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COMMITTEE AGAINST TORTURE
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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Concluding observations of the Committee against Torture

KENYA

1. The Committee considered the initial report of Kenya (CAT/C/KEN/1) at its 852nd and 854th meetings, held on 13 and 14 November 2008 (CAT/C/SR.852 and 854), and, at its 860th and 861st meetings, held on 19 November 2008 (CAT/C/SR.860 and 861), adopted the following conclusions and recommendations.

A. Introduction

2. The Committee welcomes the submission of the initial report of Kenya, which is in conformity with the Committee's guidelines for the preparation of initial reports, but regrets that the report was submitted nine years late.
3. The Committee notes with satisfaction the frankness with which the State party acknowledged the gaps in its legislation relating to the elimination and prevention of torture. The Committee also appreciates the constructive and open dialogue that was conducted with the high-level delegation from the State party, as well as the replies to the questions raised during the dialogue.

B. Positive aspects

4. The Committee welcomes the efforts made by the State party to strengthen its legal and institutional framework to safeguard universal human rights protection, including *inter alia* the following positive developments:

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- (a) The ratification by the State party of most of the core international human rights treaties;
 - (b) The ratification by the State party, on 15 March 2005, of the Rome Statute of the International Criminal Court;
 - (c) The enactment of the Community Service Order Act in 1998, which establishes the option of community services projects as an alternative to custodial sentences;
 - (d) The enactment of the Children Act in 2002;
 - (e) The enactment of the Witness Protection Act in 2006;
 - (f) The closing down of the infamous Nyayo House torture chambers;
 - (g) The establishment of the Kenya National Commission on Human Rights in 2003;
 - (h) The launch of the Governance, Justice, Law and Order Programme intended to reform the legal and justice sector;
 - (i) Recent establishment of the civilian independent Police Oversight Board;
5. The Committee also welcomes the information provided by the delegation about the National Human Rights Policy and Plan of Action currently under development aimed at integrating human rights in the national planning process.
6. The Committee notes with satisfaction that relevant reports were submitted to the Committee by the Kenyan National Commission on Human Rights and that representatives from the Commission attended the meetings of the Committee and provided valuable information.
7. The Committee also welcomes the efforts made by the State party to cooperate with non-governmental organizations, particularly national and local organizations, which have provided the Committee with valuable contributions to the review process of the initial report. The Committee encourages the State party to strengthen its cooperation with such organizations with regard to the implementation of the provisions of the Convention.

C. Subjects of concern and recommendations

Definition of torture and appropriate penalties for acts of torture

8. The Committee takes note that the State party is a dualist state requiring domestication or incorporation of international instruments at the national level through an act of Parliament and it regrets that the State party has not yet incorporated the Convention into its legal framework. While acknowledging that torture is prohibited by section 74 (1) of the Kenyan Constitution, the Committee deeply regrets that the Penal Code and Code of Criminal Procedure do not contain a definition of torture and therefore lack appropriate penalties applicable to such acts, including psychological torture. (arts. 1 and 4)

The State party should ensure the incorporation of the Convention into its legal framework. Furthermore, the State party should, without delay, include a definition

of torture in its penal legislation in full conformity with article 1 of the Convention and ensure that all acts of torture are punishable by appropriate penalties which take into account their grave nature as laid out in article 4, paragraph 2, of the Convention. The Committee urges the State party to seize the Kenya Law Reform Commission of this deficiency with a view to remedy it.

Access to justice

9. While the Committee takes into account the efforts made by the State party aimed at consolidating and ensuring the integrity, efficiency and transparency of its justice system, the Committee is concerned that the steps taken so far have not been comprehensive enough. (art. 2)

The Committee invites the State party to adopt a more comprehensive approach to reform the justice system with a view to enhancing its integrity, efficiency and transparency.

