



## **Alternative Report to the Human Rights Committee**

Submission to the Human Rights Committee in  
consideration of the third periodic report of Kenya

(CCCPR/C/KEN/3)

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presented by

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## 1. Background

1. On **29 July 2011** TRIAL submitted a report to the Human Rights Committee (“the Committee”) aiming at providing a partial review of Kenya’s implementation of the International Covenant on Civil and Political Rights (“the Covenant”) focusing on a limited number of issues.<sup>1</sup> In particular, the report referred to the crime of enforced disappearance and certain specific rights protected under the Covenant which are or may be violated by the State in cases of enforced disappearance. Part of the analysis of that report was limited to the region of Mount Elgon in Western Kenya and did not refer to the country as a whole.
2. The State’s obligations analysed were in particular those related to the right to life (article 6), the prohibition of torture (article 7), the right to liberty and security (article 9), the right to recognition as a person before the law (article 16), the rights of the child (article 24) and the right to an effective remedy (article 2.3). The themes analysed corresponded to issues of concern identified by the Committee in its concluding observations on the second periodic report of Kenya published on **29 April 2005** (doc. CCPR/CO/83/KEN, hereinafter “2005 Concluding Observations”). The specific aim of the alternative report was to convince the Committee of the opportunity to include the matters thereby analysed in the list of issues to be adopted at the 103<sup>th</sup> session.
3. The omission of other subjects in the report submitted in July 2011, as well as in the present document, do not imply by any means that TRIAL finds that Kenya fully complies with all its obligations under the Covenant.

## 2. Issues highlighted by TRIAL in its July 2011 Alternative Report and included in the Country Report Task Force List of Issues

4. To begin with, TRIAL highlighted the fact that since August 2010 Kenya went from being a dualist to a monist State. However, it was pointed out that despite this change in the Kenyan Constitution, the wording continues implying that the Constitution has supremacy over other sources of law, including international law. Namely, TRIAL highlighted the following:

*Para. 25 Kenya recognised in its third periodic report that indeed, 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”.<sup>2</sup> However, with the ratification on 27 August 2010 of the new Constitution of*

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<sup>1</sup> See [www.trial-ch.org/fileadmin/user\\_upload/documents/CAJ/Kenya/Kenya - Alternative report to the Human Rights Committee - July 2011.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/CAJ/Kenya/Kenya - Alternative report to the Human Rights Committee - July 2011.pdf)

<sup>2</sup> Third periodic report submitted by Kenya to the Human Rights Council, doc. CCPR/C/KEN/3, 13 February 2011 (hereinafter “Kenya, 2011 Third Periodic Report”), para. 24.

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”.<sup>3</sup> 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”.<sup>4</sup>

**Para. 26** 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”.<sup>5</sup>

5. The Country Report Task Force incorporated these concerns in its List of Issues (doc. CCPR/C/KEN/Q/3, “List of Issues”) under its section on the constitutional and legal framework within which the Covenant is implemented and the right to an effective remedy (Article 2) and formulated the following questions to the Government of Kenya:

*1. Please state the extent to which the provisions of the Covenant have been invoked and applied since the adoption of the new Constitution in 2010, which establishes that international treaties ratified by the State party form part of its law. Please also provide information on the measures taken to improve access to remedies by individuals by addressing the limited access to domestic courts and judicial remedies. Furthermore, please describe the measures taken to address the prevalent failure to enforce court orders and judgments.*

6. TRIAL reiterates its position that international treaties should be considered part of the law of Kenya. As such they should be able to be directly applied in domestic courts, tribunals or by administrative

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<sup>3</sup> 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) (last accessed 12 June 2012). 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.

<sup>4</sup> *Ibid.*, emphasis added.

