviations:

IMLU	Independent Medico-Legal Unit
UN CAT	United Nations Committee against Torture
NGOs	Non-Governmental Organisations
ICJ	International Commission of Jurists
ICTJ	International centre for Transitional Justice
LRF	Legal Resources Foundation Trust
KHRC	Kenya Human Rights Commission
ODPP	Office of the Director of Public Prosecutions
IPOA	Independent Policing Oversight Authority
NPS	National Police Service
ICCPR	International Convention on Civil and Political Rights
TJRC	Truth Justice and Reconciliation Commission
JSCC	Judicial Service Commission Committee
ICC	International Criminal Court

I. Introduction

A. Context and methodology

1. The Independent Medico Legal Unit (IMLU) is a registered Non-Governmental human rights and governance organization that seeks a just world free from torture by promoting the rights of torture victims, survivors, and protects all Kenyans from all forms of state-perpetrated torture by employing a comprehensive mechanism in advocating for policy reforms, supervising government devotion to human rights, litigation and rehabilitation of torture victims through psychological and medical treatment and capacity building of key stakeholders.
2. This follow-up report is developed by IMLU in partnership with the International Rehabilitation Council for Torture Victims (IRCT). Civil Society Organizations including International Commission of Jurists, Coalition on Violence against Women, Legal Resources Foundation Trust and International Centre for Transitional Justice.

B. Background

3. The Committee against Torture reviewed the second periodic report of Kenya (CAT/C/KEN/2) between the 6th and 31st of May 2013 at its 50th session and adopted its Concluding Observations (CAT/C/KEN/CO/2).
4. According to its follow-up procedure, the Committee against Torture selected four key recommendations and requested **the State party to provide an updated report on within 12 months (i.e by 31st May 2014)**. Kenyan government presented its follow up report in August 2014 and the following is an alternative follow-up report done by IMLU. The recommendations touched on the following areas: Extrajudicial killings and disproportionate use of force; Fundamental legal safeguards of persons in police custody; investigations and prosecution of post-election violence cases and lynching of elderly persons suspected of witchcraft.

II. Information regarding the implementation of the Follow-up recommendations:

C. Recommendation 9: Extrajudicial killings and disproportionate use of force

Assessment from IMLU

5. *IMLU found that **limited progress has been made** on this recommendation and there is need for the government to address the vice thoroughly.*

Extrajudicial killings and results of investigations on extrajudicial killings

6. On 22nd September 2012, the government set up a Judicial Commission of Inquiry into the Tana River clashes chaired by High Court judge Grace Nzioka to investigate the killings in these areas.¹ The Commission handed over its final report to President Kenyatta in May 2013,² ten months after the due date. The report identified resources to be the main reason for conflict and called for prosecution of perpetrators. However, the findings of the report have never been made public.

IPOA's Mandate

7. **IPOA is mandated to investigate deaths and serious injuries caused by police action and to recommend disciplinary action or prosecution so as to prevent impunity and enhance accountability within the National Police Service.** IPOA is also mandated to prepare a performance report every six months sharing statistics on its activities and on the results of some of its investigations, the last of which was shared in August 2014.³ The Authority is in the process of formulating draft regulations intended to help enhance police accountability and improve police-community relations. The regulations have not been finalized and have therefore not been disseminated.

¹ See <http://www.the-star.co.ke/news/article-5055/state-set-team-probe-coast-nep-killings>

² See <http://citizennews.co.ke/news/2012/local/item/10594-commission-hands-over-tana-violence-report-to-kenyatta>

³ See IPOA mandate at <http://www.ipoa.go.ke/about-us/ipoa-mandate>. See also IPOA Act CAP 88 at section 6(a) and (l) and section 30(3)

<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2088>

Regulation of the use of Firearms in compliance with UN Basic principles and training of law enforcement personnel on the use of force

8. Schedule 6 of the National Police Service Act of 2011 (NPS Act) (Cap 84) requires police officers who use **lethal fire to report to** their immediate superior and those whose use of force leads to death or serious injury to report to IPOA for investigation. A study done by IMLU on Firearm deaths in Kenya between 2009 and 2013 found that law enforcement officers were responsible for 80% of gun-related deaths.⁴ Police authorities have not complied with the requirements of the Act in these cases of extrajudicial killings as IPOA finds out of such cases from the public or **other sources**.⁵
9. On **compliance with the UN Basic Principles** on the use of force and firearms by law enforcement officials (1990)⁶, the NPS Act is said to be in line with the principles and to clearly stipulate the conditions under which firearms may be used. However there is some laxity in the enforcement and implementation of these laws based on the reports received in the media and from IPOA.⁷