10. While the Committee acknowledges the recent establishment of a national legal aid scheme and an awareness programme, it remains concerned about the persistent problem of access to justice, particularly by those without economic resources. (art. 2)

The Committee urges the State party to take all necessary measures to ensure that the lack of resources is not an obstacle to accessing justice. The State party should urgently implement the recently established national legal aid scheme, which could be accompanied by the setting up of an Office of Public Defender.

Age of criminal responsibility

11. The Committee is deeply concerned that the age of criminal responsibility in the State party is still set at eight years of age despite the recommendations made by the Human Rights Committee (CCPR/CO/83/KEN, 2005) and by the Committee on the Rights of the Child (CRC/C/KEN/2, 2007). (art. 2)

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

Arbitrary arrest and police corruption

12. The Committee is deeply concerned about the common practice of unlawful and arbitrary arrest by the police and the widespread corruption among police officers, which particularly affects the poor living in urban neighbourhoods. The Committee is also concerned about the bail system currently in place. (art. 2 and 11)

The Committee urges the State party to address the problem of arbitrary police actions, including unlawful and arbitrary arrest and widespread police corruption, particularly in slums and poor urban neighbourhoods, through clear messages of zero-tolerance to corruption from superiors, the imposition of appropriate penalties and adequate training. Arbitrary police actions must be promptly and impartially

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investigated and those found responsible punished. The State party should also reform the bail system currently in place with a view to ensuring that it is more reasonable and affordable.

Torture and ill-treatment and safeguards while in custody

13. While taking note of the ongoing revision of the Administration Police Act, the Committee notes with deep concern the numerous and consistent allegations of widespread use of torture and ill-treatment of suspects in police custody. The Committee also notes with concern the challenges reported by the State party in providing people under arrest with the appropriate legal safeguards, including the right to access a lawyer, an independent medical examination and the right to contact family members. In this connection, the Committee regrets the lack of detailed statistical data disaggregated on the number of prosecutions and of criminal and disciplinary actions taken against law enforcement officials found guilty of torture and ill-treatment. (arts. 2 and 11)

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

Furthermore, the State party should keep under systematic review interrogation rules, instructions, methods and practices with a view to preventing cases of torture.

The State party should provide detailed statistical data disaggregated by crime on prosecution as well as criminal and disciplinary actions against law enforcement officials found guilty of torture and ill-treatment.

14. The Committee notes with concern the reported difficulties experienced by the Kenya National Commission on Human Rights to freely access and monitor places of detention, particularly police stations. (arts. 2 and 11)

The State party should take all appropriate measures to ensure that the Kenya National Commission on Human Rights, without exception, is provided with the necessary conditions to carry out its mandate to independently monitor all places of detention, including police stations.

Conditions of detention

15. The Committee is concerned about the dire conditions of detention in Kenyan prisons, particularly the overcrowding, lack of appropriate health services and high levels of violence inside the prisons, including inter-prisoner violence. The Committee notes the relevant work undertaken by the Kenya National Commission on Human Rights in monitoring the conditions of prisons. The Committee is nevertheless concerned that visiting judges play a limited role in inspecting the conditions of detention. (art. 11)

The Committee urges the State party to take effective measures to bring the conditions of detention into line with UN Standards Minimum Rules for the Treatment of Prisoners. In addition, the State party should allocate the material, human and budgetary resources necessary to:

- a) Reduce overcrowding in prisons, in particular the high number of persons in pre-trial detention, by *inter alia* enforcing the relevant provisions which provide for alternative non-custodial measures for minor offences and by reforming the abusive bail system currently in place;**
- b) Ensure that adequate health services are available in all prisons by increasing the number of medical practitioners working for the penitentiary system;**
- c) Take the appropriate measures to reduce the high level of violence inside prisons, including inter-prisoners violence, and punish those responsible;**
- d) Strengthen judicial supervision of conditions of detention foreseen in the Prison Act.**

