

KENYA

**Second Periodic Report on the Implementation of the
Convention against Torture and Other Cruel, Inhuman
or Degrading Treatment or Punishment (CAT/C/KEN/2)**

Alternative report to the Committee against Torture

presented by

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1. Focus of the report

1. Enforced disappearance is a multiple and continuous violation of several human rights. It is thus closely related to the prohibition of torture and other cruel, inhuman or degrading treatment.¹ According to Article 1, para. 2, of the Declaration on the Protection of all Persons from Enforced Disappearance (hereinafter, “1992 Declaration”) “Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, [...] the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment [...]”.² In that sense, the United Nations Special Rapporteur on Torture declared that “to make someone disappear is a form of prohibited torture or ill-treatment, clearly as regards the relatives of the disappeared person and arguably in respect of the disappeared person or him/herself”.³ In fact, international jurisprudence recognizes that the victims of enforced disappearance are also subjected to a violation of the prohibition of torture.⁴
2. In this sense, in several of its conclusions and recommendations on periodic reports, the Committee against Torture (hereinafter “CAT”) has analysed the situation and legislation of States parties concerning enforced disappearance of persons in order to determine its compatibility with the Convention against Torture and other Cruel, Inhuman or Degrading Treatments (hereinafter “Convention against Torture”).⁵ In the case of Kenya, while the State party does not include references to the existing legal framework concerning enforced disappearance in its second periodic report, it replies to the issues raised by the CAT on this subject in its concluding observations to the initial report.⁶
3. In general, the associations submitting this alternative report share some of the doubts concerning the full implementation by Kenya of its obligations with regard to the Convention against Torture, as well as with some of the recommendations formulated by the CAT in the past. However, due to the mandate

¹ See, *inter alia*, Human Rights Committee (HRC), *General Comment No. 31 of 29 March 2004, Nature of the General Legal Obligation Imposed on State Parties of the Covenant*, para. 18. Similarly, the Working Group on Enforced or Involuntary Disappearances (WGEID), *Annual Report for 1982*, doc. E/CN.4/1983/14 of 21 June 1983, para. 131.

² It is worthwhile noting that in the preamble of the Declaration of 1992 the importance of keeping in mind the Convention against Torture “which provides that States parties shall take effective measures to prevent and punish acts of torture” is highlighted; as well as the relevant provisions of the Universal Declaration of Human Rights and of the International Pact for Civil and Political Rights which, among others, guarantees the right of all persons not to be subject to torture (Art. 7).

³ Special Rapporteur on Torture, *Interim Report 2001*, doc. A/56/156 of 3 July 2001, para. 14, see in general paras. 9-16.

⁴ See, among others, Veremuelen, *Living beyond Death: Torture or other Ill-treatment Claims in Enforced Disappearances Cases*, in *Inter-American and European Human Rights Journal*, Vol. 1 (2008), p. 164; and Pérez Solla, *Enforced Disappearances in International Human Rights*, North Carolina, 2006, p. 200. See also HRC, *Case Vicente et. al v. Colombia*, views of 29 July 1997, para. 8.8; *Case Mojica v. Dominican Republic*, views of 15 July 1994, para. 5.7; *Case Grioua v. Algeria*, views of 10 July 2007, para. 7.6; *Case Zohra Madoui v. Algeria*, views of 28 October 2008, para. 7.4; *Case Bousroual v. Algeria*, views of 30 March 2006, para. 9.8; *Case El-Megreisi v. Libya*, views of 23 March 1994, para. 5.4 and; *Case Celis Laureano v. Peru*, views of 25 March 2006, para. 8.5. See also Inter-American Court of Human Rights (IACtHR), *Case La Cantuta v. Peru*, sentence of 29 November 2006, Ser. C No. 162, para. 113; *Case Velasquez Rodriguez v. Honduras*, sentence of 29 July 1988, Ser. C No. 4, para. 156.

⁵ See, among others, Committee against Torture (CAT), *Concluding observations on Belarus*, doc. CAT/C/BLR/CO/4 of 25 November 2011; *Concluding observations on Morocco*, doc. CAT/C/MAR/CO/4 of 25 November 2011; *Concluding observations on Sri Lanka*, doc. CAT/C/LKA/CO/3-4 of 25 November 2011; *Concluding observations on Bosnia and Herzegovina*, doc. CAT/C/BIH/CO/2-5 of 19 November 2010 and; *Concluding observations on Turkey*, doc. CAT/C/TUR/CO/3 of 19 November 2010, *Concluding observations on Mexico*, doc. CAT/C/MEX/CO/5-6 of 11 December 2012.

⁶ *Second Periodic Report of Kenya to the CAT*, doc. CAT/C/KEN/2 of 28 September 2012, paras. 90-91 and 94 -97.

and field of expertise of the subscribing associations, the present document refers mostly to topics related to enforced disappearance of persons. Part of the analysis of this report is also limited to the region of Mount Elgon in Western Kenya and does not refer to the country as a whole. However, it is worthwhile signalling that the section of the report on universal jurisdiction⁷ will have a wider approach and the analysis of the current legislation will focus on the norms concerning enforced disappearance as well as those concerning torture more specifically. The omission of other topics does not imply in any way that the associations submitting this report consider that Kenya complies with all its obligations vis-à-vis the Convention against Torture or with the recommendations formulated by the CAT in the past.

4. For the reasons exposed above, the present report will take as a legal basis of reference, besides the Convention against Torture, also the 1992 Declaration.⁸

2. Background and context

From the conclusions and recommendations of the CAT (CAT/C/KEN/CO/1 of 19 January 2009)

Paragraph 8

The State party should ensure the incorporation of the Convention into its legal framework. Furthermore, the State party should, without delay, include a definition of torture in its penal legislation in full conformity with article 1 of the Convention and ensure that all acts of torture are punishable by appropriate penalties which take into account their grave nature as laid out in article 4, paragraph 2, of the Convention. The Committee urges the State party to seize the Kenya Law Reform Commission of this deficiency with a view to remedy it.

Paragraph 11

The State party should, as a matter of urgency, raise the minimum age of criminal responsibility in order to bring it in line with the generally accepted international standards.

Paragraph 13

As a matter of urgency, the State party should take immediate steps to prevent acts of torture and ill-treatment of suspects in police custody and to announce a zero-tolerance policy of all acts of torture or ill-treatment by State officials or others working in their capacity. The State party should promptly adopt effective measures to ensure that all persons detained are afforded, in practice, with the fundamental legal safeguards during detention, including the right to a lawyer, to an independent medical examination and to notify a relative. Furthermore, the State party should keep under systematic review interrogation rules, instructions, methods and practices with a view to preventing cases of torture. The State party should provide detailed 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.

⁷ *Infra*, paras. 75-86.

⁸ The associations submitting this alternative report are aware that the legally binding instrument concerning enforced disappearance is the International Convention on the Protection of All Persons from Enforced Disappearance. However, since Kenya is up to date not a State party to this instrument and since reporting on its implementation will have an autonomous monitoring body, TRIAL and WKHRW will not refer to it in this alternative report, apart from some references in footnotes.

Paragraph 21

The Committee urges the State party 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.

Paragraph 23

The State party should take vigorous steps, including the setting up of a specific legal framework, to eliminate impunity for perpetrators of acts of torture and ill-treatment by ensuring that all allegations are investigated promptly, effectively and impartially, that perpetrators are prosecuted and convicted in accordance with the gravity of the acts, and that victims are adequately compensated, as required by the Convention.

Paragraph 24

The Committee urges the State party to take the necessary measures to ensure that all individuals who may have been subject to torture and ill-treatment have the possibility to complain and their case promptly and impartially examined by the competent authorities.

Paragraph 25

The State party should take all appropriate measures to ensure that a victim of an act of torture obtains redress and has the right to a fair and adequate compensation, including the means for as full rehabilitation as possible. The State party should provide the Committee with statistical data on cases of compensation provided to victims or to members of their families.

Paragraph 28

The State party should take effective steps to ensure that all persons reporting on acts of torture and ill-treatment are protected from intimidation and from any form of reprisal as a result of their activities. The Committee encourages the State party to seek closer cooperation with civil society in preventing torture, in particular in the ongoing process of investigating and holding persons accountable for the post- election violence.

In 2011 the CAT presented the list of issues prior to the submission of the second periodic report of Kenya (CAT/C/KEN/Q/2). Among them:

- Provide updated information on the status of the draft Torture Bill, with regard to the timetable for its consideration and adoption. Please provide detailed information on the contents of this bill and state whether the bill, or any other legislation, now contains a definition of torture in full conformity with article 1 of the Convention, and whether acts of torture are punishable by penalties which take into account their gravity.
- Provide detailed information on the outcome of the reviews conducted by the Law Reform Commission to ensure that the relevant provisions of the Penal Code, Evidence Act and Criminal Proceedings Act are in conformity with the Convention.
- State the steps that have been taken to comply with the Committee’s previous concluding observations (para. 11) to raise the age of criminal responsibility in order to bring it in line with generally accepted international standards. Please provide updated information on the status of the Children’s Law (Amendment) Bill, which seeks to raise the age of criminal responsibility from 8 to 12 years. Furthermore, please provide detailed information on the acts of torture that the Children’s Act proscribes and the nature of penalties it prescribes for such acts.

- Please provide information with reference to the Committee's previous concluding observations on the allegations of widespread use of torture and ill-treatment in police custody.
- Please provide detailed information on the measures being taken to ensure that interrogation rules, instructions, methods and practices are kept under systematic review in order to prevent cases of torture.
- Please provide detailed information on the steps that have been taken to prevent acts such as the alleged extrajudicial killings and enforced disappearances by law enforcement personnel.
- Please provide information on the steps taken to ensure that the perpetrators of torture during the "Operation *Okoa Maisha*" are prosecuted and punished according to the grave nature of their acts, that the victims that lost their lives are properly identified and that their families, as well as other victims, are adequately compensated.
- Please provide detailed information on the steps taken to implement the Committee's recommendation to set up a specific legal framework focusing on the elimination of impunity for perpetrators of acts of torture and ill-treatment and ensuring that all allegations are investigated promptly, effectively and impartially. If the legal framework has been set up, please further explain whether it ensures that perpetrators are prosecuted and convicted in accordance with the gravity of their acts, and victims are compensated as required by the Convention.
- Please provide detailed and up-to-date information regarding torture related deaths without inquest, and the status of individual cases of torture that are pending in court since the consideration of the initial report.
- Please provide detailed information on the measures taken to ensure that all individuals who may have been subjected to torture and ill-treatment have the possibility to complain and their cases promptly and impartially examined by competent authorities.
- Please provide detailed information on the number of cases before the courts involving victims of torture, including victims of special police and military operations, seeking redress and compensation. Please provide detailed and up-to-date information on whether any of these cases have been resolved by the courts and the outcome thereof. Please further provide information on any new cases that have been filed since the State party's response to the Committee's concluding observations was prepared.
- Please provide detailed information about the steps taken to make reparation or compensate and rehabilitate victims of torture and/or cruel treatment.
- Please provide detailed information on the steps taken to ensure that all persons reporting on acts of torture and ill-treatment are protected from intimidation and from any form of reprisal as a result of their activities. What measures has the State party taken to seek closer cooperation with civil society in preventing torture especially in the process of investigating and holding persons accountable for the post-election violence?

* * *

On 28 September 2012 Kenya presented its second periodic report (CAT/C/KEN/2).

5. In this alternative report, TRIAL and WKHRW submit information to assist the CAT in its consideration of Kenya's second periodic report, due for evaluation in its 50th session to take place between 6 and 31 May 2013. To this end, concrete examples and instances are referred to in order to better substantiate

the allegations put forward.⁹

6. Kenya is a State party to the Convention against Torture (21 February 1997) although it has not made a declaration in accordance with article 22 of the Convention to allow the CAT to examine individual complaints nor is a party to the Optional Protocol to the Convention against Torture establishing an international inspection system for places of detention. Among others, Kenya is also a State party to the International Convention on the Elimination of All Forms of Racial Discrimination (13 September 2001), however Kenya has not recognized the competence of the Committee on the Elimination of Racial Discrimination to examine individual complaints; to the International Covenant on Economic, Social and Cultural Rights (1 May 1972), although not to its Optional Protocol, allowing the Committee on Economic, Social and Cultural Rights to examine individual communications; to the International Covenant on Civil and Political Rights (1 May 1972), although not to its Optional Protocol allowing the Human Rights Committee to examine individual communications; to the Convention on the Elimination of All Forms of Discrimination against Women (9 March 1984), although not to its Optional Protocol allowing the Committee on the Elimination of Discrimination Against Women to examine individual complaints; to the Convention on the Rights of the Child (30 July 1990) and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict (28 January 2002).
7. On 6 February 2007, Kenya signed the International Convention for the Protection of All Persons from Enforced Disappearance, which entered into force on 23 December 2010. According to Article 18 of the 1969 Vienna Convention on the Law of the Treaties, a State that has signed a treaty is under an obligation not to defeat the object and purpose of the treaty prior and after its entry into force.¹⁰
8. Kenya is also a State party to the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1 May 1972) and to the Rome Statute of the International Criminal Court (15 March 2005). Moreover, in the framework of the African system for the protection of human rights, Kenya is a State party to the African Charter on Human and Peoples' Rights (23 January 1992).
9. Since its independence, Kenya has been a dualist State. This means, international instruments ratified by the Executive required Parliament to put in place implementing legislation before they could have domestic legal effect. In a report to the Human Rights Committee (HRC), Kenya recognized that as a dualist State, "international treaties are not considered part of the law of Kenya and cannot be directly applied by the courts, tribunals or administrative authorities in the absence of domestic legislation".¹¹

⁹ For security reasons certain victims and witnesses who accepted to render their testimony for this alternative report to CAT expressly requested that their identity is not disclosed to the wider public. Hence their real names have been replaced by random initials. The names may however be disclosed to the CAT upon request. The examples used in this report were referred to TRIAL directly by the family members of the disappeared during interviews conducted in Bungoma, Western Kenya on April 2011 and/or documented by WKHRW.

¹⁰ Vienna Convention on the Law of Treaties (hereinafter, "Vienna Convention"), Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

¹¹ Third periodic report submitted by Kenya to the Human Rights Committee, doc. CCPR/C/KEN/3, 13 February 2011, para. 24.

However, with the ratification on 27 August 2010 of the new Constitution of Kenya, Kenya went from being a dualist State to being a monist one. According to Article 2(4) of the 2010 Constitution of Kenya “[...] any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid”.¹² Article 2 (5) and (6) establishes that “the general rules of international law *shall form part of the law of Kenya*” and that “any treaty or convention ratified by Kenya *shall form part of the law of Kenya under this Constitution*”.¹³

10. Hence, with the new Constitution, any international instrument ratified by Kenya automatically forms part of the law of the country without the need for it to be formally adapted at the domestic level through a specific act. Courts can thus refer directly to a treaty or convention, whether or not it is converted into a bill of Parliament. This is an important development in Kenya’s legal system and in the protection of human rights guaranteed by international instruments. However, the wording of Article 2 (6) “under *this Constitution*” leaves questions unanswered concerning the status of international law vis-à-vis the Constitution. The wording of Article 2 (6) seems to imply that the Constitution of Kenya has supremacy over other sources of law, including international law which would contravene Article 27 of the Vienna Convention on the Law of the Treaties establishing that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.
11. Mount Elgon district in Western Kenya has been subjected to land disputes contributing to insecurity and forced displacement of people since the colonial era.¹⁴ The area is predominately occupied by the Sabaot, Iteso and Bukusu communities. The Sabaots, who are considered a sub-group of the larger Kalenjin tribe¹⁵ are further divided into several sub-clans, namely the Kony, Bok, Sebei and Bongom.¹⁶ During the 1920s and 30s, the Sabaots were displaced to the areas of Chepkitale and Chebyuk when the British colonial government appropriated their land for settler farms. Tension over land escalated in

¹² Constitution of Kenya, Revised Edition 2010, Published by the Attorney-General in accordance with section 34 of the Constitution of Kenya Review Act, 2008 (No. 9 of 2008) available at: [www.kenyalaw.org/Downloads/The%20Constitution %20of%20Kenya.pdf](http://www.kenyalaw.org/Downloads/The%20Constitution%20of%20Kenya.pdf) The 2010 Constitution of Kenya replaces the independence Constitution of 1963. It was subject to a referendum which took place on 4 August 2008, approved by 67% of Kenyan voters and promulgated on 28 August 2010.

¹³ *Ibid.*, emphasis added.

¹⁴ Mount Elgon is a district in the Western Province of Kenya. It is located on the southeast slopes of Mount Elgon. Mount Elgon District is administratively divided into Kaptama and Kapsekwoy Divisions, with the latter acting as its Capital.

¹⁵ According to the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, the existence of small groups in Kenya such as the Sabaot, who are not legally recognized as separate tribes is derived “from the colonial policy of promoting assimilation of smaller communities into other dominant groups”. See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Mission to Kenya*, doc. A/HRC/4/32/Add.3, 26 February 2007, para. 21. Indigenous groups are entitled to special protection, in particular with regard to land. *Inter alia*, Art. 10 of the United Nations Declaration on the Rights of Indigenous Peoples states “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return” and Art. 26 establishes that (1) “Indigenous people have the right to the lands, territories and resources which they have traditionally owned, occupied, otherwise used or acquired. (3) States shall give legal recognition and protection to these lands, territories and resources [...]” See General Assembly, Resolution 61/295 of 2 October 2007.

¹⁶ Kenya National Commission on Human Rights (KNCHR), *The Mountain of Terror: a report on the investigations of torture by the military in Mt. Elgon*, May 2008, p. 4, hereinafter: “KNCHR report”.

particular after 1968 when the Kenyan government designated part of the Chepkitale area as a game reserve, thus forcibly displacing the communities that were established there without any consultation or compensation.¹⁷ In the following years, several resettlement and land distribution schemes were devised by the government of Kenya, namely the Chepyuk Settlement Scheme phase I, phase II and phase III. However, these schemes were controversial and marred by irregularities and did not resolve the land allocation issues.¹⁸

12. The conflict in Mount Elgon started in late 2006, in the wake of the implementation of phase III of the resettlement program, when the Sabaot Land Defence Forces (SLDF), an armed group composed largely by Sabaots, emerged to resist what they considered unfair land-allocation attempts by the government. This resistance evolved into criminal activities and over the years, the SLDF increased its control over the villages in Mount Elgon district, chasing out or killing people, occupying the land it claimed and terrorizing those who failed to follow its orders. Numerous cases of inhumane treatment, rape and sexual violence and mutilation by the SLDF have been documented by local and international NGOs.¹⁹ In particular, the SLDF resorted to cutting an ear off or sewing the mouths of anyone who refused to comply with their rules or to join them.²⁰ According to the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, over 700 killings and 120 enforced disappearances perpetrated by the SLDF had been documented by local organizations between 2006 and 2009.²¹ According to local leaders, Mount Elgon district was under the effective control of the SLDF from 2006 to 2008. Internationally, the situation in Mount Elgon was classified as a non-international armed

¹⁷ The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people noted that “The Sabaot of the Mt. Elgon area were displaced by the British and are still waiting for compensation and resettlement under the post-independence agreements between the Governments of the United Kingdom and Kenya. They provided the Special Rapporteur with copies of the plea for reparations, restitution and compensation which they presented to these Governments, but they have yet to receive satisfaction”. See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Mission to Kenya*, *supra* note 15, para. 33.

¹⁸ For more information, see Kenya Land Alliance: www.kenyalandalliance.or.ke/.

