

State of Torture and Related Human Rights Violations in Kenya

Alternative Report to the UN Committee against Torture Informing its Review of Kenya's Second Periodic Report at Its 50th Session (6-31 May 2013) on the Implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Submitted by:



The Kenyan Section of the International Commission of Jurists (ICJ Kenya)



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Coalition on Violence against Women (COVAW) - Kenya



World Organisation Against Torture (OMCT)

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Note on the Authors

The Kenyan section of the International Commission of Jurists (ICJ Kenya), the Kenya Alliance for Advancement of Children (KAACR) and the Coalition on Violence against Women (COVAW) present this report to the Committee Against Torture (CAT) to advise on the efforts towards implementation of the Convention Against Torture in relation to prevention and protection from torture., associated issues and challenges arising from this process.

The Kenyan Section of the International Commission of Jurists (ICJ Kenya)

Established in 1959, The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-partisan, not-for-profit membership organisation registered in Kenya. With membership drawn from the Bar as well as the Bench, it is a National Section of the International Commission of Jurists based in Nairobi, Kenya. It currently has over 300 members dedicated to the legal protection of human rights in Kenya, and to the promotion of democracy and the rule of law.

Niche and service delivery

ICJ Kenya works towards creating an informed society that can demand for protection and promotion of their rights as well as democratic practice at all levels of structures of governance. ICJ Kenya is driven by the belief that an informed citizenry is able participate in fully in governance issues in the country. The organization advocates for; an increase in the number of judges and magistrates in Kenya as an avenue for increasing access to justice in the enforcement of rights and remedies; supporting rights awareness in the legal profession and within the larger public, capacity building of actors on issues of human rights, good governance and access to justice; campaigning for access to Information; advocating for anti-corruption, eradication of organised crime and money laundering; promoting civic education & electoral Reforms; conducting impact litigation on emerging issues; and legal research and analysis on international criminal procedures & transitional justice; supporting legislative reforms; as well as policy advocacy for enhanced rule of law and the protection of civil rights and liberties.

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Kenya Alliance for Advancement of Children (KAACR)

Kenya Alliance for Advancement of Children (KAACR) is national umbrella body for NGO's cooperation and exchange of information on children rights in Kenya with a membership of over 100 children agencies in Kenya. KAACR is an NGO with Special Consultative status with the Economic and Social Council (ECOSOC) of the UN. KAACR is a registered national umbrella NGO under the National Non-Governmental Organizations (NGO) Coordination Act of 1990 in 1995. KAACR envisions a society that protects all the rights of children and youth to survive, develop and participate in all matters concerning them. KAACR's mission is to advocate for and promote the realization of rights and responsibilities of children and youth in Kenya. KAACR is the secretariat of the NGO Child Rights Committee consisting of 25 NGOs that advocates for policy and legislative reform that touch on children among other child rights issues.

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Coalition on Violence Against Women (COVAW) - Kenya.

COVAW was founded in 1995 as a response to the silence of the Kenyan society to addressing violence against women. COVAW works to promote and advance women's human rights through working towards a society free from all forms of violence against women. COVAW's mission is to build social movements opposed to and committed to eradicating violence against women. This work includes strengthening the voice and impact of women leaders as champions of change at the community level, linking the local to the regional and international policy processes and ensuring women access to services and justice in as far as ending violence against women is concerned.

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Legal Resources Foundation.

Legal Resources Foundation Trust (LRF) is an independent, not for profit Kenyan civil society organization that promotes access to justice through human rights education, research and policy advocacy. LRF was founded in April 1993 with the aim of enhancing the administration of justice for the poor, vulnerable and marginalized '... through participatory interventions and mutual partnerships'. LRF has three (3) thematic areas namely; Administration of Justice Programme (AJP), Governance and Development Programme (GDP) and Haki Institute Programme (HIP).

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With coordination by and technical input from the **World Organisation Against Torture (OMCT)**

Created in 1985, the World Organisation Against Torture (OMCT) is today with 311 affiliated organisations in its SOS-Torture Network the main coalition of international non-governmental organisations (NGOs) fighting against torture, summary executions, enforced disappearances and all other cruel, inhuman or degrading treatment. Based in Geneva, OMCT's International Secretariat provides personalised medical, legal and/or social assistance to hundreds of torture victims and ensures the daily dissemination of urgent appeals across the world, in order to protect individuals and to fight against impunity. Specific programmes allow it to provide support to specific categories of vulnerable people, such as women, children and human rights defenders. Submitting individual communications and alternative reports to the human rights treaty bodies of the United Nations is one of its primary activities. OMCT further actively collaborates in the development of international norms for the protection and promotion of human rights.

OMCT enjoys a consultative status with the following institutions: ECOSOC (United Nations), the International Labour Organization, the African Commission on Human and Peoples' Rights, the Organisation Internationale de la Francophonie, and the Council of Europe.

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List of Abbreviations

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CIC	Commission for the Implementation of the Constitution
COVAW	Coalition on Violence Against Women
CRC	Convention on the Rights of the Child
FGM	Female Genital Mutilation
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ICJ-Kenya	The Kenyan Section of the International Commission of Jurists
IMLU	Independent Medico Legal Unit
IPOA	Independent Policing oversight Authority
KAACR	Kenya Alliance for Advancement of Children
KANU	Kenya African National Union
KNCHR	Kenya National Commission on Human Rights
LRF	Legal Resources Foundation
NARC	National Alliance of Rainbow Coalition
ODM	Orange Democratic Movement
OMCT	World Organisation Against Torture
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
PNU	Party of National Unity
TJRC	Trust, Justice and Reconciliation Commission
SRHR	Sexual and Reproductive Health Rights
UN	United Nations

1. Introduction

This report responds to the Second Periodic Report (UN Doc. CAT/C/KEN/2)¹ from the Government of Kenya to the Committee against Torture under Article 19 of the Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment (CAT). It is based on a previous joint alternative report to the Human Rights Committee in July 2012 of which Independent Medico Legal Unit (IMLU) was also part and to whom acknowledgement and much appreciation is extended by the authors of the report.

Since the accession to the CAT by Kenya, there have been significant changes to the legal environment in Kenya not least of which has been the promulgation of the 2010 Constitution. Kenyans voted for the new Constitution on 4 August 2010 through a national referendum. It is the supreme law that provides for an elaborate legal, policy and institutional framework to ensure substantive protection and promotion of fundamental rights including the express prohibition of torture and provides avenues for redress. The Constitution provides for the incorporation of international law.² The Treaty making and Ratification Act was assented to on the 13th of December 2012 and was expected to commence on the 13th of December 2012. This treaty seeks to give effect to the provisions of Article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties.

The Constitution contains a progressive Bill of Rights that provides effective mechanisms for the enforcement of fundamental rights. Articles 19, 21, 22, 23, 24, 25, 26, 28, 29, 48, 49, 50, 53 and 59 of the Constitution of Kenya contain fundamental rights and freedoms i.e.; protection of the right to life; protection of the right to personal liberty; protection from inhuman treatment or degrading punishment or other treatment; protection against arbitrary search or entry; secure protection of the law; protection of the freedoms of expression; protection of the freedom of assembly, association and movement; protection and preservation of the dignity of individuals; protection of non-derogable rights including freedom from torture and cruel, inhuman or degrading treatment or punishment; human dignity; freedom and security of the person; right to access to justice; rights of arrested persons; a right to fair hearing and the right of persons detained, held in custody or imprisoned.

The Constitution guarantees the full enjoyment of fundamental rights to all. Article 21 (1) states: *"It is the fundamental duty of the State and State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights."* In addition, Article 21 (3) states: *"All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of the minority or marginalized communities and members of particular ethnic, religious or cultural communities."* Article 21(4) imposes on the State the duty to enact and implement legislation to fulfill its international obligations in respect of fundamental rights. It also provides for the right to pursue public interest litigation to enforce human rights through the High Court, which is empowered to uphold and enforce rights.

¹ At <http://www.ohchr.org/english/bodies/cat/cats50.htm>.

² Article 2(6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the constitution.

While Kenya has endeavoured to include principles of the CAT in its newly promulgated Constitution of 2010 and legislative framework, there continue to be important legislative and administrative gaps that still provide challenges towards full implementation of the CAT as specified in subsequent chapters. The report further shows that torture and ill treatment continue to take place and that Kenya fails to investigate, prosecute and punish these grave human rights violations. This alternative report addresses, the legislative and policy gaps and the judiciary's role in promoting the prohibition against torture by law enforcement agencies, the conduct of two institutions namely the Police and prisons where prevalence of torture has been documented.³

The report also includes a gender and child rights perspective and discusses the prevalence of torture of women and children and the continuing lack of their protection in the legislation and reality.

The report ends with a list of recommendations and a list of questions to the government of Kenya.

³ <http://www.nation.co.ke/News/politics/Police-defend-use-of-live-bullets-in-riots--/1064/1736590/-/o59uuv/-/index.html> (accessed on 2 April 2013)

2. Kenya's International and Regional Human Rights Obligations

Kenya acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 21 February 1997. Kenya is also a State Party to other international human rights treaties relevant to the prohibition of torture and ill-treatment, including:

- International Covenant on Economic, Social and Cultural Rights (ICESR) (1 May 1972);
- International Covenant on Civil and Political Rights (ICCPR) (1 May 1972);
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (9 March 1984); Convention on the Rights of the Child (CRC) (30 July 1990);
- Convention relating to the Status of Refugees (16 May 1966);
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (13 September 2001).
- Optional Protocol on the intervention for children.

Kenya ratified on 15 March 2005 the Rome Statute of the International Criminal Court (ICC).

Kenya is *not* a State party to the following international human rights treaties and optional protocols supplementing the treaties with specific human rights concerns, which are of critical importance to the prohibition of torture, ill-treatment and related human rights violations:

- International Convention for the Protection of All Persons from Enforced Disappearance (signed in 2007);
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT);
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;
- Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (signed on 8 September 2000).

With regard to individual complaints, Kenya has *not* accepted the right to individual petition under article 22 of the CAT and that exists under other various international treaties such as the First Optional Protocol to the International Covenant on Civil and Political Rights, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the Optional Protocol to the Convention on the Elimination of Discrimination against Women, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure and the Optional Protocol to the Convention on the Rights of Persons with Disabilities. This means that the various UN Treaty Bodies that monitor the implementation of the aforementioned treaties do not have the competence to receive and consider communications from or on behalf of individuals subject to Kenya's jurisdiction, who claim to be victims of a violation by Kenya of the provisions of these treaties. With regard to its regional commitments, Kenya has ratified the following core human rights instruments:

- African Charter on Human and Peoples' Rights (23 January 1992);
- Convention Governing the Specific Aspects of Refugee Problems in Africa (23 June 1992);

- The African Charter on the Rights and Welfare of the Child (25 July 2000);
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (6 October 2010).

3. From a Dualist State to a Monist State

Since the promulgation of the Constitution in 2010, Kenya has transformed from a dualist State into a monist State. Article 2 (6) of the Constitution, establishes that all treaties ratified by Kenya form part of the laws of Kenya. Moreover, Article 21 (4) of the Constitution specifically requires that: "The State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms." Thus, while ratified treaties are part of Kenyan law, the need for implementing legislation to achieve the aims of those treaties is acknowledged and for practical purposes required.

