



Association suisse
contre l'impunité

Schweizerische Gesellschaft
für Völkerstrafrecht

Swiss association
against impunity

Executive Summary

1. Presentation of the Report

1. TRIAL (Swiss Association against Impunity) with the collaboration and endorsement of the local NGO Western Kenya Human Rights Watch (WKHRW) based in Bungoma, submits information to assist the Human Rights Committee in its consideration of Kenya's third periodic report, submitted in August 2010 and due for evaluation in July 2012 (doc. CCPR/C/KEN/3).
2. This report aims at providing a partial review of Kenya's implementation of the International Covenant on Civil and Political Rights (hereinafter, the Covenant) and focuses on a limited number of issues. In particular, the report refers to the hundreds of cases of extrajudicial killings and enforced disappearances committed in Mount Elgon district, Western Kenya in the period of violence which broke out following the December 2007 elections and lasted until at least April 2008. Impunity prevails for the numerous human rights violations committed during this period. These violations and the government's non-fulfilment of international obligations spelled out in the Covenant are the subject of this report.

2. General Framework

3. The conflict in Mount Elgon district started in late 2006, when the Sabaot Land Defence Forces (SLDF), an armed group, emerged to resist what they considered unfair land-allocation attempts by the government. This resistance evolved into criminal activities and over the years, the SLDF increased its control over the villages in Mount Elgon district, chasing out or killing people, occupying the land it claimed and terrorizing those who failed to follow its orders. Numerous cases of inhumane treatment, rape and sexual violence and mutilation by the SLDF have been documented by local and international NGOs.
4. Local and international human rights organizations repeatedly called for action against the SLDF but the government ignored these requests. Finally, on 9 March 2008, in the aftermath of the presidential election held in December 2007, the government launched a joint military-police operation called "Okoa Maisha" ("Save Lives" in Swahili) to clamp down on the activities of the SLDF. The population initially welcomed this operation, considering it long

overdue but was quickly alienated by their strategy consisting of indiscriminately rounding up all the men and young boys in Mount Elgon district, taking them to military camps where they were tortured, sometimes to death, to force them to identify SLDF members or the location of weapons. According to the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 3'839 individuals were "screened" during this operation. International and local NGOs conservatively estimated at **over 200 the number of persons killed or disappeared by the security forces.**

5. While there have been efforts by the government to investigate some of the violations committed during the post-election violence, these attempts have not succeeded in practice to promptly, impartially and independently investigate alleged violations nor to try and sanction those found responsible for them.

3. Selected Issues

3.1 Right to Life (article 6)

6. In its 2005 Concluding Observations, the Human Rights Committee noted with concern the reports of extrajudicial killings perpetrated by police units or other law enforcement personnel and deplored the fact that "few instances of unlawful killings by law enforcement officials have been investigated or prosecuted, and that de facto impunity for such acts continues to be widespread". While the government of Kenya recognizes in its third periodic report, that unlawful killings by the police are a major challenge, it also states that "[...] *Any allegation of unlawful killing is investigated by the authorities and perpetrators are tried and convicted by a competent court if found to have used unreasonable force*".
7. This affirmation by the government of Kenya is not backed by any evidence or concrete example and seems to largely contradict the findings of the Special Rapporteur, Philip Alston: "Killings by the police are widespread [...] Of particular concern was the impunity enjoyed by those responsible for the vast majority of these killings".
8. The right to life may also be violated or gravely threatened through enforced disappearances. Hundreds of men, including children, were victims of enforced disappearance in Mount Elgon during operation Okoa Maisha. Several organizations have also pointed out that many of the men who were deprived of their liberty by the military died as a result of the torture inflicted on them. The government has not undertaken any investigation into cases of enforced disappearances.
9. **Suggestions for questions to be included in the List of Issues to be prepared by the Country Report Task Force:**
 - ▶ There have been numerous reports of extrajudicial killings perpetrated by the police units or other law enforcement personnel in the context of the operation Okoa Maisha in Mount Elgon District. How many

of these instances have been investigated? What has been the outcome of these investigations? Has any State agent been found responsible and been sanctioned for these crimes? What are the sanctions established for those law enforcement officials found responsible for extrajudicial killings? What are the sanctions established for those law enforcement officials found responsible for having used excessive force?

