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THE LIE OF THE LAND

Addressing the Economic, Social and Cultural Root Causes of Torture and Other Forms of Violence in Kenya

**An Alternative Report to the
Committee on Economic, Social and Cultural Rights
prepared by the World Organisation Against Torture (OMCT),
the Centre For Minority Rights Development (CEMIRIDE)
and the International Commission of Jurists (ICJ) – Kenya,
in the context of the project
“Preventing Torture and Other Forms of Violence by Acting on their Economic, Social
and Cultural Root Causes”**



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Foreword

This Report has been produced in the context of the OMCT project on “Preventing Torture and Other Forms of Violence by Acting on their Economic, Social and Cultural Root Causes” funded by the European Union’s European Initiative for Democracy and Human Rights, the Swiss Agency for Development and Cooperation (SDC), the Karl Popper Foundation, the InterChurch Organisation for Development Cooperation (ICCO) and the Fondation des Droits de l’Homme au Travail. This project is founded on the principle of the interdependence of human rights and seeks to develop human rights responses that address the link between poverty and marginalisation on the one hand, and torture and violence on the other.

OMCT would like to thank its partners – the Centre for Minority Rights Development (CEMIRIDE) and the International Commission of Jurists (ICJ), Kenya - without whose support and enthusiasm this report would not have been possible. OMCT is particularly grateful to Ms. Munini Mutuku from CEMIRIDE for organising the meetings with pastoralist communities in the Rift Valley, and to Ms. Priscilla Nyokabi from ICJ for setting up a series of meetings in Nairobi, as well as organising the urban fora. Both CEMIRIDE and ICJ also contributed material to this report and offered invaluable comments and suggestions.

In turn, OMCT, ICJ and CEMIRIDE offer their sincere thanks to the Endorois, Ilchamus, Maasai and Ogiek communities and to the urban residents of Nairobi who made an essential contribution to the preparatory mission. We hope we have done their views justice. Thanks also to the experts, officials, activists and academics who took the time to share their knowledge and experience before, during and after the preparatory mission. These include: Mr. Charles Kamuren, Chair of Endorois Welfare Council; Mr Kimonjo Kiburi, lawyer and IDP activist; Chief Inspector Kiche, Mochongoi Police Station; Mr. Daniel M. Kobei, Executive Chairman, and Mr. Leonard Mindore, Field Officer, Ogiek People’s Development Program; Mr. Zablon Kuria, Chair of Management Committee of IDP Camps, Nakuru and Ms. Nancy Kimemia, Committee member; Mr. John Letai, Pastoral Land Advocate and Mr. Semali Letai; Ms. Wangui Mbatia, Secretary General, Kenya Network of Grassroots Organisations (KENGO); Professor Mbote of the Law Faculty, University of Nairobi; Mr. Ken Njiru, Westlands Constituency, Nairobi; Mr Odindo Opiata, Economic and Social Rights Centre; Mr Peter Were Okwanyo, Under Secretary for Security; the Kenya National Commission on Human Rights; the Coalition on Violence Against Women; the Independent Medico Legal Unit (IMLU); and Kenya Alliance for the Advancement of Children’s Rights.

Special thanks to Mr. Kipruto Kimosop of the Endorois Welfare Council for both his substantive and linguistic contribution during the visits to the Endorois and Ilchamus communities.

The preparatory mission was carried out by Francesca Restifo and Michael Miller on behalf of OMCT. This report was prepared by Michael Miller and was reviewed and revised by Tom McCarthy, Munini Mutuku, Priscilla Nyokabi and Francesca Restifo.

The contents of this report are the responsibility of the author and do not necessarily reflect the views of the organisations funding this project.

1. Addressing Poverty, Inequality and Violence: “the very heart of human rights protection”

We have gone to so many meetings and meetings, expressing our problems using all kinds of languages, using our own language, using Swahili and even using English.

[...] I've been expressing myself over and over again and I reached a point where I thought some of these things, we should just forget about it.

Because from the start we have been crying over the theft of livestock, cows and cattle, until it has even reached a point that we are now crying for our husbands because when we look at it now there are more women here than elders or than husbands because our husbands have been brutally killed because of the rustling.

Until the hope if the Ilchamus community went down.

[...] We've cried so much and expressed ourselves so much until it has reached a point that we have felt: let us be examples of those who go through humanitarian crises for the sake of others.

We've even reached a point when we're asking ourselves, if our own Government doesn't even recognise us, where do we even get other people [...] who will recognise us?

**Woman, Ilchamus Community Forum.
Monday 14 April, 2008**

Introduction

Today, there is no doubt that torture and cruel, inhuman or degrading treatment or punishment and other forms of violence – including violence against women and children - are related in many ways to disrespect for economic, social and cultural rights.¹ If, therefore, these phenomena are to be effectively eliminated, then their economic, social and cultural root causes must be, first, understood and, secondly, effectively addressed.² The converse equally applies: acting to reduce levels of violence in a given society is a fundamental step toward ensuring the widespread enjoyment of economic, social and cultural rights. As Ms. Louise Arbour, the former UN High Commissioner for Human Rights observed in her preface to the OMCT study on this theme, the question of “how to prevent or reduce violence, including torture, by acting on its root causes, often found in violations of economic, social and cultural rights”, is one that, “goes to the very heart of human rights protection.”³

Box 1: How the denial of economic, social and cultural rights is related to torture and other forms of violence

- *The poor, excluded and other vulnerable groups are often the first and most numerous victims of violence, including torture and cruel, inhuman and degrading treatment.*
- *Levels of violence in a given community or society can be such that individuals or groups are unable to enjoy their economic, social and cultural rights.*
- *Violence is inflicted on persons because they demand respect for economic, social or cultural rights – their own or those of others.*
- *Denials of economic, social and cultural rights are carried out so violently as to be considered ill-treatment under international treaties.*
- *Certain violations of economic, social or cultural rights can be characterized as cruel, inhuman and degrading treatment, or in some cases as a denial of the right to life.*
- *Policies and programmes by governments, private actors or development and financial institutions can exacerbate poverty and inequalities and lead to increased levels of official, criminal and domestic violence.*

This Report, prepared by the World Organisation Against Torture (OMCT) in consultation with the Centre for Minority Rights Development (CEMIRIDE) and the International Commission of Jurists, Kenya Section (ICJ), is not intended to offer an exhaustive appraisal of the denial of economic, social and cultural rights in Kenya. Rather, it addresses some of the key areas where there is a clear and direct link between violations of economic, social and cultural rights and violence, or the threat of violence, in Kenya. An important element of this report is the recommendations it contains for the Government of Kenya to address the economic, social and cultural root causes of torture and other forms of violence.

¹ See OMCT, *Attacking the Root Causes of Torture: Poverty, Inequality and Violence – An Interdisciplinary Study*, Geneva, 2006, www.omct.org. In his role as UN Special Rapporteur on the Question of Torture, Sir Nigel Rodley noted, “As long as national societies and indeed the international community fail to address the problems of the poor, the marginalized and the vulnerable, they are indirectly and, as far as the risk of torture is concerned, directly contributing to the vicious circle of brutalisation that is a blot on and a threat to our aspirations for a life of dignity and respect for all”, UN Doc.A/55/290, Report of the Secretary-General transmitting the Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 11 August 2000, §37.

² Of course, many other measures must be taken to eliminate torture in addition to addressing its economic, social and cultural root causes. These are dealt with in OMCT-sponsored alternative reports to the Human Rights Committee, the Committee Against Torture, the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women.

³ OMCT, *Attacking the Root Causes of Torture: Poverty, Inequality and Violence – An Interdisciplinary Study*, Geneva, 2006, p.9, www.omct.org

This report can be read in conjunction with a report on the same subject submitted by OMCT, ICJ Kenya and the Independent Medico-Legal Unit (IMLU) to the Committee Against Torture in the context of this Committee's consideration of Kenya's first periodic report in November 2008. Taken together, these reports provide the Committees with a basis for coordinated and mutually reinforcing recommendations addressing the wide range of causes of torture and other forms of cruel, inhuman or degrading treatment or punishment in Kenya.

The lie of the land

The economic, social and cultural root causes of violence in Kenya are manifold and complex. In this report, however, they are examined through a specific lens – that of access to land and the resources associated with it. In Kenya, land represents survival, shelter and security. For the majority of the population, it is essential for guaranteeing the rights to work and to an adequate standard of living, including adequate food (it is said that land and natural resources provides a livelihood for some 80 per cent of Kenya's population⁴). Land is also inextricably linked to the question of housing: where there are doubts over title deeds, housing security is put at risk, and with it access to education, health facilities and other services. In Kenya's cities, residents of certain disadvantaged areas are effectively criminalised – and victimised – by the police. For women and children, their *de facto* exclusion from ownership of land and other forms of property is one of the factors at the heart of the discrimination they experience. And for many Kenyans, and in particular indigenous communities, certain pieces of land have a cultural significance so great that it is difficult for those who do not belong to these communities to begin to grasp its importance. Land in Kenya is also a symbol of political power and patronage. Political support finds reward in the form of land allocations, and groups too small to have a political impact often live in constant uncertainty over the very land on which they live and work.