Non- refoulement and renditions

16. While the Committee acknowledges the long history of the State party as a host country for refugees from the region as well as its efforts in resettling and integrating these populations, it remains deeply concerned that the current refoulement procedures and practices may expose individuals to the risk of torture. More specifically, the Committee notes with concern that the Immigration Act does not make reference to the absolute principle of non-refoulement in relation to torture and it does not provide for a process of independent review of removal orders. The Committee is further concerned about the fact that section 21 (1) of the draft Refugee Law (2006), which still remains to be enacted, provides for an exception to the general principle of non-refoulement allowing expulsion of refugees on the basis of national security. (art. 3)

The State party should adopt the necessary measures to bring current expulsion and refoulement procedures and practices fully in line with article 3 of the Convention. In particular, expulsion and refoulement of individuals should be decided after careful assessment of the risk of being tortured in each case and should be subject to appeal with suspensive effect. The Committee urges the State Party to fulfil all its obligations under article 3 of the Convention thereby guaranteeing the absolute principle of non-refoulement.

17. The Committee notes with concern the statements made by the State party delegation, also confirmed by numerous and consistent reports and allegations, about the practice of returns and renditions of individuals, nationals and non-nationals, to Somalia, Ethiopia and Guantanamo Bay, including the case of Mr. Abdulmalik, on the basis of national security and actions to fight terrorism. (arts. 2 and 3)

The Committee urges the State party to ensure that any measure taken to combat terrorism is in accordance with Security Council resolutions 1373 (2001) and 1566

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(2004), which require that anti-terrorist measures be carried out with full respect for, inter alia, international human rights law, including the Convention. The Committee calls upon the State party to investigate these allegations in order to establish responsibilities and ensure compensation to victims.

Human rights training of law enforcement personnel

18. While acknowledging the existing training programmes on human rights for law enforcement personnel, the Committee remains concerned that such trainings do not include the prohibition of torture as specific crime of grave nature and do not reach all relevant personnel who are in direct contact with detainees, including police officers, prison staff, judges and, including the military and health personnel. (art. 10)

The State party should reinforce and expand the human rights training programmes with the objective of bringing about a change in attitudes and behaviour. Training should include the prohibition of torture as specific crime of grave nature and should be made available to all law enforcement personnel enumerated in article 10 of the Convention, at all levels, including to the military and health personnel who are in direct contact with persons deprived of their liberty.

Use of force by police during post-election violence

19. The Committee notes with serious concern the numerous reports and allegations of disproportionate use of force and widespread torture and other cruel, inhuman and degrading treatment or punishment by members of the police forces during the 2007-2008 post-election violence, including sexual violence and gang rape. In this respect, the Committee welcomes the establishment of the Commission of Enquiry into Post-Election Violence, takes note of its recently published report, also known as the "Waki report", and acknowledges its important findings. (arts. 11 and 12)

While taking note of the recently established special task force by the police to enquire on sexual-related crimes during the post-election violence, the Committee urges the State party to take immediate action to ensure prompt, impartial and effective investigation of all allegations of excessive use of force and torture by the police during this period, including sexual violence and gang rape, with the aim of prosecuting and punishing perpetrators with penalties appropriate to the grave nature of their acts. The State party should ensure that the victims of post-election violence obtain redress and adequate compensation.

Extra-judicial killings and enforced disappearances

20. The Committee is disturbed to learn about consistent allegations of ongoing extrajudicial killings and enforced disappearances by law enforcement personnel, particularly during special security operations, such as the "Chunga Mpaka" Operation in the Mandera district in September 2008, and operations against criminal bands, such as the "Mathare Operation" in June 2007. The Committee is further concerned about the lack of investigation and legal sanctions in connection with such allegations, as well as about information regarding

impediments that non-governmental organisations face in their attempts at documenting the cases of disappearances and deaths. (arts. 2, 11 and 12)

The Committee urges the State party to conduct immediate, prompt and impartial investigations into these serious allegations, and to ensure that perpetrators are prosecuted and punished with penalties appropriate to the grave nature of their acts as required by the Convention. The State party should take all possible steps to prevent acts such as the alleged extrajudicial killings and enforced disappearances.

