



Association suisse  
contre l'impunité

Schweizerische Gesellschaft  
für Völkerstrafrecht

Swiss association  
against impunity

## ***Executive Summary of the Alternative Report for the Examination of Kenya's Second Periodic Report (CAT/C/KEN/2)***

***April 2013***

### **I. Background and Context**

1. TRIAL (*Swiss Association against Impunity*) and Western Kenya Human Rights Watch (WKHRW) submit to the Committee against Torture (CAT) an alternative report highlighting the existing obstacles in the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) by Kenya. In this view, concrete examples are referred to, as well as recommendations to improve the situation.
2. The associations that submit this written information have a number of concerns with regard to the implementation by Kenya of the Convention against Torture and of the recommendations issued by the CAT after the exam of the State's periodic report. However, given the particular expertise of the associations concerned, this document focuses mostly on matters related to enforced disappearance. The section of the report concerning universal jurisdiction deals both with enforced disappearance and torture. The omission of other subjects does not imply by any means that the associations submitting this alternative report find that Kenya fully complies with all its obligations under the Convention against Torture.
3. Enforced disappearance is a form of torture and relatives of disappeared people are subjected to inhumane and degrading treatment because of the length of time over which their ordeal is dragged out by State authorities and the attitude of official indifference in the face of their acute anxiety to know the fate and whereabouts of their loved ones. A wave of enforced disappearances took place between March and April 2008 in Mount Elgon district in Western Kenya when the government took action against the Sabaot Land Defence Forces (SLDF) armed group. The SLDF had emerged to resist what they considered unfair land-allocation attempts by the government. This resistance evolved into criminal activities and over the years resulted in forced evictions, numerous cases of inhumane treatment, rape and sexual violence, and mutilation on members of the population who refused to follow their orders. While the response of the government to the activities of the SLDF was initially lacklustre -fostering a climate of impunity- in March 2008 it launched a

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much larger joint military-police operation called *Okoa Maisha* (“Save Lives” in Swahili) to clamp down on the activities of the SLDF. While the population initially welcomed this operation, it was quickly alienated by the government’s strategy consisting of indiscriminately rounding up both men and boys in Mount Elgon district, taking them to military camps where they were forced to identify members of the SLDF or the location of weapons all while being tortured, sometimes to death. To date, the fate and whereabouts of over 200 persons estimated to have been killed or disappeared by the security forces remain unknown; those responsible for the crimes concerned have not been duly identified, investigated, judged and sanctioned; and relatives have not received adequate compensation and integral redress. This situation amounts to an ongoing violation, among others, of Arts. 1; 2, paras. 1 and 3; 4; 5; 6; 7; 12; 13; and 14 of the Convention against Torture.

## **II. Codification of the Offences of Torture and Enforced Disappearance**

4. No definition of torture currently exists under Kenyan legislation. At the time of writing, the Bill on Torture, which includes a definition of the crime and provides for punishment for such acts has not been adopted, and to the knowledge of the subscribing associations there is no date set for its adoption. While the National Police Service Act, 2011, defines and criminalizes torture committed by police officers as per the Convention, the Act has not been fully implemented yet. The prohibition of torture is generally framed in the 2010 Constitution -which encompasses it under the general right to freedom and security of persons; the 2001 Children Act, which establishes that “No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty” and; under Chapter 14A of the Police Code and Chapter 84 of the Kenyan Police Act, both of which make torture, cruel, inhumane or degrading treatment committed by police officers a felony. The Penal Code and the Criminal Procedure Code however are completely silent in what respects the prohibition of torture. They neither contain a definition of torture nor 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.
5. Neither is enforced disappearance defined or codified as an autonomous criminal offence under Kenyan legislation. The 2010 Constitution guarantees the general “right to freedom and security of person”, which includes the right not to be “deprived of freedom arbitrarily or without just cause”. However neither of these concepts is defined. The same applies for the Penal Code of Kenya which only provides for definitions of “kidnapping”, “abduction” and “wrongful confinement” and makes their commission a felony or misdemeanour. Enforced disappearance is only codified in Kenyan legislation as a crime against humanity under the 2008 International Crimes Act, which implements the Rome Statute for the establishment of the International Criminal Court (ICC). As such, the criminalization of enforced disappearance in Kenya is limited to those instances in which the conduct would amount to crimes against humanity as defined in the Rome Statute, thus leaving outside the scope of domestic criminal law the commission of the acts of enforced disappearance which do not occur as part of a widespread or systematic attack against civilian population. The lack of codification of torture and enforced

disappearance as autonomous offences under domestic criminal legislation hampers the prevention, investigation and prosecution of these crimes.

6. Moreover, there is no 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. Under Kenyan legislation, a person is presumed to be dead when he or she has been missing for seven years. Therefore, not only are families of disappeared persons required to certify the death of a family member in order to receive compensation (laying them open to additional victimization), but in practice 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 in order to access such benefits.