Given the extent to which the enjoyment of economic, social and cultural rights in Kenya is linked to land and its associated resources, it is hardly surprising that land is also at the root of a range of forms of violence – be it direct conflict over land or access to water, forced evictions, politically motivated violence such as that seen after Kenya's elections at the end of 2007 or, indirectly, in the form of harmful traditional practices and violence against women and children. The situation becomes still more acute when drought brings food and water shortages: in the north of the country, which is currently experiencing severe drought, there has been a marked escalation of conflict over scarce resources among the predominantly pastoralist communities. On 18 September 2008, IRIN (the Humanitarian news and analysis service of the UN Office for the Coordination of Humanitarian Affairs) reported that at least six people had been killed and hundreds displaced following days of fighting between Borana and Samburu herders over water and pasture along the border of the Isiolo and Samburu Districts. This followed the death of at least 13 people as a result of inter-community clashes in the neighbouring region of Mandera.⁵

The question of land and associated resources, including housing, is, of course, not the only key to understanding the economic, social and cultural root causes of violence in Kenyan society, however it is a theme that was raised again and again in the course of meetings held during the preparatory mission for this report. Participants in these meetings commonly expressed that they considered it impossible to address effectively the long-term and ongoing social tensions in Kenya until the issue of land tenure is satisfactorily resolved.

⁴ United Nations Development Assistance Framework (UNDAF), KENYA, 2004-2008
<http://www.ke.undp.org/UNDAF.pdf>

⁵ IRIN, "KENYA: Hundreds displaced in 'drought' clashes", Isiolo, 18 September 2008.

Listening to the people

In preparation for this report, CEMIRIDE and ICJ in Nairobi and OMCT in Geneva collaborated to produce a “List of Issues arising from the Initial Periodic Report of Kenya to the Committee on Economic, Social and Cultural Rights” in November 2007. OMCT subsequently carried out a preparatory mission to Kenya with the support of CEMIRIDE and ICJ. This mission involved two OMCT staff and a number of staff from the Kenya-based organisations and ran from 12 to 18 April 2008.

The aim of the preparatory mission was twofold: first, to consult representatives of Kenyan government and civil society regarding the link between violence and the denial of economic, social and cultural rights in Kenya, and secondly (and this is the more innovative dimension of the methodology) to hold a number of consultative fora with local communities directly affected by violence, to record their experiences, to seek their inputs and recommendations, and to bring their voices to the Committee.

Four of these meetings were coordinated by CEMIRIDE and were held with pastoralist and hunter-gatherer communities in the Rift Valley area. The situation of these communities is presented here not as an exceptional case, but rather as representative of many of the serious challenges facing communities across Kenya. Three other meetings were organised by ICJ and addressed, in particular, the challenges faced by urban-dwellers in Nairobi. All these meetings were held in formal or semi-formal settings (in the case of rural communities, outdoors at their assigned gathering places) and were both filmed and photographed – with the communities’ approval. In rural areas, the majority of participants spoke in their local language and simultaneous interpretation to English was provided. In urban areas participants spoke Kiswahili or English. Again, interpretation was provided when necessary. Selected transcripts from these fora are included in this report. They offer an eloquent testimony to the violence and insecurity that are a constant element in the lives of many of Kenya’s poorest and most marginalised citizens. Box 2 lists the details of the six fora. The full schedule of meetings and fora held during the one-week preparatory mission are listed in Appendix 1.

Box 2: Fora held during the OMCT-CEMIRIDE–ICJ preparatory mission

Sunday 13 April:

- Laikipia Maasai Community, near Nanyuki. 30 men of all ages (women were present but did not participate).

Monday 14 April:

- Arabal Endorois Community, near Mochongoi. 25 men of all ages.
- Public forum on right to land, Nairobi. 70 participants of all ages, predominantly men.
- Ilchamus Community, Mokatanne – Marigat Division. 50 men and women, all ages (including children).

Tuesday 15 April:

- Ogiek Community, Mau Forest, Nakuru (check). 40 men of all ages.

Wednesday 16 April:

- Forum on youth and economic, social and cultural rights, Nairobi. 25 participants, both men and women, from the Westlands Constituency in the north of the city. The majority of the participants were between 18 and 30 years of age.

Thursday 17 April:

- Kengo public forum on informal settlements, Nairobi. 100 men and women of all ages, low to middle income residents of informal settlements.

The impact of the 2008 post-electoral violence

This mission was carried out in the wake of the severe post-election violence that swept across the country from January 2008 and, indeed, the two main political parties were engaged in negotiations over a new power-sharing cabinet at the time of the visit by the OMCT secretariat. While the post-election violence clearly influenced the views of Kenyans, many of those who spoke with OMCT, CEMIRIDE and ICJ staff in the course of the mission underlined that this violence has deep historical roots and that the events in the early months of 2008 could be understood to represent a particularly extreme manifestation of the unrest that periodically flares up in Kenya, especially around election periods. At the root of this unrest lies the manipulation of ethnic groups by politicians, who unhesitatingly play upon questions of political representation, access to resources and – the perennial issue in Kenya – land ownership. In short, poverty and factional politics constitute a highly inflammable mix that fuelled the violence in Kenya – and that will continue to do so until a Truth, Justice and Reconciliation Committee is established. This Committee must not only address the most recent violence, but also consider earlier episodes (including the 1984 Wagalla Massacre) and the displacement, loss of livelihood and physical and psychological injuries associated with these events.

2. The Anatomy of Poverty and Inequality in Kenya

The dimensions of poverty

Kenya has a high incidence of absolute poverty. It is estimated that some 23 per cent of Kenya's 37 million population live on less than US\$1 per day,⁶ and that the number of poor in Kenya has increased from 3.7 million in 1972-73 to 15 million in 2003.⁷ The Gross National Income (GNI) per capita in 2006 was as little as US\$580.⁸ Economically, Kenya is struggling: between 1970 and 1990, GDP per capita grew at an annual average rate of 1 per cent. Between 1990 and 1996, the growth rate was zero. Over the same period, the average annual rate of inflation was 11 per cent. More recently, rising fuel prices together with the impact of the post-election crisis which disrupted food production and distribution have contributed to soaring inflation. In August 2008, the rate reached 27.6 per cent.

As regards the quota of Government spending allocated to the promotion of economic, social and cultural rights, just over one quarter (26 per cent) of central Government expenditure is allocated to education, significantly more than the 7 per cent allocated to health and 6 per cent to defence.⁹ This distribution is fairly typical of developing countries in Africa. Despite the large proportion of spending allocated to education, access to quality schooling remains a significant concern to many communities, particularly in Kenya's rural areas. Current low GDP growth and rising prices reduce still further the Government's capacity to address this issue.

Naturally, these economic statistics also have a human face: poverty in Kenya is translated into a lack of capacity of individuals, families and communities to meet basic needs. It is reflected in unemployment and underemployment, malnourishment, lack of adequate housing, poor health, and low levels of child education. The 2003 UNDAF Report for Kenya also underlines that poverty is associated with a lack of decision-making power and lack of security: "[t]o be poor is also to be exposed to ill treatment or to be powerless in influencing key decisions affecting one's life."¹⁰ This is reflected in the relative weakness of local communities, NGOs and industrial and business communities in structures of governance. All of these groups are insufficiently mainstreamed to be able to advocate rights and interests and to influence Government policy.¹¹

Land and natural resources are crucial to the country's economy and provide a livelihood to more than three quarters of the Kenyan population.¹² Many of these live in rural areas, which are also home to an estimated 80 per cent of Kenya's poor. The agricultural sector is unmechanised and rain fed, making it highly vulnerable to drought. Furthermore, poverty in Kenya is closely associated with natural and man-made disasters, including wild fires, floods

⁶ UNICEF, *State of the World's Children 2008*.

⁷ United Nations Development Assistance Framework (UNDAF), KENYA, 2004-2008

<http://www.ke.undp.org/UNDAF.pdf>

⁸ UNICEF, *State of the World's Children 2008*. GNI is the sum of value added by all resident producers plus any product taxes not included in the valuation of output plus net receipts of primary income from abroad. Some 4 per cent of Kenya's GNI is accounted for by inflow of official development assistance (ODA).