Article 261 of the Constitution provides also for consequential legislation. In accordance with Article 261 (1) and (4) and the Fifth Schedule of the Constitution (specifying the period in which legislation has to be enacted by Parliament) the Ratification of Treaties Bill, 2011, with necessary modifications needs to be introduced in Parliament as a matter of urgency, having failed to go beyond the second reading in Kenya's 10th Parliament seating.

The Kenyan Judiciary has utilised international law as evidenced by its interpretation of the law in *The Matter of Zipporah Wambui Mathara (2010)* eKLR. The Court declared that provisions of Kenya's Civil Procedure Code were in conflict with Article 11 of the ICCPR that prohibits imprisonment for inability to pay civil debt. In this instance, the Court took on Article 11 of the ICCPR appreciating that Article 2(6) of the constitution made the Covenant part of Kenya's law.

Furthermore, the Human Rights Committee expressed in 2012 its concern at the present lack of clarity in the jurisprudence of the courts on the status of the Covenant in the domestic legal order (art. 2). It recommended Kenya to take all necessary measures to ensure legal clarity on the status and applicability of the Covenant in the legal system of the State party. In this regard, the Committee urges the State party to ensure that the draft bill on Ratification of Treaties clarifies the status of the Covenant and other human rights treaties in domestic law.⁴

ICJ Kenya, KACR, COVAW, LRF and OMCT would recommend the State party to:

While ratified treaties since the promulgation of the 2010 Constitution form part of Kenyan law, urgently adopt and implement required appropriate laws and policies to guarantee full compliance in the domestic legal system with the obligations assumed under the Convention against Torture and other international treaties.

⁴ UN Doc. CCPR/C/KEN/CO/3, para 5.

4. Practice of Torture in Kenya

While it is important to note that the Constitution ushered in a new era which has been well embraced by the Judiciary and the provisions of the Convention against Torture can in principle be invoked and applied to enhance respect for human rights and eliminate incidences of torture, there are no tangible measures put in place yet to respond positively to the societal demands for justice, especially in relation to the elimination of torture, cruel, inhuman, degrading or punishment. The ways in which lives were being lost before the promulgation of the Constitution still are being reported such as extrajudicial executions, murders and manslaughter. Incidences of torture and ill-treatment by State officials in particular the law enforcement agencies, houses being torched, abductions, forceful evictions, domestic violence and other forms of violence against women, mob justice, among many other forms of human rights violations, continue to be reported. Some of these forms have almost been sanitised in the society as part of the cultural practices, caused and entrenched by deep rooted cultures, traditions, attitudes, such as killing of witches, with others being committed under undue conditions, circumstances and with far reaching consequences to the families and communities.

Current trends of torture by state officials include:

- a) Enforced disappearances - where persons are arrested in the context of fighting organized groups then disappear without trace and unexplained circumstances. This was largely used in the guise of fighting "Mungiki,"⁵
- b) Being held incommunicado where a person is arrested and held in detention facilities with no opportunity to communicate to other persons, for example relatives or lawyers, meant to coerce the persons to confess or give information;
- c) Kidnapping and ransom seeking is also a form of torture prevalent in Kenya today, where a person is suspected of having money, him, her or a close relative gets arrested with allegations of having broken the law. The person would then be locked up in a police station without any charges being preferred on them. When a relative starts searching or enquiring, they are intimidated to pay a certain amount of money;
- d) Extortions and blackmailing;
- e) Extra judicial executions where the police intent to avoid the laborious court processes or where they know they do not have enough evidence to prosecute;
- f) Threats and intimidations through short text messages on phones;
- g) Spreading fear and using intimidation by criminal gangs in cohorts with the police or through police inactions;⁶
- h) Lack of public information on the activities of Kenyan forces in Somalia given their history in security operations such as "Operation Okoa Maisha" in Mt. Elgon.
- i) Forceful evictions of urban slum dwellers In the Nairobi area alone, where over 50 per cent of the city's 3.1 million population live in these informal settlements, thousands of households have reportedly been forcibly evicted without humanitarian assistance or alternative housing solutions, including in the Mitumba, Eastleigh, Kiang'ombe, KPA and Embakasi slums.⁷

⁵ Mungiki is a politico-religious group and a banned criminal organisation.

⁶ IMLU, see note 14.

⁷ Study Report of the Special Rapporteur on internal displacement in Kenya, 18th -27th September, 2011.

- j) Detention of women in labour wards by Public hospitals for failure to pay hospital bills for undisclosed periods of time.
- k) Cases of Rape by State Security Agents during the 2007 post-election violence.

Over 60% of the Kenyan population believe that torture is still very common in the country, both physically and psychologically.⁸ Enforced disappearance of persons is seen as an emerging, common form of torture, mainly practiced within the context of fighting organized groups, followed by being incommunicado detention.⁹

The challenge of the investigating officer being police officers and perceived as the perpetrator presents a picture of compromised justice, as rarely will the investigating officer, implicate fellow police officer unless it is a blatant offence. They decline interviews on the subject with responses that torture is no longer applied.

The time factor required for one to contact a lawyer is not postulated and this remains a gap within the Criminal Procedure Code and has been abused in some cases, especially where the police are implicated on issues of torture, intimidation and harassment despite the fact that the Constitution 2010 now provides under Article 50, the right to fair hearing. Further, poor infrastructure in police cells and the socio-economic circumstances of the arrested persons should not be used as excuses by the Government to deny suspects and detained persons access to a lawyer or their relatives. It is known fact that upon arrest or detention, confiscations of communication gadgets like mobile phones follow, especially where capital offences are reported and the trend has not fully changed.

Still measures to ensure prompt and impartial investigations of torture have not improved. Reportedly, the situation has become worse, as more people undergo psychological torture and ill-treatment, with reporting of cases going down as there is no progress from the reported ones.¹⁰ However, with a proactive judiciary, it is slowly becoming clear that time is of essence in matters of justice.

Cases of sexual violations are not given adequate attention with reporting procedures being insensitive to women, gender desks that were put in place in various police stations are not facilitated with personnel; evidence preservation is faulty leading to acquittals and cases of rape by security agents in the 2007 elections are yet to be acted upon. Survivors of security agents interviewed have indicated that rape was used as a form of intimidation and for obtaining information during the 2007 elections. Many of the women raped indicated the reluctance of security agents to receive reports of rape committed by other security agents.

There was a cautious approach in the implementation of police reforms where the pace slowed down in as Kenya approached its general elections in 2013. The vetting of Police Officers which is critical to the reforms agenda has been relegated as a non-priority with fears of disquiet within the police service with regard to the approach the vetting should take. Complimentary organs such as the National Police Service

⁸ IMLU see note 14.

⁹ Ibid.

¹⁰ Ibid.

Commission and the Independent Police Oversight Authority are in place but are faced with inadequate financial support.

ICJ Kenya, KAACR, COVAW , LRF and OMCT would recommend the State party to:

Abide by its obligations under international law in relation to the absolute prohibition of torture and ill treatment, including the absolute principle of non-refoulement, prohibition of enforced disappearance and incommunicado detention among other obligations should be upheld;

Carry out full, independent and impartial investigations into allegations of torture, bring to justice those responsible for authorising and inflicting torture and ill-treatment, with proper identification mechanisms and punishments of those responsible for these crimes, including extraordinary renditions;

Carry out full, independent and impartial investigations into the allegations of police corruption, intimidation, forceful evictions, rape conducted during the 2007 Kenyan elections by state security agents, and blackmailing, bring to justice those responsible and apply appropriate punishments;

Reform practices and national laws (Penal Code, Criminal Procedure Act, Evidence Act, Public Order Act etc.) to prohibit any form of torture and comply with the provisions of CAT;

Provide adequate resources to the National Police Service Commission and the Independent Police Oversight Authority;

Reinforce that information obtained by torture or ill treatment, should not, whatsoever, be invoked as evidence in any proceedings;

Publicly condemn all forms of torture and ill treatment as a preventative measure and raise public awareness about the enormous negative effect and impact of torture;

Enhance public education and awareness raising campaigns to change social and cultural dimensions that underlie torture and other forms of violence.

5. Definition of Torture and Appropriate Penalties for Acts of Torture (Articles 1 & 4 of the CAT)

Article 1(1) of the Convention against Torture defines torture in the following terms:

“For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Furthermore, according to article 4 of the Convention against Torture:

“[e]ach State Party shall ensure that all acts of torture are offences under its criminal law” and “[t]he same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”

A prohibition against torture in Kenya was found in the former Constitution of Kenya at Section 74(1), which provided: “No person shall be subject to torture or to inhuman or degrading treatment.” Unfortunately, the prohibition of torture under Article 29 of the new Constitution is not much more comprehensive. It states:

“Every person has the right to freedom and security of the person, which includes the right not to be:

- c) subjected to any form of violence from either public or private resources;
- d) subjected to torture in any manner, whether physical or psychological;
- e) subjected to corporal punishment; or
- f) treated or punished in a cruel, inhuman or degrading manner.”

The new Constitution further provides in Article 25(a) that the right to freedom from torture and inhuman, cruel and degrading treatment is an unlimited right and, in accordance to international law, non-derogable. However, these provisions fall far short in effecting the prevention of and redress for acts of torture and cruel, inhuman and degrading treatment. For example, the provisions do not define torture, nor do they establish any means of attaining a remedy leaving it as a bald statement with no practical application.

The former Police Act (Cap 84)¹¹ made also reference to torture in Section 14 providing that: “...any police officer who engaged in torture is guilty of a felony.” This was further supplemented by Police Regulations Part 11(3) (17) which makes it a disciplinary offence for an officer to unlawfully strike any person, or use any unlawful violence to any person.

¹¹ Repealed by the National Police Service Act, 2011.

The National Police Service Act under Article 95 also prohibits the police from subjecting any person to torture or to cruel, inhuman, or degrading treatment and makes improvements in sanctions, stating that those who engage in torture may be punished with a prison term not exceeding 25 years and those who engage in cruel, inhuman or degrading acts may be punished with a prison term not exceeding 15 years.

Torture is prohibited, though not defined, in two further pieces of legislation: The Chiefs' Authority Act (Cap 28) and the Children Act (2001). The Chiefs authority act, in addition to prohibiting torture in Section 20(1)(b), punishes transgressors with a mere fine of Ten thousand shillings (Kshs 10 000) or a period of imprisonment not to exceed one month.

Thus while torture is prohibited under the new Constitution and other laws mentioned above, there is no comprehensive legislation that defines torture, or offers a process of redress and appropriate accompanying sanctions.

The Committee against Torture expressed its regret in 2008 about the fact that the Penal Code and Code of Criminal Procedure do not contain a definition of torture and therefore lack appropriate penalties applicable to such acts, including psychological torture according to Articles 1 and 4 of the Convention against Torture.¹²

Efforts to define the crime of torture in the penal legislation conform international standards is urgently required, with legislative penalties appropriate to the gravity of the offence around torture and other related violations.