Violence by state agents and access to land

21. While taking note of the inclusion of the issue of land reform in item 4 of the Kenya National Dialogue and Reconciliation Agenda, the Committee is concerned about the persistent linkage between widespread violence and torture by state agents and the problem of land in the State party. The lack of access to land, paired with other social and economic injustices, are frequently considered as root causes of torture and violence. In this connection, the Committee is deeply concerned about allegations of mass arrests, persecution, torture and unlawful killings by the military in the Mount Elgon region during the “Operation Okoa Maisha” conducted in March 2008. (arts. 12 and 16)

The Committee urges the State party to take immediate action to ensure prompt, impartial and effective investigations into the allegations of use of excessive force and torture by the military during the “Operation Okoa Maisha” in March 2008. The State party should further ensure that perpetrators are prosecuted and punished according to the grave nature of their acts, that the victims who lost their lives are properly identified and that their families, as well as the other victims, are adequately compensated.

22. The Committee is further concerned about reports of the use of excessive force, sometimes resulting in violent deaths, by the police during evictions, particularly in urban areas, which often result in the destruction of homes and other personal belongings. (arts. 12, 13 and 16)

The State party should adopt effective measures to prevent the use of excessive force during evictions. Furthermore, the State party should provide specific training on such actions as evictions for police officers, and ensure that complaints concerning forced evictions are thoroughly investigated and that those found responsible are brought to trial.

Impunity

23. The Committee is concerned about the absence of specific legal framework to ensure prompt and impartial investigations into acts of torture and other cruel, inhuman and degrading treatment or punishment committed by law enforcement personnel. The Committee is further concerned that acts of torture and ill-treatment are seldom investigated and prosecuted and that perpetrators are either rarely convicted or are sentenced to lenient penalties not in accordance with the grave nature of their crimes. In this connection, the Committee expresses its concern over the culture of impunity for perpetrators of acts of torture and ill-treatment throughout the country. (arts. 2, 4 and 12)

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

In this connection, the Committee welcomes the assurances provided by the delegation that information will be submitted regarding the status of individual cases of torture pending in court as well as torture related deaths without inquest listed in the annexes of one of the alternative reports submitted by a coalition of national non-governmental organizations.

Lack of accessible complaints mechanism

24. While acknowledging the recent establishment of a Public Complaints Standing Committee, the Committee is very concerned about the impediments faced by individuals who may have been subject to torture and ill-treatment to complain and have their cases promptly and impartially examined by the competent authorities. In this connection, while taking note that the complaint forms (including the "P3 form") are now available free of charge on the website of the Kenyan police department as well as in public hospitals, the Committee is concerned that the practice of medical practitioners of charging fees for completing P-3 forms may reduce the possibility of persons with limited economic resources to file and corroborate complaints. (arts. 12 and 13)

The Committee urges the State party to take the necessary measures to ensure that all individuals who may have been subject to torture and ill-treatment have the possibility to complain and their case promptly and impartially examined by the competent authorities. The State party should ensure that all necessary steps to file a complaint are facilitated, including access to medical assessment as required by the "P3 form".

Redress and compensation

25. The Committee is concerned at the problems and delays, acknowledged by the State party, in providing compensation to victims of torture, including the victims of special police and military operations. The Committee is also concerned at the lack of data and statistical information on the number of cases of compensation to victims of torture or to members of their families. (art. 14)

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

Violence against women and children

26. While noting the enactment of the Sexual offences Act in 2006, the Committee notes with concern the persistence of widespread violence against women and children in Kenyan society, including sexual exploitation and trafficking, as well as the high levels of impunity for such crimes. The Committee is particularly concerned about the difficulties that women face when accessing the justice system to denounce cases of sexual violence due *inter alia* to the existing provisions in section 38 of the Criminal Procedure Code. The Committee is further concerned about the delays in enacting the relevant legislation intended to protect women, including Domestic Violence (Family Protection) Bill, the Anti-trafficking in Persons Bill, the Equal opportunities Bill and the Matrimonial Property Bill.