⁹ UNICEF, *State of the World's Children 2008*.

¹⁰ United Nations Development Assistance Framework (UNDAF), KENYA, 2004-2008

<http://www.ke.undp.org/UNDAF.pdf>

¹¹ United Nations Development Assistance Framework (UNDAF), KENYA, 2004-2008

<http://www.ke.undp.org/UNDAF.pdf>

¹² United Nations Development Assistance Framework (UNDAF), KENYA, 2004-2008

<http://www.ke.undp.org/UNDAF.pdf>

and landslides. This reliance on land, together with competition for other scarce resources, is also at the heart of significant ethnic conflicts and tensions, which in turn exacerbate poverty levels.

HIV/AIDS has had a devastating impact on the country, both socially and economically and, according to the 2003 UNDAF Report, has the potential to affect political stability.¹³ While prevalence rates are decreasing thanks to sustained Government efforts, HIV/AIDS continues to be a source of serious socio-economic stress: it both creates poverty and thrives on it. Further, it potentially undermines the enjoyment of a range of human rights: it lowers life expectancy (currently 53 years, down from 60 years in 1990¹⁴), compromises children's education, reduces the earning capacity of families and exacerbates economic marginalisation and insecurity. In housing terms, those affected by HIV/AIDS often live in the poorest conditions. In urban areas such as Nairobi they frequently find shelter in informal settlements or live on the street.

Inequality, corruption and discrimination

Poverty in Kenya is accompanied by extreme inequality. Figures cited in UNDP's 2004 report WHICH? Indicate that Kenya's richest citizens earn 56 times more than its poorest citizens and that the richest 10 per cent of the population controls 42 per cent of the country's wealth, while the poorest 10 per cent control as little as 0.76 per cent. Kenya is the tenth most unequal country in the world in terms of wealth disparities. Of Africa's 54 states, it is the fifth most unequal.¹⁵ Within Kenya's borders, it is no surprise that some of the regions with the highest levels of inequality are also those with the highest levels of poverty and of violence generated by competition over resources.¹⁶

A number of factors are responsible for the extreme inequality that characterises Kenya's economic profile. One of these is corruption:

Corruption worsens poverty and inequality within societies thereby seriously inhibiting the realization of economic, social and cultural rights. Land and other natural resources occupy a central place in the livelihoods of the majority – corruption diverts these resources from the intended public use in realization of rights to decent livelihoods into private bank accounts [...] Corruption also introduces uncertainties into the economic environment that discourages investments which are so critical for economic growth and poverty alleviation.¹⁷

Indeed, the anatomy of Kenya's poverty and inequality cannot be adequately understood without considering the issue of corruption. The 40-year period of what effectively amounted to single-party rule and monolithic government since independence, first under President Jomo Kenyatta and then President Arap Moi, was characterised by gross mismanagement and corruption and a system of political patronage that would ultimately also engulf the National Rainbow Coalition that was elected to power in December 2002. There is a real expectation

¹³ United Nations Development Assistance Framework (UNDAF), KENYA, 2004-2008
<http://www.ke.undp.org/UNDAF.pdf>

¹⁴ UNICEF, *State of the World's Children 2008*. Life expectancy at birth, 2006.

¹⁵ *Pulling Apart: facts and Figures on Inequality in Kenya*, Society for International Development (SID), Nairobi.

¹⁶ Munini Mukutu, "An Introduction to Poverty, Inequality and State Policies/Processes in Kenya", paper submitted to the OMCT seminar, "Addressing the economic, social and cultural root causes of violence through the UN Special Procedures System", June 2008

¹⁷ Kenyan National Commission on Human Rights & Kenya Land Alliance, *Unjust Enrichment. The Making of Land Grabbing Millionaires*, Living Large Series, Vol. 2, 2006, p.3

among many Kenyans that political loyalty will be rewarded by economic gains, a mentality that has led to the development of a small but powerful elite dominating government and business, policies intended to serve those closest to power rather than the Kenyan population as a whole, voting patterns dominated by ethnic allegiance, and the political and economic marginalisation of any communities insufficiently large to influence the political landscape. In turn, the current Constitution of Kenya fails to recognise minority communities or to offer them adequate protection, exacerbating their vulnerability.

A second and connected factor contributing to the extreme inequality present in the country is discrimination. Indigenous and minority populations are particularly affected since they are often too small to carry political weight and therefore are excluded from the country's well-established system of political patronage. Pastoralist communities in particular, many of who occupy what are classified as Kenya's "arid and semi-arid lands", have historically been considered an obstacle to the country's economic development and have been subjected to harassment, land grabbing and forced displacement.¹⁸ During the rural mission, it was common to encounter the sentiment expressed by a member of the Laikipia Maasai community who observed that, "the Government puts us aside as if we were not part of the country" or by a representative of the Endorois who stated that, "the Government doesn't care for us." Today the National Land Policy document includes an important recognition of pastoralism as a legitimate land use and production system.

Finally, levels of poverty and inequality in Kenya also reflect a long-term lack of commitment on the part of Government to implement effective economic policies, together with the erosion of the guiding legal principles of the country's Constitution which call for the provision of basic services and goods to the country's citizens. On being asked what recommendations he would like to make to the Committee on Economic, Social and Cultural Rights, John Letai, a pastoral land advocate working with the Laikipia Maasai replied:



I would suggest the following: [...] our Government, the Kenya Government, has become an expert in drafting excellent documents. [...] but they are collecting dust on the shelves, they are never implemented. Policy to us is not a big issue, because people all along have not been that aggressive in making governments accountable. So what I can recommend to the Committee on Economic, Social and Cultural Rights is that [...] there is a need to make Government accountable to its public, rather than seeing the public being accountable to the Government. That's one thing I would want.

¹⁸ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen Addendum - MISSION TO KENYA - A/HRC/4/32/Add.3, 26 February 2007, § 83 <http://daccessdds.un.org/doc/UNDOC/GEN/G07/110/43/PDF/G0711043.pdf?OpenElement>

3. The Land Question and the Roots of Violence

Land retains a focal point in Kenya's history. It was the basis upon which the struggle for independence was waged. It has traditionally dictated the pulse of our nationhood. It continues to command a pivotal position in the country's social, economic, political and legal relations.

Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, (The Ndungo Report), 2004, p.xvii



Electric fencing on land once used by the Laikipia Maasai for grazing livestock

In a country where over three quarters of the population rely on land and natural resources for their livelihood, competition over land use is acute (it is estimated that 75 per cent of the population live in Kenya's medium- to high-potential agricultural areas, which account for some 20 per cent of the country's land mass, while the remaining 25 per cent of the population occupy Kenya's vast Arid and Semi-Arid Lands¹⁹). For many communities, specific pieces of land also have sacred or cultural significance. Add to these factors a political culture that awards land for votes, where the land registration system is wholly ineffective, where ethnic groups have been forcibly displaced and relocated over decades and where the majority of land is in the hands of a small elite, and violence is never far from the surface.

Similar dynamics operate in Kenya's urban areas, where the poorest families and individuals (many of whom have been displaced from rural areas) find shelter in informal housing in slum areas. They rarely possess title deeds for the land they occupy, leaving them vulnerable to evictions. In some cases, deeds are issued to individuals or companies without the status of a given piece of land ever being determined – indeed, the current land information system under the Ministry of Land is so inadequate that it is all but impossible to determine who

¹⁹ Ministry of Lands, *National Land Policy*, May 2007, p.4

owns a given piece of land. Evictees generally receive little or no notification prior to an eviction nor any subsequent remedy, and evictions – normally carried out by state actors, often involve the use of violence.

Experts participating in the Public Forum on the Right to Land organised by ICJ in the context of OMCT’s mission offered a valuable insight into the complex situation of land ownership and land claims in Kenya. Many of the country’s land issues have been inherited from the British land management system that ensured that the most productive land was assigned to the colonial settlers. Following independence, the post-colonial government of Jomo Kenyatta used the land formerly held by the British settlers for patronage purposes – to solidify support and build alliances. This trend continued and intensified under the successive Moi regime. The illegal and irregular allocation of public land became perhaps the regime’s most pervasive corrupt practice. The Ndungu Report of 2004,²⁰ as well as various reports of the Public Investment Committee, detail numerous cases of public land illegally allocated to individuals and companies in total disregard of the law and public interest (the Ndungu Report also contains important recommendations that are taken up in the present document). The Kenyan National Commission on Human Rights and the Kenya Land Alliance report that “[m]ost [land] allocations were made to political supporters without justification and resulted in individuals being unjustly enriched at great cost to the people of Kenya. Many allottees proceeded to sell the land to state corporations or other parties for colossal amounts of money far in excess of the prevailing market value.”²¹

Land disputes among competing communities have also been intensified by weak governance, growing poverty and, crucially, the lack of an adequate legal framework to manage and resolve such land-related disputes. Section 75 of the Kenyan Constitution - which deals with property and land rights - states that, “[n]o property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired”. The same Section lists a number of exemptions to this provision, and it is these exceptions, and notably, “the development or utilization of property so as to promote the public benefit”, that have been systematically manipulated to serve personal and political interests. Furthermore, there is no established land policy providing a context for national land management laws and the allocation of land titles and no system of land tribunals that can examine land disputes. Many of these elements were identified by the Njonjo Commission²² which was appointed in 2000 under Moi’s KANU Government to review land policy – the first such review since independence. When Moi’s Government was voted out of power in December 2002, the Commission was dismantled and its recommendations were not implemented.