In an attempt to address this gap in the legislation, a draft Prevention of Torture Bill was created in 2010, a collaborative effort between ICJ Kenya, IMLU, Ministry of Justice, National Cohesion and Constitutional Affairs, the Kenya Law Reform Commission and the Kenya National Commission on Human Rights. The Bill attempts to capture the principles of the Convention against Torture, as well as the ICCPR, with the objective of preventing, prohibiting and punishing torture and other cruel, inhuman or degrading treatment and to further provide for remedy and compensation for victims. The Bill has now been forwarded to the Commission on Implementation of the Constitution (CIC) to be considered as priority legislation as part of those spelt out under the Fifth Schedule of the Constitution. However, it remains to be seen whether the government will ensure the bill passes without unnecessary amendments.

The Human Rights Committee recommended to Kenya in 2012 to ensure that the Prevention of Torture bill is enacted and include a definition of torture that is in line with article 1 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment in related legislations.¹³

¹² UN Doc. CAT/C/KEN/CO/1, para 8.

¹³ UN Doc. CCPR/C/KEN/CO/3, para 16.

ICJ Kenya, KAACR, COVAW, LRF and OMCT would recommend the State party to:

Include, without delay a definition of torture in its penal legislation to conform to Article 1 of the Convention against Torture as a minimum. The definition should go hand in hand with fast tracking and prioritising essential Bills to combat torture such as the Torture Prevention Bill, the Coroners' Bill, and the Ratification of Treaties Bill among others;

Enact anti-torture legislation that ensures that all acts of torture and cruel, inhuman and degrading treatment or punishment are punishable by appropriate penalties taking into account their grave nature, with specific provisions that outlaw and penalise torture and other forms of violence against women and children and contain gender- and child-specific enforcement provisions and mechanisms;

Ratify the Optional Protocol to the Convention against Torture, which would strengthen the legislative provisions that have been included in the mandate of the Independent Police Oversight Authority (IPOA).

Provide adequate financial support to implement the laws in place and those proposed and institutional support for bodies or organs established under the laws or proposed laws.

6. Access to Justice (Articles 2 & 12 CAT)

Article 48 of the Constitution provides for the State to ensure that there is access to justice for all. Furthermore, the Constitution in Article 22 provides that the Chief Justice may make rules minimising the formalities to the proceedings, which includes recognition of the rules of natural justice and ensuring that the proceedings are not hampered and unreasonably restricted by procedural technicalities. It further provides that no fee may be charged for commencing the proceedings. Whilst pursuing the implementation of this Article, it is inherent to pass the Legal Aid Bill, which shall provide for the provision of legal aid and awareness to indigent persons of society. The Bill also highlights the methodology that shall be used between State and non-State actors in the provision of legal aid to the general public.

The Kenyan Judiciary has embarked on an ambitious Judicial Transformative Framework, which was officially launched on 31st May 2012. Amongst the list of priorities will be the need to address case backlog and digitise case management. Furthermore, the legislation has now provided for financial independence of the judiciary stipulated under Article 173. In the last financial year, budgetary allocation to the judiciary has increased to 1B compared to previously 300Million, which is a significant improvement. Presently, the legislation required to spell out the parameters of the judiciary funding is yet to be enacted.

The structure of the judiciary in the Constitution emphasizes its independence from the executive and dispensation of justice in a non-discriminatory manner. The Judicial Service Commission has been revamped by inclusion of representatives from the public and law society. It is responsible for the recruitment and discipline of judicial officers. The launch of the National Council on Administration of Justice has marked an important milestone in the administration of justice in Kenya. It is for the first time that a legal mandate has been bestowed in an all-inclusive body to ensure a coordinated efficient, effective

and consolidated approach in the administration, delivery of justice and the transformation of the justice system.

The Judiciary is further undergoing transition both institutionally and culturally in accordance to one of the key recommendations in the National Accord and Reconciliation Act, under Agenda Four, which includes Judicial Reform. The Judiciary is currently undergoing the vetting of judges and magistrates, taking a top-down approach by starting with the vetting of the judges of the Court of Appeal. The Vetting of Judges and Magistrates Act 2011 gives effect to section 23 of the Sixth schedule in the Constitution of Kenya which requires Parliament to enact legislation providing for the vetting of all judicial officers for their suitability to continue serving under the principles of the constitution. The aim is to restore the faith of the public in the Judiciary and that more cases will be taken to the courts.

The Supreme Court has been brought into operation following the swearing in of the Supreme Court judges, development and gazettment of the Supreme Court rules. To enhance efficiency in the delivery of justice, the High Court was restructured by creating additional divisions namely: the constitutional and human rights division and the judicial review division. To ease the workload and minimize backlog, the number of judges has been increased per division. Kenya having adopted the Geneva Conventions Act enables courts to take human rights instruments incorporated into domestic law into account when deciding human rights cases, citing the binding force of such treaties by virtue of article 2 (6) of the Constitution.

While the Constitution of Kenya has incorporated the right to a fair trial and public hearing before court under Article 50, the implementation of this right is yet to be evidenced. However, there appears to be a significant increase in public confidence and perception that the courts can now be trusted to 'fairly' adjudicated on matters¹⁴. This is especially so in light of the judicial reforms currently being instituted and the setting up of additional courthouses and decentralisation of the High Court to other towns to ease the distance in terms of access to justice is much welcomed by the Kenyan population. The compensation of the victims of Nyayo House Torture Chambers in 2010 presents a judicious example towards realisation of the Bill of Rights in the Constitution.

Kenya also has the office of the Director of Public Prosecutions to enhance effective prosecution by government and prompt delivery of justice. Recently the Public Prosecutions Office recruited more staff to handle the case backlog which is a step forward in ensuring access to justice. It may take time before changes are noted as the new staffs have not been deployed as they are still under training.

Further the Commission on Administrative Justice (Office of the Ombudsman) has been set up in Pursuant to Article 59 (4) of the Constitution. One of its mandate is to ensure that complaints against judicial officers and government are effectively followed up. However there are various challenges facing this office in that its powers under the Commission on Administrative Justice Act 2011 are highly limited. Under the current

¹⁴ ICJ Kenya's Public Perception and Opinion survey of the Judiciary released on the 3rd October 2012 available on www.icj-kenya.org.

mandate the commission needs to work very closely with the Director of Public Prosecutions in order to achieve justice as they do not have prosecutorial powers.

At the same time, the measures taken to improve access to remedies by individuals by addressing the limited access to domestic courts and judicial remedies remain unaccomplished. The Equal Opportunity Bill 2007¹⁵ and the Small Claims Court Bill 2007¹⁶ have been published since 2007 and are yet to be tabled for discussion.

Furthermore, IMLU's Report *Quest for Justice* noted that the systems of investigating acts of torture as well as prosecuting and punishing the perpetrators are seriously flawed, starting with lack of defining torture within the Laws of Kenya as mentioned above. Up to today, this has not changed.

The investigations of alleged torture claims are still vested on the same institutions implicated and this goes even to cases of extrajudicial killings, summary executions or custodial deaths, leaving families of the victims extremely devastated in their search for justice, with unwillingness of the Attorney General to prosecute, employing delaying tactics to bury cases or even failing to produce in court key witnesses or exhibits. Measures being taken to address the prevalent failure to enforce court orders and judgments have also been inadequate. This is attributable to the culture and state of the judiciary prior to the promulgation of the Constitution and still hinged on lack of political will, especially where perpetrators are State actors.

Equality before the courts requires that similar cases be dealt with in similar proceedings.¹⁷ While Article 27 of the Kenyan Constitution provides that every person is equal before the law and is entitled without any discrimination to the equal protection of the law before courts and tribunals, the Kenyan judiciary continues to be riddled with bias from both the member of the Bench and Bar. Especially women, children, the poor and vulnerable are not treated equally before the Kenya courts. Despite the enactment of the Legal Aid Bill 2012, child offenders still do not have a guarantee of legal representation by state lawyers. Preservation of evidence regarding child offenders is still wanting and the protection of child witnesses is not secured.

There continues to be 'differential treatment' amongst court users and there is a general perception that justice is only for those who can afford it. Court orders have not been enforced or obeyed in particular by the executive. For example in the case of *Liza Catherine Wangari vs. Attorney General*, the Plaintiff was awarded seven million shillings as damages for suffering while in police custody in the court's judgement in September 2010. To date, the State has failed to release the compensation despite several claims for the same.

¹⁵ See <http://www.kenyalaw.org/klr/index.php?id=124>.

¹⁶ Ibid.

¹⁷ See UN Doc. CCPR/C/GC/32, UN Human Rights Committee, *General Comment No 32, Article 14 Right to Equality Before Courts and Tribunals and to a Fair Trial*, Para. 14.

ICJ Kenya, KAACR, COVAW , LRF and OMCT would recommend the State party to:

Ensure that all individuals subject to its jurisdiction have equal access, without discrimination, to effective remedies;

Review the Commission on Administrative Justice Act 2011 to enhance the mandate of the commission:
Urgently pass the Legal Aid Bill; and Equal Opportunities Bill;

Ensure that all court orders and judgements are enforced, including decisions holding the State accountable for torture, ill-treatment and related human rights violations;

Ensure a guarantee of legal representation to child offenders.

7. Arbitrary Arrest (Articles 2 & 11)

Acts of torture are frequently practiced during unlawful or arbitrary arrests by the police, with some arrests being for the purpose of extorting bribes and especially so in the transport sector. Police still remain the main perpetrator of torture with 63% of respondents interviewed by IMLU affirming this. Other perpetrators of torture are vigilante groups, the City Council askaris and the prison warders, 7%, 5% and 5% respectively.¹⁸

Article 49(1) of the new Constitution provides for the rights of arrested persons. These rights include, but are not limited to: the right to be informed, in a language that the person understands, of the reason for arrest; the right to communicate with an advocate; the right not to be compelled to make any admission or confession; the right to be brought before a court as soon as reasonably possible but not later than 24 hours; at the first court appearance, the right to be charged or informed of the reason for continuing detention, or to be released; and the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

The rights of persons who are detained are protected under Article 51(1) of the Constitution which provides: "A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned," and Article 51(2) which provides that: "A person who is detained or held in custody is entitled to petition for an order of *habeas corpus*."

Article 51(3) of the Constitution directs the enactment of legislation that "provides for the humane treatment of persons detained, held in custody or imprisoned" and which "takes into account the relevant

¹⁸ IMLU, see note 14. (*Up-scaling Torture Prevention and Response in Kenya National Torture Prevalence Survey Report*, 2011)

international human rights instruments," such as the CAT. The Constitution also upholds the right of the accused to be separated from convicted persons in Article 49(1) (e).

Despite these Constitutional guarantees, there remain many problems, both in the law and in practice with regard to arrest and detention. The Human Rights Committee expressed in 2012 its concern at continued reports of overcrowding, torture and ill-treatment in prisons and places of detention by law enforcement personnel. The Committee is also concerned that the Prevention of Torture Bill has not yet been enacted into law.¹⁹

In 2008, the Committee against Torture expressed its deep concern about the common practice of unlawful and arbitrary arrest by the police and the widespread corruption among police officers, which particularly affects the poor living in urban neighbourhoods.²⁰ The Committee urged the State party "to address the problem of arbitrary police actions, including unlawful and arbitrary arrest and widespread police corruption, particularly in slums and poor urban neighbourhoods, through clear messages of zero-tolerance to corruption from superiors, the imposition of appropriate penalties and adequate training. Arbitrary police actions must be promptly and impartially investigated and those found responsible punished."²¹

While the law is clear on the measures to ensure that arrested persons are promptly brought before a judge, adherence to these requirements remain a challenge, largely due to lack of will, resources, attitudes and a worrying trend where only 25% victims of these incidents report to authorities which can be explained by pessimism and distrust of the authorities or ignorance of the fundamental rights and freedoms among other factors.²² Cases of persons being held incommunicado, where a person is arrested and held in detention facilities with no opportunity to communicate to other persons, for example relatives or lawyers, limit prompt attempts to see a judge and access to justice.