- ▶ Has the State taken any step towards instituting an independent ordinary body to investigate complaints filed against the police?
- ▶ There have been numerous reports of enforced disappearances perpetrated by the military in the context of operation Okoa Maisha in March-April 2008. How many of these instances have been investigated? What has been the outcome of these investigations?
- ▶ Please comment on the reports that the military have been disposing of bodies in the forest in Mount Elgon.
- ▶ What measures has the State undertaken to comply with its positive international obligations to exhume, identify and return mortal remains to the families as well as the negative obligation not to despoil or mutilate the bodies that are buried in the forest?

3.2 Prohibition of Torture (article 7)

10. In its 2005 Concluding Observations, the Committee signalled the extremely high number of deaths in custody and the fact that enforcement officials responsible for acts of torture are seldom prosecuted. Currently, torture is neither defined nor penalized under Kenyan legislation. Both the Penal Code and the Code of Criminal Procedure are completely silent in what respects the prohibition of torture. Though the State party replied in its third periodic report that a Bill on Torture had been drafted, it has apparently not been adopted. Neither has the review of other related legislation such as the Penal Code, Evidence Act and the Criminal Proceedings Act -which the State alleged was underway to ensure their conformity with the obligations assumed under the Convention against Torture- concluded.
11. Up to now, despite the numerous allegations of instances of torture from different sources, the government has not seriously investigated any instance of torture or ill-treatment allegedly perpetrated in Mount Elgon in the contexts of the operation Okoa Maisha.
12. The Committee has also recognised that any act of enforced disappearance amounts *per se* to a violation of the right to be free from torture or to cruel, inhuman or degrading treatment or punishment. By failing to investigate cases of enforced disappearance in Mount Elgon, the State party also systematically violated article 7 of the Covenant.
13. **Suggestions for questions to be included in the List of Issues to be prepared by the Country Report Task Force:**

- ▶ Please comment on allegations that police custody is frequently resorted to abusively, that torture is frequently practised under police custody and that those responsible for such acts are seldom prosecuted and sanctioned.
- ▶ What steps have been taken to prevent instances of police abuse and of deaths in custody?
- ▶ Has there been any formal investigation into cases of deaths in custody? Has there been any formal investigation into cases of torture in custody, in particular those reported in the context of operation Okoa Maisha? If so, what has been the outcome of the investigations? Has any State agent accused of torturing or mistreating detained ever been prosecuted and convicted and sanctioned?
- ▶ What is the status of the draft Bill on Torture?
- ▶ What is the status of the review by the Kenya Law Reform Commission of the Penal Code, Evidence Act and Criminal Proceedings Act? How will the envisaged reforms bring the legislation in line with obligations under the Covenant?

3.3 Right to Liberty and Security (article 9)

14. In its 2005 Concluding Observations, the Committee noted with concern that most suspects in Kenya did not have access to a lawyer during the initial stages of detention. In its third periodic report, the government of Kenya recognizes that “there is no stipulation on the period within which an accused person can contact a lawyer or his family...In practice, it is difficult to exercise their right largely due to poor infrastructure in police cells...” This cannot be considered an acceptable response to the recommendations made by the Committee, but a mere justification as to why the right to access to a lawyer is still not guaranteed.
15. The right to liberty and security is also violated or at least threatened in cases of enforced disappearance. Enforced disappearance is not codified under Kenyan legislation as a separate offence. This leads to an environment susceptible to violations of article 9 of the Covenant, a problem which was exemplified during operation Okoa Maisha, where hundreds of men were arbitrarily deprived of their freedom and subsequently subjected to enforced disappearance. Up to now, no one has been investigated or tried for the violations committed.
16. **Suggestions for questions to be included in the List of Issues to be prepared by the Country Report Task Force:**
 - ▶ What measures have been taken to ensure that access to a lawyer for all persons deprived of their liberty is guaranteed immediately after the arrest and during all stages of detention?
 - ▶ Has there been any formal investigation undertaken into the arbitrary deprivation of liberty of the men and children arrested in the context of the operation Okoa Maisha? If so, what has been the outcome of these investigations?

- ▶ What measures have been undertaken by the State to prevent arbitrary deprivations of liberty? Please provide detailed information about the laws, regulations and practice governing arrest and detention before trial.