*Please refer to paras. 17 to 47 of the full report for details and concrete examples.*

7. **Kenya shall 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. The definition of torture contained in the 2010 Constitution shall also be amended as should the Penal Code and the Code of Criminal Procedure which shall define torture and make it a criminal offence, 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. Enforced disappearance shall also be codified as a separate, continuing offence and criminalized not only when 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 and allow 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, adopting the highest standards relating to superior responsibility. Punishment of both torture and enforced disappearance shall not be subjected to any statute of limitations. Kenya shall create the figure of “certificate of absence due to enforced disappearance” and abolish the requirement to apply for a “certificate of presumption of death” for relatives of victims of enforced disappearance to obtain legal entitlements and reparations.**

### **III. Lack of Adequate Preventive Measures**

8. Notwithstanding the recommendations of various international human rights mechanisms, Kenya has not been able to provide people under arrest with the appropriate legal safeguards to prevent acts of torture and ill-treatment during custody. While the government of Kenya affirms that it has taken steps in this direction, making reference to the police reforms, it does not give any details as to how the 2010 Constitution, the Independent Police Oversight Authority Act, 2011, the National Service Act, 2011 or the

Code of Conduct of the Kenya Police Service act effectively as measures to prevent torture, enforced disappearance, and ill-treatment while arrested or in detention. The Criminal Procedure Code is silent in what respects detention registries, another effective prevention measure and while the Prison Act establishes a list of duties to be fulfilled by prison officers, among which the obligation to keep a registration book, it nonetheless fails to clarify crucial aspects with regard to the registration of persons deprived of their liberty. Moreover, despite the Constitutional provision of the right to *habeas corpus* petitions to determine the legality of a detention, no details are provided as to what the requirements to submit the *habeas corpus* petition are. Furthermore, the possibility of filing an *habeas corpus* petition is practically unfeasible in remote areas. Regarding preventive measures for children, despite multiple recommendations from international mechanisms, the government of Kenya is still to raise the minimum age of criminal responsibility, currently set at 8 years.

*Please refer to paras. 48 to 75 of the full report for details and concrete examples*

9. **Kenya shall adapt domestic legislation in order to guarantee the right to access to a lawyer or a family member for persons arrested within a time frame compatible with international standards. It shall assure the compilation and maintenance of an up-to-date official register 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 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 of the remains; as well as the date and time of release or transfer to another place of detention, and the destination and the authority responsible for the transfer. Data contained therein should be available to any person with a legitimate interest in it and penalties shall be established *inter alia* for the failure to make the corresponding registry or for providing false information. Kenya shall also ensure that an *habeas corpus* petition is an accessible, effective and expeditious resource available to relatives or other persons close to persons arrested or detained. Moreover, Kenya shall amend its legislation to bring the minimum age of criminal responsibility in line with international standards.**

#### **IV. Lack of an Adequate Legislation on Universal Jurisdiction**

10. The establishment of universal jurisdiction, intended as the jurisdiction of domestic tribunals to judge and sanction those responsible for torture, enforced disappearance or other crimes under international law that are present in the territory of the State concerned, is a bulwark against impunity. At present, due to the lack of codification of the offences of torture and enforced disappearance, Kenyan tribunals cannot exercise their jurisdiction over these crimes (beyond those instances which qualify as crimes

against humanity) when a person suspected of having committed the crime outside Kenyan territory is present in Kenya and the State does not extradite him or her. Furthermore, at present legal provisions do not make it clear that the judgment of the accused is not conditional on the existence of a previous request for extradition.

*Please refer to paras. 75 to 86 of the full report for details and concrete examples*

11. **Kenya should consider amending its criminal legislation 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 conduct of which he is accused to be an offense both in the country where it is committed and in Kenya.**

#### **V. Failure to Investigate, Judge and Sanction those Responsible for Enforced Disappearance**

12. With regard to the responsibility of undertaking effective judicial measures to prevent, investigate, judge and sanction people responsible for enforced disappearance, the few provisions that currently exist in Kenya have to do with missing persons and do not provide for an independent investigation as it is the police who are responsible for investigating possible human rights violations. While this deficiency is meant to be addressed by the Independent Policing Oversight Authority Act, the National Police Service Act, the National Police Service Commission Act and with the establishment of the figure of Director of Public Prosecution, in light of the pending criminal investigations it remains to be seen how these instruments will be operationalized and whether this figure will indeed fulfil the role it was meant to. Moreover, there exists no effective mechanism for the search of persons in Kenya nor a database on disappeared persons. Finally, despite information that the bodies of persons abducted by the military during the operation Okoa Maisha who succumbed to torture were dumped in mass graves in the forest of Mount Elgon, no comprehensive programme of exhumation and identification of mortal remains has been undertaken by the government. Neither has any independent forensic analysis of the mass graves taken place. Families of disappeared persons continue ignoring the fate and whereabouts of their loved ones and information is systematically concealed by the authorities.