Moreover, the Committee against Torture expressed concern in 2008 about the bail system in place and recommended to reform the system with a view that it is more reasonable and affordable.²³ The case of *Republic v Gerald Irungu* of 2010 deals with the unconstitutionality of the current bail system in Kenya. However, the Court found that while Section 123(1) and Section 123(4) of the Criminal Procedure Code, which prohibit the court from giving bail to a person charged with the offence or murder, treason, or robbery with violence, are inconsistent with the Constitution, until they are so declared they still provide a compelling reason as to why an accused should not be given bail.²⁴

ICJ Kenya, KAACR, COVAW, LRF and OMCT would recommend the State party to:

Address the problem of arbitrary arrests and police corruption through adequate investigations and penalties as well as police training;

¹⁹ UN.Doc. CCPR/C/KEN/CO/3, para 16.

²⁰ UN Doc. CAT/C/KEN/CO/1, para 12.

²¹ Ibid.

²² IMLU, see note 14.

²³ UN Doc. CAT/C/KEN/CO/1, para 12.

²⁴ High Court Criminal Case Number 97 of 2010

Investigate torture during arrest and detention and prosecute and punish those responsible and provide adequate remedies to the victims;

Reform the bail system.

8. Treatment of Prisoners (Articles 2 & 11)

Poor Living Conditions

The population in Kenya's penal institutions ranges from 50,000 and as high as 55,000 people yet the holding capacity still stands at 22,000. Of these, about 44 % are persons who are in pre-trial detention many of whom have been charged with petty offences. This overcrowding forms a breeding ground for other forms of human rights violations which amount to cruel and degrading treatment such as:

Inadequate food for prisoners.

The situation is worse for special category of inmates such as those who are living with HIV/AIDS, those with terminal illness, lactating and pregnant mothers and children accompanying their mothers. These persons require special nutrition which is not feasible given the prison population. Food penal institutions therefore becomes a tool of trade for those who have easy access in return for sexual favours from prisoners who are viewed as being weak or those who are young(18-21). Sexual exploitation increases the rate of HIV transmission within penal institutions.

Lack of basic facilities such as beddings, prison uniforms etc.

Rules 46 and 47 of the Prisons Act²⁵ provide that a prisoner shall be supplied with prison clothing and bedding respectively. Rule 47 goes further to expound that the beddings shall be for warmth and health. However prison uniform and beddings are in inadequate supply in all the prisoners. In some of the prisons they were too tattered to keep out the cold and some people had to sleep on the floor. This compromised the health of the prisoners a great deal as it exposed them to respiratory infections and illnesses. This issue was said to also have led some vices like corruption leading to the uneven distribution of beddings as some richer convicts who got favored at an extra cost.²⁶ In numerous occasions, those not convicted prisoners were not provided with prison clothing and had to use their civilian clothing and others stayed naked during the day in order to use them as beddings at night or to enable them to go to court the following day with decent clothing.²⁷

Due to the high number of people being admitted to the prisons daily, there are instances where young offenders and even children in conflict with the law are placed together with adults some of whom are

²⁵ Chapter 90 of the Laws of Kenya

²⁶ Page 17 of the report on the Status of Human Rights in Prison 2003-2010-
A publication of the Legal Resources Foundation Trust (2012).

²⁷ Page 19 *ibid* 3

hardcore criminals. As a result these young offenders and children in conflict with the law are sexually abused especially at night.²⁸

Children in custody with their mothers

Another area that has highly been ignored is the status of children in custody with their mothers²⁹. Statistics indicate that there are about 800 children under the age of 5 living with their mothers in prison. The living conditions and environment of most prisons in Kenya are quite traumatizing for a child. Most of the mothers complain of lack of access to healthcare, basic needs and nutritional food for their children. The government through partners has established a day care facility for these children at Langata Women's prison but unfortunately the other prisons do not have such a facility. Child offenders still spend long periods in remand homes and prisons with adults before the determination of cases.

ICJ Kenya, COVAW, KAARC AND LRF would recommends the state party to:

Utilize the non-custodial sentences and accord favourable bail terms to ease the prison population especially those charged with petty offences;

The Kenya Prisons Service should improve their infrastructure to ensure that accommodation for prisoners is humane;

Ensure adequate supply of beddings and clothing for inmates giving due consideration to the environmental conditions of particular areas;

Publicize the report prepared by the Task Force on the Rights of persons detained, held in custody or imprisoned that was constituted by the then Vice President and Minister of Home Affairs H.E Kalonzo Musyoka. This report will be useful in developing policy guidelines and legislation on the treatment of persons in custody;

Protect and safeguard at all times the physical and psychological integrity of children in detention.

Lack of Access to detention Centres

The Independent Police Oversight Authority Act 2011, as mentioned above, provides for an independent civilian body to look into complaints against the police; the National Police Service Act 2011, which operationalizes two previous outfits, the Regular police and the Administration police, will report to a single command, and also provides for the vetting of members of the police force by the Commission, with a view to restore confidence and integrity to the service; and the National Police Service Commission Act 2011, which will handle vetting, recruitment, promotions and discipline of police officers.

²⁸ Page 16 *ibid* 3

²⁹David O., Langat Women Prison Hosts 360 Children , Standard Newspaper, 1st March 2012,
http://www.standardmedia.co.ke/?articleID=2000053144&story_title=Langata-Women%E2%80%99s-Prison-hosts-360-children

Kenya National Human Rights Commission Act 2011 operationalises Article 59 of the Constitution that provides for an empowered human rights commission to monitor human rights compliance by government agencies. The Commission on Administrative Justice Act 2011 establishes an ombudsman office to check on government excesses and an avenue for receiving complaints from the public where they are dissatisfied with any government action.

The judiciary has moved to enhance efficiency in the courts in matters of addressing the problem of case backlogs, but without an articulated policy in terms of access to the detention centres, detention without trial, ill-treatment and massive violations of the rights of detainees as well as deaths in custody remain a major concern and always happen as news flash. Those fighting for a torture free society still have hard times visiting some of these detention centres, further compounded by the Prisons Act (CAP 90) that was reviewed in 2006, but up to date it remains unpublished. The Borstal Act (Cap 92) is under review to synchronize it with the Children's Act in order to capture the multiple needs and challenges of children in conflict with the law.

Without access to detention centres, it is not easy to ascertain the overall state of torture cases in all places of detention particularly the non-traditional places of detention like health facilities for mentally challenged persons or places where child offenders are detained. It remains impossible to access information regarding police operations around the country.³⁰

In relation to access to detainees, the Human Rights Committee has stated in its General Comment No 20 on article 7: "The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members."³¹

ICJ Kenya, KAAACR, COVAW, LRF and OMCT would recommend the State party to:

Protect detainees by allowing them prompt and regular access to a lawyer, doctor and, when the investigation so requires under appropriate supervision, to family members;

Record all arrests made, and action taken and to provide criminal sanctions for state security agents who fail to record any arrests made;

Provide adequate facilities and basic needs for children in custody with their mothers;

Ratify the Optional Protocol to the Convention against Torture;

Strengthening of judicial supervision and oversight on the conditions of prisons.

³⁰ IMLU, see note 14.

³¹ Human Rights Committee, General Comment 20, Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment, at <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/6924291970754969c12563ed004c8ae5?Opendocument>.

9. Non-refoulement and Renditions (Article 3 CAT)

The war against terrorism has taken a new dimension in Kenya with extraordinary renditions used as a measure to counter terrorism activities. For instance, the arbitrary detentions in Kenya and the transfers to Somalia, Ethiopia and Guantánamo Bay in 2009 violated a range of Kenya's obligations under international law, including the absolute prohibition of torture and other cruel, inhuman or degrading treatment, the absolute principle of non-refoulement, the absolute prohibition of enforced disappearance, the right to liberty and security of the person, the right to consular access and the right to due process.³²

On 11 July 2010, bombings in Kampala Uganda led to the deaths of 74 people and dozens injured. Subsequently under unclear circumstances, five Kenyans were arrested in Kenya and handed to the Uganda authorities while 11 others were arrested in Uganda. The Kenyans were detained in 2010 and taken to Uganda for questioning about the two suicide bomb attacks. Some of them, including the executive director of a Nairobi-based Muslim Human Rights Forum Al-Amin Kimathi, a civil society organisations but has since been released. However the trials against six Kenyans continue in Uganda. The detention in Kenya and Uganda is riddled with reports of torture and cruel, inhuman and degrading treatment.

The government is being compelled to prosecute officials including senior police officers who were involved in transferring the Kenyans to Uganda in relation to the Kampala bombing in July 2010. This happened after Members of Parliament endorsed in May 2012 a report prepared by the Defence and Foreign Relations Committee with far reaching implications on the fight against terrorism in Kenya and its neighbouring countries. In the report, the Defence Committee observed that legal provisions for extradition were not followed and that the whole process was unconstitutional. "The rendition and subsequent holding of Kenyans in Ugandan prisons facilities violates the fundamental freedoms and liberties of the affected Kenyans as provided for under the Constitution, customary international law, as well as International Treaties and Conventions on Human Rights which Kenya is a signatory."³³ This can be attributed to the failure to abide by the pre-existing international human rights obligations when countering terrorism. So far there are no tangible measures to ensure that counter-terrorism activities abide and comply with what the Covenant postulates, a loophole that is exploited especially with the incessant attacks that are being linked to Al-shabaab and other terror groups even with the Contiguous and Foreign Countries Act, The Extradition (Commonwealth Countries) Act and The Witness Summonses (Reciprocal Enforcement) Act.

Despite the Government having published the Refugee Regulations operational for effective implementation of the Refugee Act, 2006 and having planned to develop a National Refugee Policy, no measures have been taken to amend the Act, which provides for an exception to the general principle of non-refoulement thereby allowing the expulsion of refugees on the basis of national security. The challenge has been placed on the fear of influx of refugees and concerns for insecurity especially during the fight against terrorism.

³² See Redress and Reprieve, *Kenya and Counter-Terrorism: A Time for Change*, 2009 at <http://www.redress.org/downloads/publications/Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf>, <http://www.the-star.co.ke/national/national/77758-police-may-be-prosecuted-over-uganda-renditions>, article by Francis Mureithi.

The exception is contrary to the obligations under international law, such as article 3 of the Convention against Torture and article 7 of the International Covenant on Civil and Political Rights, no person may be sent back to a country where he or she would be at risk of being subjected to torture or other forms of ill-treatment (non-refoulement principle). This is an absolute rule that must be applied in all circumstances, including in times of war or in the fight against terrorism.

The Human Rights Committee expressed concern in 2012 at the allegations of Kenya's involvement in extraordinary renditions and the refoulement of individuals suspected of being involved in terrorist acts to countries where they are likely to be tortured or face serious human rights violations.

While Kenya acceded to all the 13 Conventions set out in Resolution 1373 (2001) of the UN Security Council Kenya remains in breach with the non-refoulement principle.