In May 2007, the Ministry of Lands completed a National Land Policy document. This important document, which addresses both land tenure reform and land redistribution, picks

²⁰ The official title is *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*. The 20-member Commission, chaired by Paul Ndungu was appointed by President Kibaki in June 2003 as one of a series of measures to tackle corruption. It comprehensively details illegal land allocation and investigates how public procedures have been manipulated for political and private interests. It contains important recommendations, including the setting-up of an inventory of public land, the development of a comprehensive land policy, and the establishment of a Land Titles Tribunal charged to examine complaints and conflicts regarding land allocation.

²¹ Kenyan National Commission on Human Rights & Kenya Land Alliance, *Unjust Enrichment. The Making of Land Grabbing Millionaires*, Living Large Series, Vol. 2, 2006, pp iv-1

²² The Commission of Inquiry into the land law system of Kenya on the principle of a national land policy framework, constitutional position of land and new institutional framework for land administration.

up many of the issues raised by the Njonjo Commission, and explicitly recognises the centrality of the land issue in Kenya, both as regards poverty and conflict:

*The land question has manifested itself in many ways such as fragmentation, breakdown in land administration, disparities in land ownership and poverty. This has resulted in environmental, social, economic, and political problems including deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict.*²³

Crucially, the policy document recognises the need for security of tenure for all Kenyans, “all socio-economic groups, women, pastoral communities, informal settlement residents and other marginalized groups.”²⁴

Over the years, conflict and competing claims over land have led to the internal displacement of untold thousands of Kenyan citizens. In turn, displaced communities have occupied territory and worked land for which they have no title deeds, but which they come to consider their own, complicating still more the land tenure situation. Furthermore, many traditional, communally-owned grazing lands have been privatised, with the result that nomadic pastoralists are forced to eke out a living from the most marginalised areas of land. Similarly, forest land in Kenya has become a highly contested resource: it is said that in 1895, when Kenya was declared a British Protectorate, forest accounted for 30 per cent of the country’s landmass. Some 70 years later, at independence, only 3 per cent of the landmass was under closed canopy gazetted forests. Today it is estimated that illegal and irregular incursions have reduced this to 1.7 per cent, against the internationally recommended minimum of 10 per cent.²⁵ The Kenyan National Commission on Human Rights and the Kenya Land Alliance explain that, “[g]azetted and protected forestland belongs to that category of special lands which, due to their ecological, cultural and strategic value, should never be allocated to private individuals unless public interest dictates otherwise. Close canopy forests are among the country’s most important natural resources as they have important consequences for water conservation, flood control, rainfall, food and medicine, grazing land, tourism development and biodiversity conservation.”²⁶ Government policy to protect forest areas (notably the 2005 Forest Act) has failed to take into account that these areas were occupied by hunter-gatherer communities whose livelihood and wellbeing was intimately tied to the forest ecosystem (see Section 4 of this report on the Ogiek in the Mau Forest area). In a number of cases, the Government itself has allocated individuals illegal title deeds to forest land that was already allocated or occupied and thus laid the ground for evictions and conflict. Indeed, allocation of forest land is often the result of presidential land allocation.

Similar contradictions exist as regards the establishment of wildlife parks, which has seen traditional pastoralists and hunter-gatherers expelled from their traditional lands and the outlawing of subsistence hunting by indigenous communities. This has led the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to conclude that, “[i]n the context of rising human population and escalating poverty, the restrictions imposed on the utilization of national parks and game reserves by pastoralists

²³ Ministry of Lands, *National Land Policy*, May 2007, p.iv

²⁴ Ministry of Lands, *National Land Policy*, May 2007, p.iv

²⁵ Kenyan National Commission on Human Rights & Kenya Land Alliance, *Unjust Enrichment. The Making of Land Grabbing Millionaires*, Living Large Series, Vol. 2, 2006, p6

²⁶ Kenyan National Commission on Human Rights & Kenya Land Alliance, *Unjust Enrichment. The Making of Land Grabbing Millionaires*, Living Large Series, Vol. 2, 2006, p5

have severely affected their livelihoods and their chances of survival.”²⁷ Box 3 discusses the situation of the indigenous Endorois community, which was not only displaced when its traditional lands were designated a national park, but which is also currently threatened by commercial mining activities encroaching on the land on which it subsequently resettled.

Box 3: Flamingos and rubies – the marginalisation of the Endorois

The Endorois – a community of some 20,000 nomadic pastoralists – are found in the districts of Baringo, Koibatek and Nakuru in the Rift Valley. The community lived for centuries on their traditional territory around Lake Bogoria, renowned for its natural springs and flamingo population. In 1973 – without effective consultation – the Government declared the Lake and its surroundings a wildlife sanctuary, and the area was re-gazetted in 1978.²⁸ As a result, the Endorois were denied access to their traditional lands, which not only had an economic value for the grazing of livestock, but also a very strong cultural significance, and were driven to live in fragmented groups in the higher lands around the lake. These lands are rocky and dry, and provide insufficient pasture for their herds.

The Endorois have never received adequate compensation for the loss of their land, and for many years Endorois protests were met by police brutality and arbitrary arrests and detention. One Endorois activist interviewed in the course of the OMCT-CEMIRIDE mission reported having been arrested 17 times and beaten in custody by police officers using truncheons and rifle butts.²⁹ With the support of CEMIRIDE and Minority Rights Group International, the Endorois have now taken their case to the African Commission on Human and People’s Rights to seek effective remedy for the impact of the gazetting of their land on their cultural identity and their ability to secure their livelihood. They report that after going to the African Commission the police harassment of the community stopped.

Part of the Endorois community displaced from Lake Baringo moved to semi-arid land to the west of Mochongoi in Baringo District. Recently pink and red rubies have been discovered in the alluvial deposits in this area. Once again, the Endorois risk marginalisation and displacement. A mining company – Corby Ltd - has begun operations and members of the Endorois community living in or around the site of the mine have been displaced. Once again, the Endorois have received no compensation or benefits from this project and their land rights have been ignored. Furthermore, the mine dumps waste directly into the Sandai River, the main source of water for the Endorois and their livestock. The river is now said to be heavily polluted by heavy metals and chemicals used for cleaning rocks in the mining process. It is reported that drinking the water from the river results in sickness, vomiting and diarrhoea. Despite this, no environmental impact has been carried out due to a loophole in Kenya’s Mining Act that allows extraction activities to proceed without an impact study if these activities are classified as “exploration” rather than “mining”.

As this report discusses, in rural and urban areas alike tensions around the land situation are a principal source of violence in Kenyan society. In some cases, this violence is generated between and among communities as a result of competition and conflict over diminishing land resources: (see Section 5 on the Endorois and Ilchamus communities). In these

²⁷ “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Addendum, Mission to Kenya”, A/HRC/4/32/Add.3, §50.

²⁸ “Gazetting” refers to the official designation of land to a specific use. Notification of this designation is published in *The Kenya Gazette*, which is published by the authority of the Republic of Kenya.