D. Recommendation 10: Fundamental legal safeguards of persons in police custody

Assessment from IMLU

10. **Limited progress has been made on this recommendation and there is need for the reforms to be expedited.** However we appreciate efforts made by the state to enact the Persons Deprived of Liberty Bill 2014 which is currently in the National Assembly for debate. The Bill seeks to give effect to Articles 29 and 51 of the Constitution.

Situation in Prisons – Rights of an arrested person

11. Article 49(1) (c) and (f) (i) of the Constitution provide for the rights of arrested persons. These include the right to communicate with an advocate, and other persons whose assistance is necessary; and to be brought before a court as soon as reasonably possible, but not later than 24 hours after being arrested. There is however reported a marked improvement in the protection of the rights of the arrested person mainly in city based remand centres. This can be attributed to the fact that the prisons within the city centers have buses that transport the inmates to the courts within the stipulated time. However the situation is different in the rural areas where transportation of inmates remains a challenge due to the limited number of vehicles and at time the vehicles do not have fuel. Access to lawyers for pre-trial detainees remains a challenge especially due the fact that Kenya is yet to enact the Legal Aid Bill 2013. T

⁴ "1873 firearm deaths were reported over five years which meant that each year there were more than 350 reported gunshot related deaths. The most common documented circumstance is said to be shooting in response to robbery while the common reason for shooting was in response to the descendent shooting at them." See the report: Firearm Deaths in Kenya: Exploring the Data 2009-2013 and Perspectives on Triggers and Prevention by IMLU, June 2014

⁵ See Report: Killings, Disappearances by anti-terror police, Human Rights Watch 2013 at <http://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police>

⁶ See UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>

⁷ See the report: Firearm Deaths in Kenya: Exploring the Data 2009-2013 and Perspectives on Triggers and Prevention by IMLU, June 2014

Torture and Il-treatment

12. **On compliance with General Comment No.2, recent reports revealed several incidences of torture and ill-treatment by State officials**, in particular the law enforcement agencies⁸. NGOs recall that torture and ill treatment often occur in the first hours of detention. Between January 2013 and September 2014, IMLU documented 237 cases of torture, cruel inhuman and degrading treatment and extra judicial killings. In penal institutions acts of torture have reduced though the prison officers however there is new trend where inmates are beaten in places where it is difficult to detect physical injuries such as the knees, elbows, shoulders and ankles. In prison most of the torture occurs in the course of searches for contraband. For example in February 2014 scores of remandees were injured others sustaining serious injuries during searches conducted at the Kamiti Maximum Prison. The remandees were later transferred to the Nairobi Remand and Allocation Prison without any medical attention save for one inmate who suffered very serious injuries and had to be admitted at the Kenyatta National Hospital

Recommendation 17: Witchcraft Act of 1925 and the investigation, prosecution and punishment of perpetrators.

Assessment from IMLU

13. *This is still a very worrying trend and no concrete laws have been put in place to adequately address the vice*
35. The witchcraft phenomenon calls for the repeal of the Witchcraft Act⁹. The last amendment to the Act was in 1964¹⁰ with a review being done in 2012, of which the amendments effected were not substantive amendments. There has been no word on any consultations being made to review the act as this has not been made public.
36. The other challenge is the fact that the Act also does not take into account the social ethos of the community which it is supposed to regulate and is therefore ignored and its effect diminished¹¹.