ICJ Kenya, KAACR, COVAW , LRF and OMCT would recommend the State party to:

Amend national laws so that any deportation, extradition, rendition, expulsion, return where an individual would appear at risk of torture or other ill-treatment is legally prohibited;

Ensure that all counter-terrorism measures comply with its international obligations, including the ICCPR;

Immediately reverse the renditions of the Kenyan nationals to Uganda and to try them locally for the terrorism charges;

Provide for effective remedies and reparations to those subjected to extraordinary renditions.

10. Extra-judicial Killings (Articles 2 & 12)

The new Constitution provides for the right to life in Article 26(1). This right is qualified in Article 26(3) which states that "A person shall not be deprived of life intentionally, except to the extent authorized by the Constitution or other written law."

Although great strides have been made to reform the Judiciary as mentioned above, it is paramount to state that there has not been any tangible progress in the investigations and prosecution of the widespread extrajudicial killings by the police that were reported from 2007. No investigations and prosecutions of the 2007 post elections violence, where 405 gunshot deaths were recorded out of the 1,113, have been carried out. Fifty-seven percent of the killings have shown various injuries that were inflicted by assorted crude weapons which resulted in arrow wounds, cut wounds; blunt objects trauma, stab wounds, amputations, decapitations and even burns.

Although the Government Report acknowledges that there has been a major challenge arising out of unlawful killings by the police,³⁴ contrary to what is stated in the Government Report,³⁵ allegations of unlawful killing are rarely investigated by the authorities, and the perpetrators are rarely tried and convicted of the crimes committed, and where unreasonable force is used. Sixty-three percent of the Kenyan people are unhappy with the police performance owing to claims of corruption, brutality and a culture of extrajudicial killings.³⁶

The killings that occurred at Mt. Elgon during the joint police –military operation, "Operation Okoa Maisha" in 2008 have never been properly investigated or prosecuted. In its report entitled *Double Tragedy*,³⁷ IMLU found that there was systematic torture, cruel, inhuman degrading treatment or punishment at the hands of security officers and / or the criminal militia (SLDF). Moreover, there were allegations of enforced disappearances of persons in custody by both the police and the military. The Operation was characterised by secrecy, lack of transparency and accountability. Although the operation was intended to preserve law and order, instead it systematically engaged in gross human rights violations on a population hitherto terrorised by criminal gangs.

In November 2008, the Committee against Torture expressed concern about the allegations of mass arrests, persecution, torture and unlawful killings by the military in the Mount Elgon region during the "Operation Okoa Maisha" conducted in March 2008.³⁸ The Committee urged Kenya "to take immediate action to ensure prompt, impartial and effective investigations into the allegations of use of excessive force and torture by the military during the "Operation Okoa Maisha" in March 2008. The State party should further ensure that perpetrators are prosecuted and punished according to the grave nature of their acts, that the victims who lost their lives are properly identified and that their families, as well as the other victims, are adequately compensated."³⁹

IMLU also recommended in 2008 that the Attorney General exercises his powers to initiate investigations and prosecutions of all perpetrators of torture, cruel inhuman degrading treatment or punishment in Mt. Elgon.⁴⁰ Since Kenya had not taken any such action to ensure effective investigations into all the reports of unlawful killings, torture and enforced disappearances and prosecute those responsible, IMLU filed cases with the East African Court of Justice Reference No. 3 of 2010 whilst ICJ Kenya filed a reference (in collaboration with IMLU) at the African Commission Communication Number 381 of 2010.

The government is obliged to provide statistical data disaggregated by crime on prosecution as well as criminal and disciplinary actions against law enforcement officials found guilty of torture and ill-treatment. However, information on the number of investigations launched against the alleged perpetrators of extrajudicial executions since 2007 and the type of charges brought against the perpetrator has not been documented or has not been made public.

³⁴ Un Doc. CCPR/C/KEN/3, para 136.

³⁵ Ibid.

³⁶ IMLU, *Up-scaling Torture Prevention and Response in Kenya National Torture Prevalence Survey Report*, 2011.

³⁷ IMLU, *Double Tragedy Report on Medico-Legal Documentation of Torture and Related Violations in Mount Elgon "Operation Okoa Maisha"*, August 2008.

³⁸ UN Doc. CAT/C/KEN/CO/1, para 21.

³⁹ Ibid.

⁴⁰ IMLU, see note 15.

On matters related to the ICC and information on the measures taken to cooperate with the Court towards prosecutions of those who bore the greatest responsibility for the post-election violence remains blurred. The Attorney General has formed an Advisory Committee that has to date not made its recommendations public. In fact, glaring efforts are observed to defer the cases.

The Human Rights Committee in 2012 on this issue: "While noting the efforts by the State party to cooperate with the International Criminal Court in prosecuting those who bear the greatest responsibility for the post 2007 election violence and the continuing work of the Truth, Justice and Reconciliation Commission (TJRC), the Committee regrets the lack of investigations and prosecutions of the other categories of perpetrators which exacerbates the climate of impunity that prevails in the State party (arts. 2, 6 and 7). The State party should, as a matter of urgency, pursue all cases of post 2007 election violence to ensure that all allegations of human rights violations are thoroughly investigated and that the perpetrators are brought to justice, and that victims are adequately compensated. In this regard, the State party should ensure that the recommendations of the Commission of Inquiry into the Post-Election Violence (Waki Inquiry) are duly implemented."⁴¹

It should be observed that whenever State-sponsored special security operations are sanctioned, there are hardly any measures put forward in terms of ensuring accountability of such operations. As highlighted in IMLU's *Double Tragedy* report, any State security operation and their agencies respond with denial of acts of torture, cruel inhuman degrading treatment, denial of intimidations and harassment of the civilian population and human rights defenders who raise concerns about the violations.⁴²

Despite the fact that the Committee against Torture also expressed its concern in 2008 about consistent allegations of on-going extrajudicial killings and enforced disappearances by law enforcement personnel, particularly during special security operations, such as the "Chunga Mpaka" Operation in the Mandera district in September 2008, and operations against criminal bands, such as the "Mathare Operation" in June 2007 and about the lack of investigation and legal sanctions in connection with such allegations, as well as about information regarding impediments that non-governmental organizations face in their attempts to document cases of disappearance and death,⁴³ so far there have been no tangible responses on the alleged extrajudicial killings and enforced disappearances in Operation Chunga Mpaka and the Mathare Operation. While the Committee against Torture urged Kenya to "conduct immediate, prompt and impartial investigations into these serious allegations, and to ensure that perpetrators are prosecuted and punished with penalties appropriate to the grave nature of their acts as required by the Convention [and to] take all possible steps to prevent acts such as the alleged extrajudicial killings and enforced disappearance,⁴⁴ until today there have been no investigations, legal sanctions or any other measures have been adopted in connection with the allegations to prevent their recurrence.

Moreover, there are no known actions that have been taken towards investigating and prosecuting those responsible for the killing of Oscar Kamau King'ara and John Paul Oulu on 5th March 2009. The Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, noted in his follow-up

⁴¹ UN Doc. CCPR/C/KEN/CO/3.

⁴² *Ibid.*

⁴³ UN Doc. CAT/C/KEN/1, para 20.

⁴⁴ *Ibid.*

country recommendations of 26th April 2011, which analyses the progress made by Kenya in implementing the recommendations made by the former Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, following his visit to the country from 16 to 25 January 2009 (A/HRC/11/2/Add.6), that the Government was requested to provide information on the investigations and criminal proceedings regarding the killings of Mr. Kingara and Mr. Oulu and that two years later, the Government had yet to respond to these communications.⁴⁵ The Special Rapporteur further noted that the Government failed to accept international offers to provide criminal investigation assistance to identify those responsible for the 5 March 2009 killings of the two prominent human rights defenders.⁴⁶

In 2012, the Human Rights Committee expressed concern "at the slow pace of investigations and prosecutions into allegations of torture, extrajudicial killings by the police and by vigilante groups. The Committee is particularly concerned that the State party has not conducted conclusive investigations of alleged excessive use of force by the police during operation Okoa Maisha in Mt. Elgon and operation Chunga Mpaka in the Mandera district as well as Operation Mathare. The Committee is also concerned at the lack of conclusive investigations and prosecutions into the killing of Oscar Kamau King'ara and John Paul Oulu who cooperated with the Special Rapporteur on extrajudicial, arbitrary and summary executions during his visit to the State party in 2009. The Committee is further concerned at regular reports of serious and unlawful use of force by State security forces and as to whether adequate training and planning procedures are in place to prevent excessive use of force in security operations (arts. 2, 6 and 7)."

The Human Rights Committee recommended that "(t)he State party should strengthen its efforts to ensure that police officers suspected of committing extrajudicial killings and other offences are thoroughly investigated and perpetrators brought to justice, and that the victims are adequately compensated. The State party should also conclude investigations into the killing of Oscar Kamau King'ara and John Paul Oulu and ensure that the alleged perpetrators are prosecuted, and if convicted, punished with appropriate sanctions. The State party should initiate training programmes for State security officers and law enforcement officials which emphasize alternatives to the use of force, including the peaceful settlement of disputes, the understanding of crowd behaviour, and the method of persuasion, negotiation and mediation with a view to limiting the use of force."⁴⁷

ICJ Kenya, KAACR, COVAW, LRF and OMCT would recommend the State party to:

Ensure prompt, impartial and effective investigation of all allegations of excessive use of force and torture by the police and the military during the different 'operations' since 2007, to prosecute and punish perpetrators with appropriate penalties and to adequately compensate the victims;

Provide statistical data disaggregated by crime on prosecution as well as criminal and disciplinary actions against law enforcement officials found guilty of torture and ill-treatment;

⁴⁵ UN Doc. A/HRC/17/28/Add.4.

⁴⁶ Ibid.

⁴⁷ UN. Doc. CCPR/C/KEN/CO/3, para 11.

Provide tangible evidence of prosecution 2007 post-election violence cases including documenting all allegations of human rights violations which have been thoroughly investigated and that the perpetrators brought to justice, and those victims adequately compensated.

11. Death Penalty

Despite the existence of the death penalty in Kenya, President Kibaki in 2009 commuted all death sentence, nearly 4 000, to sentences of life imprisonment. The President also requested all relevant Government Ministries and departments to conduct empirical studies and engage stakeholders to determine whether the death penalty should continue in Kenya. To date, however, no such studies under this directive have been completed or published.

There has been a significant case from the Court of Appeal, *Godfrey Ngoto v Republic [2010] eKLR*, which determined that the mandatory application of the death penalty for the crime of murder was unconstitutional and “antithetical to the Constitutional provisions on the protection against inhuman or degrading punishment or treatment and fair trial.” While the case only applies to the crime of murder, the court expressly stated that the reasoning behind its rejection of the mandatory death penalty for the crime of murder might also apply to other capital crimes that carry the mandatory death sentence such as treason, robbery with violence and attempted robbery with violence.

Unfortunately, since this case, a reverse position was taken by the High Court in *Republic v Dickson Mwangi Munene [2011] eKLR*, in which it was held that the death penalty was the only sentence imposable in law for the crime of murder and that the Court of Appeal had taken a step in the wrong direction. The Court moreover stated that the President was failing to exercise his legal duty by not signing impending death warrants. These conflicting court decisions and judicial philosophy in Kenya does neither augur well nor paint a clear position with regard to the existing moratorium on the death penalty.