<sup>5</sup> Vienna Convention on the Law of Treaties, Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331. Kenya signed the Vienna Convention on the 23 of May 1969. It has not yet ratified it.

authorities. Moreover, international law should have supremacy over domestic legislation. Any interpretation of Articles 2 (5) and (6) of the Constitution of Kenya contrary to this would contravene Kenya's obligation not to invoke provisions of internal law as a justification for its failure to perform a treaty, established in Article 27 of the Vienna Convention on the Law of Treaties. Though Kenya has not ratified the Vienna Convention, it has ratified it, which means it is bound by its object and purpose.<sup>6</sup>

7. With regard to the **right to life**, the following points were particularly highlighted by TRIAL in the report submitted in July 2011 and further mirrored by the Country Report Task Force in its List of Issues taken up in consideration of the third periodic report of Kenya:

***Para. 28** 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. It also 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”.<sup>7</sup> In this view, the Committee recommended that Kenya “promptly investigates reports of unlawful killings by police or law enforcement officers and prosecute those found responsible”. It also suggested that the State “should actively pursue the idea of instituting an independent civilian body to investigate complaints filed against the police”.<sup>8</sup>*

***Para. 29** In its third periodic report, the government of Kenya recognises that unlawful killings by the police are a major challenge.<sup>9</sup> However, it also states that “the Government has been unequivocal in condemning this whenever it happens as one of the most serious human rights violations. 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”.<sup>10</sup>*

***Para. 30** This affirmation by the government of Kenya is not backed by any evidence or concrete example. Furthermore, it seems to largely contradict the findings of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, who, in the report of his February 2009 mission to Kenya states “Killings by the police are widespread. Some killings are opportunistic, reckless or personal. Many others are carefully planned. It is impossible to estimate reliably how many killings occur, because the police do not keep a centralised database. But police shootings are reported nearly every day of the week by the press and the total number is certainly unacceptably high. In just a five month period in 2007,*

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<sup>6</sup> As per Article 18 of the Vienna Convention on the Law of Treaties, “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty [...]”

<sup>7</sup> Human Rights Committee (HRC), Concluding Observations of second periodic report of Kenya (doc. CCPR/C/KEN/2004/2), doc. CCPR/CO/83/KEN, 29 April 2005, (hereinafter “HRC, 2005 Concluding Observations”), para. 16.

<sup>8</sup> *Ibid.*

<sup>9</sup> Kenya, 2011 Third Periodic Report, *supra* note 2 para. 136.

<sup>10</sup> *Ibid.*

the Kenya National Commission on Human Rights (KNCHR) documented approximately 500 people killed or disappeared”.<sup>11</sup> Concerning the statement by the State that any allegation of unlawful killing is investigated and the perpetrators tried and sentenced if found responsible, the Special Rapporteur stated that during his mission “Of particular concern was the impunity enjoyed by those responsible for the vast majority of these killings”.<sup>12</sup>

**Para. 31** The right to life may also be violated or gravely threatened through enforced disappearances. The Committee has repeatedly stressed that enforced disappearance of a person *inter alia*, “violates or constitutes a grave threat to the right to life”.<sup>13</sup> The Committee has also held that the State has a primary duty to take appropriate measures to protect the life of a person, especially detained persons who are in a particularly vulnerable situation.<sup>14</sup> In fact, it has emphasised that in situations of detention, the burden of proof to provide a satisfactory and convincing explanation, establishing and disclosing with certainty the fate and whereabouts of the disappeared person in question, rests mostly on the authorities.<sup>15</sup> The State is thus under an ongoing obligation to investigate alleged violations of the right to life, to identify those responsible and to judge and sanction them, as well as to provide adequate compensation and integral reparation to the victims and their families.

**Para. 32** Hundreds of men, including children, were victims of enforced disappearance in Mount Elgon during operation Okoa Maisha.<sup>16</sup> Despite the many efforts made to locate them in prisons, police offices, hospitals or morgues, their family members were most of the times unable to learn the fate or whereabouts of their loved ones. Several organisations 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.<sup>17</sup> Moreover, on 27 March 2009 the Daily Nation newspaper quoted a military source describing how bodies had been dumped in the forest reserve in Mount Elgon national park.<sup>18</sup> HRW [Human Rights Watch] also received information from a different military source that eight bodies from Kapkota were flown and dumped in the forests, north of Kaptaboi village on 2 April 2008.<sup>19</sup> Former detainees also testified that a helicopter was always kept on standby at Kapkota military camp to ferry bodies to the forest.<sup>20</sup> Some children interviewed by Associated Press described how they were forced to help load bodies of victims of torture

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<sup>11</sup> 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”, para. 5.