D. Recommendation 18: Investigation and Prosecution of Post-Election Violence (PEV) cases

Assessment from IMLU

14. There is not much progress on the investigation and prosecution of post-election violence (PEV).
15. Based on the recommendations of the **Waki Commission**, the **Truth and Justice Reconciliation Commission (TJRC) completed its report and transmitted it to the President on the 21st May 2013**. In spite of the elaborate timelines that had been established in the

⁸See the Report "An Assessment by Stakeholders of Government's performance in implementation of UPR recommendations", Kenya UP stakeholders coalition, p. 30

⁹ Witchcraft Act, 1925 at <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2067>

¹⁰ Legal Notice Number 124 of 1963; which substitutes the word "Governor" with "Minister"

¹¹ Witchcraft and the Criminal Law in East Africa, Onesimus K. Mutungi

Truth Justice and Reconciliation Commission Act there is delay in the implementation of the report. In August 2013, the National Assembly passed the Truth Justice and Reconciliation Commission Amendment Act, which gave the National Assembly powers to revise the report. The report was published by the government printers and tabled before the National Assembly where it has since been awaiting Parliamentary approval before publishing of the final version. This has caused undue delay in the implementation of the recommendations in the TJRC report.¹² On 4th October, a representative of the Ministry of Interior will spearhead the formation of the TJRC Implementation Inter-Agency Committee, which is to consist of representatives from different organizations including the Office of the Director of Public Prosecutions, the Office of the Attorney General, Parliament, ICJ, ICTJ among others. The purpose of this committee is to set up and develop a structure for the implementation of the report.

16. Regarding the **investigation and prosecution of the violence**, very little has been done. In February 2014, the DPP said that none of the 4000 cases related to PEV could be prosecuted **due to the lack of evidence**¹³. None of them were forwarded to the Court. Recent figures show that only four cases are currently reviewed by the Courts. All four cases are related to sexual gender based violence and are still pending¹⁴.
17. The Judicial Service Commission Committee (JSCC) approved the creation of the **“International Crimes Division in the High Court of Kenya”** to try medium and low level perpetrators of post-elections violence cases. However no meaningful progress has been made to set it up.
18. **The Multi-Agency Taskforce on Post-Election violence** cases was established by the Director of Public Prosecutions on February 9th 2012 to assess the progress of current investigations into the post-election violence and decide whether there is enough evidence to pursue 5000

¹² See media report <http://www.standardmedia.co.ke/article/2000122104/civil-society-faults-state-over-tjrc-report>

¹³ <http://mobile.nation.co.ke/blogs/International-Crimes-Division-bring-accountability/-/1949942/2197978/-/format/xhtml/-/ch6vpg/-/index.html>

¹⁴ See <http://www.icj-kenya.org/index.php/media-centre/news/596-hearing-of-the-pev-sexual-gender-based-violence-case-begins-in-court>. As background information on the prosecutions of PEV case, see the FIDH-KHRC 2013 report: “The information I have is that The government gazetted a multi-agency task force on 20th April 2012. Its mandate was retrospective to begin on 6th February 2012. The Task Force was comprised of members drawn from the Office of the Director of Public Prosecutions (DPP), the State Law Office, the Ministry of Justice, National Cohesion and Constitutional Affairs, the Witness Protection Unit and the Police Service. The task force's mandate was to review the 6000 cases arising out of the 2007/2008 PEV that had been arbitrarily shelved by the office of the Attorney General. The Attorney General's office after an internal audit in 2009 had indicated that only 156 of these cases had been investigated and they all related to relatively minor offenses, such as theft, house-breaking, malicious damage to property, publishing false rumors, criminal possession of offensive weapons, and robbery with violence, assaulting police officers, and breach of the peace. The Task force has reportedly reviewed all 6000 cases. They have 1716 suspects, 420 potential witnesses, 4 murder cases already being prosecuted, 150 on sexual and gender based violence”. See <http://www.fidh.org/IMG/pdf/kenya604uk2013.pdf>

case files that have been opened. To date, there has been no report published by the task force on the outcome of their investigations and thus no dissemination of the same.¹⁵

19. On **cooperating with the Prosecution at the ICC**, the Kenyan government has been accused on several occasions for failing to cooperate with the ICC. ICC Chief Prosecutor Fatou Bensouda filed an application on 12th of September 2014 requesting an adjournment of proceedings. Chief among her reasons for the delay is the lack of cooperation by the Kenyan government, which refuses to disclose certain documents that the prosecution says are central to a successful prosecution.¹⁶

¹⁵ See a summary of the situation in Kenya by Fergal Gaynor-Common Legal Representative for Victims at <http://www.icc-cpi.int/iccdocs/doc/doc1590033.pdf>

¹⁶ See Norwegian Council for Africa report - Kenya: Prosecuting Kenyatta - damned if you do, damned if you don't (analysis) on 15th September 2014 at <http://www.afrika.no/Detailed/25349.html>