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

17. In Mount Elgon, hundreds of men and children were forcibly disappeared by State agents and, as such, effectively placed outside the protection of the law and hindering their possibility to exercise and enjoy all other human rights and freedoms. In many of the cases, their whereabouts remain unknown. Under Kenyan legislation, a person is presumed to be dead when he or she has been missing for seven years. The only avenue whereby the seven-year requirement can be circumvented, arises when an inquiry is conducted into the case of a missing person presumed to be dead; the magistrate can, on the basis of the inquiry, order that the victim's family be issued with a death certificate.
18. A death certificate is important in accessing a number of benefits in Kenya. They are needed for widows or widowers to be able to secure ownership of property in their deceased spouse's name. Proof of the death of a parent can assist in accessing certain benefits such as scholarships. Thus, the State's failure to conduct inquiries has not only deprived victims' families of truth and justice – it has also prevented them from accessing material assistance.
19. **Suggestions for questions to be included in the List of Issues to be prepared by the Country Report Task Force:**
 - ▶ What steps has the State undertaken to regulate the legal situation of victims of enforced disappearances and their families and allow the latter accessing material assistance?
 - ▶ What is the legal framework that regulates the right to compensation in Kenya in cases of human rights violations and in particular in cases of enforced disappearance?

3.5 Rights of the Child (article 24)

20. Article 24.1 of the Covenant establishes that every child has the right to such measures of protection as are requested by his or her status as a minor, on the part of the family, the society and the State. In particular, the international obligations of a State to grant to all individuals under its jurisdiction the right to life, the right not to be subjected to torture or to other cruel, inhuman or degrading treatment, the right to liberty and the right to juridical personality have special features in the case of minors, as follows from reading the relevant provisions in conjunction with Article 24.1 of the Covenant. It therefore becomes an obligation of the State to prevent situations that might lead, by action or omission, to negatively affect the mentioned rights. Further, when the alleged victims of human rights violations, including ill-treatment, are minors, the highest standard in determining the seriousness of the actions that violate

their right to humane treatment must be applied.

21. During operation Okoa Maisha, children were both direct and indirect victims of enforced disappearance. They were also subjected to arbitrary deprivation of liberty, torture and ill-treatment, and to arbitrary killings. Furthermore, many were charged of crimes as if they were adults despite their status as minors.
22. **Suggestions for questions to be included in the List of Issues to be prepared by the Country Report Task Force:**
 - ▶ Please comment on the allegation that during operation Okoa Maisha, dozens of children were held in detention on charges of promoting warlike activities.
 - ▶ Has any of these children been tried and sanctioned for the charges held against them?
 - ▶ What is the status of the review of the Children's Act 2001? How does this review envisage bringing the Act in line with Kenya's international obligations regarding the minimum age of criminal responsibility?
 - ▶ What measures have been adopted by the State party to protect minors held in detention?
 - ▶ Has any investigation been undertaken with regard to arbitrary killings, enforced disappearances, torture and ill-treatment of minors in the context of operation Okoa Maisha?

3.6 Right to an Effective Remedy (article 2.3)

23. The Committee notes that a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. On May 2008 the government of Kenya tasked the Commissioner of Police to investigate allegations of human rights violations committed in Mount Elgon, to identify the perpetrators and make appropriate recommendations to ensure that such abuses are not repeated. The report produced however, focused on criticizing and minimizing the reports and information compiled by the NGOs as well as their methodology. The report reflects the lack of self-criticism by the government and the absolute lack of will to investigate the alleged violations of human rights committed by the security forces, in violation of article 2 of the Covenant. The military also claimed that it had conducted its own internal investigation into the Mount Elgon atrocities. In an undated statement by the Ministry of State for Defence entitled "Allegations against the Military Unfounded," the Ministry claimed that reports of human rights violations were the result of a smear campaign "which [the SLDF] finance and orchestrate." In a more serious effort to investigate alleged human rights violations than that undertaken by the police and the military, the Kenyan Members of Parliament conducted a "fact finding visit" to Mount Elgon in August 2008. The report produced found that there were indeed cases of human rights abuses by the security forces in Mount Elgon which should be investigated, and recommended that the government investigate and prosecute allegations of human rights abuses and enforced disappearances. These recommendations however

were not implemented by the government. Rather, they were dismissed as being based on allegations by SLDF-supporters.