In its State report, the Government highlights that the Kenyan public is still not ready for the abolition of the death penalty. However, the State ought to take responsibility to ‘protect’ human life and not to be guided by the public mood. There are currently no tangible campaigns to show commitment towards its abolition.

Kenya has not acceded to the Second Optional Protocol to ICCPR and the Government seems not to consider to do so and to take clear measures in order to abolish the death penalty within its jurisdiction.

ICJ Kenya, KAACR, COVAW, LRF and OMCT would recommend the State party to:

Abolish the death penalty in line with international human rights standards, as it is an unacceptable derogation from the ICCPR’s guarantee of the right to life;
Sensitize the public on the implications of the death penalty.

Provide training to judicial officers on the interpretation and application of international human rights instruments, which would contribute towards the harmonising the divergent and conflicting judicial philosophy on the right to life principle under ICCPR;

12. Torture of Women in Kenya.

Torture against women has continued to manifest itself in so many ways including the killing of old female members of the society. In Kisii County, Kenya the practice of the burning of “witches” has been allowed to go on unabated. A Study conducted showed that elderly women lost their lives or were being ostracized by the community on accusations of practicing witchcraft. The majority of women victims have been lynched alive by mobs in broad daylight. The trend of burning of witches has been traced to widows and elderly women, in attempts to target those women who are either widowed or have no children. Their property is then taken over by beneficiaries of the “mob justice”. Residents who wish to provide information about the incidences are also threatened and are labelled traitors or enemies of the community. The authorities have been unable or unwilling to curb the menace. Often, state security agents are unable to protect the women accused of being “witches” by claiming inadequate resources to respond appropriately and lack of information because community members are unwilling to provide the same. However, it has been established that even where video evidence exists that shows the perpetrators of such crimes, no-one is arrested or indicted for assault, causing grievous bodily harm, murder or arson, all crimes addressed under Kenya’s Penal Code. The Witchcraft Act, chapter 67 of the Laws of Kenya, which came into force in 1925, is way too archaic and provides no sanctions likely to deter the burning of witches. The law is part of a number of statutes passed during the early independence of Kenya and is yet to conform to the current Constitution of Kenya.

12.1 Deprivation of Life and Security of women

Article 26 of the Constitution of Kenya provides for the right to life. “A person shall not be deprived of life intentionally, except to the extent authorised by” the Constitution or other written law. Further Article 29 on the security of the person states that “every person has the right to freedom and security of the person, which includes that right not to be”...”subjected to any form of violence from either public or private sources; subjected to torture in any manner, whether physical or psychological; treated or punished in a cruel, inhuman or degrading manner.”

ICJ Kenya, KACR, COVAW, LRF and OMCT would recommend the State party to:

Take action and investigate and prosecute those found to have participated in the burning of any persons suspected of witchcraft.

Provide remedial action and protect women specifically elderly women and widows where the security of life is vulnerable and protect their property.

Amend the Witchcraft Act to conform to the Constitution of Kenya and to specifically sanction acts of unilateral "justice" through burning or mob justice and provide for criminal sanctions.

12.2 Violence and Discrimination Against LGBTI

In 2011, the Kenyan Human Rights Commission interviewed LGBT Kenyans to document the current discrimination and abuses that these Kenyans face.⁴⁸ The findings indicate that LGBT Kenyans are harassed by state officials, subjected to physical violence and death threats, and generally stigmatized by their families and society at large as a result of their sexual orientation or gender identity. LGBT Kenyans are routinely harassed or abused by the police, held in "remand houses" beyond the constitutional limit without being informed of the charges against them, and brought into court on false charges. Additionally, interviewees reported that there is a group of corrupt police officers who extort and blackmail LGBT individuals with the threat of arrest and imprisonment if they do not pay those officers bribe money. The report also indicates that other Kenyan citizens physically and sexually assault LGBT Kenyans.⁴⁹ In one case, three interviewees reported being gang-raped by groups who "specifically targeted gay men and raped them

12.3 Domestic Violence, including Marital Rape

According to Article 45 of the Constitution, the rights of women and men are equal at the time of marriage, during the marriage and at the dissolution of the marriage. However, the Bills that would give effect to this Article, the Matrimonial Property Bill and the Marriage Bill, 2012 are now before the office of the Attorney General awaiting publication. The concern therefore is that these Bills have been slated to pass only 5 years after the passing of the Constitution under the 6th Schedule while there is an urgent need to pass the Bills related to family and family property.

⁴⁸ Kenya Human Rights Commission, *the outlawed amongst us: A study of the lgbti community's search for equality and non-discrimination in kenya 19* (2011).

⁴⁹ *Supra*.

An additional concern is the fact that the draft Marriage Bill endorses polygamous marriages which undermine non-discrimination and equality between men and women. An issue that arises with polygamous families is the non-protection women receive in such a union that is further complicated in the event of death of the husband. Often polygamous unions have led to family rivalry and been the breeding ground for violent acts against women, neglect of children and at times the death of family members in a fight for the available resources. This is largely complicated by lack of the harmonization of laws on Marriage and protection of property in line with the Constitution of Kenya.

In relation to domestic violence, the following Bills have been drafted are with the Commission for the Implementation of the Constitution (CIC):⁵⁰

a) *The Protection Against Domestic Violence Bill 2012* seeks to protect and offer relief to victims of domestic violence. As for now there is no single legislation that explicitly prohibits domestic violence. Domestic Violence is not an offence per se and to charge a perpetrator for that offence one has to use the offence of assault causing actual bodily harm, which is provided for in section 251 of the Penal Code.⁵¹ Moreover, marital rape is still not recognized as an offence in the Kenyan legislation. During the 48th CEDAW Committee Session that took place between 17 January and 4 February 2011 in Geneva, there were concerns about Kenya's reluctance to expressly prohibit acts like polygamy and marital rape that discriminate against women.

Intimate partner violence (including marital rape) is a common problem across Kenya and is overwhelmingly driven by factors ranging from the low status society accords to women, to poor policy and legal frameworks that condone the prevalence of domestic violence.⁵² According to the 2008-09 Kenya Demographic and Health Survey, 13 per cent of married women were raped by their male partners. Marital rape remains one of the under-reported violent crimes because it is still socially tolerated. Another aspect is that women who are abused fear reporting the violence since they are financially dependent on their spouses.

b) *The Marriage Bill 2012* seeks to amend and consolidate all the laws relating to marriage. Currently there are several laws dealing with marriage in Kenya, which means that there is no uniform standard of assessing gender justice within the family. Family law is regulated under four different legal regimes, namely: African customary laws of the various cultural groups; Hindu marriage and Divorce Act, Mohammedan Marriage and Divorce Act, and the Marriage Act and the African Christian Marriage and Divorce Act. However, the efforts to legislate the Marriage Bill is frustrated by lack of political will which is anchored on negative patriarchal and cultural dispensations and fear that this law will give women more power.

c) *The Matrimonial Property Bill 2012* makes provisions for the rights of spouses in relation to matrimonial property. This has been a thorny issue especially for women who are disinherited once their spouses pass

⁵⁰ The Bills will require to be introduced in the 11th Parliament and may need the newly elected Members of Parliament with the Bills. The Bills faced resistance from a section of Kenyans such as religious groups and may need to undergo a review before being taken to Parliament.

⁵¹ The Penal Code Cap 63.

⁵² Gender-Based Domestic Violence in Kenya, Federation of Women Lawyers in Kenya, 2008, p. 6.

on. Currently there is no single law in Kenya dealing with matrimonial property as such. This Matrimonial Property Bill also lacks political support.

Between 11 and 15 June 2012, the Commission for the Implementation of the Constitution held Public Forums on the Family Bills in various Counties in Kenya. The forums were meant to get views from the public and some of the issues that formed the basis of the discussion include⁵³; equality at the time of marriage, during marriage and dissolution of marriage, what constitutes matrimonial property, protection from domestic violence among others. This is a great step in the enactment of the Family Bills that have taken decades. It should be noted with concern that in the past similar legislation like the Domestic Violence (Family Protection) Bill was never voted on.

ICJ Kenya, KAAACR, COVAW , LRF and OMCT would recommend the State party to:

Enact urgently the Protection Against Domestic Violence Bill (2012) for the prevention, prohibition and punishment of domestic violence, as the majority of cases of domestic violence remain unreported or at least unpunished;

Enact urgently the Marriage Bill 2012 and the Matrimonial Property Bill 2012;

But take concrete measures to prohibit polygamous marriages;

Launch a public awareness campaign to sensitize the Kenyan society to the gravity of domestic violence and to eradicate cultural beliefs regarding the subordinate status of women both in the family and society;

The recognition of marital rape as a crime and a form of torture in Kenyan law with adequate sanctions;

Investigate, prosecute, punish and redress domestic violence with due diligence.

12.4 Female Genital Mutilation

The Prohibition of Female Genital Mutilation Act of 2011 (the Prohibition of FGM Act) was assented to on 30 September 2011, which is a milestone in the fight against female genital mutilation (FGM). The purpose of the Act is 'to prohibit the practice of FGM, to safeguard against violations of a person's mental or physical integrity through the practice of FGM and for connected purposes.'

The Prohibition of FGM Act creates a number of offences in regards to the practice of FGM as well as a Prohibition of FGM Board. This board is yet to be constituted and this is harbouring the implementation of the Prohibition of FGM Act as the board is intended to be the body charged with ensuring adherence to the Act. Membership of the board is also planned as inward looking in that most of the members are to be

⁵³ <http://cickenya.org/news/cic-hold-public-forums-family-law-bills>.

derived from the Ministry of Gender, Social Development and Children. This Ministry is tasked with policies that appertain to Gender, Social Development and Children. The Act also provides that the cabinet secretary shall do the appointment of the three other members of the board.

A number of policies and studies concerning FGM have been carried out. Key among them is the National Plan of Action for the Elimination of Female Genital Mutilation 2008-2012 that provides a road map on the implementation of anti- FGM activities. Moreover, there is an initiative to draft an anti- FGM policy that will foresee in the implementation of the Prohibition of FGM Act.

The enactment of the Children Act 2001 prohibits FGM of children, that is, anyone below the age of 18 years. Section 14 of the Act protects children against harmful cultural practices. Although this may be interpreted as having created a loophole in that it did not prohibit FGM among adults, there now exists the Prohibition of FGM Act as stated above that takes cognizance of different aspects and levels of the practice.

The Constitution also seeks to address issues of FGM and other forms of discriminative cultural practices. Article 2 (4) of the Constitution provides that 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. This provision seeks to address issues such as FGM and wife inheritance that is conducted under the guise of customary law.

Furthermore, Article 44(3) of the Constitution states that a person shall not compel another person to perform, observe or undergo any cultural practice or rite. This stipulation speaks to persons in the community who coerce women to undergo some practices that are contradictory to the Constitution. Again, these include wife inheritance, FGM and forced/early marriage among others.

However, the passing of the laws that prohibit the practice of FGM has not necessarily acted as a deterrent to immediately stop the practice. It is a deeply rooted practice and changing attitudes, beliefs and practices is a slow process. With the Constitution stating the rights of Kenyans to observe their cultures, this is being misconstrued in many communities to imply that they can therefore continue practicing FGM and wife inheritance. Criminalization of FGM has also driven the practice underground in some instances with new shifts in the practice including medicalization of the same. In such cases, some medical personnel such as nurses have been reported to be doing it in what is seen to be "sanitized" environments. This raises concerns about the implementation of Ministry of Health policies that provide guidelines on the conduct of health workers and health service providers.