<sup>12</sup> Philip Alston report, *supra* note 11, para. 1.

<sup>13</sup> HRC, Case *Bousroual v. Algeria*, views of 30 March 2006, para. 9.2; Case *Boucherf v. Algeria*, views of 30 March 2006, para. 9.2; and Case *Jegatheeswara v. Sri Lanka*, views of 16 June 2003, para. 9.3.

<sup>14</sup> HRC, Case *Hugo Demit Barbato v. Uruguay*, views of 21 October 1982, para. 10.

<sup>15</sup> HRC, Case *Vicente and others v. Colombia*, views of 29 July 1997, para. 8.8.

<sup>16</sup> Philip Alston report, *supra* note 11, para. 52.

<sup>17</sup> Médecins Sans Frontières (MSF), *Mount Elgon: Does Anybody Care?*, June 2008, available at: [www.msf.org.uk/mount\\_elgon\\_report\\_20080616.news](http://www.msf.org.uk/mount_elgon_report_20080616.news) (last accessed 26 July 2011), (hereinafter “MSF report”), p. 9; Human Rights Watch (HRW), *All the Men have Gone: War Crimes in Kenya’s Mount Elgon Conflict*, July 2008, (hereinafter “HRW report”), p. 5.

<sup>18</sup> *Daily Nation*, 27 March 2008, quoted in HRW report, *ibid.*, p. 30.

<sup>19</sup> HRW report, *supra* note 17, p. 30.

<sup>20</sup> KNCHR report, *supra* note 17, p. 12.

onto military helicopters in Kapkota camp.<sup>21</sup> Government authorities have made no systematic or transparent attempts to protect those sites or have them excavated and the bodies contained therein duly identified and returned to their families. 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<sup>22</sup> as well as in the 2007 International Convention for the Protection of All Persons from Enforced Disappearances.<sup>23</sup> NGOs that attempted to study the sites in the forest where the mortal remains may be located have received veiled threats and been prevented from doing so.<sup>24</sup>

8. The Country Report Task Force included the subjects brought up in the preceding paragraphs and formulated the following questions to the Government of Kenya in its List of Issues:

*7. Please describe the measures taken to deal with past reports of widespread extrajudicial killings by the police, particularly the lack of accountability for the killings that occurred during the 2007 post-election violence, where 405 gunshot deaths were recorded out of a total of 1,113, and the killings that occurred at Mt. Elgon during the joint police-military operation dubbed Okoa Maisha (Save Lives) in 2008. Please provide detailed information on:*

- (1) the number of investigations launched against the alleged perpetrators;*
  - (2) the type of charges brought against them;*
  - (3) the number of cases dismissed and the reasons for their dismissal;*
  - (4) the number of perpetrators that have been convicted and the nature of the sentences;*
- and*
- (5) whether victims have been adequately compensated and/or rehabilitated.*

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<sup>21</sup> Katharine Houreld, *Hundreds of Kenyan kids caught between brutal militia, Kenyan army*, Associated Press, 21 June 2008.

<sup>22</sup> 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).

<sup>23</sup> See Article 24.3 of the 2007 International Convention for the Protection of All Persons from Enforced Disappearances, 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 Article 24.2 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, Article 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*, doc. A/HRC/14/42 of 22 March 2010, paras. 67-81; 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.

<sup>24</sup> Philip Alston report, *supra* note 11, para. 63.