24. In addition to the lack of willingness by the government to investigate cases of human rights violations, there is no independent investigation possible in Kenya as it is the police who are responsible for investigating abuses. This deficiency is meant to be addressed with the introduction of the Independent Policing Oversight Authority Bill (establishing police oversight authority), the National Police Service Bill (providing a new legal framework for policing) and the National Police Service Commission Bill (establishing a police service commission), however these Bills have not been discussed in Parliament yet.
25. Due to the nature of the violations committed in the wake of the operation Okoa Maisha, complying with the obligations under article 2.3 of the Covenant would also necessarily require undertaking exhumations of the mass graves in Mount Elgon. Up to date, no independent forensic analysis of mass graves in Mount Elgon has taken place.
26. Article 2 of the Covenant also requires that access to justice is guaranteed. Regarding Kenya, the Committee has noted with concern that because of, inter alia, widespread corruption, the access of citizens to domestic courts and to judicial remedies is limited in practice.
27. Not only are citizens limited in their access to domestic courts because of widespread corruption but also because of inefficiency, lack of means and lack of witness protection resulting in threats and harassment to members of civil society willing to come forward and report violations.
28. Access to justice in Kenya, in violation of article 2(3) of the Covenant, is further limited due to the threats and harassment to human rights defenders, including witnesses of gross human rights violations, in particular those related to the operation Okoa Maisha.
29. **Suggestions for questions to be included in the List of Issues to be prepared by the Country Report Task Force:**
 - ▶ Does the State party have in place a system for providing effective legal remedies, including compensation and other forms of reparation (including restitution, rehabilitation, satisfaction and guarantees of non-repetition), to victims of human rights violations and their families?
 - ▶ Has the DNA analysis been carried out on the unidentified bodies found in morgues in the aftermath of the operation Okoa Maisha?
 - ▶ The conclusions of the fact-finding visit conducted by the members of parliament to Mount Elgon district on August 2008 indicate that “There are cases of human rights abuses by the security forces in Mount Elgon which should be investigated further to ascertain which arm of the security forces perpetrated the abuses”. Have these cases been investigated? If so, what has been the outcome of these

investigations? Has any security force been investigated and prosecuted for such violations?

- ▶ Please comment on the conclusions of the parliamentary report which refer to a lack of collaboration from the police: “There are reports of disappearances of people in custody of security agencies which should be investigated to establish the whereabouts of these people. Attempts by the Committee to verify these allegations in the OB [Order Book] were frustrated by the Police”.
- ▶ What is the status of the discussions concerning the introduction of the Independent Policing Oversight Authority Bill (establishing police oversight authority), the National Police Service Bill (providing a new legal framework for policing) and the National Police Service Commission Bill (establishing a police service commission)? When are they meant to be discussed in Parliament and how, specifically, will they bring Kenyan legislation in conformity with international standards?
- ▶ Please comment on the allegations that State officials have in fact tampered with crime scenes from operation Okoa Maisha, removing bodies that had been found in the forest in the absence of any legal process to record what was found or where the bodies were subsequently taken, despite requests from human rights organizations to preserve the crime scene for independent documentation.
- ▶ What measures have been taken by the State party to reduce incidences of harassment to witnesses and to human rights defenders? Have those cases of harassment or attacks to witnesses of human rights abuses, families of victims of human rights abuses and human rights defenders been thoroughly and duly investigated? If so, what was the outcome of the investigation? Has anyone been tried and convicted for such episodes?

4. Conclusions and Recommendations

Regarding Article 6 of the Covenant:

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

Regarding Article 7 of the Covenant:

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

complaints pursuant to article 22 of the Convention against Torture.

Regarding Article 9 of the Covenant:

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

Regarding Article 16 of the Covenant:

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

Regarding Article 24 of the Covenant:

- ▶ The State party shall conclude the process of reviewing the Children's Act 2001 and amend the Kenyan Penal Code to raise the minimum age of criminal responsibility currently set at 8 years old under article 14(1) and to bring it into accordance with international standards.
- ▶ The State party shall take immediate action to ensure the prompt, impartial and effective investigation of

all allegations of arbitrary detention, ill-treatment, torture or enforced disappearance of minors in the context of the operation Okoa Maisha.

- ▶ The State party shall take immediate action to ensure that all minors deprived of their liberty within the operation Okoa Maisha currently detained are released.
- ▶ The State party shall take immediate action to ensure that all minors deprived of their liberty and charged with a criminal offence are ensured a fair trial within the shortest delay and in accordance to international standards relating to juvenile justice.
- ▶ The State party shall ensure that minors who were victims of torture or ill-treatment, or their families if they were subjected to enforced disappearance or arbitrary killings obtain redress and adequate compensation, taking into account their status as minors and the related aggravated responsibility by the State.

Regarding Article 2.3 of the Covenant:

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