²⁹ Charles Kamuren, Chair of the Endorois Welfare Council and Executive Secretary of the National Union of Teachers in Nakuru (Rift Valley), interviewed 15 April 2008.

situations, the perpetrators of violence are non-State actors, and the responsibility of the Government lies in its omission to address this violence. In other cases, the State is directly involved in perpetrating acts of violence against its own citizens. In the 2007 report on his mission to Kenya, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people drew attention to police abuses in relation to social protests associated with land rights claims involving the ill-treatment and arrest of members of indigenous communities.³⁰ He also noted that a number of organizations active in denouncing abuses against indigenous communities have allegedly been the object of systematic harassment and intimidation by the authorities.³¹

One of the most serious cases of government-backed violence in Kenya in recent years is currently taking place in the Mount Elgon District, Western Province, where the Kenyan Army is engaged in violent action – including widespread torture - against a guerrilla militia formed with the intention of protecting land claims (see Box 4 and also Appendix 2 for the full text of a communication on Mount Elgon prepared jointly by OMCT, the Independent Medico-Legal Unit [IMLU], and ICJ, Kenya).³²

³⁰ “In Laikipia, in 2004, Maasai protesters marking the expiration of leases under the 1904 treaty with the British were severely repressed, resulting in the killing of an elder and serious injury to four people. Rape of women and looting in local villages were reported as a result of the security operation that ensued.” Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen Addendum - MISSION TO KENYA - A/HRC/4/32/Add.3, 26 February 2007, § 60

<http://daccessdds.un.org/doc/UNDOC/GEN/G07/110/43/PDF/G0711043.pdf?OpenElement>

³¹ Including the Kenya Land Alliance, Osiligi in Laikipia and MPIDO. “In 2005, the director and two other staff members of MS Kenya, a branch of the Danish association for International Cooperation that supports the promotion of land rights, were accused of ‘subversive activities’ ”. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen Addendum - MISSION TO KENYA - A/HRC/4/32/Add.3, 26 February 2007, § 61

<http://daccessdds.un.org/doc/UNDOC/GEN/G07/110/43/PDF/G0711043.pdf?OpenElement>

³² For further details, see OMCT Action File KEN040608.ESCR, “Kenya: Military Action Against the Sabaot Land Defence Force in Mount Elgon Involves Serious Human Rights Violations Against Civilians”, 4 June 2008. Prepared in conjunction with the Independent Medico-Legal Unit (IMLU) and ICJ Kenya.

Box 4: Mount Elgon: land claims at the root of acts of extreme violence and widespread torture

Mount Elgon, in Kenya's Western Province, has been the scene of extended violent conflict over land allocation involving the Sabaot Land Defence Force (SLDF), a guerrilla militia. The SLDF was formed in 2005 to resist government attempts to evict population in the Chebyuk area of Mount Elgon as part of a resettlement programme. It has since been accused of killing more than 600 people, terrorizing local populations through physical assaults and threats and committing a variety of atrocities including torture, rape, and the theft and destruction of property. It is estimated that more than 66,000 people were displaced in an 18 month period due to the activities of the SLDF. In March 2008, the Kenyan Army was deployed in the Mount Elgon area to clamp down on the activities of the SLDF in an action called "Operation Okoa Maisha". This military operation has been conducted under a veil of secrecy. Since early March of this year, it has resulted in mass arrests and the subsequent prosecution of over 1200 persons.

It is reported that since the start of operations, the military has been responsible for the execution of thousands of men and boys from the Sabaot community in the Mt. Elgon District. It is believed that many have died while undergoing torture, and that others have subsequently died in prison due to injuries received during their interrogation. The SLDF activities and the police and military operations that have followed in their wake not only violate the civil and political rights of the inhabitants of the area, but also compromise their enjoyment of a range of economic, social and cultural rights. Military action is leading to the abandonment of farms, impeding food supply and access to markets and thus contributing to food insecurity. In addition to the question of land allocation, population displacement and the consequent implications for the possibility of earning a livelihood from traditional activities, the mass arrest, torture and killing of Sabaot men and youth in itself threatens the economic and social wellbeing of this community. The government sponsored operation is also causing women and children severe psychological distress as they have no way of learning of the fate of their male family members.

To date the Government of Kenya has taken no steps to halt this situation.

4. “Nowhere Else to Go”: the Laikipia Maasai and the Mau Forest Ogiek

The Maasai who occupy land in Likipia, Rift Valley, are pastoralists who rely on their livestock to earn their living, while the Ogiek are traditionally forest-dwelling hunter-gatherers. Both however find themselves marginalised in terms of land allocation - the Maasai increasingly hemmed in by fences across grazing grounds, and the Ogiek shut out from the forest that was not only their traditional home, but also their basic source of livelihood. Moreover, each community feels overlooked by Government and struggles to obtain even the most basic services. And both understand that competition over scarce land resources can easily deteriorate into violence.

The Maasai, Laikipia

It is estimated that Kenya’s Maasai lost one third of their territory through coercive treaties imposed upon them by the British in 1904 and 1911, under the terms of which they were allowed to maintain only marginal land. Today, in Laikipia District in the Rift Valley, 75 per cent of the land is still in the hands of European owners, and traditional rangelands are fenced off, restricting the seasonal movement of the Maasai’s livestock herds.³³

The Laikipia Maasai – a community some 4000 strong - occupy an area 25km distant from Nanyuki, the nearest settlement. They arrived at their present location in 1982, at a time when drought was pushing them to search further afield for green pastures for their cattle. They recount that the land had previously belonged to a “white settler” and, by their own admission, the Maasai, having no land titles, “squatted” the site. The land they occupy covers a small area of low hills, enclosed by wire fences erected around neighbouring farms and game parks. Since their arrival nobody – until recently – has claimed the site and they now regard it as their own, referring to it as their “motherland”.



Support from the Government for this community has been all but absent. The community used their own resources to build the primary school that its children attend. The teachers are paid directly by the parents, while the Government provides textbooks and jotters, but no

³³ “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Addendum, Mission to Kenya”, A/HRC/4/32/Add.3, §30.

desks. Community members estimate that the teacher-pupil ration is currently 1:90. Regarding health services, the closest dispensary and hospital are located 25km away in Nanyuki.

Recently there has been growing interest in the land occupied by the Laikipia Maasai, and in early April 2008, community members saw “strangers” crossing their land on motorbikes and filming and photographing the terrain. Already individuals have come forward claiming ownership, although to date none have been able to produce title deeds. Nonetheless, the community is certain that the sale of their land is imminent and, indeed, they believe that the chief of the District is collaborating in the sale. In the midst of this uncertainty, they are sure of two things: they have “nowhere else to go”, and if they are forced to move off their land they will receive no compensation. If they resist or contest the sale of the land they fear that the police will be called in and violence will ensue. They have good reason to be concerned: in 2004, Maasai protests marking the expiration of leases under the 1904 treaty with the British were severely suppressed by the police, resulting in the killing of an elder and serious injury to four people.³⁴

The Ogiek, Mau Forest, Nakuru

We must hunt and gather. That's the true meaning of Ogiek. Ogiek in other words means the caretaker of all, the flora and the fauna. So we believe that these animals are ours. We take care of it, and again we go hunt for maybe something for food. So the game wardens are actually suppressing us. The Ogiek want access to the forest so that they can go hunting and make their honey as it used to be and gather wild fruits.

Leonard Mindore, Field Officer, Ogiek People's Development Program (OPDP)

The Ogiek – who number about 20,000 across the Mau Escarpment - have lived in the Mau Forest for many generations. An elder of the Ogiek community visited during the OMCT-CEMIRIDE mission recounts that under the post-colonial Government they were assigned forest land, but never received title deeds. In 1974, the Mau Forest was gazetted as a National Forest, and the Ogiek were evicted without prior consultation or compensation. The designation of the National Forest meant that the Ogiek could no longer pursue their traditional activities of hunting and collecting honey. They recount that this had severe repercussions for their standard of living, contributing to poverty, poor health and low life expectancy. Ogiek schools were also closed down when the Forest areas were taken over by the Government, a factor that the Ogiek consider has contributed to low levels of education in their community. Despite a court injunction in the Ogiek's favour in 1997, the Government has continued to reallocate Ogiek forest land, and the Ogiek's ancestral title to the forest has never been recognised. The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people reports that, “[b]eing considered as squatters on their own land and legally banned from using the forest resources for their livelihood, their attempt to survive according to their traditional lifestyle and culture has often been criminalized and their repeated recourse to the courts has not been successful.”

Despite the 1974 gazettement, the area covered by the Mau Forest has continued to decline as a result of illegal logging, the introduction of exogenous species and the allocation of parts of the forest for private development. Today, large swathes of land that were once forested have

³⁴ “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Addendum, Mission to Kenya”, A/HRC/4/32/Add.3, §60.

been converted to agricultural use. The remaining Forest is protected and patrolled by wardens who prevent the Ogiek from re-entering their traditional forest home. The Ogiek report that forest guards who find them trespassing in the forest often beat them.

During his mission to Kenya, the Special Rapporteur on adequate housing³⁵ met with representatives from the Ogiek community in the Mau Forest area.³⁶ He reported that the



Ogiek have been deprived of their traditional sources of livelihood and are forced to take up farming and livestock rearing, to work as labourers on the farms of new settlers, or to leave their traditional homes and move elsewhere.³⁷ Leonard Mindore, OPDP field officer explains that, “We believe that the Government move was not good – our lives have transformed and taken a different direction that we don’t like.” The transformation in the Ogiek’s way of life has also had

an impact on their cultural identity: “[...] what I can say is that the case of the Ogiek is in ICU – Intensive Care Unit – because people have been transformed. The children that are being born right now don’t understand the tradition of the Ogiek as it used to be. So they just grow up as they cope with the other communities who are around us.”