¹⁹ For a detailed examination of human rights violations committed by the SLDF and the Kenyan security forces see the following reports: Human Rights Watch (HRW), *All the Men have Gone: War Crimes in Kenya's Mount Elgon Conflict*, July 2008, hereinafter: “HRW 2008 report”; Independent Medico-Legal Unit (IMLU), *Double Tragedy: Report on Medico-Legal Documentation on Torture and Related Violations in Mount Elgon “Operation Okoa Maisha”*, August 2008, hereinafter: “IMLU report”; Médecins Sans Frontières (MSF), *Mt. Elgon: Does Anybody Care?*, June 2008, available at: www.msf.org.uk/mount_elgon_report_20080616.news (last accessed 23 January 2013), hereinafter: “MSF report”; “KNCHR report”, as well as World Organisation Against Torture (OMCT) - International Commission of Jurists, Kenya (ICJ Kenya) - IMLU alternative report to the Committee Against Torture, November 2008, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/OMCT_Kenya41.pdf.

²⁰ HRW 2008 report, *supra* note 19, pp. 4-5.

²¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, *Mission to Kenya*, A/HRC/11/2/Add.6, 26 May 2009, hereinafter: “Philip Alston report”.

conflict.²² The government of Kenya however denied this, considering the SLDF a “criminal gang”²³ with “a loose chain of command comprising of coordinators (Chairman, Secretary and Treasurer) and at the grassroots across Mount Elgon Region” and thus considered it to be “an internal *crime situation* with no prisoners of war”.²⁴

13. In addition to the land-related objectives of the SLDF, funding and support of the SLDF by local politicians also gave way to politically-motivated violence. In the presidential election of December 2007, the SLDF supported the Orange Democratic Movement (ODM) candidate, Fred Kapondi, and targeted supporters of rival parties, in particular the Party of National Unity (PNU) through which the then member of parliament, John Serut campaigned. In the aftermath of the 2007 elections, forced displacement of the families across Mount Elgon district increased as the SLDF sought to continue driving the unwanted population and political opponents from the mountain completely.
14. The response of the government to the activities of the SLDF in Mount Elgon was initially lacklustre, fostering a climate of impunity. Local human rights organizations such as WKHRW as well as international civil society and humanitarian organizations repeatedly called for action against the SLDF but the government ignored these requests. In late 2006 and 2007, the police and the paramilitary police, the General Service Unit (GSU) launched low-level security operations but these operations drew criticism from human rights groups due to allegations that police and GSU members raped women and girls and wantonly destroyed property.²⁵ Finally, on 9 March 2008, in the aftermath of the presidential election held in December 2007, the government launched a much larger joint military-police operation called *Okoa Maisha* (“Save Lives” in Swahili) to clamp down on the activities of the SLDF.²⁶ The population initially welcomed this operation, considering it long overdue but was quickly alienated by their strategy consisting of indiscriminate rounding up “all the men and *young*

²² The Rule of Law in Armed Conflicts Project (RULAC) of the Geneva Academy of International Humanitarian Law and Human Rights states “Kenya is engaged in an armed conflict in the Mount Elgon region with the Sabaot Land Defence Forces (SLDF), a non-state armed group composed of members of the Sabaot, a sub-tribe of the Kalenjin community. *This armed conflict, which is of a non-international character, is regulated by common Art. 3 to the 1949 Geneva Conventions, as well as other provisions of customary international law*”. See: www.adh-geneva.ch/RULAC/applicable_international_law.php?id_state=119, emphasis added. HRW considers that “Although the situation in Mt. Elgon may have initially been a police operation, since the Kenyan army began actively participating in operations against the SLDF in Mt. Elgon in March 2008, *fighting has risen to the level of an armed conflict under international humanitarian law* (the laws of war)”. See: HRW 2008 Report, *supra* note 19, p. 39. As a conflict of non-international character, both the Kenyan security forces and the SLDF are obliged to observe Art. 3 common to the four Geneva Conventions of 1949 (common Art. 3). In addition, the government of Kenya is a State Party to the Second Additional Protocol of 1977 to the Geneva Conventions (Protocol II), applicable to non-international armed conflicts, since 23 February 1999 and thus bound by its provisions.

²³ Kenya Police, *Operation Okoa Maisha: Update*, May 2008, available at: <http://www.kenyapolice.go.ke/News135.asp>.

²⁴ Kenya Police, *A Report on Human Rights Violations in Mt. Elgon (2008)*, available at: , p. 45, her www.scribd.com/doc/6337563/Kenya-Police-Inquiry-into-the-Mt-Elgon-violence hereinafter: “Kenya Police report”.

²⁵ HRW, *Submission to the 41st Session of the United Nations Committee Against Torture on Kenya*, 15 September 2008.

²⁶ According to the Mt. Elgon District Security and Intelligence Committee (DSIC), “Operation Okoa Maisha was composed of a military detachment, Kenyan Police, the General Service Unit, the Administration Police and the Anti-Stock Theft Police”. Further, the DSIC stated that it was composed of about 400-security force members, including 120 from the military (the so-called “20 Para Battalion”). The Chief of General Staff and the Assistant Minister for Defence stated that they deployed approximately 300 soldiers from two companies (the Alpha Company of the First Kenya Rifles, and the Alpha Company of the 20 Para Battalion). See Philip Alston report, *supra* note 21, para. 48.

boys from the ages of 13” in Mount Elgon district, taking them to military camps where they were all tortured, sometimes to death, to force them to identify members of the SLDF or the location of weapons.²⁷ This description of the government’s strategy matches the one given by Médecins Sans Frontières (MSF) according to whom “most adult male citizens in Mount Elgon have systematically been subjected to violent screening”.²⁸ Likewise, Human Rights Watch (HRW) draws attention to the fact that during the interviews, victims described “how military and police units rounded up nearly all males in Mount Elgon district, some of them children as young as 10. At military camps, most notoriously one called Kapkota, every detainee appears to have been tortured and forced to identify members of the SLDF or the location of weapons”.²⁹ The Kenya National Commission on Human Rights (KNCHR) describes the operation in the following way: “All the men and young boys from the ages of 13 were taken away by the military to their operational bases that they set up in Kaptama and Kapkota where they were all subjected to torture as a method of interrogation by the military. A number of the people taken away died as a result of the alleged torture inflicted upon them”.³⁰

15. According to the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 3,839 individuals were “screened” at Kapkota military camp to identify SLDF members.³¹ Reports by a wide range of observers and NGOs including WKHRW, the KNCHR, the Independent Medico-Legal Unit (IMLU), MSF and HRW, conservatively estimated at **over 200 the number of persons killed or disappeared by the security forces**. A lack of investigation by the government into abuses committed by State forces coupled with underreporting of cases of disappearance by the families due to fear and the presence of few NGOs in Western Kenya, makes it difficult to provide precise data on the phenomenon of enforced disappearance resulting from the operation *Okoa Maisha*.
16. Up to date, there does not exist an updated database that allows establishing with precision the number of enforced disappearances committed in Kenya. The lack of precise data and systematic information does not contribute to evidence the real dimensions of the problem of enforced disappearance. As a consequence, the investigation of cases is complicated and impunity fostered.

²⁷ KNCHR report, *supra* note 16, p. 8, emphasis added.

²⁸ MSF report, *supra* note 19, p. 7, emphasis added.

²⁹ HRW 2008 report, *supra* note 19, p. 5, emphasis added.

³⁰ KNCHR report, *supra* note 16, p. 8, emphasis added.

³¹ Philip Alston report, *supra* note 21, para. 51.

3. Codification of the offences of torture and of enforced disappearance

Art. 1 Convention against Torture

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. 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Art. 2, para. 3, Convention against Torture

An order from a superior officer or a public authority may not be invoked as a justification of torture.

Art. 4 Convention against Torture

Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Art. 4 1992 Declaration³²

All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness. 2. Mitigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance.

Art. 6 1992 Declaration³³

No order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it. 2. Each State shall ensure that orders or instructions directing, authorizing or encouraging any enforced disappearance are prohibited. [...]

Art. 17 1992 Declaration³⁴

Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified. [...] 3. Statutes of limitations, where they exist, relating to acts of enforced disappearance shall be substantial and commensurate with the extreme seriousness of the offence.

³² See also Arts. 2, 4, 6 and 7 of the International Convention for the Protection of all Persons from Enforced Disappearance.

³³ See also Arts. 6, para. 2 and 23, para. 2 of the International Convention for the Protection of all Persons from Enforced Disappearance.

³⁴ See also Art. 8 of the International Convention for the Protection of all Persons from Enforced Disappearance.

3.1 Torture

17. The Special Rapporteur on Torture established that “Impunity for the perpetrators of torture is one of the root causes for its widespread practice. To fight impunity it is important that States establish a legal framework that unambiguously prohibits and sanctions torture [...]”.³⁵ The CAT has highlighted in several occasions the importance of the obligation of codifying torture in the national penal codes.³⁶ These considerations also apply to the codification of the crime of enforced disappearance of persons.³⁷
18. No general definition of torture currently exists under Kenyan legislation.
19. As has been made clear in Kenya’s second periodic report to the CAT, the **Bill on Torture**, which includes a definition of the crime of torture and provides for punishment for such acts -thus criminalizing within the domestic legal framework the offence concerned, as requested by the Convention against Torture- has not been adopted. Neither has a date been set for its adoption. In its second periodic report, Kenya simply states “The Bill is being reviewed by the Commission on the Implementation of the Constitution [...] After review and the necessary stakeholders’ consultations, the Bill will be submitted to Cabinet for approval and onward transmission to the Parliament”.³⁸ As of April 2013, the Bill has not been transmitted to the Parliament nor considered by the Commission.
20. Similarly, in its second periodic report to the CAT the government of Kenya mentions that the **National Police Service Act, 2011** criminalizes torture and other cruel, inhuman and degrading treatment or punishment committed by police officers, and defines torture as per the Convention against Torture. The said Act establishes sentences of up to 25 years for police officers committing acts of torture and of 15 years for those who subject a person to cruel, inhuman or degrading treatment. Assented to in 2011, the Act was given a commencement date in October 2012 when the Inspector-General of the National Police Service was approved by Parliament and sworn in. However, the Act has not been fully implemented yet.
21. In the 2010 Constitution, the prohibition of torture is encompassed under the general right to freedom and security of persons. Article 29 establishes the right not to be “(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”. This cannot be considered an improvement with respect to the

³⁵ Special Rapporteur on Torture, *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, doc. A/HRC/13/39/Add.5 of 5 February 2010, para. 140. (“Study on the phenomenon of torture”).

³⁶ See, *inter alia*, CAT, General Comment No. 2 Implementation of Art. 2, doc. CAT/C/GC/2 of 24 January 2008, paras. 8-11.

³⁷ Regarding the obligation to codify enforced disappearance as an autonomous crime, see, *inter alia*, WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, doc. A/HRC/16/48/Add.3 of 28 December 2010; *1995 Annual Report*, doc. E/CN.4/1996/38 of 15 January 1996, paras. 46, 54 and 473; *2009 Annual Report*, doc. A/HRC/13/31 of 21 December 2009, para. 650; *General Comment on the definition of enforced disappearance*, 2008, para. 3; *2007 Annual Report*, doc. A/HRC/7/2 of 10 January 2008, para. 304; *2006 Annual Report*, doc. A/HRC/4/41 of 25 January 2007, para. 345; *1996 Annual Report*, doc. E/CN.4/1997/34 of 13 December 1996, para. 395; and Inter-American Court of Human Rights (IACtHR), *Case Gómez Palomino v. Peru*, judgment of 22 November 2005, Ser. C No. 136, para. 96.

³⁸ *Second Periodic Report of Kenya to the CAT*, *supra* note 6, para. 4.

independent provision on torture established in the repealed 1963 Constitution which states in section 74(1) that “No person shall be subject to torture, or to inhuman or degrading punishment or other treatment”.³⁹

22. Beside the prohibition of torture in the Constitution, section 18 of the Children Act, 2001 establishes that “18. (1) No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty.” Moreover, under Chapter 14A of the Police Code, it is stated that “(2) No police officer shall subject any person to torture or to any other cruel, inhuman or degrading treatment. (3) Any police officer who contravenes the provisions of this section shall be guilty of a felony.”
23. The Kenyan Police Act, Chapter 84 establishes a number of rules by which the Kenya police must abide in performing its duties. Article 14 (a) (2) of the Police Act on the “Control and conduct of Force in executing functions” establishes that “No police officer shall subject any person to torture or to any other cruel, inhuman or degrading treatment” while the following subsection (3) provides that “Any police officer who contravenes the provisions of this section shall be guilty of a felony”.
24. Both the Penal Code and the Criminal Procedure Code are completely silent as far as the prohibition of torture is concerned. They do not contain a definition of torture nor do they provide for any penalties applicable to this crime. This has already been subject of concern to the CAT, which referred to it in its 2008 concluding observations to Kenya’s initial report.⁴⁰

3.2 Enforced disappearance

25. Article 4 of the 1992 Declaration establishes that “all acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness”.⁴¹
26. No definition of enforced disappearance currently exists under Kenyan legislation. Neither is enforced disappearance considered a criminal offence.
27. The Kenyan Constitution of 2010 guarantees “the right to freedom and security of person, which includes the right not to be (a) deprived of freedom arbitrarily or without just cause, (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58”.⁴²
28. The Penal Code of Kenya does not define arbitrary deprivation of freedom, nor does it provide for a definition of enforced disappearance, thus failing to codify the latter as a separate criminal offence. Instead, it provides the definition of **kidnapping** and **abduction**.⁴³

³⁹ 1963 Constitution, section 74(1).

⁴⁰ CAT, *Concluding Observations on the initial report of Kenya*, doc. CAT/C/KEN/CO/1 of 19 January 2009, para. 8.

⁴¹ See also Art. 4 of the International Convention on the Protection of All Persons from Enforced Disappearance.

⁴² Art. 58 (6) of the Constitution of Kenya, 2010 states: “Any legislation enacted in consequence of a declaration of a state of emergency (a) may only limit a right or fundamental freedom in the Bill of Rights to the extent that (i) the limitation is strictly required by the emergency; and (ii) the legislation is consistent with the Republic’s obligations under international law applicable to a state of emergency”.

⁴³ Kenya Penal Code, Cap. 63, Ch. XXV Offences Against Liberty, Arts. 254 and 256.

29. Kidnapping is classified into **kidnapping** from Kenya and kidnapping from lawful guardianship. According to Article 254 of the Penal Code, “Any person who conveys any person beyond the limits of Kenya without the consent of that person, or of some persons legally authorized to consent on behalf of that person, is said to *kidnap that person from Kenya*”.⁴⁴ According to Article 255 “Any person who takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of a lawful guardian of the minor or person of unsound mind, without the consent of the guardian, is said to *kidnap the minor or person from lawful guardianship*”.⁴⁵
30. Regarding the definition of **abduction**, Article 256 provides that “Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person”.⁴⁶ Kidnapping committed in any of the forms foreseen in the Kenyan Penal Code (kidnapping a person from Kenya, Article 254 or kidnapping someone from lawful guardianship, Article 255) is considered a felony under Kenyan legislation and is subject to a penalty of imprisonment for seven years according to Article 257 of the Penal Code. No punishment is provided for the offence of abduction.
31. In addition, Article 259 of the Kenyan Penal Code provides for the offence of kidnapping or abduction “*with the intent to cause the person kidnapped or abducted to be secretly and wrongfully confined*”.⁴⁷ According to Article 259, **wrongful confinement** is considered a felony and liable to imprisonment for seven years. Article 261 extends this punishment to those who perhaps did not commit the kidnapping or abduction with the intention of wrongfully concealing or confining the person kidnapped or abducted but who are aware of it. Namely, Article 261 establishes that “Any person who, *knowing* that any person has been kidnapped or has been abducted, **wrongfully conceals or confines such person** is guilty of a felony and shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose, as that with or for which he conceals or detains such person in confinement”.⁴⁸
32. The offence provided for under Article 259 of the Penal Code –wrongful confinement- seems to be the closest to a definition of enforced disappearance in Kenyan legislation. However, the term wrongful confinement is not defined and in fact, according to Article 263 “Whoever wrongfully confines any person is guilty of a misdemeanour and liable to imprisonment for one year or to a fine of fourteen thousand shillings.” This is seemingly in contradiction with Article 261. The ambiguous terminology in these provisions may lead to confusion and cannot be said to comply with the requirement to make all acts of enforced disappearance offences under criminal law as established in Article 4 of the 1992 Declaration.
33. The definition of enforced disappearance as an autonomous offence and the specific description of

⁴⁴ *Ibid.*, Art. 254, emphasis added.

⁴⁵ *Ibid.*, Art. 255, emphasis added.

⁴⁶ *Ibid.*, Art. 256.

⁴⁷ *Ibid.*, Art. 259, emphasis added.

⁴⁸ *Ibid.*, Art. 261, emphasis added.

punishable conducts that constitute the offence are essential for the effective eradication of the practice. In fact, considering the particularly grave nature of enforced disappearance, the protection offered by criminal laws on offences such as abduction, kidnapping, wrongful confinement or murder is insufficient. The Working Group on Enforced or Involuntary Disappearances (WGEID) pointed out that “the definition of the crime in domestic law should cover all the varieties of situations covered by the generic term of ‘deprivation of liberty’. For instance, using the term ‘kidnapping’ alone is inappropriate, as it refers only to a certain type of illegal abduction”.⁴⁹ Enforced disappearance of persons is a different offence, distinguished by the multiple and continuing violations of various human rights. Often, the failure to define enforced disappearance of persons as an autonomous offence or the adoption of a particularly narrow definition has prevented the carrying out of effective criminal proceedings that encompass the constitutive elements of enforced disappearance, thus allowing impunity to be perpetuated.

34. Since 1996 the WGEID pointed out that the obligation to codify enforced disappearance as an autonomous criminal offence “applies to all States, regardless of whether acts of enforced disappearances actually take place or not. It is not sufficient for governments to refer to previously existing criminal offences relating to enforced deprivation of liberty, torture, intimidation, excessive violence, etc. In order to comply with Article 4 of the Declaration, the very act of enforced disappearance as stipulated in the Declaration must be made a separate offence”.⁵⁰ The WGEID also clarified that “[...] a plurality of fragmented offences does not mirror the complexity and the particularly serious nature of enforced disappearance. While the mentioned offences may form part of a type of enforced disappearance, none of them are sufficient to cover all the elements of enforced disappearance, and often they do not provide for sanctions that would take into account the particular gravity of the crime, therefore falling short for guaranteeing a comprehensive protection”.⁵¹
35. Enforced disappearance is however included among crimes against humanity under Kenyan legislation. Article 5 (4) of the International Crimes Act, 2008, which is the implementing legislation for the Rome Statute in Kenya, establishes that “‘crime against humanity’ has the meaning ascribed to it in Article 7 of the Rome Statute and includes an act defined as a crime against humanity in conventional international law or customary international law that is not otherwise dealt with in the Rome Statute or in this Act”.⁵² In acknowledging the definition of crimes against humanity provided for in the Rome Statute, “enforced disappearance” is codified in Kenyan legislation as a crime against humanity, that is, when it is “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.⁵³
36. The WGEID pointed out that an enforced disappearance can be qualified as a crime against humanity only when committed in a certain context,⁵⁴ therefore differentiating enforced disappearance as a

⁴⁹ WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, supra note 37, para. 23.

⁵⁰ WGEID, *1995 Annual Report*, supra note 37, para. 54.

⁵¹ WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, supra note 37, para. 11.

⁵² International Crimes Act, 2008 (entered into force on 1 January 2009), emphasis added.

⁵³ Rome Statute of the International Criminal Court, Art. 7 (1).