*Furthermore, please provide updated information on the measures taken to cooperate with the International Criminal Court (ICC) in order to prosecute those that bear the greatest responsibility for the post-election violence.*

9. TRIAL also pointed out at para. 79 of its report of July 2011 violations committed against human rights defenders who have been documenting violations occurred in the in the context of the post-election violence, including the arbitrary killing of Oscar Kamau King'ara and John Paul Oulu, Chief Executive Officer and Advocacy Director of the Oscar Foundation respectively. The issue was taken up by the Country Report Task Force in the following manner:

*9. Please describe the actions taken to investigate and prosecute those responsible for the killing of two human rights defenders, Oscar Kamau King'ara and John Paul Oulu, who had cooperated with the Special Rapporteur on extrajudicial, arbitrary and summary executions during his visit in 2009. Furthermore, please explain the measures taken to protect other human rights defenders who met the Special Rapporteur during his 2009 visit, who have reportedly received death threats.*

10. TRIAL wishes to reiterate its concerns on the numerous reports of extrajudicial killings and enforced disappearance perpetrated by the police, military and other law enforcement personnel in general and in the context of operation Okoa Maisha in Mount Elgon District and the cases of enforced disappearance perpetrated by the military and police during Operation Okoa Maisha in March 2008. TRIAL also remains deeply concerned about the treatment given to the mortal remains and kindly requests the Committee to refer to the questions to the Government of Kenya formulated in para. 34 of the July 2011 report.<sup>25</sup> TRIAL reaffirms that the Government of Kenya 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 the alleged perpetrators are tried by a competent, ordinary court.**
11. Moreover, TRIAL continues expressing its concern over the deaths of human rights defenders Oscar Kamau King'ara and John Paul Oulu and as stated in para. 91 of its July 2011 report, reaffirms that the Government of Kenya **shall take measures to reduce the incidences of harassment to witnesses and human rights defenders; have those cases of harassment or attacks to witnesses of human**

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<sup>25</sup> 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?

**rights abuses, families of victims of human rights abuses and human rights defenders thoroughly and duly investigated and if so, to publish the outcome such investigation.**

12. With regard to the **prohibition of torture and cruel, inhuman or degrading treatment**, TRIAL highlighted a number of issues in the report of July 2011. At **para. 35 of the July 2011 report**, TRIAL **gave numerous examples of cases of torture** committed in the context of Operation Okoa Maisha. Namely, TRIAL highlighted cases of men suspected of being sympathisers or members of the Sabaot Land Defence Forces, abducted by the military and brutally tortured, often leading to their death in custody. TRIAL also highlighted the following issues:

***Para. 36** In its 2005 Concluding Observations, the Committee noted with concern the reports that police custody is frequently resorted to abusively, and that torture is frequently practised in such custody. In particular, the Committee signalled the extremely high number of deaths in custody and by the reports that enforcement officials responsible for acts of torture are seldom prosecuted. In this sense, it recommended that the State party takes “more effective measures to prevent abuses of police custody, torture and ill-treatment” and that allegations of such incidents are “promptly and thoroughly investigated by an independent body so that perpetrators are brought to justice”.<sup>26</sup>*

***Para. 37** As a reply, the State party in its third periodic report indicates that it has drafted a Bill on Torture which defines the crime of torture and also provides for punishment for such act, thus criminalising within the domestic legal framework the offence concerned, as requested by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>27</sup> The State party also argues that “The Kenya Law Reform Commission is also conducting a review of other related legislation, such as the Penal Code, Evidence Act and the Criminal Proceedings Act to ensure that there [sic] are in conformity with the obligations assumed under the Convention against Torture”.<sup>28</sup>*

***Para. 38** The Bill on Torture was apparently not adopted and no definition of torture currently exists under Kenyan legislation. The provision related to torture in the 2010 Constitution, which contains the prohibition of torture within the right to liberty and security, seems to be a step backwards with respect to the 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”.<sup>29</sup> Beside the prohibition of torture in the new Constitution, section 18 of the Children Act, 2001 established 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*

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<sup>26</sup> HRC, 2005 Concluding Observations, *supra* note 7, para. 18.

<sup>27</sup> Kenya, 2011 Third Periodic Report, *supra* note 2, para. 143.

<sup>28</sup> Kenya, 2011 Third Periodic Report, *supra* note 2, para. 144.

<sup>29</sup> 1963 Constitution, section 74(1).

any other cruel, inhuman or degrading treatment. (3) Any police officer who contravenes the provisions of this section shall be guilty of a felony.”