The marginalisation and discrimination the Ogiek experience is both reflected in, and exacerbated by the fact that they are not recognised as a distinct community by the Government, they hold no positions in the local administration, there are no secondary schools provided in exclusively Ogiek areas, and there are no Ogiek in the local police force. Moreover, it is said that the Kenya Wildlife services will not recruit them as wardens. During the 2008 post-election violence, at least nine Ogiek homes in the area were burnt down, and the community was blocked from accessing their farms or reaching medical services. The head of the OPDP received threats from other communities – “they want my head” – and the OPDP office had to be shut down for three months. Nonetheless, when the Government started to distribute fertilizers and seeds in the wake of the violence, none were assigned to the Ogiek on the grounds that they had not been affected by the troubles.

³⁵ “Adequate housing as a component of the right to an adequate standard of living. Report by the Special Rapporteur, Miloon Kothari Addendum - Mission to Kenya (9-22 February 2004)”, E/CN.4/2005/48/Add.2

³⁶ “Ancestral land of the Ogiek in the Mau forest was declared a protected forest area by colonial authorities in 1942, and communities living in the area were resettled to other lands. The Ogiek nevertheless remained or returned to their ancestral land from resettlement areas in Sururu, Likia and Teret. Under Kenya’s Forest Act, no cutting, grazing, removal of forest produce or disturbance of the flora is allowed, except with the permission of the director of forestry; permission shall only be given with the object of conserving natural flora and amenities of the reserve.” E/CN.4/2005/48/Add.2, § 60

³⁷ Adequate housing as a component of the right to an adequate standard of living Report by the Special Rapporteur, Miloon Kothari Addendum - Mission to Kenya (9-22 February 2004)

E/CN.4/2005/48/Add.2, 17 December 2004, § 60

<http://daccessdds.un.org/doc/UNDOC/GEN/G04/168/86/PDF/G0416886.pdf?OpenElement>

Today, the land on the edge of the Mau Forest has been subdivided and allocated – in some cases as a reward for political support to the Government – to a number of communities, including the Kipsigi, Nandis and Tuken. In a situation that mirrors that of the country as a whole, the Mau Forest area now constitutes a complex patchwork of interests and claims, where each community is convinced of its right to occupy the land and many would have nowhere to go were they forced to move. For their part, the Ogiek - increasingly marginalised - ask,

All this land was actually somehow invaded by different communities and the question is, “Why are they invading our land and yet they have their own land? Why don’t we have Ogiek who are going to their land?” That’s our question now. So that’s why we want the Government to take these people back to their lands so that the Ogiek can live peacefully and exist harmoniously as they used to be in their own ancestral land.

On being asked for recommendations to ameliorate the situation of the Ogiek, Joseph Towett, of the Ogiek People’s National Assembly and the Ogiek Welfare Council urged the Government to finish the resettlement process it had started for the Ogiek and to desist from relocating people to the Mau Forest from other areas until resettlement questions have been fully addressed. This, he insists, should be done according to a clear timetable. He also asks that the Ogiek community is empowered through the provision of education facilities and the establishment of local businesses, perhaps using a microfinance model. In these and all other issues affecting them, including institutional reform, and land, forest and wildlife issues, he underlines that it is essential that the Ogiek are consulted in a meaningful manner.

More generally, Joseph Towett, on behalf of his community, calls on the Government to adopt a specific policy to protect the interests of minorities in Kenya and to make funds available to strengthen traditional institutions and support NGOs working for indigenous peoples.

5. The impact of insecurity: the Endorois and the Ilchamus

Among Kenya's ethnic groups, violence and the denial of economic, social and cultural rights form a vicious circle, whereby endemic tensions and insecurity - particularly in northern and western Kenya – along with the periodic violent outburst of dissatisfaction can be attributed to poverty and lack of power. In turn, this violence exacerbates the poor economic conditions of those communities affected by these struggles³⁸ and compromises the enjoyment of their economic, social and cultural rights.

Certain pastoralist communities consulted during the OMCT/CEMIRIDE mission to the Rift Valley indicated that they live in constant fear of attack by neighbouring communities – normally in the form of cattle rustling raids – and have little expectation that the police will intervene. When insecurity prevails, women become afraid to fetch water or collect firewood, parents will not let their children go to school, and men, who travel large distances with their cattle to find pasture and water, live in constant fear of attack. Add to this the weight of extreme poverty, lack of basic services, unreliable water supplies, limited access to health and education, poor representation, discrimination and political marginalisation and you have communities that are – as an Ilchamus elder put it – “brought [...] to zero”.

Moreover, reports suggest that deaths and injuries associated with cattle-rustling among pastoralists are increasing as a result of the growing availability of firearms. For example, IRIN reported that at least 60 people died while another 15 were injured following clashes on 29 July 2008 between the Turkana and Pokot communities in northwest Kenya.³⁹ The rising number of firearms reflects the porous nature of Kenya's borders, especially those with Somalia, Sudan and Uganda, and the relatively low cost of acquiring a weapon. An AK-47 is currently said to sell for around \$US 500 – beyond the reach of the poorest communities, but a realistic investment for individuals from more powerful and affluent groups.

The Endorois, Arabal: living with insecurity



The security issue is beyond any description. Because so far, many of these people are living almost just like wild animals, because the basic needs of a human being is to have shelter, food and clothing. Now, the only thing that we have is food that will just keep us surviving, because generally the health situation of these people – they all look like brothers and sisters and they have an average body weight that may not go beyond 70 kilograms, simply because we are starving. And with that food shortage we are just surviving on hand to mouth existence[...] In general, most of these people live a life of abject poverty.

Endorois elder, Arabal location, 14 April 2008

³⁸ Minority Right Groups International and Cemiride: “Kenya: Minorities, Indigenous Peoples and Ethnic Diversity” <http://www.minorityrights.org/?lid=645>

³⁹ IRIN, “KENYA: Availability of firearms exacerbating insecurity”, 7 August 2008.

The small Endorois community living in Arabal location, Mochongoi, possesses some 5000 cows and 3000 goats, and also produces honey. The land they occupy falls under the Arid and Semi-Arid land scheme, and as a result they receive a small amount of food from the World Food Programme. They complain that when issues of land demarcation in Mochongoi have arisen, they have not been taken into account because they are too few to have an impact, “And so, us here have just been watching as others are being allocated land, and we are just left here.” The Endorois also face challenges accessing markets for their livestock and point to the poor prices they receive for their cattle from middle men, who then sell the same beasts at a 500 or 600 per cent markup in Nairobi or Mombassa: “we feel that we are working in very hard conditions, yet getting very little.”

The Endorois live in constant fear of attacks from the neighbouring Pokot community, who regularly steal livestock. The Endorois point out that, with no land and no jobs, the only thing they have is their cattle, and that this cattle is, in a sense, the source of their insecurity:

[The] Pokot community wish actually to own all animals. Their belief is that the animals we have is theirs and therefore we don't have rights as us owning these animals, so the issue is, they rustle. They go away, they kill us and the Government, maybe they are slow to respond. They don't bother. You either be killed or you don't be killed. Even now, as we stay here, here is a lot of tension. The security is not good.

The Pokot rustlers are armed with AK-47 and M16 assault rifles, and the Endorois reported that four people have been killed and one seriously injured in recent cattle rustling attacks. These attacks mostly take place at night, but daylight raids are becoming more common. The Pokot arrive in large numbers from the bush wearing jungle camouflage. On their way, they steal the Endorois's honey and burn their hives. “They come like thieves. Sometimes when we are having a meeting like this one they will come.” Prior to an attack, Pokot rustlers will survey the Endorois settlement from along the ridges. In some cases, they even inform the Endorois of when an attack will take place: “[w]hen we are scared of what is going to happen, people start running away.”

The nearest police station is just under an hour away by car. When asked about the police response to these constant attacks, the Endorois replied that, “[t]he police don't come, or if they come, they come once the animals is gone and somebody is killed. And they say we have no choice. What can we do?” The police – poorly paid and less well-armed than the rustlers – have little motivation to pursue the Pokot, and insist instead that community members or the owners of the stolen livestock, take the lead. In any case, they demand money from the Endorois for their support: “[i]nstead of being assisted, we are told to donate money to fuel the government vehicles.” The Endorois know that this money, “goes in their pockets”. (For the police perspective on cattle rustling in Mochongoi District, see Box 5.)