The committee notes with satisfaction the development of reference manual as the basis for training of law enforcement personnel at different levels, which addresses violence against women, but it remains concerned that not enough attention has been paid to the training of personnel who are in direct contact with victims. (arts. 12 and 16)

The State party should, as a matter of urgency, take all necessary legal and administrative measures to protect women and children from all forms of violence. In particular, the Committee encourages the State party to facilitate the access to justice for women, including, *inter alia*, through the revision of section 38 of Criminal Procedure Code. The State party should also ensure the speedy enactment of the relevant legislation, including the Domestic Violence (Family Protection) Bill, the Anti-trafficking in Persons Bill, the Equal Opportunities Bill and the Matrimonial Property Bill.

The State party should provide the necessary specific training to all law enforcement personnel, particularly to the personnel who are in direct contact with women victims of violence.

Female genital mutilation

27. While acknowledging the fact that female genital mutilation is outlawed in the State party, the Committee notes with concern that the practice still persists among certain ethnic groups. (art. 16)

The State party should take all necessary steps to eradicate the practice of female genital mutilation, including through the intensification of nationwide awareness raising campaigns, and to punish the perpetrators of such acts.

Human rights defenders

28. The Committee notes with concern allegations of reprisals, serious acts of intimidation and threats against human rights defenders, especially those who report acts of torture and ill-treatment, and in particular human right defenders involved in addressing the post-election violence. (art. 16)

The State party should take effective steps to ensure that all persons reporting on acts of torture and ill-treatment are protected from intimidation and from any form of reprisal as a result of their activities. The Committee encourages the State party

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to seek closer cooperation with civil society in preventing torture, in particular in the ongoing process of investigating and holding persons accountable for the post-election violence.

Death penalty

29. While acknowledging that the death penalty has not been applied in the State party since 1987 as well as taking note of the practice of the President of the Republic to commute death sentences, as well as the existence of a de-facto moratorium of the death penalty, the Committee remains concerned however about the situation of uncertainty of those who serve on death row, which could amount to ill-treatment. (art. 16)

The Committee urges the State party to take the necessary steps to establish an official and publicly known moratorium of the death penalty with a view of eventually abolishing the practice. The State party should take the necessary measures to improve the conditions of detention for persons serving on death row in order to guarantee basic needs and rights.

Data collection

30. The Committee regrets the lack of data and statistical information, especially on cases of torture, type and number of complaints, prosecution and conviction of perpetrators as well as on compensation and rehabilitation of victims.

The Committee welcomes the additional information provided by the delegation after the consideration but it nevertheless requests the State party to provide in its next periodic report further information including disaggregated data on the number of people held in custody, including remandees and prisoners, and length of sentences.

The State party should also provide detailed statistical data, disaggregated by crime, ethnicity and gender, on complaints relating to torture and ill-treatment allegedly committed by law enforcement officials, as well as on the related investigations, prosecutions and criminal and disciplinary sanctions.

31. The Committee encourages the State party to consider making the declaration under article 22 of the Convention, thereby recognizing the competence of the Committee to receive and consider individual communications.
32. The Committee encourages the State party to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as soon as possible.
33. The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet a party, namely the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of All Persons from Enforced Disappearance.

34. The Committee invites the State party to submit its core document in accordance with the requirements of the Common Core Document in the Harmonized Guidelines on Reporting, as approved by the international human rights treaty bodies and contained in document HRI/GEN/2/Rev.5.
35. The State party is encouraged to disseminate widely the reports submitted by the State party to the Committee and the latter's concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.
36. The Committee requests the State party to provide, within one year, information on measures taken in response to the Committee's recommendations, as contained in paragraphs 8, 11, 12, 19, 21 and 25 above.
37. The State party is invited to submit its next report, which will be considered as its second periodic report, by 21 November 2012.