⁵⁴ WGEID, *General Comment on Enforced Disappearance as a crime against humanity*, 2010, para. 8.

common crime from enforced disappearance when occurring as a crime against humanity. Moreover, the WGEID highlighted that “experience shows that enforced disappearances often do not occur as part of a widespread or systematic attack against civilians. In this perspective, criminalizing enforced disappearance in domestic law only when committed in this specific context implies that many acts of enforced disappearances remain outside the scope of domestic criminal law and the jurisdiction of national courts”.⁵⁵ The WGEID also clarified that “[...] it follows that States cannot limit the criminalization of enforced disappearances only to those instances which would amount to crimes against humanity in the sense of the ICC Statute, but should encompass in the definition of the offence any kind of such act”.⁵⁶

37. This difference is not currently mirrored under Kenyan legislation, which refers only to enforced disappearance when occurring as a crime against humanity, reproducing the particularly narrow definition of enforced disappearance of the Rome Statute (literally reproduced in Schedule 1 of the International Crimes Act, 2008). Under the Rome Statute, enforced disappearance is defined as “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, *with the intention of removing them from the protection of the law for a prolonged period of time*”.⁵⁷ In the 1992 Declaration, the element of intention is not included. Any act of enforced disappearance is only said to have the consequence to place “the persons subjected thereto outside the protection of the law”.⁵⁸
38. The problem with the element of intentionality included in the Rome Statute is that it imposes in practice an almost impossible burden of proof. The independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, has pointed out that the element of intention in the definition of enforced disappearance in the Rome Statute is a subjective element “which in practice will be difficult to prove. The perpetrators usually only intend to abduct the victim without leaving any trace in order to bring him (her) to a secret place for the purpose of interrogation, intimidation, torture or instant but secret assassination. Often, many perpetrators are involved in the abduction and not everybody knows what the final fate of the victim will be”.⁵⁹ The expert stressed out that “in any case, if criminal law is to provide an effective instrument of deterrence, the definition of enforced disappearance in domestic criminal law [...] has to be broader than that included in the ICC Statute”.⁶⁰ Along the same line, the WGEID expressed reservations on the specific definition of enforced disappearance resulting from the

⁵⁵ WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, *supra* note 37, para. 16.

⁵⁶ *Ibid.*, para. 18. In the conclusions formulated by the WGEID it is pointed out that “codification of an autonomous offence of enforced disappearance [should be] sufficiently broad to cover enforced disappearances committed as part of a widespread or systematic attack against a civilian population, but also isolated cases” (para. 62.b).

⁵⁷ Rome Statute of the International Criminal Court, Art. 7 (2)(i).

⁵⁸ 1992 Declaration on the Protection of all Persons from Enforced Disappearance, Art. 1(2).

⁵⁹ Commission on Human Rights, *Report submitted by Mr. Manfred Nowak, independent expert charge with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances*, doc. E/CN.4/2002/71 of 8 January 2002, para. 74.

⁶⁰ *Ibid.*

Rome Statute and it repeatedly recommended that “[...] the definition of enforced disappearance provided for by the Rome Statute be interpreted by the national authorities in line with the more adequate definition provided for in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearances”.⁶¹

39. For the above reasons, at present, Kenyan criminal legislation concerning enforced disappearance fails to meet the requirements of Article 4 of the 1992 Declaration.

3.3 Enforced disappearance as a continuing offence

40. Article 17 (1) of the 1992 Declaration establishes that acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified”. In a general comment about this provision, the WGEID noted that *“The definition of ‘continuing offence’ (para. 1) is of crucial importance for establishing the responsibilities of the State authorities. Moreover, this article imposes very restrictive conditions. The article is intended to prevent perpetrators of those criminal acts from taking advantage of statutes of limitations. It can be interpreted as seeking to minimize the advantages of statutes of limitations for the perpetrators of these criminal acts. At the same time, as the criminal codes of many countries have statutes of limitations for various offences, paragraph 2 stipulates that they shall be suspended when the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective. The Covenant refers in particular to the possibility of having ‘an effective remedy’ when a human rights violation ‘has been committed by persons acting in an official capacity’. Owing to the seriousness of acts of enforced disappearance a number of irrevocable rights are infringed by this form of human rights violation, with obvious consequences in criminal law. Recent developments in international law require clear priority to be given to action against the serious forms of violations of human rights in order to ensure that justice is done and that those responsible are punished. Thus, according to article 1 (2) of the Declaration, ‘Any act of enforced disappearance ... constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life. The interpretation of article 17 must be consistent with the provisions of articles 1(1), 2(1), 3 and 4 of the Declaration, which seek to punish these crimes severely in order to eradicate the practice. This explains and justifies the restrictive approach to the application of statutes of limitation to this type of offence. Thus, article 1(1) stipulates that ‘Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field’. [...]”*⁶²

⁶¹ WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, supra note 37, para. 15.

⁶² WGEID, *2000 Annual Report*, doc. E/CN.4/2001/68 of 18 December 2000, paras. 28 and 31-32.

41. More recently, the WGEID expanded its reasoning on the continuous nature of the crime of enforced disappearance and on the legal consequences derived from this, noting that “*Enforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual. Even though the conduct violates several rights, including the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment and also violates or constitutes a grave threat to the right to life, the Working Group considers that an enforced disappearance is a unique and consolidated act, and not a combination of acts. Even if some aspects of the violation may have been completed before the entry into force of the relevant national or international instrument, if other parts of the violation are still continuing, until such time as the victim’s fate or whereabouts are established, the matter should be heard, and the act should not be fragmented. As far as possible, tribunals and other institutions ought to give effect to enforced disappearance as a continuing crime or human right violation for as long as all elements of the crime or the violation are not complete*”.⁶³
42. The Penal Code of Kenya is silent in what concerns the statute of limitations except for the criminal offence of treason, for which Article 45 (1) provides that no one can be tried for treason unless the prosecution is commenced within two years after the offence is committed. In this regard, it could be read that for all other offences in the Penal Code, no statutory limitations exist for their prosecution. However, this is not clearly established in practice.
43. The only reference to statute of limitations for criminal proceedings under Kenyan legislation is found in the International Crimes Act, 2008. This Act reproduces the Rome Statute, which provides in Article 29 that “the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”. This provision covers war crimes, genocide, acts of aggression and crimes against humanity, as defined by the Rome Statute. As we have previously analysed, the Rome Statute only encompasses enforced disappearances when committed as a part of a widespread or systematic attack against civilian population. In order to respect the requirements established under Article 17 of the 1992 Declaration, it should be clarified that the term of limitation for criminal proceedings for any act of enforced disappearance, irrespective of its commission as part of a widespread and systematic attack directed against any civilian population, can commence only from the moment when the offence ceases, that is to say, when the fate and whereabouts of the victim are established with certainty and made known to his or her family. Moreover, if a statute of limitations for criminal proceedings relating to enforced disappearances is applied, it must be of long duration and proportionate to the extreme seriousness of the offence.

⁶³ WGEID, *General comment on enforced disappearance as a continuous crime*, doc. A/HRC/16/48/ of 26 January 2011, para. 1, 2 and 6.

3.4 Declaration of absence due to enforced disappearance

44. As no definition of enforced disappearance exists under Kenyan legislation, neither is there a special procedure to regulate the legal status of the disappeared person, declaring his or her absence for enforced disappearance in order for his or her relatives to exercise rights in fields such as social welfare, financial matters, family law and property rights.
45. “Certificates of absence due to enforced disappearance” are the legal instrument that should be available to relatives of victims of enforced disappearance in order to be able to obtain reparations and claim other entitlements related to welfare, family law, property rights and financial matters. The CAT has previously observed that requiring the families of disappeared persons to certify the death of a family member in order to receive compensation could constitute a form of inhuman and degrading treatment for such persons, by laying them open to additional victimization.⁶⁴ Having to apply for a “certificates of presumption of death” or a “death certificate” as the WGEID has previously stated, “re-victimizes families by making them go through the process of having a death certificate, although neither the fate nor the whereabouts of the disappeared person are known”.⁶⁵ Moreover, “the fact that a disappearance is treated as a direct death does not take into account the continuous nature of the crime, the right to truth for the families of the disappeared and the obligation of the State to continue the investigation”.⁶⁶ In its recent general comment on the right to recognition as a person before the law in the context of enforced disappearances, the WGEID further clarified that “enforced disappearances also entail violations of the rights of other persons, including the next-of-kin and others connected to the disappeared persons. Family members are prevented to exercise their rights and obligations due to the legal uncertainty created by the absence of the disappeared person. This uncertainty has many legal consequences, among others on the status of marriage, guardianship of under age children, right to social allowances of members of the families and management of property of the disappeared person. The Working Group considers that the right to be recognized as a legal person entails the obligation of the State to fully recognize the legal personality of disappeared persons and thus respect the rights of their next-of-kin and as well as others. For that reason, most domestic legal systems have institutions designed to deal with the impossibility of ascertaining a person’s death. Some States allow the issuance of a ‘presumption of death’, others of a ‘declaration of absence’. Some other States, which have been confronted in the past with a systematic or massive practice of enforced disappearance, have specifically created the notion of ‘certificate of absence by reason of forced disappearance’. *The basis for such an acknowledgement should take the form of a ‘declaration of absence by reason of enforced disappearance’, to be issued, with the consent of the family, by a State authority after a certain time has elapsed since the disappearance, in any case no less than one year.* Such a declaration should allow the appointment of a representative of the disappeared person, with the mandate to exercise his/her rights and obligations for the duration of his/her absence, in his/her interests and those of his/her next-

⁶⁴ CAT, *Concluding Observations on Algeria*, doc. CAT/C/DZA/CO/3 of 26 May 2008, para. 13.

⁶⁵ WGEID, *2008 Annual Report*, doc. A/HRC/10/9 of 6 February 2009, para. 113.

⁶⁶ *Ibid.*, para. 114.

of-kin. The latter should be allowed to manage temporarily the disappeared person's properties, for as long as the enforced disappearance continues, and to receive due assistance from the State through social allowances. In most cases, the disappeared persons are men and were the family breadwinners and special social support should be provided to dependent women and children. The acceptance of financial support for members of the families should not be considered as a waiver of the right to integral reparation for the damage caused by the crime of enforced disappearance, in accordance with article 19 of the Declaration. In parallel to the issuance of a system of declaration of absence as a result of enforced disappearance, *States should continue to investigate all cases to determinate the fate and the whereabouts of the disappeared and to ensure accountability of those responsible for the commission of enforced disappearances [...]*.⁶⁷

46. Similarly, the Human Rights Council Advisory Committee has declared that “missing persons should be presumed to be alive until their fate has been ascertained. The foremost right of a missing person is that of search and recovery. A person should not be declared dead without sufficient supporting evidence”.⁶⁸ In its recent concluding observations on Bosnia and Herzegovina, the HRC recommended the State to amend its legislation, abolishing “the obligation in cases of disappearance which makes the right to compensation dependent on the family’s willingness to have the family member declared dead”.⁶⁹ The figure of a “certificate of absence due to enforced disappearance” is not recognized under Kenyan legislation. This creates an additional problem for the relatives of hundreds of men in Mount Elgon by blocking them from accessing to compensation that would come with such document or to regulate their legal situation with regard to social welfare, financial matters, family law and property rights. Instead Kenyan legislation requires “death certificates” for relatives to secure property titles in their spouse’s name. Proof of death of a spouse or relative can also assist in accessing certain benefits such as gaining access to bank accounts and obtaining scholarships. In Mount Elgon -where in most cases the person who was forcibly disappeared was the breadwinner- families are penalized by this flaw in the legislation as they would be forced to undergo the deeply re-victimizing process of obtaining a death certificate for their disappeared relative.
47. Further, even the deeply re-victimizing process of obtaining a death certificate would not be effective in the case of relatives of victims in Mount Elgon whose loved one is disappeared. Under Kenyan legislation, a person is presumed to be dead when he or she has been missing for seven years.⁷⁰ To date, five years have passed since operation *Okoa Maisha* took place in March and April 2008. The only avenue whereby the seven-year requirement can be circumvented, according to Kenyan law, arises when an inquest is conducted into the case of a missing person presumed to be dead. In such case, the magistrate can, on the basis of the inquiry, order that the victim’s family be issued with a death

⁶⁷ WGEID, *General Comment on the right to recognition as a person before the law in the context of enforced disappearances*, paras. 5-10 (emphasis added), available at: <http://www.ohchr.org/Documents/Issues/Disappearances/GCRecognition.pdf>.

⁶⁸ Human Rights Council, *Progress Report of the Human Rights Council Advisory Committee on Best Practices on the Issue of Missing Persons*, doc. A/HRC/14/42 of 22 March 2010, para. 60.

⁶⁹ HRC, *Concluding Observations on Bosnia and Herzegovina*, *supra* note 5, para. 12.

⁷⁰ The Evidence Act Chapter 80, 2009, <http://www.kenyalaw.org/Downloads/GreyBook/10.%20The%20Evidence%20Act.pdf>, Section 118A (“Presumption of death”).

certificate.⁷¹ According to WKHRW, in the case in Mount Elgon, where inquiries have not been undertaken, none of the families of those who were subjected to enforced disappearance in the context of the operation *Okoa Maisha*, have been able to obtain death certificates or burial permits, which are required, in addition to death certificates, in order to access some benefits.

4. Lack of adequate preventive measures

Art. 2, para. 1, Convention against Torture

Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

Art. 2, para. 2, 1992 Declaration⁷²

States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance.

Art. 3 1992 Declaration

Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.

Art. 10 1992 Declaration

Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention. 2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned. 3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person.

Art. 11 1992 Declaration

All persons deprived of liberty must be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured.

Art. 12 1992 Declaration

Each State shall establish rules under its national law indicating those officials authorized to order deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating penalties for officials who, without legal justification, refuse to provide information on any detention. 2. Each State shall likewise ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms.

⁷¹ Criminal Procedure Code, Art. 388.

48. International legal instruments concerning torture, including the Convention against Torture, as well as tools concerning enforced disappearance emphasize the obligation of States to adopt all necessary legislative, administrative or judicial tools necessary to prevent these crimes. It is noteworthy that persons deprived of their liberty are in a situation of particular vulnerability to acts of torture and enforced disappearance. Preventive measures in this regard are thus of the utmost importance.
49. Article 3 of the 1992 Declaration establishes that “each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction”. The WGEID, commenting this provision noted “[...] *this is a broad obligation which is assumed by States and is primarily an obligation to do something. This provision cannot be interpreted in a restrictive sense, since what it does is to serve as the general model for the purpose and nature of the measures to be taken, as well as for the content of the international responsibility of the State in this regard. The purpose of the measures to be taken is clear: ‘to prevent and terminate acts of enforced disappearance’. Consequently, the provision calls for action both by States in any territory under its jurisdiction of which acts of enforced disappearance might have occurred in the past and by States in which such acts have not occurred. All States must have appropriate machinery for preventing and terminating such acts and are therefore under an obligation to adopt the necessary measures to establish such machinery if they do not have it. With regard to the nature of the measures to be taken, the text of the article clearly states that legislative measures are only one kind. In referring to ‘legislative, administrative, judicial...’ measures, it is clear that, as far as the Declaration is concerned, it is not enough to have formal provisions designed to prevent or to take action against enforced disappearances. It is essential that the entire government machinery should adopt conduct intended for this purpose. To this end, administrative provisions and judicial decisions play a very important role. The article also refers to ‘other measures’, thus making it clear that the responsibility of the State does not stop at legislative, administrative or judicial measures. These are mentioned only by way of example, so it is clear that States have to adopt policy and all other types of measures within their power and their jurisdiction to prevent and terminate disappearances. This part of the provision must be understood as giving the State a wide range of responsibility for defining policies suited to the proposed objective. It is, however, not enough for legislative, administrative, judicial or other measures to be taken, since they also have to be ‘effective’ if they are to achieve the objective of prevention and termination. If the facts showed that the measures taken were ineffective, the international responsibility of the State would be to take other measures and to adapt its policies so that effective results would be achieved. The main criterion for determining whether or not the measures are suitable is that they are effective in preventing and, as appropriate, terminating acts of enforced disappearance. Consequently, the provision contained in article 3 must be understood as the general framework for guiding States and encouraging them to adopt a set of measures. It must be understood*

⁷² See also Arts. 17-23 of the International Convention for the Protection of All Persons from Enforced Disappearance. See also the Standard Minimum Rules for the Treatment of Prisoners (Arts. 7, 35-39 and 44-45); and Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, (Arts. 2, 4, 6, 9-13, 15-19, 32-34 and 37).

*that the international responsibility of States in this regard arises not only when acts of enforced disappearance occur, but also when there is a lack of appropriate action to prevent or terminate such acts. Such responsibility derives not only from omissions or acts by the Government and the authorities and officials subordinate to it, but also from all the other government functions and mechanisms, such as the legislature and the judiciary, whose acts or omissions may affect the implementation of this provision”.*⁷³

50. Accordingly, Article 3 of the 1992 Declaration should serve as a general guideline on the measures that States should adopt with a view to effectively preventing and terminating acts of enforced disappearance. Besides ratifying the Rome Statute and adopting the International Crimes Act, 2008 which implements it, the government of Kenya has taken no other measures related to the prevention and suppression of enforced disappearance. As we have already analyzed, the International Crimes Act, 2008 does not cover all relevant aspects connected with the prevention and suppression of enforced disappearance inasmuch as it solely reproduces the Rome Statute, which encompasses enforced disappearance only to a limited extent. In addition, no legislation exists establishing the punishment for acts of enforced disappearance. As the WGEID has pointed out, the obligation of States to prevent and suppress acts of enforced disappearance is a positive obligation, namely, the obligation to establish “appropriate machinery for preventing and terminating such acts”.⁷⁴ This machinery should be reflected in administrative and judicial decisions and in the adopting of the entire government machinery for their implementation. The limited actions taken so far by the government of Kenya to prevent and suppress acts of enforced disappearance cannot be deemed sufficient.

4.1 Safeguards for persons arrested and detained under police custody

51. One of the most effective ways to prevent torture is providing those persons arrested or detained with safeguards while in police custody. With regard to Kenya, the CAT noted with concern “the numerous and consistent allegations of widespread use of torture and ill-treatment of suspects in police custody” as well as the “challenges [...] in providing people under arrest with the appropriate legal safeguards, including the right to access a lawyer, an independent medical examination and the right to contact family members [...]”.⁷⁵ This reiterates what the HRC had already noted in its 2005 concluding observations, namely, that most suspects in Kenya did not have access to a lawyer during the initial stages of detention and recommended that Kenya guarantees “the right of persons in police custody to have access to a lawyer during the initial hours of detention”.⁷⁶
52. In its third periodic report to the HRC submitted in 2005, the government of Kenya recognizes that “there is no stipulation on the period within which an accused person can contact a lawyer or his family” and simply states in this regard that “In practice, it is difficult to exercise their right largely due to poor infrastructure in police cells and the socio-economic circumstances of the arrested person. Where

⁷³ WGEID, 1995 *Annual Report*, *supra* note 37, paras. 48-53.

⁷⁴ WGEID, *General Comment on Article 3*, doc. E/CN.4/1996/38), para. 49.

⁷⁵ CAT, 2008 *Concluding Observations on Kenya*, *supra* note 40, para. 17.