To date, the Government has taken no steps to prevent the cattle raids and no arrests have ever been made, despite the catalogue of deaths and the high value of the losses sustained by the Endorois and others at the hands of the rustlers. Indeed, the Endorois have a strong conviction that, “the Government has permitted certain communities to be armed [...]”. In the case of the Pokot, they recall that this community gave support to Kibaki's victorious Rainbow Coalition in the 2002 elections, and that the local member of parliament (Mr Asmam Kamama, MP for Baringo East) was a cabinet minister under Kibaki (an observation that speaks volumes in Kenya's deeply corrupt political system).

The Endorois fear that the cattle raids will eventually drive them off even the marginal land they inhabit today. Their solution to the situation points to the real possibility of a downward spiral of violence: “The Government should disarm them [the Pokot], or if not, if they don’t disarm them, they should also arm us, they should arm us so that when they come, they know we are ready to hit them.”

Box 5: The Police Perspective

In a meeting with OMCT and CEMIRIDE at Mochongoi Police Station, the Chief Inspector, Division of Security Police, indicated that cattle rustling is a deeply ingrained activity in certain communities, and as such is a subject that it is difficult to get them to discuss. Rustling raids in the Division might see anything between 500 and 800 animals taken at a time. The local terrain presents challenges to the police in terms of pursuing the rustlers, and the fact that the rustlers are armed puts the police at risk. The Government supports the police by providing helicopters. The Chief Inspector considered that the way forward lies in working on civic education with the leaders of communities engaged in rustling.

The Ilchamus: violence and internal displacement

At times, inter-community violence is so extreme that it leads to the displacement of entire communities, and this in turn seriously compromised the enjoyment of their economic, social and cultural rights. The post-election violence in 2008 resulted in significant internal displacement, but the phenomenon is by no means new. Land-related disputes have ensured that community displacement and the suffering and loss that accompanies it has a long heritage in Kenya.

Like the Endorois, the Ilchamus, a pastoralist community, have their origins in the Lake Baringo District. In March 2007, following a series of well-organised raids by the neighbouring Pokot that took the lives of 35 people and left over 70 injured, some 5000 Ilchamus families were forced to flee from their homes in the Division of Mukutani. Initially they sought refuge in secondary schools and in a police station. They were eventually displaced some 60km and scattered across some seven different locations. In the raids they also lost an estimated 2000 head of cattle and 3000 sheep and goats – a severe blow to a community that relies on livestock for their livelihood. Today nobody lives in the Mukutani Division: the Ilchamus were forced to abandon their homes, eight primary schools, and two public health institutions. They tell how everything they had has been burnt down or vandalised and their wells destroyed. Even their traditional clothes – an important element of their cultural identity - have been lost or destroyed and they now wear donated clothing. Their displacement has also distanced them from the structures of local administration. One of the Ilchamus elders described his community as, “sheep without a shepherd”. The morale of the Ilchamus is extremely low. They feel that they have lost everything to the Pokot, “[u]ntil it has even reached a point that every time it rains it’s the Pokot’s rain” (for more on the Pokot community, see Box 6).

The community’s children have been scattered by the violence with the result that many can no longer attend school. Nonetheless, community members insist on the importance of education and are proud to note that the level of education among the community has been rising and that some community members have completed high school. They explain that today, “[m]ost of these women don’t want their children to go and look after cattle or what. All of them want their children to go to school”.



The Ilchamus community remains a target for raids. Like the Endorois, the Ilchamus indicate that the Pokot are well-organised, uniformed and well-armed, frequently carrying assault rifles. And like the Endorois, the Ilchamus wonder why the Government does so little to address the situation, despite the fact that, “[...] we keep on submitting reports, every day, every time.” There is a small security force provided by the Government stationed in the area, but the Ilchamus insist that they are inactive and ineffective. Originally the raids took place on moonlit nights, but lately the Pokot have also carried out raids in daylight, “even during the day, like today”. The Ilchamus explain that the police will

not intervene because they fear for their own lives, while the security personnel will not fire on the raiders because they, “haven’t been given orders”. Like the Endorois, the Ilchamus suspect that the Government supports – or at least turns a blind eye – to the actions of the Pokot.

In the short term, the Ilchamus call on the Government to provide them with relief food, but their ultimate goal is to be able to return to their land and reconstruct their community: “Our greatest cry, and the greatest expectation of these people, is to go back to their homes.” They also call for bursaries for their children to enable them to attend high school. Traditionally, the Ilchamus do not use fences or boundaries, seeing these as a colonialist concept, however today this displaced community calls for the certification of the boundaries of their land to ensure that when they return to it they have legal redress should others encroach upon it.

Box 6: Understanding the Pokot

As a pastoralist community, the Pokot have always placed great significance upon cattle as a symbol of wealth. During the forum, the Ilchamus explained that, traditionally, cattle rustling – and even the killing of a man during cattle rustling raids – were viewed as prestigious achievements in Pokot society. The Ilchamus suggest that the Pokot engage in livestock raids for both cultural and socio-economic reasons: young men must go on raids to prove their worth and to accumulate enough livestock to allow them to marry, “and so the young men who don’t go to school, their only way of accumulating wealth is through theft.” A highly traditional society, it is said that the Pokot schedule their raids according to the provisions of the community’s seers. These seers identify the propitious moment for a raid, and in return, the young men must bring them back a share of the cattle. In this way, it is clearly in the interest of the community seers to perpetuate and encourage these raids.

The depiction of the Pokot provided by the Ilchamus may be only part of the picture. Pokot raids are now carried out with a notable degree of organization and precision by heavily armed, uniformed men who were described on several occasions in the course of meetings as “militia”. And their aim is no longer the simple theft of livestock – they also seek to displace neighbouring communities from their land and extend the boundaries of their own territory. The activities of the Pokot may be seen as a distortion of their traditional activities as a result of increasing competition over resources among communities in western Kenya, rising poverty levels, the growing availability of illegal firearms in that part of the country, and the absence of the State – including the police – in Pokot areas. Members of the Endorois community also suggested that the Government has an interest in allowing the Pokot to carry arms because they guard the border with Uganda.

The Government of Kenya has an obligation to protect its citizens from violence, and steps must be taken to end the killing and theft perpetuated by the Pokot “militias”. The solution does not, however, lie in another “Operation Okoa Maisha” (see Box 4 on Mount Elgon). The response to human rights violations carried out by non-state actors cannot be found in still more human rights violations perpetrated by Government. The Ilchamus consider that there are three measures necessary to end the violence perpetuated by the cattle raiders: disarming the Pokot; providing them with alternative sources of income; and ensuring that Pokot children and young people go to school. A promising disarmament strategy involves providing livestock to communities in exchange for their weapons, however this must be done in a coordinated manner. It is said that the Pokot fear – and not without reason – that if they are left unarmed they will be vulnerable to retaliatory attacks from their neighbours.

6. Violence and Access to Land and Resources in Urban Areas

By the Government's own admission, housing demand in Kenya far outstrips supply, particularly in the middle- and low-income groups and especially in urban areas.⁴⁰ Today, one out of every five Kenyans live in urban areas, and the urban population is growing at a rate of 3.7 per cent per year.⁴¹

The majority of Kenya's urban poor inhabit overcrowded informal settlements in and around the country's capital and other urban centres. By their very nature it is difficult to assess the population of informal settlements, however a slum mapping exercise from 2002 for the cities of Nairobi, Kisumu and Mombasa, cited by the Government in its report, indicates that between 30 and 35 per cent of the population of these cities live in informal settlements.⁴²

The daily reality behind these figures is one of extreme poverty, severe overcrowding, makeshift housing, lack of services, inexistent sanitation and constant exposure to pollutants and toxins. Poorly lit at night and inadequately policed, Kenya's informal settlements are also characterised by high levels of insecurity, particularly for women and girls. This situation is exacerbated by the presence of violent gangs – most notably the Mungiki – who control large areas of informal settlements, engage in racketeering, and control access to utilities. The Mungiki – whose leadership has openly claimed to have two million members around the country – is often referred to as a “sect”. Founded as a Kikuyu youth organisation to protect its community in the Rift Valley, it has mutated and evolved into a powerful and secretive illegal organisation which, it is said, enjoys both influence and support at the highest levels of Government. Many of its members, however, are drawn from Kenya's poor and marginalised Kikuyu youth. It has been reported that in certain settlements residents have to pay a levy to the Mungiki to be able to access communal latrines and to ensure their security at night. In the Mathare informal settlement in the east of Nairobi, the Mungiki are said to provide illegal water and electricity to residents.⁴³ Not only are the poorest members of society directly exploited and threatened by this group, they are also caught up in police reprisals against the Mungiki – notably during the three-day police operation in June 2007 in Nairobi's Mathare informal settlement, in the course of which indiscriminate shooting on the part of the police resulted in the death of more than 30 people. The operation took place following the killing of two police officers, however it was suggested to OMCT that the scale of the police action also reflected a concern at the Government level that the Mungiki were becoming too powerful and hence, some would say, harder to control. The inter-ethnic violence that followed Kenya's elections offered the Mungiki the ideal opportunity to re-establish their influence following this police action against them.