**Para. 39** Furthermore, the legislation reforms mentioned by the State party in its third periodic report have not been implemented yet. Both the Penal Code and the Code of Criminal Procedure are completely silent in what respects the prohibition of torture. 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 Committee against Torture, which referred to it in its 2008 Concluding Observations to Kenya’s initial report.<sup>30</sup>

**Para. 40** Up to now, despite the numerous allegations of instances of torture from different sources, namely the Kenya National Commission on Human Rights, the Committee against Torture, the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the NGOs HRW, the Independent Medico-Legal Unit, Médecins Sans Frontières, the World Organisation against Torture, and the International Commission of Jurists, 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.

**Para. 41** The Committee has pointed out that “The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual”.<sup>31</sup> In this sense, the State party has a positive obligation to adopt legislative or other measures as may be necessary to protect everyone against acts prohibited by article 7, whether committed by people acting in their official capacity, outside their official capacity or in a private capacity. The Committee has further observed that no derogation from article 7 is allowed and that its provisions must remain in force even in situations of public emergency. In order to fully comply with the obligations under article 7, the State party must include in its domestic legislation, provisions which “penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons”.<sup>32</sup> In addition, the State party has the obligation to investigate all allegations of torture and to ensure that alleged perpetrators are tried and sanctioned if found responsible for violating article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts.

**Para. 42** 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.<sup>33</sup> In fact, it has stated that “the disappearance of

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<sup>30</sup> Committee against Torture, Concluding Observations on the initial report of Kenya, doc. CAT/C/KEN/CO/1 of 21 November 2008, para. 8.

<sup>31</sup> HRC, General Comment No. 20, para. 2.

<sup>32</sup> *Ibid.*, para. 13.

<sup>33</sup> See *inter alia*, HRC, Case *Ana Rosario Celis Laureano v. Peru*, views of 25 March 1996, para. 8.5; Case *Katombe L. Tshishimbi v. Zaire*, views of 25 March 1996, para. 5.5; Case *Sarma v. Sri Lanka*, views of 16 July 2003, para. 9.3; and Case *Grioua v. Algeria*, views of 10 July 2007, para. 7.6.

persons is inseparably linked to treatment that amounts to violation of article 7".<sup>34</sup> In doing so, the Committee recognises that the mere act of being taken away by State agents for an unspecified or indefinite period of time, followed by a lack of acknowledgement of the act itself and the fate or whereabouts of the person, amount to torture, cruel, inhuman or degrading treatment or punishment.

**Para. 43** During operation Okoa Maisha, both military and former SLDF members turned government informants violated systematically article 7, either by perpetrating acts of torture or by tolerating them. Inasmuch as hundreds of acts of enforced disappearance were committed, article 7 was also systematically violated.

13. The Country Report Task Force included the subjects brought up in the preceding paragraphs and formulated the following questions to the Government of Kenya in its List of Issues:

13. Please provide information on the measures taken to **prevent and punish the persistent acts of torture in police custody in the State party. Please provide an update concerning the Bill on Torture, or other efforts to enact a definition of the crime of torture** consistent with international standards and to legislate penalties appropriate to the gravity of the offence. What measures have been taken to address the problem of prolonged detention without trial, ill-treatment and massive violations of the rights of detainees as well as the reported high numbers of deaths in custody? Please describe the measures taken to provide training to police and prison officers on the prevention and prohibition of torture, and reforms of the police and prison departments within the framework of the Governance, Justice, Law and Order Sector Reform Programme. Please provide disaggregated statistical data on the number of criminal prosecutions and disciplinary measures taken against law enforcement officials who are alleged to have committed acts of torture and ill-treatment.

14. TRIAL reiterates its concerns regarding the numerous cases of torture in custody as well as regarding the lack of a definition of torture under Kenyan legislation. TRIAL also remains concerned about the numerous cases of enforced disappearance inasmuch as they amount to torture and kindly refers the Committee to the questions formulated in para. 47 of the July 2011 report.<sup>35</sup> TRIAL reiterates its recommendations that the Government of Kenya **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; to ex**

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<sup>34</sup> HRC, Case *Rafael Mójica v. Dominican Republic*, views of 10 August 1994, para. 5.7.