⁷⁶ HRC, 2005 *Concluding Observations*, doc. CCPR/CO/83/KEN, 29 April 2005, para. 17.

communication facilities exist, the right to a phone call is guaranteed. This had been made easier by the fact that a considerable number of people now own mobile phones and are usually allowed to use them in front of the police officers to contact persons of their choice before they are surrendered to the arresting authority”.⁷⁷ This cannot be considered an acceptable response to the recommendations made by the HRC as it does not address the issue at stake but merely attempts to provide a justification as to why the right to access to a lawyer is still not guaranteed. Lack of infrastructure or the socio-economic circumstances of the arrested person should not be a reason to deny this fundamental right, which the HRC has deemed to be “an essential right under the Covenant”.⁷⁸

53. These problems were experienced during the operation *Okoa Maisha*, where hundreds of men were arbitrarily deprived of their freedom and subsequently subjected to enforced disappearance. Some of them were charged with criminal offences, while most were tortured and killed. Those who were charged with criminal offences were never allowed the possibility to access a lawyer. Their families were not informed of their place of arrest or detention and thus had no opportunity to help them seek legal assistance. According to the cases documented by WKHRW, not one single men of the dozens arrested during operation *Okoa Maisha* underwent a trial.
54. In its second periodic report to the CAT submitted in 2012, the government of Kenya attempts to address this issue by making reference to Article 49 of the 2010 Constitution, as well as to the Independent Police Oversight Authority Act, 2011, to the National Service Act, 2011 and to the Code of Conduct of the Kenya Police Service.
55. While it is true that Article 49(1) guarantees the rights of arrested person, *inter alia* “(c) to communicate with an advocate and other persons, and other persons whose assistance may be necessary”, the government of Kenya does not explain how this has been put in practice to address the many problems highlighted by the CAT and the HRC in the last years. Moreover, while the government of Kenya affirms that “over the years it has taken various steps to prevent acts of torture and ill-treatment of suspects in police custody” making reference to the police reforms, it does not give any details as to how the Independent Police Oversight Authority Act, 2011 has been operationalized.⁷⁹ The Kenyan government simply states that it provides for accountability and monitoring functions over the police by being authorized to inspect police premises and investigate deaths or serious injury occurring or suspected of having occurred as a result of police action. No details are provided however as to how this works in

⁷⁷ Third periodic report submitted by Kenya to the HRC, *supra* note 11, para. 50.

⁷⁸ Report of the HRC, Ireland, ICCPR, A/48/40 vol. I (1993) 119 at para. 605. Additionally, the HRC pointed out that “The right of access to legal counsel begins from the moment an individual is deprived of his freedom”, *Concluding Observations on Senegal*, ICCPR, A/48/40 vol. I (1993) 23 at para. 104. The HRC further observed that States parties must ensure that all persons arrested “have immediate access to a lawyer”, *Concluding Observations on Algeria*, ICCPR, A/53/40 vol. I (1998) 52 at para. 360. The HRC also stated that “Free access to lawyers, doctors and family members should be guaranteed immediately after the arrest and during all stages of detention”, *Concluding Observations on Uzbekistan*, ICCPR, A/56/40 vol. I (2001) 59 at para. 79(7) and that “The State party should guarantee the right of persons in police custody to have access to a lawyer in the initial hours of detention, to inform their family members of their detention and to be informed of their rights...”, *Concluding Observations on Benin*, ICCPR, A/60/40 vol. I (2004) 30 at para. 83(16). Finally, the CAT also pointed out that “The likelihood of commission of acts of torture or of other cruel, inhuman or degrading treatment would be limited if suspects had easy access to a lawyer, doctor or family member during the 48 hours of police custody”, *Concluding Observations on Poland*, CAT, A/52/44 (1997) 18 at para. 110.

⁷⁹ *Second Periodic Report of Kenya to the CAT*, *supra* note 6, para. 37.

practice and how this recently established body “plays a major role in restoring public confidence in the police”.⁸⁰

56. Neither are details provided as to how the Code of Conduct of the police works in practice to prevent acts of torture for persons arrested or detained. In its second periodic report to the CAT, reference to this legal tool is limited to the following affirmation: “The Code of Conduct establishes the standard for professional and ethical behaviour for the police”. This explanation cannot be considered sufficient to address the concerns raised by the CAT and HRC.
57. Finally, while the government of Kenya refers to the duty of the National Police Service to train its staff to respect human rights as well as to the obligation of the police to comply with constitutional standards of human rights and fundamental freedoms through a training module, as previously stated, the National Police Service Act of 2011, which establishes the National Police Service has not actually been published in the Gazette nor operationalized. It remains thus unclear how these legal tools act effectively as measures to prevent torture, enforced disappearance, and ill-treatment while arrested or in detention.

4.2 Inadequate registries of persons deprived of their liberty

58. Another measure to effectively preventing torture and enforced disappearance of people arrested or detained under police custody is the compilation and maintenance of up-to-date official registries and records of persons deprived of liberty. These should be filled-in for each individual and in all cases of deprivation of liberty.⁸¹
59. The Criminal Procedure Code is silent in what concerns detention registries. The Prisons Act (Chapter 90) establishes a list of duties to be fulfilled by prison officers, among which the obligation to keep a registration book (used interchangeably with the term “prison record”) containing the following information pursuant to Article 135. “(a) information as to his identity; (b) the reason for his commitment and the authority therefore; and (c) the day and hour of his admission and release; (iii) a daily release book in diary form, in which shall be entered under the proper date the name of each prisoner on admission into prison; (iv) a prisoners’ property book in a form to be approved by the Commissioner; (v) a prisoners’ punishment book, in which shall be recorded the name of every prisoner punished for a prison offence, the punishment imposed, the name of the officer awarding the punishment and, in the case where a certificate from a medical officer is necessary, such certificate; (vi) an imprest [*sic!*] account; (vii) an account of receipts and disbursements; (viii) an unofficial visitors book, containing a record of unofficial visitors to the prison; (ix) a visiting justices minute book; (x) an official visitors book; (xi) a list of books and documents committed to his care; and (xii) such other books and records as the Commissioner may direct”.
60. While seemingly an exhaustive list of obligations, the provisions in the Prisons Act fail to clarify crucial

⁸⁰ *Ibid.*

⁸¹ See also, Arts. 17 and 18 of the International Convention for the Protection of All Persons from Enforced Disappearance.

aspects with regard the registration of persons deprived of their liberty. First, the Act does not establish when the registry should be filled in. Neither does it establish which authorities the information on the detentions should be shared with or whether the registry is confidential or private. No clarifications are provided as to who has access to the registry, particularly, whether the lawyer or persons close to the person deprived of his or her liberty are allowed to see it.

61. Neither does the Prisons Act or the Penal Code establish sanctions related to the detention and custody registry. These sanctions should encompass not only the omission by officers in charge to undertake the corresponding detention registry, but also providing inaccurate information for the integration of the registry, altering information contained therein or failing to communicate the competent authority when wrong information has been registered, among others. Further, it does not seem that Kenya establishes any specific sanction for the refusal to provide information on the deprivation of liberty of a person, or the provisions of inaccurate information, even though the legal requirements for providing such information have been met.⁸²
62. These gaps were clearly reflected in the case of the arrests and subsequent detentions and enforced disappearances that took place in the context of the operation *Okoa Maisha* in 2008. As will be highlighted below, relatives of the victims searched endlessly for their loved ones, including in places where they had been seen by witnesses but the registries did not contain their names. There were also cases of incorrect registries, and of registries that may have been initially filled-in but then did not record transfers to other prisons or authorities.
63. In order to act as an effective preventive measure, registries should be integrated and signed not only by the authorities present at the moment of the detention, but also by the competent authority under which the detained persons will be placed in custody and by the medical staff that undertakes the necessary physical examinations. The registries should also be kept in electronic format in order to be able to share them with different institutions. The information contained in the electronic registry should correspond to that contained in the physical signed registries. Furthermore, the information contained in the registry should be public and easily accessible to people close to the detained person.
64. Moreover, a database should be kept by all authorities competent to keep persons deprived of their liberty of the public servants authorized to perform detentions, as well as of their superiors and of the medical personnel who may intervene.
65. The detention registry should not be cancelled nor the information eliminated once the person is freed from detention. Finally, the public servants who apply and make use of the detention registries should undergo a training concerning its application.
66. During *Okoa Maisha* operation, relatives of the men who were arrested and subsequently disappeared normally received information on the whereabouts of their loved ones through neighbours or friends. Never through the authority performing the arrest. Upon visiting the prison where they were allegedly

⁸² See also, Art. 22 of the International Convention for the Protection of All Persons from Enforced Disappearance.

being held, they were seldom allowed to see the “Occurrence Books” which is where Kenyan prison authorities are meant to register those detained. From the few relatives that were not chased away by the authorities upon reaching the different detention centres, only a few were given access to the Occurrence Books. If lucky, they were allowed to look up the name of their loved one themselves. Others were simply informed by the police in charge, upon aloofly reviewing the book, that their relative was not registered there or had been transferred to another place of detention –something not previously disclosed to them. This resulted in relatives having to endure long travels to go from one village to another in search of their relatives but their attempts were always futile. Eventually, the relatives were forced to give up the search due to lack of financial resources.

4.3 Habeas Corpus petition in Kenya

67. The right to *habeas corpus* petitions to determine the legality of a detention is provided for in Article 51 of the Kenyan Constitution that establishes the rights of persons who are detained, held in custody or imprisoned. Pursuant to Article 51(2) “A person who is detained or held in custody is entitled to petition for an order of *habeas corpus*.” No details are provided as to what the requirements to obtain the *habeas corpus* petition are.
68. Despite the Constitutional provision, as experienced by the numerous relatives of victims of enforced disappearance that occurred in the context of the operation *Okoa Maisha*, the possibility of filing a *habeas corpus* petition is practically unfeasible for a number of factors. The lack of financial means – rendering access to a lawyer impossible- coupled with illiteracy rates in rural areas such as Mount Elgon offer residents very little possibilities of availing themselves of local judicial remedies. Proof of this is that out of the alleged hundreds of cases of enforced disappearance resulting from the 2008 military-police operation in Mount Elgon, only one *habeas corpus* application has reached the High Court of Kenya at Bungoma. The application, dated 31 July 2008 and containing the names of the police officers allegedly responsible for the enforced disappearance of **Mr. Q.S.**, was replied to on 4 August 2009. The alleged arrest, detention and torture of the person were categorically denied by the State Counsel on behalf of the Respondents. The High Court of Bungoma hence directed the Attorney-General, the Chief of General Staff and the Police Commissioner on 24 March 2010, to initiate an investigation into the enforced disappearance of the alleged victim within 30 days. More than three years after this order was issued, no investigation has been launched and the family and the representatives were never informed of any step taken by Kenyan authorities.

4.4 Lack of adequate preventive measures for minors

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

childhood in a constant situation of uncertainty, between hope and despair”.⁸³

70. The WGEID has recently emphasized that “The enforced disappearance of a child constitutes an exacerbation of the violation of the multiplicity of rights protected by the Declaration on the Protection of All Persons from Enforced Disappearance and an extreme form of violence against children [...] Children’s evolving stages of physical and mental maturity, as well as their reliance on adults, places them in a situation of particular vulnerability [...] Given that enforced disappearance is a continuous crime, its specific effects on a child could continue even after he or she has reached majority [...] the obligations of the State that arose when the child was under the age of 18 continue as long as those obligations are not fully complied with”.⁸⁴
71. During the operation *Okoa Maisha*, children were both direct and indirect victims of enforced disappearance. While many lost their fathers during the operation, they were also subjected to torture and ill-treatment. Furthermore, many were charged of crimes as if they were adults despite their status as minors. HRW drew attention to the fact that during the interviews conducted in its field investigation in March 2008, victims described “how military and police units rounded up nearly all males in Mount Elgon district, some of them children as young as ten. At military camps, most notoriously one called Kapkota, every detainee appears to have been tortured and forced to identify members of the SLDF or the location of weapons”.⁸⁵ The KNCHR described the operation in the following way: “All the men and young boys from the ages of 13 were taken away by the military to their operational bases that they set up in Kaptama and Kapkota where they were all subjected to torture as a method of interrogation by the military. A number of the people taken away died as a result of the alleged torture inflicted upon them”.⁸⁶ Furthermore, according to journalistic investigation, during the operation *Okoa Maisha*, dozens of children were tortured by the Kenyan army because they were suspected of aiding rebels; the army beat them, squeezed their genitals and made them crawl through barbed wire and shake hands with corpses.⁸⁷ Dozens of children were held in detention on charges of promoting warlike activities.⁸⁸ According to a report by a visiting justice officer for Bungoma High Court, 32 school-age children were

⁸³ Commission on Human Rights, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances*, *supra* note 59, para. 91. On 30 July 1990 and on 25 July 2000 Kenya ratified respectively the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Both treaties reiterate the existence of an obligation to afford a special degree of protection to minors.

⁸⁴ WGEID, *2012 Annual Report*, doc. A/HRC/22/45 of 28 January 2013, paras. 90 91 and 93.

⁸⁵ HRW 2008 report, *supra* note 19, p. 5, emphasis added.

⁸⁶ KNCHR report, *supra* note 16, p. 8, emphasis added.

⁸⁷ Katharine Houreld, *Hundreds of Kenyan kids caught between brutal militia, Kenyan army*, Associated Press, 21 June 2008.

⁸⁸ *Ibid.*

in detention on 21 May 2008.⁸⁹

72. In its 2005 concluding observations, the HRC noted with concern the “extremely low age of criminal responsibility, namely 8 years, which cannot be considered compatible with article 24 of the Covenant” and had urged the State party to raise the minimum age of criminal responsibility.⁹⁰ In response to this recommendation, in its third periodic report the government of Kenya stated that it is “in the process of reviewing the Children’s Act, 2001. The review among other things, seeks to address the issue of the age of criminal responsibility in order to bring it in line with international standards”.⁹¹ This reply cannot be considered satisfactory to the recommendation made by the HRC.
73. In its 2007 concluding observations on Kenya’s second periodic report, the Committee on the Rights of the Child reiterated “its previous concern that the minimum age of criminal responsibility, still set at 8 years of age, is too low”.⁹² Similarly, the CAT in its 2008 concluding observations also expressed its deep concern “that the age of criminal responsibility in the State party was still set at eight years despite recommendations by the HRC and by the Committee on the Rights of the Child and called the State party to “as a matter of urgency, raise the minimum age of criminal responsibility to bring it in line with generally accepted international standards”.⁹³
74. In response to the CAT’s concerns, the government of Kenya simply reiterates in its second periodic report that it is reviewing the Children’s Act “to bring it in line with constitutional and generally accepted international standards [...] one of the changes sought is the raising of the age of criminal responsibility from eight to twelve years. Parliament is now in the process of passing a high number of pending constitutional bills and *the Children’s Act (amendment bill) 2011 has been lined up for prompt attention*”.⁹⁴ The end result is that despite numerous appeals, neither the age of criminal responsibility has been raised nor has the government of Kenya adopted any other measure of protection concerning minors. Furthermore, no investigations have been undertaken with regard to arbitrary killings, enforced disappearance, torture and ill-treatment of minors in the context of the operation *Okoa Maisha*.

⁸⁹ Visiting justice officer, Bungoma High Court, *Research Report on Bungoma Prison as per 21 May 2008*, on file with HRW. In particular, in cases of enforced disappearance involving minors both as direct victims and as relatives of a disappeared person, the European and the Inter-American Court of Human Rights noted that States are under an obligation to adopt special measures of protection owing to the stage of physical and emotional development of the minor and his or her special vulnerability. In fact, in order to determine the suffering of a victim, due regard must be paid to his or her personal conditions, such as age, sex and other personal characteristics which may increase the physical pain and the mental anguish: the personal features of an alleged victim of torture or cruel, inhuman, or degrading treatment should be taken into consideration when determining whether his or her personal integrity has been violated, for such features may change the insight of his or her individual reality and, therefore, increase the suffering and the sense of humiliation when the person is subjected to certain types of treatment. See *inter alia*, IACtHR, Case *Masacres de Ituango v. Colombia*, judgment of 1 July 2006, Ser. C. No. 148, para. 244; and ECtHR, Case *Aydin v. Turkey*, judgment of 25 September 1997, para. 84 and IACtHR, Case *Ximenes Lopes v. Brazil*, judgment of 4 July 2006, Ser. C No. 149, para. 127.

⁹⁰ HRC 2005 Concluding Observations, *supra* note 76, para. 24. The age of criminal responsibility is established in Art. 14(1) of the Penal Code which states “A person under the age of eight years is not criminally responsible for any act or omission”.

⁹¹ Third periodic report submitted by Kenya to the HRC, *supra* note 11, para. 67.

⁹² UN Committee on the Rights of the Child, Concluding Observations on the second periodic report of Kenya, doc. CRC/C/KEN/CO/2, 19 June 2007, para. 67.

⁹³ CAT, *Concluding Observations on the initial report of Kenya*, *supra* note 40, para. 11.

⁹⁴ *Second periodic report of Kenya to the CAT*, *supra* note 6, para. 8, emphasis added.

Instances of Torture and Enforced Disappearance Involving Minors

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

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

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

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

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

5. Lack of adequate legislation on universal jurisdiction

Art. 5 Convention against Torture⁹⁵

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate. 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article. 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Art. 6 Convention against Torture

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted. 2. Such State shall immediately make a preliminary inquiry into the facts. 3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides. 4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Art. 7 Convention against Torture

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution. 2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1. 3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Art. 14 1992 Declaration⁹⁶

Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control.

⁹⁵ See also Arts. 11, 12 and 14 of the International Convention for the Protection of All Persons from Enforced Disappearance.

75. As previously mentioned,⁹⁷ while the other sections of this report focus mostly on topics concerning enforced disappearance of persons, in this section reference is made to the Kenyan legislation concerning universal jurisdiction for crimes under international law and, in particular, for the crimes of torture and enforced disappearance.
76. In its initial report to the CAT, the government of Kenya declared with regard to Article 5 of the Convention against Torture that “[...] *The Penal Code applies within the entire territory of Kenya. It also applies to offences committed aboard ships and aircrafts within the country’s jurisdiction. Such acts are considered extraditable offences. **Since torture is not named as an offence in the Kenyan penal system, it is not possible to classify it as an extraditable offence.** Once it has been proved that a crime has been committed, the penalties are meted out on any person, citizen or alien, present in the territory of Kenya who is proved to have committed the said offence. Kenya will extradite a person accused of offences contained in the Extradition Acts within the country to his country of origin under the provisions of its extradition Acts. **The basic ingredients surrounding extradition would apply, such as the fact that the act must be an offence in both countries [...]** In relation to international obligations and the principle of universal jurisdiction, Kenya is a party to the Rome Statute. **The Government has further embarked on the process of domestication to give effect to this principle and to give the country jurisdiction over international crimes**”.⁹⁸*
77. With regard to Article 6 of the Convention against Torture the government states, “[...] *Kenya does not have definition of torture as an offence under its laws. However, should the act complained of fall under the category of extraditable offences, the Government shall communicate the presence of the alleged offender, to the person’s country of origin through diplomatic the channels [...]* The person will in practice be arrested and remain in police custody pending further investigation. If the risk of flight by the person arrested is high, then bail will be denied. If the investigations give credible evidence of the commission of an offence, then the person will be produced before court and charged accordingly”.⁹⁹
78. With regard to Article 7 the government reiterates “[...] **persons accused of acts of torture face prosecution for offences in the Penal Code [...]** **There is no distinction in law between nationals and foreign nationals.** Foreign nationals who are accused of torture in their countries and who are within Kenya’s territory will be arrested and extradited to face trial [...] even though Kenya has not entered into an extradition treaty with any country specifically for torture, the Government has expressed that it will support and co-operate with any nation to fight torture [...] the absence of the definition of torture in Kenyan penal statutes makes it difficult to state with authority what the courts have ruled on this but; the Judiciary has taken a stand and affirmed that it will treat with extreme

⁹⁶ See also Art. 9, 10 and 11 of the International Convention for the Protection of all Persons from Enforced Disappearance.

⁹⁷ See *supra*, para. 4.

⁹⁸ *Initial report of Kenya to the CAT*, doc. CAT/C/KEN/1 of 16 August 2007, paras. 65-68.