The reasons given for supporting the practice among practicing communities are varied. Some communities indicate that the practice is part of their culture and traditions while others strongly indicate it is a religious practice. Among the Somali communities for example, the practice is seen a means to preserve virginity while the Maasai indicate that it ensures women are not promiscuous.⁵⁴ In an interview with IRIN one of the FGM practitioners indicated that "When you cut a girl, you know she will remain pure until she gets

⁵⁴ <http://www.irinnews.org/InDepthMain.aspx?InDepthId=15&ReportId=62470>.

married, and that after marriage, she will be faithful".⁵⁵

There are a number of interventions by non-State actors addressing the practice through community awareness and education, alternative rites of passage for girls and young women in practicing communities, creation of rescue centres and schools to provide a safe haven and education for girls who escape the practice of FGM and early marriage. These interventions at times fall short of addressing the actual reasons associated with the practice such as creation of agency and status for both girls and women. Education of girls is an important avenue of demonstrating the difference education can make and as a tool for expanding the spaces for agency for girls and women.

Some interventions⁵⁶ have also proved that while women and girls have been educated and are sensitized on the dangers of FGM, it is important to also educate the men and boys on the harmful effects of FGM. In some societies, it is the women who are perpetrators of the custom and educating the men and boys help in protecting the girls from the vice.

ICJ Kenya, KAACR, COVAW, LRF and OMCT would recommend the State party to:

Urgently constitute the Prohibition of Female Genital Mutilation Board;

Provide equal education to girls;

Provide adequate resources to the implementation of the Prohibition of Female Genital Mutilation Act;

Launch a public awareness campaign on the new laws on FGM, the gravity and the consequences of FGM;

Live up to the provision of article 5 of the UN Convention on the elimination of all forms of discrimination against women and to eliminate cultural traditional practices that perpetuate discrimination on and gender stereotyping of women.

12.5 THE PLIGHT OF FEMALE OFFENDERS

Women who find themselves in conflict with the law are more vulnerable to cruel, inhumane and degrading treatment as compared to their male counterparts. This is attributable to other socio-economic factors such as the fact that women are less economically empowered hence even raising bail is a great challenge and also the fact that many women in conflict with the law are illiterate or semi-illiterate in comparison to the men are in conflict with the law. Apart from this, women in conflict with the law have to deal with other challenges in penal institutions that limit their capacity to engage the criminal justice system. These challenges include:

⁵⁵ Ibid.

⁵⁶ "Baseline Survey Report: Stop Violence Against Girls in School Project" 2011, Catholic University, Actionaid, CDC and GCN

a. Inadequate health care facilities

Rule 23 of the Standard Minimum Rules for the Treatment of Prisoners provides that *In women's institutions there shall be special accommodation for all necessary prenatal and post-natal care and treatment.* Despite this provision being part and parcel of our law, the quality of care provided to pregnant and lactating mothers in conflict with the law is wanting. These women require special care including special diets and proper nutrition however the same is unavailable in the Prisons and they have to make do with whatever food is offered in prison. This affects the growth and development of the babies. This conditions compromise their engagement with the criminal justice system as they are more worried about their health and that of their children than the court proceedings.

Due to the low budgetary allocations female inmates have to depend on well wishers to donate essential things such as sanitary towels. In instances where there are no well-wishers to donate the sanitary towels the women have to improvise and the material that the female offenders use are unhygienic as they are not properly cleaned. This makes them vulnerable to infections within their reproductive tract yet when they get these infections the Prisons are unable to meet the costs. Others depend on their families to bring to them these essential commodities but the calamity is that once they are behind bars, most inmates are rejected by their families hence have nobody visiting them. Those who are lucky enough to have their families deposit some 'pocket' money for their use can purchase the sanitary towels however at times the prison authorities deny them access to these funds hence are in the same predicament as those who are not visited by their families. Where the prisons are supplied with sanitary towels priority is given to the convicts since in the opinion of Prison authorities pre-trial detainees are being held on behalf of the police hence are not a major concern.

b. Sexual abuse and exploitation

Women who find themselves in behind bars are more vulnerable to abuse and exploitation by law enforcement officers compared to their male counterparts. The abuse may be perpetrated by prison officers, police officers or even male inmates. Due to the challenges face the Police during transportation of inmates to and from the courts, male and female inmates may be pooled together⁵⁷ and in such occasions they exposed to sexual abuse and exploitation by male prisoners counterparts or even male Police/Prison officers. The issue is aggravated by the fact that in some court stations there are no separate holding cells for men and women⁵⁸ and this exposes the women to further exploitation from male offenders. Since there are no mechanisms to complain and even if such mechanisms were to exist the female inmates would probably not report as they would think that no-one would believe that they were sexually violated. In other instances due to the hardships they face in prison and the fact that they have been rejected by their families some female offenders end up prostituting themselves to male offenders for as little as fifty shillings (50.00). Some end up pregnant, infected with sexually transmitted infection and/ or HIV.

⁵⁷ This was noted in Meru Prison where male and female inmates are transported to court together.

⁵⁸ *ibid*

ICJ Kenya, KAACR, COVAW, LRF and OMCT would recommend the State party to:

Increase budgetary allocation for prisoners to ensure supply of adequate sanitary towels to female prisoners;

Ensure separate holding area for female and male prisoners especially in the courts;

Increase budgetary allocation to the National Police Service to ensure male and female prisoners are transported separately to and from the court. They should also ensure that during the transportation, female officers accompany the female prisoners.

12.6 Health and Reproductive Rights

Article 43 (1) (a) of the Kenyan Constitution states: “Every person has the right to the highest attainable standard of health which includes the right to health care services, including reproductive health care.”

The Kenya National Commission on Human Rights (KNCHR) carried out a public inquiry in 2011 on Sexual and Reproductive Health Rights violations in Kenya. The inquiry highlighted mainly that citizens stated their inability to plan their families due to their lack of awareness of family planning measures and lack of family planning methods.⁵⁹ Kenya has made key commitments towards Sexual and Reproductive Health Rights (SRHR) but their actualization has not been achieved yet. Maternal health care has more often than not been ignored. According to a report that was commissioned by COVAW⁶⁰ in Narok and Isiolo, most women cannot access health care facilities due to the long distances and the fact that there is no means of transportation compounds access to health care. In combination with the high fees at hospitals, women opt to give birth at home.

There are reports that women are detained once they have delivered and not able to pay the fee. Detention of women specifically in public hospitals has continued to be practiced despite the fact that it deprives the women an opportunity to earn a living that would eventually be able to pay outstanding bills and feed the children. The women are at times denied food and therefore are held under conditions that cause psychological torture to them. The act of detaining women in hospitals for non-payment of bills also denies the women the human dignity as provided for in the Constitution of Kenya at Article 28.

Article 26(4) of the Constitution provides that abortion is not permitted unless the life or health of the mother is in danger, or if permitted by any other written law. While Kenya is a secular State, religious beliefs that border on religiosity and fundamentalisms are always used to promote anti-choice messages on matters of women’s access to safe abortion. For this reason most issues surrounding abortion and reproductive health rights have been left to general interpretation.

⁵⁹ KNCHR 2011, Realising Sexual and Reproductive Health Rights in Kenya: A myth a reality - A report of the public inquiry into violations of sexual and reproductive health rights in Kenya.

⁶⁰ COVAW (K) 2012, Experiences of child birth by women and their care providers in Narok and Isiolo.

Article 26 provides that Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life of the mother is in danger, or permitted by any other written law. The provision allows for health practitioners to provide abortion services specifically where the life of the mother is in danger. Despite this women have lost their lives even when it is clear that an abortion in a safe environment is necessary to preserve the life of the mother.

During the constitutional review process between 2008 and 2009, there emerged two schools of thought on in regard to Article 26(4) which to date has continued to polarise communities and religious groups in regard to the constitutional provision on abortion. The anti-abortion campaigners are mainly driven by the religious groups. In Kenyan majority of the population, at least 70% ascribe to the Christian faith.

ICJ Kenya, KAACR, COVAW LRF and OMCT would recommend the State party to:

Improve access to equitable family planning services for all;

Review its abortion laws to ensure that women do not have to undergo life-threatening clandestine abortions.

Promote dialogue amongst communities and religious groups on reproductive health.

12.7 Sexual slavery and servitude

The Kenya Constitution prohibits any person being held in slavery or servitude.⁶¹ However Beading of Girls is a practice that involves young girls selected forcefully for the purpose of providing sexual services to Morans (Young warriors of the community). The practice is prevalent in the Samburu Community in Kenya and involves giving a young lady a bead necklace which signifies that she has been selected by a warrior as a “temporary wife” for the sole purpose of his sexual gratification. In the event the young girl gets pregnant, the pregnancy is required to be terminated by force based on the fact that it is taboo for the child to be born as the warrior and the beaded girl are from the same clan.

The practice is a “silent” yet accepted as a contemporary form of sexual slavery. This practice affects girls as young as seven (7) years old and puts them at risk of ill health, nips their education prospects and dims their economic dreams. Most importantly, it has direct and dire consequences on the SRHR (Sexual Reproductive Health and Rights) of girls and young women. The culture gives rise to numerous human rights violations, including psychological abuse experienced by young girls who undergo the practice and have to bear the brunt of unintended pregnancies thereafter.

Although cultural practices that are harmful to women and against the Constitution of Kenya are prohibited proactive measures need to be taken to stop their perpetuation. This includes providing legal criminal sanctions, education of community members and rescue of girls subjected to harmful cultural practices.

⁶¹ Article 30 of the Constitution of Kenya

Unfortunately adequate resources are not provided for this and thereby allowing the continuation of practices with little resistance from the State.

ICJ Kenya, KACR, COVAW, LRF and OMCT would recommend the State party to:

Take remedial measures to safeguard the lives of young girls and women subjected to sexual slavery arising out of harmful cultural practices;

Take legislative and administrative measures to sanction the practice of sexual slavery;

Provide adequate resources and funds towards curbing the perpetuation of sexual slavery and other harmful cultural practices;

13. Torture of Children in Kenya.

13.1 Age of Criminal responsibility

The age of criminal responsibility in Kenya is still set at 8 years of age .

ICJ Kenya, KACR, COVAW, LRF and OMCT would recommend the State party to:

Raise the minimum age of criminal responsibility in order to bring it in line with the generally accepted international standards

13.2 Torture of Children

Children in Kenya experience torture mostly at the hands of security forces, in institutions (CCIs) and even in home settings. A recent example is a case of a youth, 19 years old, from Pokot district who was tortured by the Kenya police in 2009 when he was a child herding his father's cows but mistaken for a cattle rustler. The boy's case has been widely covered in the Kenyan media. Even though the Police Commissioner promised to bring the perpetrators to book within seven days, nothing has been done so far yet the youth is unable to make a family due to the injury caused by the police.

