



Kenya: Torture reforms must tackle implementation gap and end impunity

Nairobi, 5 October 2013

At the conclusion of a visit to Kenya by a delegation of anti-torture experts, the World Organisation Against Torture (OMCT) and its coalition of partner organisations in Kenya call for the continuation of the reform path and effective steps to end impunity.

Scope of the mission:

Over the last week the delegation held meetings with state and civil society actors to assess the way forward in implementing the recommendations issued over the last years by the main UN anti-torture bodies. We wish to express our appreciation for all the state and civil society actors met, and note the openness of discussions with the authorities, including the Attorney General, the Solicitor General, the Deputy Commissioner of Prisons, the Independent Police and Oversight Commission and the Police Service Commission, representatives of the Judiciary, and the Kenyan National Human Rights Commission. The delegation was also able to visit a penitentiary facility in Industrial District in Nairobi.

Torture and terrorism:

The mission took place only a few days after the terrorist attack on the Westgate Mall. To our organisations there is no doubt that such a terrorist act constitutes a crime against humanity and violates the very values human rights law seeks to protect. It is vital for victims and their families to receive support, to receive adequate information about what happened to their loved ones, and that those responsible for such crimes are brought to justice within the ordinary justice process.

We appreciate assurances by the Attorney General that security threats such as terrorism must be addressed within and not as an abrogation of the rule of law. It is important to withstand any temptation to resort to measures outside the law, and we urge all actors involved to fully respect the absolute prohibition of torture, cruel, inhuman and degrading treatment even in such time of crisis, and not to repeat some of the violations that occurred after the attacks in Mombasa in 2002.

Dissemination of recommendations:

The UN Committee Against Torture and the UN Human Rights Committee have both - on the basis of Kenya's state report - made important recommendations for an effective prevention of torture. These recommendations should be disseminated widely so that they trigger down to all relevant actors, and we believe that thought need to be given to consider conducting government and civil society consultations on their implementation, and the discussion of a joint action plan on its implementation. We also believe that the governments

stated intention to invite the UN Special Rapporteur on Torture should be followed soon by a visit of the Special Rapporteur as an important follow-up measure.

Legislative and constitutional reforms:

Our experiences during the mission mirror the findings of the UN Committees on legal reforms. Kenya has made over the last years important progress in building a strong constitutional and legal framework against torture. Other important recommendations include the early adoption of the child rights and persons deprived of liberty bills presently under consideration.

We believe that these important reforms need to be rounded up by the adoption of a prevention of torture law, which the UN Committee Against Torture identified as a priority.

This draft law elaborated in consultation between state and civil society would fully ensure the domestication of the UN Convention Against Torture. We are greatly encouraged in this regard by the Attorney General's commitment received during our meeting with him to expedite the law to parliament before the end of the year as well as the openness to hold a consultation on torture prevention and reparations.

Redressing lack of implementation:

The number one challenge in the fight against torture remains in the view of all those that we met the lack or late implementation of the many of the good laws passed over the last years as well as the continuous impunity for torture, and other forms of cruel, inhuman or degrading treatment, that appears to persist despite the adoption of these various legal reforms.

The bodies and commission set-up in recent years need to be fully resourced to live up to their expectations. Serious concerns about the delays in their creation or effective functioning, for example of a gender and children desk within police facilities and an FGM board under the FGM law, need now to be addressed. We are concerned about the severe reductions in funding for the Kenyan National Human Rights Commission and the delays in the appointment of its commissioners which risks to frustrate one of the most effective national institutions in the region.

Police reforms:

We appreciate the important reform efforts of the police, including through the creation of an Independent Police Oversight Authority (IPEA). Scope and mandate of this institution can become an important model and reference point in other jurisdictions. However, the delegation is concerned about apparent attempts to limit some of its powers and that may alter and expand the rules on the use of firearms. Altering the IPEA mandate at the very moment when it is about to gain credibility is a real threat to its future impact. It also runs counter the conclusions of the UN Committee Against Torture. Overall, we recall the importance of the recommendations made by both UN bodies on moving forward in the actual vetting process of the police. While recognizing the complexities involved, this process should proceed to secure the transition from a police force to a police service.

Judicial reforms:

The delegation noted the wide consensus that the judiciary reforms have improved the human rights performance of the judiciary. At the same time there remains a serious delay in the adjudication of cases leading to overcrowded prisons in remand. There is also concern that most torture cases do not make it to the court stage posing questions on actual effectiveness of investigations into torture. The right of victims to reparation is vital. In this regard, we learned with concern, that rulings providing compensation for torture victims have in a number of cases not been executed, undermining the judiciary and the rule of law.

Penitentiary reforms:

We are encouraged by the reforms in the prison system with an increased openness to the outside world. There remain problems of overcrowding - including in pre-trial detention in some cases for up to 11 years - which is unacceptable and requires a rethinking of punishment policies. We are particularly concerned about the detention of children, including in remand detention, as children should only be subjected to pre-trial detention in the most exceptional circumstances. Another area of reform concerns the treatment of prisoners facing the death penalty whose prison regime has to be assimilated to ordinary prisoners, as the death penalty is not executed in Kenya.

Overall, we appreciated the openness of the prison administration and urge the authorities to move forward on the ratification of the Optional Protocol to the UN Convention Against Torture, which establishes a national prevention mechanism, implementing a core recommendation of the UN Committee Against Torture.

Impunity and investigations:

The central challenge continues to be impunity for torture, cruel and inhuman or degrading treatment, or extrajudicial killings often despite solid documentation. In this regard we noted that most cases do not make its way to judicial determination and there appears to be a serious gap in the functioning of investigations and prosecutions. Without breaking the cycle of impunity a culture change in law enforcement will remain illusionary. Legal accountability must complement the many legal reforms undertaken.

Protection of victims, witnesses and human rights defenders:

We are particularly concerned about indications on the intimidation of victims who lodge complaints or of their families, or of witnesses who may provide testimonies and human rights defenders documenting violations, including in the context of the violations in Mount Elgon.

The protection of human rights defenders and the effective investigation and prosecution of attacks on human rights defenders must be a first priority of any democratic state.

Kenya's civil society has no doubt played a tremendously positive role in accompanying the reform process in the country. This contribution should be appropriately recognized. Against this background it is disquieting to see that some question the patriotism of human rights organisations because of their international support as members of the universal and regional human rights movement. In this regard we stress that the implementation of the new Public Benefits Act and any consideration of a Draft Charity Act need to fully respect the positive role of protecting the rights enshrined in the countries constitution, and protect the rights enshrined in the UN Declaration on Human Rights Defenders.

Finally, we express our conviction that the continuation of the reform process and effective steps to ensure accountability will allow the country to contribute to an eradication of torture in law and in practice. These efforts will require our continuous and collective support.

Background:

The United Nations Committee Against Torture, the authoritative universal anti-torture body made multiple recommendations to the authorities about ways to implement the United Nations Convention Against Torture. Earlier in 2012 the United Nations Committee on Human Rights had also identified the fight against torture and for better prison conditions as a priority concern.

The mission was composed of the OMCT Secretary General, Gerald Staberock, and OMCT Vice President and former senior UN human rights official, José Dougan-Beaca, and conducted in partnership with the Kenyan Section of the International Commission of Jurists (ICJ Kenya) The Independent Medico-Legal Unit (IMLU), The Coalition of Violence Against Women, (COVAW) Legal Resources Foundation (LRF-K) and The Kenya Alliance for the Advancement of Children (KAARC).

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