⁹⁹ *Ibid.*, paras. 69-70.

seriousness abuse of office which permits torturous cruel and inhuman treatment".¹⁰⁰

79. Kenyan legislation entrusts Kenyan courts with territorial titles of jurisdiction in Article 5 and Article 6 of the Penal Code. According to Article 5. "*The jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters.*" As per Article 6, when an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.
80. Moreover, Kenyan legislation provides domestic courts with universal jurisdiction grounds over war crimes, crimes against humanity and genocide. The 1968 Geneva Conventions Act confers on Kenyan courts universal jurisdiction over the grave breaches of the 1949 Geneva Conventions. Moreover, section 8 of the 2008 International Crimes Act provides for jurisdiction with regard to war crimes as defined in Article 8(2) of the Rome Statute, crimes against humanity within the meaning of Article 7 of the Rome Statute and genocide as defined in Article 6 of the Rome Statute when "*the person [who is alleged to have committed such an offence] is, after commission of the crime, present in Kenya*". Section 8(2) of the said Act bestows universal jurisdiction on the High Court of Kenya by prescribing that "*A trial authorised by this section to be conducted in Kenya shall be conducted in the High Court*". As of April 2013, it would seem that no trial ever took place in Kenya on universal jurisdiction grounds for international crimes.
81. Universal jurisdiction is not foreseen for acts of torture and enforced disappearance (beyond those instances which qualify as crimes against humanity in Article 7 of the Rome Statute) as these offences are not codified under Kenyan legislation.¹⁰¹
82. The necessary starting point for a State to institute jurisdiction over crimes of torture and enforced disappearance is that such crimes are adequately defined in their constitutive elements in the domestic system¹⁰² and not subjected to prescription.¹⁰³ Five years after the submission of its initial report where, as seen in the paragraphs above, the flaws in the domestic legislation concerning torture were dutifully recognized, the government of Kenya has not been able to amend it to comply with international standards. As previously analysed, neither torture nor enforced disappearance are generally defined within Kenya's domestic legislation. While neither is considered an offence in the Penal Code, torture

¹⁰⁰ *Ibid.*, paras. 71 and 73-75.

¹⁰¹ See *supra*, paras. 17-39.

¹⁰² See, *inter alia*, Special Rapporteur on Torture, Study on the phenomenon of torture, *supra* note 35, paras. 144-145; Rodley, Pollard, *Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, in *European Human Rights Law Review*, 2006, pp. 115-141; and Burgers, Danelius, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrecht, 1988, pp. 129-130. See also, CAT, *Concluding Observations on Turkmenistan*, doc. CAT/C/TKM/CO/1 of 15 June 2011, para. 8; *Concluding Observations on Kuwait*, doc. CAT/C/KWT/CO/2 of 28 June 2011, para. 7; and *Concluding Observations on Ethiopia*, doc. CAT/C/ETH/CO/1 of 20 January 2011, para. 9.

¹⁰³ See, *inter alia*, CAT, *Concluding Observations on Sweden*, doc. CAT/C/SWE/CO/5 of 4 June 2008, para. 10; *Concluding Observations on Denmark*, doc. CAT/C/DNK/CO/5 of 16 July 2007, para. 11; and *Concluding Observations on Jordan*, doc. CAT/C/JOR/CO/2 of 25 May 2010, para. 9.

and enforced disappearance are only codified when committed as crimes against humanity. As already pointed out, it is not enough that States limit their criminalization to those cases where they would amount to crimes against humanity in the sense of the Rome Statute. Rather, the definition should encompass any kind of commission of the offence.¹⁰⁴ Hence, even when there is no distinction in law between national and foreigners, it is impossible to prosecute either for the commission of torture or enforced disappearance.

83. With regard to extradition, the government explained in its initial report to the CAT that it has two separate laws on extradition, namely the Extradition (Contiguous and Foreign Countries) Act, Chapter 76 and the Extradition (Commonwealth Countries) Act, Chapter 77. “[...] *These laws provide for extraditable crimes [...] The laws do not explicitly mention torture as an extraditable offence [...] Under the extradition laws, Kenya will surrender to other countries persons accused or convicted of extraditable offences and receive persons returned to Kenya from such countries with which it has executed extradition treaties*”.¹⁰⁵
84. In practice, even when the above-mentioned laws provide for extradition, neither torture nor enforced disappearance are extraditable offences as they are not defined under domestic legislation. Hence, since in Kenya, the act has to be an offence in both countries in order for extradition to take place, the government is not able to seize this mechanism for persons suspected of committing torture or enforced disappearance in its territory.
85. In its list of issues prior to the submission of the second periodic report, the CAT requests Kenya to indicate whether it has “*since the submission of the previous report, rejected, for any reason, any request for extradition by another State of an individual suspected of having committed an offence of torture and has started prosecution proceedings as a result*” as well as to clarify whether it has “*signed any extradition treaty on torture with any country. If so to provide detailed information on any person accused of torture that have been extradited pursuant to such treaties*”.¹⁰⁶ As stated in its second periodic report, the government of Kenya has not signed any extradition treaty specifically related to torture.¹⁰⁷ According to the government of Kenya, neither has it received such request since the publishing of the previous concluding observations by the CAT.¹⁰⁸
86. In light of the above, it cannot be said that Kenya complies with the requirement established in Articles 5 – 7 of the Convention against Torture. In order to fully comply with its obligations under the Convention against Torture, Kenya must strengthen its criminal law defining and criminalizing torture and enforced disappearance. It is also important to highlight that the trial of the alleged perpetrator should not be dependent on the existence of a prior extradition request, and is not necessary for the offense of which he or she is accused to be an offense in the country in which it was committed as well as in Kenya.

¹⁰⁴ See *supra* para. 35.

¹⁰⁵ *Ibid.*, paras. 76-77.

¹⁰⁶ CAT, *List of issues prior to the submission of the second periodic report of Kenya*, doc. CAT/C/KEN/2 of 15 February 2011, paras. 20-21.

¹⁰⁷ *Second periodic report of Kenya to the CAT*, *supra* note 6, para. 73.

¹⁰⁸ *Second periodic report of Kenya to the CAT*, *supra* note 6, para. 72.

6. Failure to investigate, judge and sanction those responsible for enforced disappearance

Already mentioned Arts. 5, 6, and 7 Convention against Torture

Art. 12 Convention against Torture

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Art. 13 1992 Declaration¹⁰⁹

1. Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation. 2. Each State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits. 3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal. 4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation. 5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished. 6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.

Already mentioned Art. 14 1992 Declaration

Art. 16 1992 Declaration

1. Persons alleged to have committed any of the acts referred to in article 4, paragraph 1, above, shall be suspended from any official duties during the investigation referred to in article 13 above. 2. They shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts. 3. No privileges, immunities or special exemptions shall be admitted in such trials, without prejudice to the provisions contained in the Vienna Convention on Diplomatic Relations. 4. The persons presumed responsible for such acts shall be guaranteed fair treatment in accordance with the relevant provisions of the Universal Declaration of Human Rights and other relevant international agreements in force at all stages of the investigation and eventual prosecution and trial.

6.1 Gaps in the investigation of enforced disappearance

87. Article 5 of the 1992 Declaration sets forth “in addition to such criminal penalties as are applicable, enforced disappearances render their perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable under civil law, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law”. Article 9 of the 1992 Declaration provides that “the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the

authority ordering or carrying out the deprivation of liberty is required to prevent enforced disappearances under all circumstances, including those referred to in article 7 above. In such proceedings, competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found. Any other competent authority entitled under the law of the State or by any international legal instrument to which the State is a party may also have access to such places". Further, Article 13 of the 1992 Declaration establishes that "each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation".

88. Each State shall ensure that the competent authority has the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits. Steps shall be taken to ensure that all those involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified". Pursuant to Article 14 of the 1992 Declaration: "any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control". Finally, Article 18 of the 1992 Declaration reads as follows: "Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction. In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account".¹⁰⁹
89. With regard to the undertaking of effective judicial measures to prevent, investigate, judge and sanction people responsible for enforced disappearance, the few provisions that currently exist in Kenya have to

¹⁰⁹ For an extensive and detailed general comment on this provision see WGEID, *Annual Report for 2005*, doc. E/CN.4/2006/56 of 27 December 2005, para. 49.

do with missing persons and already existed before the adoption of the International Crimes Act, 2008 implementing the Rome Statute. **Article 386 (1) (d)** of the Criminal Procedure Code establishes that “The *officer in charge of a police station*, or any other officer especially empowered by the Minister in that behalf, on receiving information that a person *is missing and believed to be dead*; shall immediately give information thereof to the nearest magistrate empowered to hold inquests, and, unless otherwise directed by any rule made by the Minister, shall proceed to the place where the body of the deceased person is, and *shall there make an investigation and draw up a report on the apparent cause of death*”.¹¹⁰ **Article 387 (1)** states that “When a person dies while in the custody of the police, or of a prison officer, or in a prison, the nearest magistrate empowered to hold inquests shall, and in any other case mentioned in section 386 (1) a magistrate may, but *shall in the case of a missing person believed to be dead* hold an inquiry into the cause of death, either *instead of or in addition* to the *investigation held by the police or prison officer*, and if he does so he shall have all the powers in conducting it which he would have in holding an inquiry into an offence”.¹¹¹

90. The problem with the mentioned provisions is that there is no independent investigation as it is the police who are responsible for investigating possible human rights violations. The KNCHR had already emitted recommendations in this regard. “Parliament should urgently enact legislation de-linking the investigation function of the police with that of the prosecution...the police should not be investigator and prosecutors, particularly given the numerous opportunities for collecting rents that this entails”.¹¹² This deficiency is meant to be addressed with the Independent Policing Oversight Authority Act (establishing police oversight authority), the National Police Service Act (providing a new legal framework for policing) and the National Police Service Commission Act (establishing a police service commission). As has been previously seen, it is not yet clear how these instruments have been operationalized and in the case of the National Police Service Act, it has not been fully implemented yet. Even if operationalized, these recently-enacted Acts will not bring change overnight and there will have to be continued evaluation to assess the progress being made. **Article 388 (1)** states that the Attorney-General may also at any time “direct a magistrate to hold an inquiry, in accordance with section 387, into the cause of a particular death to which the provision of that section apply and *shall* in the case of a missing person believed to be dead *give such directions as he deems fit*”.¹¹³ The wording of Article 388 adds an element of ambiguity regarding the obligation to order investigations into cases of enforced disappearance. It is not clear from the wording “give such directions as he deems fit” if the Attorney-General has indeed the obligation to order an inquiry to be held in the case of a person subjected to

¹¹⁰ Criminal Procedure Code, Cap. 75, Art. 386(1)(d), emphasis added.

¹¹¹ Criminal Procedure Code, Cap. 75, Art. 387(1), emphasis added.

¹¹² KNCHR, “The Cry of Blood” Report on Extra-Judicial Killings and Disappearances, September 2008, available at: http://marsgroupkenya.org/pdfs/2009/03/KNCHR_crimes-against-humanity-extra-judicial-killings-by-kenya-police-exposed.pdf, p. 7 (last accessed 23 January 2013).

¹¹³ Criminal Procedure Code, Cap. 75, Art. 388(1), emphasis added.

enforced disappearance.¹¹⁴ What happens often in reality is that an Attorney-General will take over an investigation or plainly put an end to it.¹¹⁵ This was supposed to change with the implementation of the 2010 Constitution which establishes the figure of Director of Public Prosecutions (DPP), an independent figure with the power “to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction”.¹¹⁶ Its mandate is to exercise State powers of prosecution and may a) “institute and undertake criminal proceedings against any person before any court (other than court martial) in respect of any offence alleged to have been committed; b) take over and continue any criminal proceedings commenced in any court (other than court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority...”.¹¹⁷ The DPP may also discontinue proceedings but only with the permission of the Court.¹¹⁸ However, to date, in light of the pending investigations, in particular on the post-electoral violence, it remains to be seen whether this figure will indeed fulfil the role it was meant to.

91. The Special Rapporteur on extrajudicial, summary or arbitrary executions established that with regard to police investigations, “currently, the *modus operandi* is that when the media highlights a case of extrajudicial killing by the police, the suspected perpetrators are suspended, a public announcement is made that the case will be investigated, and no further action is taken on the matter. Only in a few cases will the matter be taken to court for prosecution”.¹¹⁹
92. Regarding the obligation to prosecute, **Article 387 (3)** of the Criminal Procedure Code establishes that “If before or at the termination of the inquiry the magistrate is of the opinion that the commission by some known person or persons of an offence has been disclosed, he shall issue a summons or warrant for his or their arrest, or take such other steps as may be necessary to secure his or their attendance to answer the charge...”. In the case the magistrate deems that an offence has been committed but ignores the identity of the person or persons who committed it, “he shall record his opinion and shall forthwith send a copy thereof to the Attorney-General”.¹²⁰ According to **Article 26** of the Constitution of Kenya, the Attorney-General has the constitutional power to require the Police Commissioner to investigate any matter relating to an alleged offence. The Attorney-General may also, according to **Article 388 (2)** of the Criminal Procedure Code, reopen an inquiry, which has been terminated if he determines that further investigation is necessary.¹²¹ Under the 1963 Constitution, the Attorney-General

¹¹⁴ In addition to the provisions regarding investigation for violations in the Criminal Procedure Code, Cap. 75, the TJRC Bill includes as one of the functions of the Commission to “investigate violations and abuses of human rights relating to killings, abductions, *disappearances*, detention, torture, ill-treatment and expropriation of property suffered by any person between 12 December and 28 February 2008. Operation *Okoa Maisha* in the Mount Elgon District began on 9 March 2008, thus falling outside the scope of the investigations with which the TJRC was tasked.

¹¹⁵ Interview with Stella Ndirangu from the International Commission of Jurists - Kenya, 14 April 2011, Nairobi, Kenya.

¹¹⁶ 2010 Constitution of Kenya, Art. 157(4).

¹¹⁷ *Ibid.*, Art. 157(6).

¹¹⁸ *Ibid.*, Art. 157(8).

¹¹⁹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum, Follow-up country recommendations Kenya, doc. A/HRC/17/28/Add.4, 26 April 2011, hereinafter: “Christof Heyns report”, para. 25.

¹²⁰ Criminal Procedure Code, Cap. 75, Art. 387(4).

¹²¹ *Ibid.*, Art. 388(4).

had the power to conduct investigations as well as to stop prosecutions.¹²² Also under the 1963 Constitution, the Attorney-General was a constitutional office-holder, a member of the National Assembly¹²³, a member of the Judicial Service Commission¹²⁴ and the principle legal advisor to the Government¹²⁵ with tenure for life.¹²⁶ According to the report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on his February 2009 mission to Kenya, documents provided to him by the Attorney-General “clearly indicate, he is all too aware of the grave deficiencies in police investigations. But instead of using his constitutional powers to force individual investigations and to promote essential institutional reforms, letters simply go back and forth for years, with cases neither investigated sufficiently nor prosecuted. In addition, the repeated failure to prosecute *any* senior officials for their role in large-scale election violence over a period of many years has led to a complete loss of faith in the commitment of his office to prosecute those in Government with responsibility for crimes”.¹²⁷

93. The above considerations reveal the problems related to granting the powers to prosecute and to intervene in prosecutions to a person who is a political office-holder. Once again, this was supposed to change with the 2010 Constitution with the position of the DPP, which makes the position of Attorney-General a political position and that of the DPP more of a judiciary position. However, as noted above, it is uncertain how much this has changed.
94. The violence in the Mount Elgon district and the allegations of torture and arbitrary killings in the post-election period triggered a field investigation by HRW during **March and April 2008**. The already mentioned 2008 report of HRW “All the Men Have Gone: War Crimes in Kenya’s Mount Elgon conflict” made reference to hundreds of disappeared persons and extra-judicial executions. HRW called for a criminal investigation into “[...] all claims of unlawful killings, arbitrary arrest and detention, torture, rape, and destruction of property by security forces and prosecute those responsible” and stressed the need for the government of Kenya to “ensure fundamental due process guarantees to persons in detention, including the right to have their detention reviewed by an independent judicial authority with power to order their release; to grant them immediate access to medical attention, family members and legal counsel, as well as to inform families of deaths in custody and return the bodies of their relatives”.¹²⁸
95. In **May 2008**, the government of Kenya tasked the Police Commissioner to investigate allegations of human rights violations committed in Mount Elgon, to identify the perpetrators and make appropriate recommendations to ensure that such abuses are not repeated, as well as to compile a report and submit it within two to four weeks.¹²⁹ The report produced by the Police Commissioner alleges “Though most of the atrocities on the residents have been perpetrated by the SLDF, these

¹²² 1963 Constitution of Kenya, Art. 26 (3).

¹²³ *Ibid.*, Art. 36.

¹²⁴ *Ibid.*, Art. 68 (1)(b).

¹²⁵ *Ibid.*, Art. 26 (2).

¹²⁶ The previous Attorney-General, Mr. Amos Wako was in office from 1991 to 2011. The new one, Mr. Githu Muigai took power in August 2011.

¹²⁷ Philip Alston report, *supra* note 21, para. 29.

¹²⁸ HRW 2008 report, *supra* note 19, p. 8.

¹²⁹ Kenya Police report, *supra* note 24, p. 1.

organizations [ICRC, IMLU, KNCHR and HRW] lay emphasis on the alleged violations of human rights by the security forces”.¹³⁰ The report focuses on justifying the operation in Mount Elgon alleging that its proximity to the Ugandan border made it “all the more necessary” to protect “National Security”.¹³¹ The report also focused on criticizing and minimizing the reports and information compiled by the NGOs as well as their methodology.¹³² According to the police report “All the human rights organizations that purported to document the alleged reports on human rights violations lack investigation ability, mandate, expertise and capacity. The allegations were found to be mischievous, baseless and compounded on hearsay”.¹³³ Most of the report concentrates on the abuses committed by the SLDF giving numerous case-studies and it highlights the “normalcy and tranquillity” which is back in the region thanks to the operation *Okoa Maisha*: “Normalcy and tranquillity has returned to Mount Elgon region as residents are embarking on their daily activities peacefully. Residents are happy with the presence of the military in the District. The proposed establishment of a permanent military camp in Kopsiro Division, Mount Elgon district to deter reorganization and future attacks by SLDF was well received by the residents”.¹³⁴ In general, the report is a mere justification of the operation which categorically denies the commission of any human rights violations by State agents: “The security forces did not commit human rights violations on the residents of Mount Elgon region during the operation ‘*Okoa Maisha*’ as documented in the alleged human rights reports”.¹³⁵ The police report in fact states in its recommendations that “The operation “*Okoa Maisha*” should be intensified, all SLDF members arrested and charged in court”.¹³⁶ The report concludes that “The Government has a duty under the constitution of Kenya to protect life and property of its citizens. To achieve this noble responsibility, the Government has established various security forces in line with enabling statutes noted earlier in this report [...] The several Human Rights Organizations have come up with reports on alleged human rights violations which turned to discredit the good work being performed by the security forces backed by the military in the region”.¹³⁷ The report reflects the lack of self-criticism by

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² Regarding the report compiled by the KNCHR, the Kenya Police report establishes that “The KNCHR was found to have neither had the capacity, ability nor expertise to carry out investigations for prosecution purposes. The three instances of alleged torture victims captured earlier attest to this as the cited identity card numbers were confirmed from the Registrar of Persons to belong to other people. The KNCHR report is neither authentic nor analytical but based on unsubstantiated hearsay. It is at best a public relations write-up passed off as an investigation report.” See Kenya Police report, *supra* note 24, p. 34. With regard to the report by the ICRC, they state “ICRC has no mandate to comment on Kenyan internal crime trends/situations. Again Kenya is not at civil war or total war with any country to warrant ICRC intervention. In the Kenyan scenario, there were no prisoners of war and all persons arrested have since been arraigned before court. The report on alleged Mt. Elgon human rights abuses is therefore null and void, ab initio”. See Kenya Police report, *supra* note 24, p. 38. Regarding the report by WKHRW, the Kenya Police report determines that “The organization has neither mandate nor capacity to carry out any investigations and its alleged report is therefore a nullity”. See Kenya Police report, *supra* note 24, p. 40. About the report by MSF, they say “Médecins Sans Frontières is not an investigation agency and alleged torture victims who attend their Health Care Clinics may not necessarily be genuine victims of human rights abuses but mischievous opportunists out to get sympathy and humanitarian assistance from the organization”. See Kenya Police report, *supra* note 24, p. 42. Similar conclusions are drawn about the IMLU report.