<sup>35</sup> 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 detainees 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?

**officio, promptly, impartially and effectively investigate all allegations of torture and ensure that alleged perpetrators are tried by competent ordinary courts; to sign the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment without further delay; and to recognise the competence of the CAT to receive and examine individual complaints pursuant to article 22 of the Convention against Torture.**

15. With regard to the **right to liberty and security of person and the treatment of persons deprived of their liberty** TRIAL highlighted a number of issues in the July 2011 report:

***Para. 47** The Kenyan Constitution of 2010 guarantees “the right to freedom and security of person, which includes (a) 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 in subject to Article 58”.<sup>36</sup>*

***Para. 48** 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 and recommended that Kenya guarantees “the right of persons in police custody to have access to a lawyer during the initial hours of detention.” The Committee also expressed concern over the fact that those accused of a capital offence do not fully benefit from the guarantees of article 9.3 of the Covenant since the time limit for being brought before a judge is 14 days rather than 24 hours stipulated for those accused of having committed an offence.<sup>37</sup>*

***Para. 49** In its third periodic report, the government of Kenya recognises 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 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 from of the police officers to contact persons of their choice before they are surrendered to the arresting authority”.<sup>38</sup>*

16. The Country Report Task Force included the subjects brought up in the preceding paragraphs and formulated a number of questions to the Government of Kenya in its List of Issues. Incorporating it within Article 4 ruling conditions to declare a state of emergency, the following question was formulated:

***Para 6** Please explain whether article 58(6)(a) of the 2010 Constitution, which governs*

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<sup>36</sup> Constitution of Kenya, 2010, *supra* note 3, Article 29 (a), (b) and (d). Article 58 (6) 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.

<sup>37</sup> HRC, 2005 Concluding Observations, *supra* note7, para. 17.

<sup>38</sup> Kenya, 2011 Third Periodic Report, *supra* note 2, para. 50.

*states of emergency, permits or prohibits derogation from rights that are non-derogable under article 4 of the Covenant.*

17. Incorporating it within Article 9, the following questions were formulated:

***Para. 14*** Please explain the **measures taken to prevent unlawful or arbitrary arrest by the police, including arrests** for the purpose of extorting bribes as well as other abuses. Please **identify the remedies available to victims of unlawful or arbitrary arrest, and the measures taken to ensure that arrested persons are promptly brought before a judge.**

18. Incorporating it within the right to a fair trial, the Country Report Task Force also took up TRIAL's concerns regarding access to a lawyer highlighted in the preceding paragraphs and formulated the following questions to the Government of Kenya:

***Para. 20*** Please explain the measures taken to ensure that suspects have access to a lawyer during the initial stages of detention and that suspects, other than those facing a capital murder charge, benefit from a legal assistance scheme.

19. TRIAL also highlighted and gave examples of several human rights defenders who in documenting human rights violations have been the subject of threats of harassment (paras. 87 to 89), which the Country Report Task Force incorporated the subject under the **right to freedom of expression, freedom of assembly and freedom of association** and formulated the following questions to the Government of Kenya:

***Para. 23*** According to information before the Committee, journalists and human rights defenders have been subject to harassment and intimidation, especially by security forces. Also, journalists carry out self-censorship to avoid defamation action by public officials in response to legitimate criticism. Please comment and indicate the measures taken to guarantee, in practice, the right to freedom of expression.

20. TRIAL reiterates its concerns on the lack of access to a lawyer for persons deprived of their liberty as well as for the lack of clarity regarding the conditions to declare a state of emergency, on the instances of arbitrary arrest by the police and of threats to human rights defenders. It kindly refers the Committee to the questions addressed to the State party formulated in this regard stated on para. 54 of its July 2011 report<sup>39</sup> and reiterates its recommendations that the State party **take immediate action to ensure that arbitrary deprivation of liberty is criminalised in accordance with international standards;**

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<sup>39</sup> 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.

and 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; 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.