*Please refer to paras. 87 to 119 of the full report for details and concrete examples*

13. **Kenya shall investigate all instances of enforced disappearance, and in particular those which took place in the context of the operation Okoa Maisha in a prompt, thorough, effective and impartial manner and punish those responsible with sanctions in line with the gravity of the acts committed. An independent mechanism composed of forensic science independent experts**

shall be created to support the Kenyan government in the investigation of the mass graves found in Mount Elgon, as well as a programme to locate, exhume, identify the mortal remains of victims of enforced disappearance and return them to their relatives, which is in line with international standards on this subject. Finally Kenya shall create a national registry of disappeared persons that guarantees full-access to relatives, lawyers, human rights defenders and any other person with a legitimate interest in it, as well as a national registry of non-identified mortal remains. Both the creation and supervision of these registries should allow the participation of the organisations of the civil society.

#### **VI. Gaps in the Protection of Witnesses, Human Rights Defenders and Relatives of Victims of Enforced Disappearance**

14. Numerous instances of threats, harassment, and attacks against witnesses, human rights defenders or relatives of disappeared people have been reported. The existing legal framework does not offer the necessary protection and support. While the Witness Protection Amendment Act 2010 expanded the definition of a witness in need of protection and established an independent Witness Protection Agency (WPA), 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 been confronted with lack of funding. Threats to individuals who witnessed post-election violence have been reported by international organisations. An unknown number of other potential witnesses have fled Kenya in the last five years because of similar threats against them. These re-victimisation processes, along with financial distress and lack of trust in the judicial system are among the main factors which thwart relatives from reporting their loved one's disappearance. Moreover, Kenya does not count with a comprehensive programme that guarantees protection and psychological support to relatives of disappeared persons and witnesses.

*Please refer to paras. 120 to 130 of the full report for details and concrete examples*

15. **Kenya shall amend its legal framework to guarantee the necessary protection from threats and reprisals for witnesses and relatives of disappeared persons as well as their legal representatives and human rights defenders. It shall fully implement the measures envisaged under the Witness Protection Amendment Act 2010. Furthermore, it shall ensure that a comprehensive programme of witness protection and psychological accompaniment is granted at all levels when a trial takes place, protection should be awarded prior, during and after the trial. Instances of threats or harassment shall be promptly and thoroughly investigated and those responsible shall be judged and sanctioned.**

#### **VII. Lack of Compensation and Reparation for Victims of Enforced Disappearance and their Relatives**

16. Victims of enforced disappearance are not only the disappeared persons, but also any person who suffers a direct harm as a consequence of enforced disappearance. In particular, relatives of disappeared people are subjected to a grave form of ongoing ill-treatment. Accordingly, victims of enforced disappearance are entitled to receive prompt, fair and adequate compensation, as well as integral reparation, including restitution, rehabilitation, satisfaction (including restoration of dignity and reputation); and guarantees of non-repetition. The Kenyan Constitution provides for the right to institute court proceedings claiming that a right or fundamental freedom enshrined therein has been infringed. This provision may be invoked by a person acting on behalf of another one who cannot act in his or her own name and the formalities relating to the proceedings are, according to the law, to be kept at a minimum. High Courts have jurisdiction to hear and determine such applications for redress and the measures of reparation which may be granted by the government for such proceedings 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 [...]; (e) an order for compensation; and (d) an order of judicial review. These provisions do not 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. Despite these provisions, 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 only other reference to reparations under Kenyan legislation can be found in the International Crimes Act, 2008, which implements the Rome Statute. As such, reparations would only apply for cases of enforced disappearance when committed as crimes against humanity.

*Please refer to paras. 131 to 137 of the full report for details and concrete examples*

17. **Kenya shall amend its legal framework not only to provide the right to integral reparation for victims of enforced disappearance and their families, but also to provide for compensation that is commensurate to the gravity of the violation and the suffering of the victims and their relatives. The right to integral reparation should include compensation, restitution, rehabilitation, including a programme of free medical and psychosocial care, satisfaction, and guarantees of non-repetition.**

#### **VIII. The Non-ratification of the International Convention for the Protection of All Persons from Enforced Disappearance**

18. Kenya signed the International Convention on the Protection of All Persons from Enforced Disappearances on 6 February 2007, the very day it was opened for signature. In its concluding observations of 2009, the CAT invited Kenya to ratify the Convention among other core international human rights instruments. 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.

Undisputedly, its ratification, together with the recognition of the competence of the Committee on Enforced Disappearances plays a crucial importance in the prevention and suppression of this heinous phenomenon.

19. **Kenya shall ratify without further delay 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.**

#### **VIII. Engagement with the International Criminal Court**

20. 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 but it 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. 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.
21. **Kenya shall 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; conclude specialized agreements with the ICC on the enforcement of sentences and on witness relocation; and respect the obligations embodied in the Rome Statute to guarantee an effective cooperation with the International Criminal Court.**