¹³³ Kenya Police report, *supra* note 24, p. 30.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, p. 47.

¹³⁷ *Ibid.*, p. 32.

the government and the absolute lack of will to investigate the alleged violations of human rights committed by the security forces.

96. Also on **22 May 2008**, the government of Kenya established the Commission on Inquiry into the Post-Election Violence (hereinafter, "CIPEV"). The Commission however *did not include the human rights violations committed during operation Okoa Maisha* in its mandate. The reason given by the CIPEV for this exclusion was because "[...] the problems associated with violence in Mount Elgon *predated the elections*, the Commission was unable to establish any link with the 2007 PEV and therefore *did not integrate it into investigations of PEV in the region*".¹³⁸ In justifying its decision, the CIPEV also stated that they were of the view that "issues concerning Mount Elgon were *of such magnitude* that the Commission could not delve into them...".¹³⁹
97. On **15 October 2008**, the CIPEV presented a report finding that 1,133 people were killed during the post-election violence and issuing a number of recommendations.¹⁴⁰ Among the recommendations made by the CIPEV to the government, was the creation of "A special tribunal, to be known as the **Special Tribunal for Kenya** be set up as a court that will sit within the territorial boundaries of the Republic of Kenya and seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya. The Special Tribunal shall achieve this through the investigation, prosecution and adjudication of such crimes".¹⁴¹ If this special tribunal was not established within the deadlines fixed by the CIPEV,¹⁴² a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal *would be forwarded to the Special [sic] Prosecutor of the International Criminal Court. The Special [sic] Prosecutor would be requested to analyze the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons*.¹⁴³
98. In **February 2009**, the Kenyan Parliament voted against a bill to establish the above-mentioned Special Tribunal. A second attempt generating a Bill for the establishment of a national mechanism to deal with accountability for the post-election violence was made in **July 2009** when the Minister for Justice proposed through a Bill the establishment of a Special Division of the High Court to specifically deal with the post-election violence cases. This Bill was rejected by the Cabinet citing a need for immunity clauses for the Head of State as well as presidential power to pardon suspects within any such legislation.
99. After this second failure, the International Criminal Court Prosecutor was sent the extensive

¹³⁸ Report of the Commission on Inquiry into the Post-Election Violence (hereinafter "CIPEV report"), 16 October 2008, available at: <http://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report>, p. 162, emphasis added.

¹³⁹ *Ibid.*, p. 162, emphasis added.

¹⁴⁰ *Ibid.*, p. 383.

¹⁴¹ *Ibid.*, p. 472.

¹⁴² The deadline for signing an agreement to establish the tribunal was within 60 days from the presentation of the CIPEV report, that is in mid-December 2008. A Statute for the tribunal was also to be enacted and the deadline for its coming into force was set for 45 days after the signing of the agreement. The special tribunal was to commence functioning 30 days after the giving of Presidential Assent to the Bill enacting the Statute. No such tribunal was ever formed. CIPEV report, *supra* note 139, p. 473.

¹⁴³ *Ibid.*, emphasis added.

documentation compiled by the CIPEV. Following an analysis of this documentation, on **26 November 2009**, the Prosecutor, invoked for the first time his *proprio motu* powers to initiate investigations granted to him under Article 15(3) of the Rome Statute (right to submit a request for authorization to initiate an investigation without referral from a State Party or the UN Security Council). The Prosecutor's investigation led him to identify six individuals that he alleged were responsible for crimes against humanity.

100. On **15 December 2010** he publicly revealed he had submitted an application requesting Court's summonses for these six people, divided into two separate cases. The Pre-Trial Chamber reviewed this evidence and determined that there were reasonable grounds to believe that those individuals had committed the crimes alleged in the Prosecutor's application. The request was therefore granted, and the summonses were issued, on **8 March 2011**. The six people summoned by the International Criminal Court are: William Samoei Ruto, Henry Kiprono Kosgey, and Joseph Arap Sang (Case 1)¹⁴⁴ and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali (Case 2).¹⁴⁵
101. As the Police Commissioner at the time when operation *Okoa Maisha* took place, Major General Mohammed Hussein Ali was responsible for approving any police operations undertaken. In an interview with Time magazine, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston observed "One thing that was clear from all those with whom I spoke was that *Commissioner Ali was totally on top of everything. Nothing happened that he wasn't aware of*, and he was criticized in fact for micromanaging".¹⁴⁶ Having found that in Kenya "investigations by police are so deficient and compromised, that claims by the police that all killings are lawful, are inherently unreliable and unsustainable", the Special Rapporteur called for the removal of Hussein Ali.¹⁴⁷ It is important to highlight that the investigation by the International Criminal Court, does not include the violations committed in Mount Elgon.
102. On **28 November 2008**, the government of Kenya also established a Truth, Justice and Reconciliation Commission (TJRC) whose mandate and functions are regulated by the TJRC Act, 2008. According to the TJRC Act, 2008, the objective of the TJRC was "to promote peace, justice, national unity, healing and reconciliation among the people of Kenya".¹⁴⁸ To achieve its objectives the TJRC was to establish "an accurate, complete and historical record of violations and abuses of human rights and economic

¹⁴⁴ William Samoei Ruto: Senior member of the Orange Democratic Movement (ODM), member of parliament from Eldoret (Rift Valley) and Minister of Higher Education, Science and Technology in the coalition government (though he is currently suspended due to allegations of corruption). Henry Kiprono Kosgey: Senior member of the Orange Democratic Movement (ODM), member of parliament from Tinderet (Rift Valley) and former Minister of Industrialization in the coalition government (he stepped down in January 2011 due to corruption allegations). Joseph Arap Sang: Current head of operations at Kass FM in Nairobi. At the time of the attacks, Sang was a radio host in Eldoret, Rift Valley Province.

¹⁴⁵ Francis Kirimi Muthaura: Senior member of the Party of National Unity (PNU), currently holding the positions of Head of the Public Service and Secretary to the Cabinet of the Republic of Kenya (as he was during the period of post-election violence). Uhuru Muigai Kenyatta: Senior member of the Party of National Unity (PNU), currently holding the positions of Deputy Prime Minister and Minister for Finance of the Republic of Kenya. Mohammed Hussein Ali: Currently holding the position of Chief Executive of the Postal Corporation of Kenya, and Police Commissioner at the time of the elections. For a good overview of the Kenyan cases before the ICC see: www.icckkenya.org/

¹⁴⁶ Nick Wadhams, *Kenya's Police Chief Fired: The Start of Reform*, Time Magazine, 16 September 2009, emphasis added.

¹⁴⁷ Philip Alston report, *supra* note 21, para. 85 (a).

¹⁴⁸ Truth, Justice and Reconciliation Commission Act, 2008, Art. 5.

rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired *between 12 December 1963 and 28 February 2008*”.¹⁴⁹ The operation *Okoa Maisha* began on **9 March 2008**, thus the mandate of the TJRC does not cover violations committed during this operation either.

103. The violations committed during the operation *Okoa Maisha* thus are not encompassed by the mandates of the three mechanisms capable at both the national and international level to investigate the 2008 post-election violence in Kenya, namely the CIPEV, the TJRC and the ICC.
104. The lack of results in the investigations clearly owing to the unwillingness of the government of Kenya to investigate the violations occurred in Mount Elgon, triggered the CAT to express in its concluding observations published in **January 2009** on the report submitted by Kenya, deep concern about “allegations of mass arrests, persecutions, torture and unlawful killings by the military in the Mount Elgon region during the ‘Operation *Okoa Maisha*’ conducted in March 2008”.¹⁵⁰ The CAT urged the government of Kenya to take “immediate action to ensure prompt, impartial and effective investigation into the allegation of excessive force and torture by the military” during this operation as well as to “ensure that perpetrators are prosecuted and punished, the victims who lost their lives are properly identified and that their families, as well as other victims are adequately compensated”.¹⁵¹ The failure to investigate also led the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston in **May 2009** to call on the government of Kenya to “immediately set up an independent commission for Mount Elgon modeled on the Waki Commission, to investigate human rights abuses [...] by the police and the military and the reasons for the lengthy delay in government intervention to stop the SLDF”.¹⁵² The Special Rapporteur also recommended that the government “make available to the ICRC and the KNCHR, with assurances of appropriate confidentiality, *the names of all those detained at Kapkota military camp* [...] This would facilitate the quest to resolve disappearances and enable a thorough accounting to be undertaken”.¹⁵³ The Special Rapporteur considered that the government “should provide funding and other assistance to the families of those who remain disappeared following the police-military intervention”¹⁵⁴ and “ensure that evidence of killings, and especially mass graves in Mount Elgon is not destroyed”.¹⁵⁵
105. In its second periodic report to the CAT, the government of Kenya still refers to the investigation led by the police in May 2008, claiming that “[...] intensive investigations into the matter [...] found no evidence to show that security officers tortured victims as claimed [...] This case is now under the review of the Truth, Justice and Reconciliation Commission who received the testimony of the people during hearings mounted in the area. The Commission is expected to present a report on its findings on whether or not

¹⁴⁹ *Ibid.*, Art. 5(a).

¹⁵⁰ CAT, Concluding Observations to the initial report on Kenya, *supra* note 40, para. 21.

¹⁵¹ *Ibid.*

¹⁵² Philip Alston report, *supra* note 21, para. 99.

¹⁵³ *Ibid.*, para. 100, emphasis added.

¹⁵⁴ *Ibid.*, para. 101.

¹⁵⁵ *Ibid.*, para. 102.

atrocities were committed by the security agencies and make recommendations on the prosecution of any alleged perpetrators and the compensation of victims”.¹⁵⁶ Neither the government’s reference to the ill-willed investigation led by the police in 2008, nor the vague affirmations regarding the TJRC -which as we have previously seen has no obligation to investigate the atrocities committed in Mount Elgon¹⁵⁷- be considered adequate responses to the questions posed by the CAT.

106. In its 2011 World Report, HRW states “Impunity remains a pervasive problem in Kenya [...] Kenya has not *credibly and effectively investigated and prosecuted* other perpetrators of post-election violence [...] There have been no investigations or forthcoming prosecutions for war crimes committed by the insurgent Sabaot Land Defence Force or *Kenyan security forces* during the 2006-2008 Mount Elgon conflict; abuses by Kenyan army and police units implicated in using excessive force [...]”.¹⁵⁸ HRW 2012 World Report reiterates “The government continued to deny responsibility for extrajudicial executions, enforced disappearances, and torture during a 2008 security operation in Mount Elgon region. NGOs filed cases against the government at the East African Court of Justice, the UN Working Group on Enforced or Involuntary Disappearances, and the African Commission on Human and People’s Rights. Local organizations documented over 300 cases of persons ‘disappeared’ between 2006 and 2008, some by the Sabaot Land Defence Forces, a militia, but most by the army. The government took no new steps to investigate the ‘disappearances’, with the exception of one inquest, or to exhume mass graves”.¹⁵⁹
107. According to Amnesty International’s 2011 World Report “No measures were implemented to ensure accountability for human rights violations, *including possible crimes against humanity, committed in the post-election violence in 2007/2008* [...] No individual police officers or security personnel were brought to justice for unlawful killings and other human rights violations committed during the year and in the recent past”.¹⁶⁰ Amnesty International’s 2012 World Report refers that “Although the government stated several times that investigations were continuing into crimes and human rights violations, including possible crimes against humanity, allegedly committed during the post-election violence, *steps were not taken to bring perpetrators to justice*”.¹⁶¹
108. Similarly, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns noted in the follow-up report to the recommendations made by his predecessor that “There has been *little or nothing done to ensure that perpetrators are held accountable* for the 2007-2008 post-electoral violence and killings at Mount Elgon. The government’s commitment to address grave human rights

¹⁵⁶ *Second periodic report of Kenya to the CAT, supra note 6, para. 98-99.*

¹⁵⁷ See, *supra* para. 102.

¹⁵⁸ HRW, World Report 2011: Kenya (hereinafter “HRW 2011 World Report”), p. 134, available at: www.hrw.org/en/world-report-2011/kenya, emphasis added.

¹⁵⁹ HRW, World Report 2012: Kenya (hereinafter “HRW 2012 World Report”), p. 135, available at: <http://www.hrw.org/world-report-2012/world-report-2012-kenya>, emphasis added.

¹⁶⁰ Amnesty International, World Report 2011: Kenya (hereinafter “AI 2011 World Report”), p. 195, available at: www.amnesty.org/en/annual-report/2011/downloads#en, emphasis added.

¹⁶¹ Amnesty International, World Report 2012: Kenya (hereinafter “AI 2012 World Report”), p. 201, available at: <http://www.amnesty.org/en/annual-report/2012/downloads>, emphasis added.

abuses appears to be *minimal*.¹⁶² The Special Rapporteur Christof Heyns also notes with regard to prosecutions: “The prosecution and conviction rate for perpetrators of extrajudicial executions and other gross human rights violations is alarmingly low [...] there is fear among public authorities that investigating gross human rights violations is likely to open a Pandora’s box. Public officials are likely to be implicated, hence the state of paralysis of the Government in conducting investigations”.¹⁶³

109. Despite the reports and recommendations by the HRW, the CAT and the Special Rapporteur, the Kenyan authorities failed to conduct a proper investigation on the situation of enforced disappearance in Mount Elgon district. To date, the perpetrators of such violations remain unpunished.

Selection of cases of torture and enforced disappearance in Mount Elgon

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

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

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

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

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

¹⁶² Christof Heyns report, *supra* note 120, para. 10, emphasis added.

¹⁶³ *Ibid.*, para 26.

6.2 Absence of effective mechanisms for the search of persons

110. There are no legal mechanisms in place for the search of missing persons and there is no service in place to provide help to citizens looking for the disappeared persons in the Kenyan laws.

6.3 Absence of databases on disappeared persons

111. No database exists for the disappeared persons nor are there public information available for missing persons.

6.4 Gaps in exhumations and mortal remains' identification programs

112. As a result of the failure of the government to investigate instances of enforced disappearance and of the lack of access to domestic remedies, families of victims are denied the right to know the truth regarding the fate and whereabouts of their loved ones, including the return of their mortal remains in case of their decease. The existence of an autonomous right to know the truth has been recognized by the WGEID since its very first report in 1981 by recognizing "the right of families to know the fate of their relatives" spelled out in the Additional Protocol I to the Geneva Convention of 12 August 1949, as one of the various human rights of the members of the family of a missing or disappeared person which may also be infringed by that person's enforced absence.¹⁶⁴ In a more recent General Comment on the Right to the Truth in Relation to Enforced Disappearances, the WGEID stated that: "1. *The right to the truth in relation to enforced disappearances means the right to know about the progress and result of an investigation, the fate or the whereabouts of the disappeared person, and the circumstances of the disappearances, and the identity of the perpetrators is a broad obligation which is assumed by States and is primarily an obligation to do something. This provision cannot be interpreted in a restrictive sense, since what it does is to serve as the general model for the purpose and nature of the measures to be taken, as well as for the content of the international responsibility of the State in this regard. 2. The right to the truth in relation to enforced disappearances should be clearly distinguished from the right to information [...] The right to information on the person detained, together with the non-derogable right of habeas corpus, should be considered central tools to prevent the occurrence of enforced disappearances. 3. Article 13 of the Declaration recognizes the obligation of the State to investigate cases of enforced disappearances, Paragraph 4 of Article 13 specifies that "the findings of such an investigation shall be made available upon request to all interested persons, unless doing so would jeopardize an ongoing criminal investigation" [...] the restriction in the last part of this paragraph should be interpreted narrowly. Indeed the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance. The refusal to provide information is a limitation on the right to the truth. 4. [...] The obligation to continue the investigation for as long as the fate and the*

¹⁶⁴ WGEID Annual Report, E/CN.4/1435, 26 January 1981, para. 187. This right is also recognized at an international level in a number of instruments for instance, Art. 32 of Protocol 1 to the Geneva Conventions which establishes "the right of families to know the fate of their (disappeared) relative" and Art. 24 of the International Convention for the Protection of All Persons from Enforced Disappearances which states "Each victim has the right to know the truth regarding the circumstances of the enforce disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard".

*whereabouts of the disappeared remains unclarified is a consequences of the continuing nature of enforced disappearance [...]. The right to know the truth about the fate and whereabouts includes, when the disappeared person is found to be dead, the right of the family to have the remains of their loved one returned to them, and to dispose of those remains according to their own tradition, religion or culture. The remains of the person should be clearly and indisputable identified, including through DNA analysis [...] States ought to take the necessary steps to use forensic expertise and scientific methods of identification to the maximum of its available resources, including through international assistance and cooperation”.*¹⁶⁵

113. Similarly, the Advisory Committee of the Human Rights Council notes that “The right to know the truth is the pillar of protection that ought to be afforded to missing persons and their families [...] The right also includes the right to information about the place of burial of a missing relative, if known”.¹⁶⁶
114. According to Article 35 (1) of the 2010 Constitution of Kenya, “Every citizen has the right to access (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom”. This right is in practice violated inasmuch as the families are rarely given any information on the fate or whereabouts of their loved ones in the case of enforced disappearances. This is the case of victims of enforced disappearance in Mount Elgon region in the context of the operation *Okoa Maisha*. None of the families interviewed until now by TRIAL or WKHRW have been given information on the fate or whereabouts of their disappeared relatives. On the contrary, whenever relatives of the disappeared in Mount Elgon inquired on the fate and whereabouts of their relatives with State agents, they were simply told that they had no information and thus should look elsewhere, forcing them to undertake the sometimes prohibitive costs of travelling through the region to search in mortuaries, prisons and police stations. Some of the relatives were simply unable to undertake the cost of the search for their relatives, who were most of the times the breadwinners.
115. In Kenya, it is believed that if you do not bury a dead person, this person will haunt you. According to the local traditions, if you know where a body is, you *must* bury it. Despite the fact that none of the relatives of the persons who were abducted by the military during operation *Okoa Maisha* have seen the bodies of their loved ones, many have resigned to the idea that they are dead. Some of them have in fact received information from neighbours or people who were detained together with their loved ones that they succumbed to torture in the military camps during the “screening” process. Many have also been informed that their loved one’s body was dumped in the forest of Mount Elgon.¹⁶⁷
116. Mass graves have been indeed found in the forest of Mount Elgon. HRW received information from a military source that eight bodies from Kapkota were flown and dumped in the forests, north of Kaptaboi village on 2 April 2008.¹⁶⁸ Former detainees also testified that a helicopter was always kept on standby

¹⁶⁵ WGEID, General Comment on the right to the truth in relation to enforced disappearance, 2010.doc. A/HRC/16/48.

¹⁶⁶ Advisory Committee of the Human Rights Council, Report on Best Practices in the Matter of Missing Persons, doc. A/HRC/AC/6/2 of 22 December 2010, para. 50 and 53.

¹⁶⁷ Interviews with relatives of disappeared persons, Bungoma, Kenya 9-13 April 2011.

¹⁶⁸ HRW 2008 report, *supra* note 19, p. 30.

at Kapkota military camp to ferry bodies to the forest.¹⁶⁹ Some children interviewed by Associated Press described how they were forced to help load bodies of victims of torture onto military helicopters in Kapkota camp.¹⁷⁰ The *Daily Nation* newspaper quoted on 27 March 2009 a military source describing how bodies had been dumped in the forest reserve in Mount Elgon national park.¹⁷¹ The government has always claimed that these mass graves contain the bodies of victims of the SLDF. While it is likely that victims of SLDF are also contained in the sites, the government has never undertaken any comprehensive programme of exhumation and identification of the remains.¹⁷² Neither has any independent forensic analysis of mass graves in Mount Elgon has taken place up to date.