This prevalence of torture and other forms of violence against children in Kenya can be well illustrated by the voices of Internally Displaced Children (IDCs) from different parts of Kenya specifically the Rift Valley and western provinces that they presented at the Trust, Justice and Reconciliation Commission (TJRC) hearing in December 2011 in Nairobi. Prior to the presentation, over 100 IDCs held a two days workshop organized by the Provincial Children Network of Rift Valley and KACR in Nakuru. The children shared their experiences on the various physical, psychological and emotional violence and torture that they faced following the post election violence in 2007. Below a sample experience that a child shared in his own words:

After two years of hardship in Nakuru, 2002, my mother decided to take us back to our father who was working in Mombasa as she thought it was also his responsibility to bring us up as our biological father. This act of my mother brought a sign of relief to us but it was not after the divorce, my father remained and they had a daughter with the stepmother. I was 3 years old by that time. I could cook for the whole family. Imagine cooking a meal for five people on a stove in my age. I would be told to go fetch water using a ten-litre Jerri cane to fill a sky plast of 125 litres a distance of about 2km from our home. I would also be told to wash cloths for my brother and my stepsister and I which I could do very strenuously I also face severe beating from the stepmothers on the failure to perform the duties. After about one year of hard life in Mombasa we went upcountry for another miserable life. The work upcountry increased tremendously. After my father returned to Mombasa all the work was pressed against of our chest of my brother and I. We were supposed to do all the house chores as my stepmother shouted orders from the bedroom on which in failure to carry them out we received firewood from a distance, cook, wash clothes and feed her babies as they had gotten another child. This was very difficult for my brother and me. To top it up we could receive thorough beating in the morning if we could not wake at her first call for us to wake up. This inflicted a lot of pain to us both physically and psychological as I was very sad wondering why this was happening to us. Later, in 2006 my mother came to our rescue and we went with her to Nakuru again where a happy life stated. The recommendation I make to TJRC is that they should ensure that these violations happening to children should not be done and carry out the prevention measures necessary like teaching the parents, Inflicting severe punishment on the perpetrators to act as example to the whole community.

A study⁶² by the Ministry of Gender, Children and Social Development in conjunction with UNICEF shows that sexual, physical and emotional violence against children is prevalent in Kenya. The statistics were quite sobering with about 30% of children experiencing sexual, physical or emotional violence in school, at home and within the community. Of the children interviewed, approximately 30 % sought help. Most of them did not know where to seek help. This shows that most of these incidences go unreported. In cases of sexual abuse, the police are usually hesitant to take action. Where culprits are arrested, most of them are released under unclear circumstances. The community also prefers settling matters traditionally due to fear or disregard of the police.

Another interesting observation on the report is that 57.5% of the children interviewed stated that they had experienced physical violence by an authority figure, in most cases a teacher. The Constitution of Kenya outlawed canning. The Children Act 2001, The Basic Education Act and various other ministerial directives declare canning illegal. Despite the existence of these laws, the report indicates that caning in schools is still being carried out.

ICJ Kenya, KAACR, COVAW, LRF and OMCT would recommend the State party to:

Enhance protection against torture and violence against children by law enforcement agencies;

⁶²"2010 Kenya Violence against Children Study", Ministry of Gender, Children and Social Development, UNICEF and CDC.

Fast-track police reforms, which ensures a new code of conduct for service members prohibiting torture and violence against children;

Fast track reforms in the Teachers Service Commission to ensure corporal punishment in schools is abolished;

Establish a complaints mechanism, follow up procedure and support services for children who have been tortured and abused;

Recommend the state party to review the Children Act 2001 to include a framework on diversion, "diverting" children in conflict with the law from the criminal justice system.

14. List of Recommendations to the State

ICJ Kenya, KAACR, COVAW , LRF and OMCT would recommend the State party to:

- While ratified treaties form since the promulgation of the 2010 Constitution part of Kenyan law, urgently adopt and implement required appropriate laws and policies to guarantee full compliance in the domestic legal system with the obligations assumed under the CAT and other international treaties;
- Include, without delay a definition of torture in its penal legislation conform Article 1 of the Convention against Torture as a minimum. The definition should go hand in hand with fast tracking and prioritising essential Bills to combat torture such as the Torture Prevention Bill, the Coroners' Bill, and the Ratification of Treaties Bill among others;
- Enact anti-torture legislation that ensures that all acts of torture and cruel, inhuman and degrading treatment or punishment are punishable by appropriate penalties taking into account their grave nature, with specific provisions that outlaw and penalise torture and other forms of violence against women and children and which contains specific enforcement provisions and mechanisms;
- Abolish the death penalty in line with international human rights standards as it is an unacceptable derogation from the ICCPR's guarantee of the right to life;
- Provide training to judicial officers on the interpretation and application of international human rights instruments which would contribute towards harmonising the divergent and conflicting judicial philosophy on the right to life principle under the ICCPR;
- Sensitize the public on the implication of the death penalty;
- Reform practices and repeal national laws (Penal Code, Criminal Procedure Act, Evidence Act, Public Order Act etc.) to prohibit any deportation, extradition, rendition, expulsion, return where an individual would appear at risk of torture or other ill-treatment;
- Address the problem of arbitrary arrests and police corruption through adequate investigations and penalties as well as police training;
- Reform the bail system;
- Ensure that all counter-terrorism measures comply with its international obligations, including the ICCPR;

- Provide statistical data disaggregated by crime on prosecution as well as criminal and disciplinary actions against law enforcement officials found guilty of torture and ill-treatment;
- Abide to its obligations under international law in relation to the absolute prohibition of torture and other ill-treatment, including the absolute principle of non-refoulement, prohibition of enforced disappearance and incommunicado;
- Ensure prompt, impartial and effective investigation of all allegations of excessive use of force and torture by the police and the military during the different 'operations' since 2007, to prosecute and punish perpetrators with appropriate penalties and to adequately compensate the victims;
- Carry out full, independent and impartial investigations into all allegations of torture, bringing to justice those responsible for authorising and inflicting torture and other ill-treatment, with proper identification mechanisms and punishments of those responsible for these crimes, including extraordinary renditions;
- Carry out full, independent and impartial investigations into the allegations of police corruption, intimidation and blackmailing, bring to justice those responsible and apply appropriate punishments;
- Ensure that all court orders and judgements are enforced, including decisions holding the State accountable for torture, ill-treatment and related human rights violations;
- Enhance public education and awareness raising campaigns to change social and cultural dimensions that underlie torture and other forms of violence, including violence against women and children;
- Ensure that all individuals subject to its jurisdiction have equal access, without discrimination, to effective remedies;
- Pass the Legal Aid Bill; and Equal Opportunities Bill
- Ensure that all individuals subject to its jurisdiction have, without any form of discrimination, the right to a fair and public hearing;
- Immediately reverse the renditions of the Kenyan nationals to Uganda and try them locally;
- Provide for effective remedies and reparations to those subjected to extraordinary renditions;
- Publicly condemn all forms of torture and ill-treatment as a preventative measure and raise public awareness about the enormous negative effect and impact of torture;
- Reinforce that information obtained by torture or ill-treatment, should not, whatsoever, be invoked as evidence in any proceedings;

- Protect detainees by allowing them prompt and regular access to a lawyer, doctor and, when the investigation so allows under appropriate supervision, family members;
- Ratify the Optional Protocol to the Convention against Torture as well as other international and regional instruments for the protection and promotion of human rights;
- As part of its judicial reform agenda fast track the training of judicial officers on interpretation and application of international human rights instruments, which would contribute towards the harmonising the divergent and conflicting judicial philosophy on the right to life principle under ICCPR;
- Advance women's participation in both the public and private sectors;
- Improve access to equitable family planning services for all;
- Review its abortion laws to ensure that women do not have to undergo life-threatening clandestine abortions;
- Enact urgently the Protection Against Domestic Violence Bill (2012) for the prevention, prohibition and punishment of domestic violence as the majority of cases of domestic violence remain unreported or at least unpunished;
- Enact urgently the Marriage Bill 2012 and the Matrimonial Property Bill 2012;
- Launch a public awareness campaign to sensitize the Kenyan society to the gravity of domestic violence including marital rape and to eradicate traditional beliefs regarding the subordinate status of women both in the family and society;
- Investigate, prosecute, punish and redress domestic violence especially against children with due diligence;
- Fast track reforms in the Teacher's Service Commission to ensure that corporal punishment in schools is abolished.
- Establish a complaints mechanism, follow up procedure and support services for children who have been tortured and abused.
- Urgently constitute the Prohibition of Female Genital Mutilation Board;
- Ensure all laws that are in force and are to be enacted that intended to prohibit acts of torture are adequately funded, including laws such as the Prohibition of Female Genital Mutilation Act;

- Take administrative action to address cases of harmful cultural practices such as Female Genital Mutilation and girl beading (sexual slavery) by providing adequate action plans to eradicate the practices and providing Government funding, personnel (human resource) and good will.
- Provide adequate facilities and basic needs for children in custody with their mothers.
- The Children Act, 2001 be amended to improve section 15 on child offenders in tandem with the constitution of Kenya 2013.
- Training and capacity building of investigators, judges, magistrates, police prison offenders and probation officers on child friendly skills of administrative of juvenile justice.
- Build the capacity of child friendly courts in all counties in Kenya.
- Set up specialized unit for children with the national police service.
- Provide logistical support to all juvenile justice agencies.
- Equip all child protection units existing in police stations with necessary facilities for child offenders.
- Sufficient funding set aside to the national budget for the Juvenile Justice Administration.
- Provide equal education to girls;
- Launch a public awareness campaign on the new laws on FGM, the gravity and the consequences of FGM;
- Live up to the provision of article 5 of the UN Convention on the Elimination of All Forms of Discrimination against Women and to eliminate cultural and traditional practices that perpetuate discrimination and gender stereotyping of women;
- Implement all the Concluding Comments, Observations and Recommendations of the various UN Treaty Bodies and Special Procedures.

15. Questions List of for the State

- Was the second periodic report circulated for the attention of the non-governmental organisations operating in the country?
- Can the State demonstrate what type of follow-up actions it has carried out in relation to the implementation of the Concluding Comments and Observations and Recommendations of the various UN treaty Bodies and Special Procedures?
- How has the State demonstrated its commitment towards conducting investigations of extra-judicial killings perpetrated by police and other law enforcement agencies?
- Is there any available data on the number of perpetrators accused of extra-judicial killings that have been convicted and the nature of the sentences relating to cases of extrajudicial execution?
- Which effective measures has the State taken to prevent abuse of police custody, torture and ill-treatment? What has the State done to investigate death in police custody including allegations of torture and ill-treatment?
- What steps has Kenya taken to abolish the death penalty? Has any study been completed or published on the question whether the death penalty should continue in Kenya?
- What steps is Kenya taking to enact the Prevention of Torture Legislation?
- Does the State possess disaggregated data on information of filed complaints by victims and disciplinary and criminal measures taken against the perpetrators (law enforcement officers or persons in authority)?
- What mechanisms and strategies does the State have to disseminate the past and present Concluding Observation and Recommendations of the UN Treaty Bodies in relation to violence against children to children and the children sectors in Kenya?
- What follow-up measures have been taken to prosecute security forces for child abuse regarding the incidence in Turkana?
- What steps has the State taken to reverse the rendition of Kenyan citizens to face trial in Uganda?
- What steps has the State taken to implement the right to remedy to victims and survivors of torture?
- Has the State developed a database that contains information on actions taken by the government to compensate and rehabilitate victims of torture or related violence?