21. With regard to the **rights of the child**, TRIAL pointed out in its July 2011 report:

*Para. 65 In its 2005 Concluding Observations, the Human Rights Committee had 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.<sup>40</sup> In response to this recommendation, the State party which in its third periodic report states 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”.<sup>41</sup> This reply cannot be considered satisfactory to the recommendation made by the Committee. 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”.<sup>42</sup> 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 Human Rights Committee 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”.<sup>43</sup> Despite numerous appeals, the age of criminal responsibility has not been raised and no other measure of protection has been adopted by the State party as requested by his or her status as a minor. Furthermore, no investigation has been undertaken with regard to arbitrary killings, enforced disappearances, torture and ill-treatment of minors in the context of operation Okoa Maisha.*

22. The Country Report Task Force in its List of Issues formulated the following questions to the Government of Kenya:

*17. Please provide an update on the specific steps taken under the Law Reform Commission’s review of the Children’s Act (2001), to bring the age of criminal responsibility,*

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<sup>40</sup> HRC 2005 Concluding Observations, *supra* note 7, para. 24. The age of criminal responsibility is established in article 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.”

<sup>41</sup> Kenya, 2011 Third Periodic Report, *supra* note 2, para. 67.

<sup>42</sup> 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.

<sup>43</sup> UN Committee against Torture, Concluding Observations on the initial report of Kenya, *supra* note 30, para. 11.

*currently set at eight years of age, in line with international standards. Please also explain the measures taken to put an end to the prevalent phenomenon of treating children as adults during criminal trials, and to the detention of accused and convicted juveniles with adults. What measures have been taken so far to extend the juvenile justice system outside the capital of the State party?*

23. TRIAL reiterates its concerns on the low age set under Kenyan legislation for criminal responsibility as well as on the lack of investigation into allegations of arbitrary detention, enforced disappearance, extrajudicial executions, torture and ill-treatment of minors and kindly refers the Committee to the questions addressed to the State party formulated in this regard stated on para. 67 of its July 2011 report.<sup>44</sup> TRIAL would like to reiterate the obligation of the State party **to raise the minimum age of criminal responsibility currently set at 8 years old and to bring it into accordance with international standards; 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; take immediate action to ensure that all minors deprived of their liberty within the operation Okoa Maisha currently detained are released; 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; 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.**

### 3. Conclusions and recommendations

24. TRIAL would like to point out that since the submission of its report in July 2011, the situation in Kenya has not changed and the information then provided thus continues being relevant. At the same time, TRIAL would also like to highlight some of the problems we have already highlighted in our previous Alternative Report. As such, TRIAL respectfully requests the Committee to request to the State party:

#### 25. 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.

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<sup>44</sup> 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?

**26. 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 recognise the competence of the CAT to receive and examine individual complaints pursuant to article 22 of the Convention against Torture.

**27. Regarding Article 9 of the Covenant:**

- ▶ The State party shall take immediate action to ensure that arbitrary deprivation of liberty is criminalised 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.

**28. 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 recognising 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.

**29. 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.

**30. 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.

#### 4. Association submitting the information

31. TRIAL (*Swiss Association against Impunity*) is an association under Swiss law founded in June 2002 and headquartered in Geneva. It is apolitical and non-confessional and is in consultative status with 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 a 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.
32. Since 2010, TRIAL has been working with Western Kenya Human Rights Watch (WKHRW), a local NGO based in Bungoma, Kenya to combine their expertise in order to help victims of human rights violations committed in Mount Elgon obtain redress. Between May and July 2011 TRIAL, in partnership with WKHRW, submitted 40 individual communications to the UN Working Group on Enforced or Involuntary Disappearances (WGEID). Other cases of enforced disappearance are currently being documented and prepared to be submitted to the WGEID. Furthermore, in May 2011, TRIAL submitted a General Allegation to the WGEID on the obstacles encountered for the full implementation by the Government of Kenya of the 1992 Declaration on the Protection of all Persons from Enforced Disappearance.

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