117. In 2009, Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston recommended that independent forensic analysis of the mass graves in Mount Elgon takes place. He also recommended that the government “ensure that evidence of killings, and especially the mass graves in Mount Elgon, is not destroyed. Civil society should not be prevented from visiting these sites”.¹⁷³ In the April 2011 follow-up report to the country visit undertaken in 2009 by Philip Alston, the new Special Rapporteur, noted that these recommendations had not been implemented.¹⁷⁴
118. Notwithstanding the fact that they have never seen the bodies of their loved ones, in complying with the cultural traditions, some of the family members have undergone the ritual of burying a banana stem to simulate the body of the dead person. This procedure is a source of enormous emotional distress for the families.
119. Families of disappeared persons in Mount Elgon continue ignoring the fate and whereabouts of their loved ones. Information is systematically concealed by the authorities. Relatives of those believed to be

¹⁶⁹ KNCHR report, *supra* note 16, p. 12.

¹⁷⁰ Katharine Houreld, *Hundreds of Kenyan kids caught between brutal militia, Kenyan army*, *supra* note 87.

¹⁷¹ Daily Nation, 27 March 2008, quoted in HRW 2008 report, *supra* note 19, p. 30.

¹⁷² The positive obligation to exhume, identify and return mortal remains to the families as well as the negative obligation not to despoil or mutilate the bodies, is clearly spelled out in the 1949 Geneva Conventions and their Additional Protocols, see: Convention I Geneva for the Amelioration of the Condition of Wounded and Sick in the Armed Forces in the Field (Art. 17); Convention II Geneva for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Art. 20); Convention III relative to the Treatment of Prisoners of War (Art. 120 and 121); Additional Protocol I relating to the Protection of Victims of International Armed Conflicts (Art. 33.4 and 34); and Additional Protocol II relating to the Protection of Victims of Non-international Armed Conflicts (Art. 8) as well as in the 2007 International Convention for the Protection of All Persons from Enforced Disappearances, see Art. 24, para. 3, of the 2007 International Convention for the Protection of All Persons from Enforced Disappearance, which establishes the obligation for States Parties, in the event of death of the victim of enforced disappearance “to locate, respect and return their remains”. Such provision must be read in conjunction with Art. 24, para. 2, of the same treaty, which provides that “each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard”. Furthermore, Art.15 of the 2007 Convention sets forth “States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains”. See also: Human Rights Council, *Progress Report of the Human Rights Council Advisory Committee on Best Practices on the Issue of Missing Persons*, *supra* note 68; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by the Economic and Social Council Resolution No. 1989/65 of 24 May 1989, Principle 10; Principles on the right to a remedy and reparation for victims of gross violations of human rights law and serious violations of humanitarian law (“UN Principles on the Right to a Remedy”), adopted by General Assembly Resolution No. 60/147 of 16 December 2005, Principle 12; and *Guiding Principles on Internal Displacement*, doc. E/CN.4/1998/53/Add.2 of 11 February 1998, Principle 16.3 and 4.

¹⁷³ Philip Alston report, *supra* note 21, para. 102.

¹⁷⁴ Christof Heyns report, *supra* note 120, Appendix, F.

dead have not received the mortal remains of their loved ones and are thus unable to give closure to their grief. As such, the government of Kenya is violating the right of the people to know the truth on the fate or whereabouts of their loved ones.

Examples pointing out to the existence of mass graves in Mount Elgon

Case of Mr. T.G.

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

Case of Mr. D.O.

On **13 March 2008** at 13:00 hours, while Mrs. G.O., wife of Mr. D. O. was looking after the cattle at her home, located on Cheptaburbur village, Kipsigon location, Cheptais division, Mount Elgon district, eight military officers in uniform approached her and asked for her husband. She replied that he had left in the morning and had not told her where he was going. One of the military officers warned her that if she did not tell them where he was, and they found him themselves, they were going to kill him. Two military officers hit Mrs. G.O. with whips and kicked her on her buttock and on her head. They questioned her about her husband's activities and insisted that she should tell them where her husband was or otherwise they would arrest her. A few minutes later she heard one of the officers who had stayed outside shouting "He is here! He is here!". The soldiers had found her husband who was in a hideout approximately 250 meters from their house in the valley. The officers brought Mr. D.O. to the house and beat with him kicks and gun butts on the back until he collapsed. Then they dragged him to the military truck and bundled him on it. The truck which was parked at Kipsigon market was full of other people who had also been arrested in that area. On **14 March 2008**, Mrs. G.O. went to Kapkota military camp and asked the military officers at the gate to allow her to see her husband. One of them asked her who her husband was. When she gave him the name, the soldier laughed and told her to forget about him "Mama sahou, bwana yako hayuko tena" which in English means "Mummy forget, your husband is no longer. Your husband's body is in the forest, go home and look after your children!". On her way back home, Mrs. G.O. met Mr. M.C., her neighbor who was assisting the military to crack down the SLDF and screening persons at Kapkota military camp. He confirmed to her that her husband had been tortured to death at Kapkota and his body disposed of in the forest. "Hold your heart" Mr. M.C. told her "there is

nothing I can do.” He further advised her not to let the military fool her by telling her Mr. D.O. was alive. His body, he said, together with many others had been put in helicopters and disposed of in the forest.

7. Gaps in the protection of witnesses, human rights defenders and relatives of victims of enforced disappearance

Already mentioned Arts. 5, 6, and 7 Convention against Torture

Art. 13 Convention against Torture

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Art. 13, paras. 3 and 5, 1992 Declaration¹⁷⁶

3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisals. [...] 5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.

7.1 Gaps in the protection of witnesses and human rights defenders

120. Article 13 of the 1992 Declaration requires States to take steps to ensure that all persons involved in the investigation including the witnesses and those conducting the investigation are protected against ill-treatment, intimidation or reprisal. The Witness Protection Amendment Act 2010, which became law in June 2010, substantially modified and improved the Witness Protection Act of 2006. The 2010 Act expanded the definition of a witness in need of protection and established an independent Witness Protection Agency (WPA), effectively removing the previous witness protection programme from the office of the Attorney-General. However the law is not yet fully operational and it is too soon to determine whether it will offer effective protection for victims and witnesses of the post-election violence. The WPA has also faced a lack of funding receiving only 35 million Kenyan Shillings out of the 1.2 billion requested by the Attorney-General to implement it. In this regard, Special Rapporteur Christof Heyns stressed that “it is crucial that the agency receives sufficient capital to fund its operations and that it be independent from external influence”¹⁷⁶ Protection to witnesses is key in the fight against impunity for crimes committed in the aftermath of the December 2007 elections and the crimes committed in Mount Elgon district.
121. According to Amnesty International, in late 2010, up to 22 witnesses who testified before a 2008 official

¹⁷⁵ See also Art. 12, paras. 1 and 4, of the International Convention for the Protection of all Persons against Enforced Disappearance.

¹⁷⁶ Christof Heyns report, *supra* note X, para. 55.

inquiry into the post-election violence and who might be called to testify in future at the International Criminal Court or other court trials, were reported to be living in fear as a result of threats to their lives or security. An unknown number of other potential witnesses had to flee Kenya in the last three years because of similar threats against them.¹⁷⁷

Examples of gaps in the protection of witnesses

Threats to Job Bwonya, Executive Director of WKHRW

After the visit by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston to Kenya on February 2009, Job Bwonya, -who had been documenting atrocities committed both by the SLDF and the government since 2006- began receiving numerous death threats and after government officials demanded that he gave them a list of witnesses he arranged to be interviewed for the report.¹⁷⁸ Fearing for his life, he decided to flee to Uganda.

Previously, the premises of WKHRW had been broken into twice, in 2004 and 2007 and during these raids, the organization lost all of the office equipment that had been acquired through donations as well as many files documenting violations. In April 2008, WKHRW received a grant from the organization Frontline Protection of Human Rights Defenders, with which they reinforced their doors, front middle and rear and the windows with double steal grills. The new security measures allowed WKHRW employees to continue documenting human rights violations and assisting victims.

Killings of human rights activists Oscar Kamau Kingara and John Paul Oulu

Two other Kenya human rights defenders whom the Special Rapporteur met during his visit, Oscar Kamau Kingara, Chief Executive of the Oscar Foundation and John Paul Oulu, its advocacy director were killed in Nairobi on March 2009. The Oscar Foundation had been critical of the Kenyan government for its use of extrajudicial killings and during the meeting with the Rapporteur, Kingara and Oulu provided him evidence of alleged police abuses.¹⁷⁹ The Special Rapporteur said the way the Oscar Foundation's officials were killed was likely to raise suspicion upon the police. "It is extremely troubling when those working to defend human rights in Kenya can be assassinated in broad daylight in the middle of Nairobi ... this constitutes a major threat to the rule of law, regardless of who might be responsible for the killings" and called for independent investigations "It is imperative, if the Kenyan Police are to be exonerated, for an independent team to be called from somewhere like Scotland Yard or the South African Police to investigate".¹⁸⁰ However, the Police Commissioner Hussein Ali said that the local police had previously cracked other murder cases and that these latest ones should not be accorded "special treatment". He also said that the Special Rapporteur portrayed "activist mentalism"

¹⁷⁷ Amnesty International, Public Statement, *Kenya's Application before the International Criminal Court: A Promise is Not Enough to Pre-empt the Court's Jurisdiction*, 6 April 2011, AI Index: AFR 32/003/2011.

¹⁷⁸ Lucas Tanglen, *Kenya rights activists fleeing country after UN report release*: AP, 15 March 2009 available at: <http://jurist.org/paperchase/2009/03/kenya-rights-activists-fleeing-country.php>.

¹⁷⁹ Devin Montgomery, *Kenya rights activist killings must be investigated: UN special Rapporteur*, 6 March 2009, available at: <http://jurist.law.pitt.edu/paperchase/2009/03/kenya-rights-activist-killings-must-be.php>. See also: Adam Myott, *Rule of Law Reels in Kenya*, 6 March 2009, available at: <http://news.bbc.co.uk/2/hi/africa/7928519.stm>

¹⁸⁰ Mutahi Rukanga, *UN's Alston urges independent probe over deaths*, Daily Nation, 16 March 2009, available at: www.nation.co.ke/News/-/1056/542438/-/u32wc5/-/.

and his ideas should not be proscribed to.¹⁸¹ HRW noted in its World Report 2011 that “There were no developments in finding the killers of Oscar Kamau Kingara and John Paul Oulu, human rights defenders from the Oscar Foundation Free Legal Aid Clinic...”¹⁸² In its 2012 World Report, Amnesty International noted that “The authorities took no steps to bring to justice police officers and other security personnel who had reportedly carried out extrajudicial executions and other unlawful killings in recent years” and highlighted particularly that the “Police halted their investigations into the 2009 killings of Oscar Kingara and Paul Oulu, two human rights activists, by unknown gunmen”.¹⁸³

Killing of police officer Bernard Kirinya in June 2008

When the National Commission on Human Rights was in the process of conducting investigations, it recorded the confessions of police officer Bernard Kirinya in June 2008, who said he witnessed extra-judicial killings of 58 suspects by his colleagues, under orders from his superiors. Kirinya was shot dead three months later as he was coming out of his safe house.¹⁸⁴ Up to date, no investigation on the case has been undertaken and no one has been tried or sanctioned for the murder of Bernard Kirinya.

122. In its 2011 World Report, HRW noted “Witness protection emerged as a challenge to investigations. Threats against individuals who witnessed post-election violence, including some who testified before the CIPEV, increased after the prosecutor announced that he would seek to open a Kenya investigation”.¹⁸⁵ The proper implementation of the Witness Protection Amendment Bill 2010 will be crucial in investigating post-election violence in Kenya, including that occurred in the wake of the operation *Okoa Maisha*. It will also prompt potential witnesses to come forward and denounce the crimes and alleged perpetrators. As per today however, it cannot be deemed that Kenyan legislation complies with Article 13 of the Convention against Torture.

7.2 Risks for the relatives of victims of enforced disappearance

123. Despite the numerous and consistent reports signalling a high number of enforced disappearance committed in Kenya -at least stemming from operation *Okoa Maisha* in 2008-, until 2011 when TRIAL and WKHRW begun documenting and transmitting cases to the WGEID, not a single annual report by the WGEID to the Human Rights Council mentioned cases concerning Kenyan nationals.¹⁸⁶ This must be seen in the general context of the under-reporting of cases from the African continent.¹⁸⁷ However, the WGEID has expressed its concern “that underreporting of disappearance in certain regions and

¹⁸¹ *Ibid.*

¹⁸² HRW World Report 2011, *supra* note 159, p. 134.

¹⁸³ AI 2012 World Report, *supra* note 162, p. 202.

¹⁸⁴ KNCHR, Press Release, Extra-judicial Executions: The testimony and subsequent execution of the late Bernard Kirinya Ikunya, March 2009, available at: www.marsgroupkenya.org/pdfs/2009/03/KNCHR_Press_Release.pdf

¹⁸⁵ HRW World Report 2011, *sky*, p. 134.

¹⁸⁶ In its 2012 Annual Report, the WGEID mentioned 40 standard cases transmitted to the Kenyan government during the reporting period. These cases concern enforced disappearances occurred in 2008 in the Mount Elgon district, WGEID, *2012 Annual Report*, doc. A/HRC/22/45, 28 January 2013, para. 209.

¹⁸⁷ WGEID, 2004 Annual Report, doc. E/CN.4/2006/56, 27 December 2005, para. 593. The WGEID expressed its deep concern over underreporting in Africa in these terms “[...] the Working Group remains concerned that while Africa has been racked by armed conflicts over the last decade, at the same time it is the region with the fewest reported cases of enforced or involuntary disappearances. The Working Group suspects that it is dealing with an underreported phenomenon of disappearances.”

countries is also due to government restrictions on, or active disruption of, civil society work on this sensitive issue".¹⁸⁸ The following are the main factors which thwart relatives from reporting their loved one's disappearance. The associations submitting this report have identified the following as the main factors which thwart relatives from reporting their loved one's disappearance.

124. **Re-victimisation processes.** Relatives of victims in Mount Elgon have been discouraged from denouncing violations due to harassment and threats by security personnel. Most of these threats consisted in potential reprisals against their physical integrity or that of their close ones.
125. To give but a few more examples of cases of harassment in Mount Elgon district, **Mrs. O.H.**, wife of Mr. A.H., who was abducted by the military on March 2008 was told by the military that she would be arrested too if she did not keep quiet. Similarly, **Mrs. I.E.** wife of Mr. T.I., whose husband was abducted by the military, was threatened by the military to never return to Kapkota Military Camp, where she went to inquire on his fate or whereabouts. **Mrs. I.H.** biological mother of Mr. E.H. who was also taken by the military on March 2008, was warned by the Provincial Administration not to follow the truck which had taken her husband because she risked being raped. **Mrs. K.M.**, wife of Mr. P.K., another victim of enforced disappearance by the Kenyan military, said the military in Mount Elgon district were making it public that any women who took legal actions to find their missing husbands or sons would be arrested and killed. When Mr. O.A. was taken by the military, his wife, **Mrs. R.B.** was warned by the men who took her husband not to report the abduction to any police station. These threats as well as information circulating in the village that people who went to look for their loved ones in military camps and prisons had also been arrested, prevented her from taking action to look for her husband.
126. These testimonies are in line with what has been highlighted by the Special Rapporteur on extrajudicial, summary or arbitrary executions, another thematic mandate of the Human Rights Council where underreporting is evident. In a statement after his 2009 mission to Kenya he denounced, "witness and civil society representatives were intimidated, harassed and threatened by police, military and government officers. Individuals were told not to speak with me about police/military abuses, and only to mention abuses by the SLDF".¹⁸⁹ It is hence no surprise that almost five years after the government-led operation, the families of the disappeared continue to ignore the fate or whereabouts of their loved ones. This is due at least in part to the risks entailed by the families when attempting to report their relative's disappearance.
127. Furthermore, the families in Mount Elgon are discouraged from reporting abuses due to the government's use of informers, sometimes called "brokers" by local residents. During the operation *Okoa Maisha*, the government relied heavily on informants to identify members of the SLDF. According to the Special Rapporteur on extrajudicial, arbitrary or summary executions, "*With the assistance of local informants, police and military cordoned villages, detained and frequently beat the male residents, and took them to one of several temporary military bases, the largest of which was Kapkota military*

¹⁸⁸ WGEID, 2004 Annual Report, *supra* note 188, para. 593.

¹⁸⁹ Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions, Press Statement, Mission to Kenya, p. 6, available at: www.extrajudicialexecutions.org/application/media/PRESS_STATEMENT_Kenya.pdf (last accessed 23 January 2013).

camp. There, men were stripped, tortured and interrogated. *They were screened before local informants.* Those identified as SLDF were taken to the local police station and charged, the others were let go”.

128. **Financial Distress.** Most of the disappeared in Mount Elgon were adult and teenage males responsible for providing all or a substantial part of the household income. As such, their enforced disappearance placed their families in a dire financial situation, having lost the breadwinner -in most cases- in the family.
129. People in rural areas such as Mount Elgon have very little possibilities of availing themselves of local judicial remedies due to lack of financial means. Most of the villages in Mount Elgon have neither water nor electricity. Roads are not paved and become impassable any time it rains. Few people have motorcycles which may take people from the villages in Mount Elgon to the lowlands but their scarceness makes this only means of transportation prohibitively expensive for the majority of people. As such, access to a lawyer is impossible for most people. Rates of illiteracy are high and thus the possibility of filing a *habeas corpus* petition is practically unfeasible. Proof of this is that out of the alleged hundreds of cases of enforced disappearance resulting from the 2008 military-police operation in Mount Elgon, only one *habeas corpus* application has reached the High Court of Kenya at Bungoma.¹⁹⁰
130. **Lack of trust in the judicial system.** In addition to the failure by the State of Kenya to investigate, prosecute and sanction those responsible for enforced disappearance due to instances of threats and harassment, relatives of the disappeared are in practice denied access to domestic courts and judicial remedies due to corruption, inefficiency and lack of financial means. Regarding corruption, the HRC “notes with concern that because of, *inter alia*, widespread corruption, the access of citizens to domestic courts and to judicial remedies is limited in practice. The frequent failure to enforce court orders and judgements is an additional cause of concern (article 2 of the Covenant)”.¹⁹¹ Moreover, the Kenyan courts inspire little faith in the public and are usually considered corrupt and inefficient, with an estimated backlog in 2009 of 800,000 cases.¹⁹²

¹⁹⁰ See, *supra* para. 68.

¹⁹¹ HRC, Concluding Observations to the second periodic report of Kenya, *supra* note 76.

¹⁹² Antonina Okuta, *National Legislation for Prosecution of International Crimes in Kenya*, *Journal of International Criminal Justice* 7 (2009), p. 1072.

8. Lack of compensation and reparation for victims of enforced disappearance and their relatives

Art. 14 Convention against Torture

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Art. 19 1992 Declaration ¹⁹⁴

The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.

CAT, General Comment No. 3, para. 16

Satisfaction should include, by way of and in addition to the obligations of investigation and criminal prosecution under articles 12 and 13 of the Convention, any or all of the following remedies: effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification, and reburial of victims' bodies in accordance with the expressed or presumed wish of the victims or affected families; an official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; judicial and administrative sanctions against persons liable for the violations; public apologies, including acknowledgement of the facts and acceptance of responsibility; commemorations and tributes to the victims.

131. In 1996 the WGEID adopted a general comment on this provision, stressing out that: “[...] States are, therefore, under an obligation to adopt legislative and other measures in order to enable the victims to claim compensation before the courts or special administrative bodies empowered to grant compensation. In addition to the victims who survived the disappearance, their families are also entitled to compensation for the suffering during the time of disappearance and in the event of the death of the victim; his or her dependants are entitled to compensation. Compensation shall be “adequate”, i.e. proportionate to the gravity of the human rights violation (e.g. the period of disappearance, the conditions of detention, etc.) and to the suffering of the victim and the family. Monetary compensation shall be granted for any damage resulting from an enforced disappearance such as physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation and costs required for legal or expert assistance. Civil claims for compensation shall not be limited by amnesty laws, made subject to statutes of limitation or made dependent on penal sanctions imposed on the perpetrators. The right to adequate compensation for acts of enforced disappearance under article 19 shall be

¹⁹³ See Art. 24, para. 4 and 5, of the International Convention for the Protection of All Persons from Enforced Disappearance. See also WGEID, 2012 Annual Report, *supra* note 84, paras. 46-68.

distinguished from the right to compensation for arbitrary executions. In other words, the right of compensation in relation to an act of enforced disappearance shall not be made conditional on the death of the victim. 'In the event of the death of the victim as a result of an act of enforced disappearance', the dependents are, however, entitled to additional compensation by virtue of the last sentence of article 19. If the death of the victim cannot be established by means of exhumation or similar forms of evidence, States have an obligation to provide for appropriate legal procedures leading to the presumption of death or a similar legal status of the victim which entitles the dependants to exercise their right to compensation. The respective laws shall specify the legal requirements for such procedure, such as the minimum period of disappearance, the category of person who may initiate such proceedings, etc. As a general principle, no victim of enforced disappearance shall be presumed dead over the objections of the family. In addition to the punishment of the perpetrators and the right to monetary compensation, the right to obtain redress for acts of enforced disappearance under article 19 also includes "the means for as complete a rehabilitation as possible". This obligation refers to medical and psychological care and rehabilitation for any form of physical or mental damage as well as to legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to one's place of residence and similar forms of restitution, satisfaction and reparation which may remove the consequences of the enforced disappearance".¹⁹⁴

132. In its 2012 Annual Report, the WGEID emphasized “[...] in practice, measures intended to help relatives to cope with the consequences of the absence of the disappeared person are assimilated to measures of reparation [...]. In addition, social allowances and/or measures of reparation should not be made conditional on the requirement that the relatives of the disappeared person produce a death certificate [...] The Working Group does not differentiate between direct and indirect victims, but rather considers that both the disappeared person and those who have suffered harm as a result of the disappearance are to be considered victims of the enforced disappearance and are therefore entitled to obtain reparation [...] the obligation to provide redress to victims of enforced disappearances is not limited to the right to monetary compensation, but includes, inter alia, medical and psychological care and rehabilitation for any form of physical or mental damage as well as legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance [...] within the scope of the right to reparation in the case of enforced disappearance, the family of the disappeared person has an imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person and, in the event of decease, that person's body must be returned to the family as soon as it has been identified, regardless of whether the perpetrators have been identified or prosecuted [...] The Working

¹⁹⁴ WGEID, 1995 Annual Report, *supra* note 37, paras. 72-75. For further developments of the concept of “measures of reparation” to be adopted in cases of enforced disappearance, see Art. 24.5 of the International Convention on the Protection of All Persons from Enforced Disappearance: “The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as: a) restitution, b) rehabilitation, c) satisfaction, including restoration of dignity and reputation; and d) guarantees of non-repetition”. See also UN, Principles on the right to a remedy and reparation for victims of gross violations of human rights law and serious violations of humanitarian law, adopted by General Assembly resolution 60/147 of 16 December 2005 (in particular Principles 15-23); and UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, recommended by the Commission on Human Rights resolution 2005/81 of 21 April 2005 (in particular Principles 32-38).

*Group emphasizes that financial compensation is not sufficient in itself and should be normally associated with other forms of reparation [...] Individual and collective reparations may be granted concurrently and they do not exclude each other, given that both their essence and purpose are different. Collective reparations respond to collective harm or harm to society as a whole. Public apology or acceptance of responsibility as well as the construction of monuments or memorials for victims of enforced disappearances are possible forms of collective reparation”.*¹⁹⁵

133. **Article 22 (1)** of the Kenyan Constitution on the Enforcement of the Bill of Rights establishes that “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”. According to **Article 22 (2)**, such a proceeding, may not only be instituted by the person affected acting on his or her own interest, but also by a person acting on behalf of another one who cannot act in their own name. According to this same provision, “the formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum and in particular, that the court shall, if necessary, entertain proceedings on the basis of informal documentation”.¹⁹⁶ This provision is particularly important in cases of enforced disappearance where the personal identification cards of the persons are often taken away, leaving the relatives without any other document to identify their loved one and at times even finding it hard to prove their existence and to undertake proceedings. It is also important in cases where there has been looting or where the property has been burned and all documentation lost. **Article 23 (1)** of the Kenyan Constitution establishes that the High Courts have jurisdiction “to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights”.¹⁹⁷ Additionally, **Article 23 (2)** establishes that “Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights”. The measures of reparation which may be granted by the government for proceedings brought under **Article 23 (3)** are: (a) a declaration of rights; (b) an injunction, (c) a conservatory order; (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under **Article 24**¹⁹⁸; (e) an order for compensation; and (d) an order of judicial review.
134. The provisions under Article 23 (3) would in any case not be sufficient to meet all the requirements of integral reparation, in particular with regard to rehabilitation (e.g. medical and psychological support), satisfaction (e.g. apologies, ceremonies, etc.), and guarantees of non-repetition.
135. Despite the provisions under Articles 22 and 23 of the 2010 Kenya Constitution, to date, no remedies have been awarded to victims of violations committed by the military or police in Mount Elgon. This is due mainly to fear, which prevents people from bringing claims forward. Fear among the population in

¹⁹⁵ WGEID, 2012 Annual Report, *supra* note 84, paras. 46-68.

¹⁹⁶ Constitution of Kenya, Art. 23(3)(b).

¹⁹⁷ *Ibid.*, Art. 23(1) on the Authority of courts to uphold and enforce the Bill of Rights.

¹⁹⁸ *Ibid.*, Art. 24.

Mount Elgon is particularly acute due to the fact that they have been twice victimized, first by the SLDF's atrocities committed in a climate of total impunity due to the government's inaction and afterwards, by government agents during the operation *Okoa Maisha*, in which numerous human rights violations were committed. As we have already seen, families have often been threatened not to report the case of their loved one. To date, there is no comprehensive reparation scheme in Kenya and no one has been offered compensation or other forms of reparation for cases of abuses committed by the military forces in the context of the operation *Okoa Maisha*. The provisions in the Kenyan Constitution are hence rendered in practice useless. It cannot be said then that the requirements under Article 19 of the 1992 Declaration and Article 14 of the Convention against Torture are met.¹⁹⁹

136. The only other reference to reparations under Kenyan legislation can be found in the International Crimes Act, 2008, which implements the Rome Statute and reproduces the text of it in the First Schedule. Article. 75 of the Rome Statute provides for reparation of victims.²⁰⁰ As previously analysed, this would only apply for cases of enforced disappearances when committed as crimes against humanity as defined by the Rome Statute.
137. There is no legislation or public mechanism that provides material, psychological or legal support to the families of victims of enforced disappearances. The only services in place for victims or enforced disappearances are those designed by specific programmes run by civil society organisations. In no way does the presence of such programmes of assistance discharge State authorities of their duty to provide support to victims of gross human rights violations.

9. The non-ratification of the International Convention for the Protection of all Persons from Enforced Disappearance

138. The International Convention for the Protection of All Persons from Enforced Disappearance was adopted by Resolution 61/177 of the General Assembly of 20 December 2006. It was opened for signature on 6 February 2007 in Paris and Kenya in fact signed the Convention on this same day. According to Article 18 of the 1969 Vienna Convention on the Law of the Treaties, a State that has signed a treaty is under an obligation not to defeat the object and purpose of the treaty prior and after its entry into force.²⁰¹ The International Convention for the Protection of All Persons from Enforced

¹⁹⁹ Other than those provisions, the Kenyan TJRC Act, 2008 whose objective is to "promote peace, justice, national healing and reconciliation among the people of Kenya" establishes that one of the means of achieving these objectives is by: "recommending reparation measures in respect of the victims". Furthermore, Art. 47(1)(2)(d) establishes that "The Commission shall submit a report of its work to the President at the end of its operations which shall, inter alia "recommend reparations for the victims". Here one may even wonder whether the TJRC in fact recommended reparations or not. The scope of the TJRC however does not cover violations occurred during the *Okoa Maisha* operation.

²⁰⁰ International Crimes Act, 2008, First Schedule, Art. 75 of the Rome Statute establishes: "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Art.79.

²⁰¹ Vienna Convention on the Law of Treaties (hereinafter, "Vienna Convention"), Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

Disappearance entered into force on 23 December 2010.²⁰²

139. In its concluding observations of 2009, the CAT invited Kenya to “ratify the core United Nations human rights treaties to which it is not yet a party, namely [...] the International Convention for the Protection of All Persons from Enforced Disappearance.”²⁰³ Notwithstanding this recommendation, at the time of writing Kenya has not yet ratified the International Convention for the Protection of All Persons from Enforced Disappearance and in this sense, does not seem to consider the recommendation made by the international mechanism as a priority.

10. Engagement with the International Criminal Court

140. The Rome Statute for the International Criminal Court represents a key international instrument to enhance the struggle against impunity for crimes under international law such as torture and enforced disappearances. Kenya is a party to the Rome Statute since 15 March 2005 and it has commendably adopted domestic legislation in order to incorporate the provisions of the Rome Statute into national law for both the parts dealing with the relevant crimes, jurisdiction and admissibility as well as those with international co-operation and judicial assistance.²⁰⁴ Yet, Kenya has not ratified the Agreement on Privileges and Immunities of the International Criminal Court nor the Kampala Amendments on the crime of aggression to the Rome Statute of the International Criminal Court.²⁰⁵
141. Moreover, since the ICC prosecutor opened investigations in 2010 on crimes committed during Kenya’s 2007-2008 post-election violence after Kenya’s national authorities failed to bring those responsible to justice, the degree of cooperation with the ICC has been far from optimal. If it is true that the Kenyan government signed a memorandum of understanding with the ICC in 2010 and has facilitated some of the court’s activities in Kenya, several acts or omissions in the last couple of years point to a lack of cooperation and engagement with the ICC on cases involving its nationals which is at variance with the obligations spelled out in the Rome Statute.²⁰⁶

²⁰² By February 2013, the Convention has been signed by 91 States and ratified or acceded by 37. Among the States parties to the Convention, 15 have recognised the competence of the Committee on Enforced Disappearances to receive and examine individual communications pursuant to Article 31 of the Convention, and 16 have recognised the competence of the Committee to receive and examine inter-State communications pursuant to Article 32.

²⁰³ CAT, 2008 *Concluding Observations on Kenya*, *supra* note 40, para. 33.

²⁰⁴ See the International Crimes Act, 2008 : an act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions, entered into force on 1 January 2009.

²⁰⁵ As of April 2013, Kenya has not concluded any specialized agreements with the ICC on the enforcement of sentences or on witness relocation.

²⁰⁶ In February 2011, Kenya campaigned for a deferral of the cases related to the 2007-2008 post-electoral violence at the UN Security Council. In April 2012 the Kenyan government campaigned within the East African Community in order to pass a resolution extending the jurisdiction of the East Africa court of justice (EACJ) to cover crimes against humanity in order to transfer the Kenyan cases pending before the ICC to the African sub-regional court. Moreover, the ICC prosecutor has indicated that Kenya has stalled or failed to assist its evidence collection, including access to government records. Notably, on 11 March 2013, the ICC prosecutor cited the lack of cooperation by the Kenyan government in the Muthaura case as one of the main factors determining the decision to drop charges: “Despite assurances of cooperation, the government of Kenya has provided only limited assistance to the prosecution and failed to provide the prosecution with access to witnesses or documents which may shed light on the Muthaura case”.

11. Conclusions and Recommendations

142. Kenya continues to violate the rights of persons who have been subjected to enforced disappearance in Mount Elgon and of their relatives. The State is further in breach of its obligations with regard to universal jurisdiction in respect of torture and enforced disappearance. In particular, the present situation corresponds to ongoing violations by Kenya of its obligations pursuant to Articles 1, 2, para.1, and 3, 4, 5, 6, 7, 12, 13 and 14 of the Convention against Torture.
143. Accordingly, the associations submitting the present report, respectfully request the CAT to recommend to Kenya:
- a. To adopt without delay the Bill on Torture, ensuring that the definition of the crime of torture contained therein is compatible with international standards and that it provides for a punishment for such acts which is consistent with the gravity of the offence.
 - b. To amend the definition of torture contained in the 2010 Constitution ensuring that it is compatible with international standards.
 - c. To adopt without delay all necessary measures to make the Penal Code and the Code of Criminal Procedure compatible with international standards, in particular, by defining torture and making it a criminal offence, as well as by guaranteeing that the definition allows to sanction all authors, accomplices or any other public official or person acting in an official capacity who consent or acquiesce to acts of torture.
 - d. To codify enforced disappearance as a separate offence under its criminal legislation, also when it is not committed as part of a widespread or systematic attack against civilian population. The offence must be punishable by appropriate penalties which take into account its extreme seriousness. The provisions adopted must enable to hold criminally responsible any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance. Highest standards relating to superior responsibility shall also be included in Kenyan legislation. Enforced disappearance shall be expressly codified as an ongoing offence and criminal proceedings in respect of enforced disappearance shall not be subjected to any statute of limitations.
 - e. To fully implement the National Police Service Act, 2011.
 - f. To ensure that criminal legislation provides that no order or instruction of any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance, and that orders of this nature are expressly prohibited, as well as to ensure that the person who refuses to obey an order will not be punished.
 - g. To create the figure of “certificate of absence due to enforced disappearance” under Kenyan legislation and make it available to all relatives of disappeared persons in order to be able to obtain reparations and claim other legal entitlements on their behalf such as property titles and access to bank accounts. At the same time, to abolish the requirement to apply for a “certificate of presumption of death” for relatives of victims of enforced disappearance.
 - h. To adapt domestic legislation in order to guarantee the right to access to a lawyer or a family

member for persons arrested. This exercise of this right should be ensured during the initial hours of detention and in any case within a time frame compatible with international standards.

- i. To assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty which includes, as a minimum, information on the identity of the person deprived of liberty, the date, time and place of the where the person was deprived of liberty and the identity of the authority that deprived the person of liberty; the authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty; the place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty; elements relating to the state of health of the person; in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination: the date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer. The information contained therein should be available to any judicial or any other competent authority or institution authorized for that purpose, as well as to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel.
- j. The registry must be made and signed by both the authorities present at the time of arrest and the authority under which the detainee will be put in charge, as well as the medical staff performing the corresponding physical examinations. The registry should also be in electronic format so that information can be shared with other institutions. The information in the electronic record must correspond to that contained in the physical signed record. The registry should not be cancelled or the information eliminated once the person is released.
- k. To establish penalties related to the registry not only for the failure to make the corresponding registry of the arrest but also for, *inter alia*, providing false information for the integration of the registry, altering the information contained in the record, failing to sign the physical record, failing to communicate to the competent authority of the detention.
- l. To create and updated database of the public servants with competence to make an arrest, their line of command and the medical staff involved. This database shall be kept for two years after the date on which a public servant has left office.
- m. To ensure that an *habeas data* petition is a fast and effective resource for cases in which authorities refuse to provide information related to the detention to relatives or other persons close to the detainee.
- n. To ensure that *habeas corpus* is accessible to population in rural areas and that petitions are dealt with in an expeditious and effective manner.
- o. To bring the minimum age of criminal responsibility in line with international standards.
- p. To modify domestic criminal law in accordance with its international obligations on the establishment and exercise of universal jurisdiction over crimes under international law. In this respect Kenya should consider introducing a specific provision providing for the jurisdiction of the Kenyan courts for crimes of torture and enforced disappearance committed abroad, in all cases in which the accused is in the territory of Kenya and it does not extradite. The provision should further clarify that the prosecution of the alleged perpetrator is not dependent on the existence of

a prior extradition request, and is not necessary for the offense of which he is accused is an offense in the country where it is committed and in Kenya.

- q. To investigate all cases of enforced disappearance, and in particular those which took place in the context of operation *Okoa Maisha* in a prompt, effective and impartial manner and punish those responsible for acts of enforced disappearance in line with the gravity of the acts committed.
- r. Avoid all forms of detention may facilitate the commission of enforced disappearance of persons, investigate allegations of arbitrary arrest and punish those responsible of having committed these offences.
- s. To establish an independent mechanism composed of forensic science independent experts to support the Kenyan government in the investigation of the mass graves found in Mount Elgon, so that the truth concerning the facts of what happened can be known and to respect the rights of the families to know the truth of the facts, respect the right to the truth of families and to reparations for the damage. Such mechanism should involve the participation of civil society groups.
- t. As part of the right to truth of families in cases of enforced disappearance, to form an independent commission, with the support and civil society groups involved, to conduct a national study on mass graves in the country in general and in Mount Elgon in particular. Such a commission should investigate the number of graves that have appeared, the fate of the remains and conduction a national search and exhumation plan.
- u. To create a national registry of disappeared persons as well as a national registry of non-identified mortal remains the creation and supervision of which allows the participation of the organisations of the civil society. An independent and impartial organ should be in charge of the registry of unidentified remains to allow safeguard and protect DNA samples from family members who give their consent in order to create a DNA bank that is useful for search and registration of cases of enforced disappearance. Relatives of the victims, their lawyers or representatives and any person with a legitimate interest in this information should have access to those records.
- v. To adopt protocols for the exhumation and identification of mortal remains, train teams of experts in this area, so that they can be called immediately when mass graves or unidentified bodies are discovered.
- w. To adopt investigation protocols for cases of enforced disappearance of persons and to create mechanisms to provide protection from threats and reprisals against witnesses and relatives of disappeared persons as well as their legal representatives and human rights defenders.
- x. To guarantee the right to integral reparation for victims of enforced disappearance and their families. The legal framework should provide that compensation is commensurate to the gravity of the violation and the suffering of the victim and his or her family. The right to integral reparation should include compensation, restitution, rehabilitation, including a programme of free medical and psychosocial care, and satisfaction, and guarantees of non-repetition.
- y. To ratify the International Convention for the Protection of All Persons from Enforced

Disappearance and recognize the competence of the Committee on Enforced Disappearances in accordance with Articles 31 and 32 to receive and consider individual and inter-state communications.

- z. To ratify the Agreement on Privileges and Immunities (APIC) of the International Criminal Court and consider the ratification of the Kampala Amendments to the Rome Statute; to conclude specialized agreements with the ICC on the enforcement of sentences and on witness relocation; and to respect the obligations embodied in the Rome Statute to guarantee an effective cooperation of the national authorities with the International Criminal Court.

On behalf of:

TRIAL

Western Kenya Human Rights Watch

A handwritten signature in black ink, appearing to read 'Philip Grant', with a stylized flourish at the end.

Philip Grant
TRIAL Director

12. Information on the associations presenting the report

TRIAL (*Swiss Association against Impunity*)

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

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

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Western Kenya Human Rights Watch (WKHRW)

WKHRW is a no-profit independent non-governmental organization(NGO) that was formed in 1998 and registered in 2000 under the 1990 NGO Coordination Act of Kenya. The headquarter of WKHRW is located in Bungoma town, Mount Elgon. Its main areas of focus include: research, monitoring and documentation of human rights violations, social audit, fight against impunity and corruption advocacy and lobbying.

WKHRW has a network of trained human rights monitors that include: local volunteers at the community level, lawyers, doctors, religious-based groups and affiliated grassroots organizations active across the region for fact-finding and reporting human rights violations.

Contact person: Job Wandania Bwonya (Executive Director)

E-mail: wkhrwach@yahoo.com

Since 2010, TRIAL works together with WKHRW. In April 2011, TRIAL conducted a field mission to Western Kenya during which it met with a number of local lawyers and representatives of local and international organization and, interviewed the next-of-kin of numerous victims of enforced disappearances. Between 2011 and 2012, TRIAL and WKHRW have submitted the first sixty cases of enforced disappearance perpetrated in Mount Elgon district to the WGEID. They are currently working on preparing additional cases to be brought to the attention of the WGEID by the end of 2013.