⁴⁰ Initial Periodic Report of the Government of Kenya, E/C.12/KEN/1, § 130

⁴¹ UNICEF, *State of the World's Children 2008*. Kenya's urban dwellers accounted for 21 per cent of the country's total population in 2006. Average annual growth rate of the population is significantly down from the period 1970-1990, when it averaged 6.5 per cent per year.

⁴² Joint slum mapping exercise conducted in June 2002 by Nairobi City Council, UN-Habitat, Central Bureau of Statistics and Housing Department, Initial Periodic Report of the Government of Kenya, E/C.12/KEN/1, § 131.

⁴³ BBC News “Profile: Kenya's secretive Mungiki sect”, <http://news.bbc.co.uk/2/hi/africa/6685393.stm>

People speak up on economic, social and cultural rights in Nairobi's informal settlements

Participants in the KENGO/ICJ forum for residents of informal settlements spoke of some of the principal obstacles they face to the full enjoyment of their economic, social and cultural rights. High on their list of concerns is the lack of secure employment available for the urban poor. As a consequence, many have little choice but to earn a living in the informal sector, as hawkers,



porters, labourers, drivers, scrap dealers or breakers or by offering services including repairs and food preparation. None of these activities are formally recognised or regulated and hence a large proportion of Kenya's urban population enjoys no form of social protection.

Participants also spoke of their frustration at the country's education system. Despite Kenya's policy of free education, access to school is often particularly difficult for the urban poor. In Kibera – an informal settlement in Nairobi with a population of between 600,000 and 800,000 - it is reported that there are only two public schools for the entire population of the area. Moreover, forum participants underlined that they face hidden costs associated with sending their children to school because they must purchase books and uniforms and pay fees in order to register for examinations. And schooling is not only about physical access and enrolment, it is also about the quality of teaching and the motivation to stay in school.

More and more, and in particular given the impact of HIV/AIDS on traditional family and community structures and the recent steep increases in staple foodstuffs, the costs associated with education are proving to be too high for the poor. As a result, children are dropping out of school in order to take employment in the informal sector. And if access to basic education is difficult for the poor, access to further education is harder still. It is said that access to higher education often hinges on an individual's ability to pay bribes as much as it does his or her scholastic performance.

Likewise, forum participants underlined that access to health services is also associated with costs that are often beyond the reach of Kenya's poor urban dwellers. While health care is, in theory, free of charge, there are real costs associated with obtaining services such as medical tests or purchasing medicines. Moreover, many forum participants pointed to the fact that if one wanted to avoid long waiting lines in hospitals, there was no option but to make a "payment" to ensure receiving medical treatment. Participants also told of cases in which patients had been forcibly detained in hospitals - including Nairobi's Kenyatta Hospital – because they were unable to pay bills they had incurred.

The criminalization of Kenya's urban poor

Testimonies gathered during the two urban fora hosted by ICJ and OMCT drew attention to a disturbing phenomenon: the criminalisation of a significant section of Kenya's citizens as a result of their economic status and the neighbourhoods in which they reside. Again and again residents of Nairobi's poorest areas pointed to the increasing level of insecurity and crime in capital's informal settlements coupled with police ineffectiveness and corruption. Indeed, one participant in the Westlands community forum even suggested that, "if there isn't something done to the police and justice system there will be a serious backlash from society."

Young people from poor urban areas are particularly vulnerable to being stopped and searched by the police (often having personal belongings such as cell phones "confiscated"), as well as to arbitrary arrest and detention and to having false charges brought against them. Detained in police cells late at night, they are often exposed to violence by other detainees ("hard-core inmates and street boys"). They report that they or family members are frequently required to pay bribes to obtain their release, while women and girls who are arbitrarily arrested might be obliged to engage in sexual acts with police officers. Informal street traders explained that corruption among police and city council officials is so commonplace that they must carry money with them while working in order to be able to pay off officials. In theory hawking is regulated by city council officials, but the police will also often intervene because they know that the traders are likely to have some money. Typically the police will take a payment from hawkers, hold them until evening and then release them. Often they will also confiscate the goods they are selling.

Those unable or unwilling to pay the price demanded for their release face detention in inhuman conditions and frequently become victims of violence in police cells or jails. It is reportedly not uncommon for police officers to abuse and torture detainees in order to extract confessions to alleged crimes. As one speaker put it, "when you get to the cell there are no human rights." Oscar, a young man who earns his living as an informal trader, recounted an all too typical experience: on being apprehended as a hawker the police asked him to hand over his money (some 1000 Kenyan shillings, or approximately \$US14). When he refused, he was taken to a police station where he was forced by police officers to clean up human waste with his hands. The police recorded the reasons for his detention as theft and possession of a firearm. Oscar then recounted how he had been subjected to torture, including physical and sexual abuse.

When charges are brought against them, many of Kenya's urban poor simply do not have the means to post bail, and hence prisons become congested with remand prisoners who have no hope of release before their trial date.

Poor urban residents also face obstacles reporting crime and accessing justice, even when they are victims of serious offences. Women victims of sexual violence are understandably reluctant to approach the police, a situation which is not helped by the relatively few female officers in the police force. Participants in the Westlands forum also reported that victims of rape or sexual assault are often kept waiting for treatment for several hours at Kenyatta Hospital in Nairobi because they have no money to pay for preferential treatment. A specific recommendation made by participants in the urban fora in Nairobi was that efforts be made to employ more women in the police force. Participants also welcomed the introduction of the Gender Desk Programme to ensure that support for women and children victims of violence is available in Kenya's police stations, but underlined that in practice, this initiative is poorly implemented.

Some fora participants suggested that the police – and also prison warders – should undergo human rights training. Others, however, took the view that the police and wardens already know that they should respect human rights but fail to do so because they themselves work in difficult conditions. Underpaid and poorly trained, (most of police training is physical, and there is little emphasis on investigative techniques) they easily resort to extorting bribes and abusing prisoners in order to obtain confessions. For many of Kenya’s police officers, patrols come to be regarded as little more than a source of additional income.

Forced evictions

Lack of clarity over land ownership, the absence of a national land registry, and abuse of the land allocation system by officials (District officers and chiefs in urban areas are said to allocate land despite having no authority to do so) inevitably means that forced evictions are regularly carried out in Kenya’s urban centres. Despite the fact that evictions are common, there exist no guidelines to determine how, if at all, such evictions should take place. As a result, the eviction process is characterised by arbitrariness that only serves to heighten the vulnerability of Kenya’s poorest urban dwellers.⁴⁴ In many cases there is involvement of city council *askaris* (armed guards) or police, and during the ICJ/OMCT fora residents of informal settlements reported that it was common practice for both groups to employ violence when carrying out evictions. Even in cases where an eviction is clearly illegal or undue force has been employed, the poor often lack effective remedy. In the absence of a legal aid system, many victims of illegal or forced evictions cannot afford to engage legal services.

The case of the evictions carried out in the Deep Sea settlement near Westlands in north Nairobi in 2005 serves to illustrate many of the typical features of urban evictions in Kenya, including questionable land claims, improper legal procedures, lack of consultation and use of force by officials. The eviction procedure, which ultimately affected some 850 families, began when an individual, claiming to own the land on which Deep Sea was built, went to court to obtain an eviction order. This order was granted and an eviction notice was placed in a newspaper. Shortly after midnight on 23 September 2005, and without warning, Government-owned bulldozers started demolishing homes in the Deep Sea area. Armed police were involved, and locals also recognised city officials, although it is said that the latter did not wear identification. Subsequent to the evictions, the case was brought to the High Court, which ruled that the operation had in fact been illegal on the grounds that the newspaper announcement did not constitute adequate notice and that the residents of Deep Sea had therefore not been informed of the operation. Despite this ruling, the residents of Deep Sea have never received adequate reparation for these events.

A response to informal settlements: slum upgrading

Slum upgrading involves the improvement or replacement of housing and infrastructure for residents of informal settlements. Such upgrading is, however, rarely if ever accompanied by concomitant improvements in the socio-economic situations of the inhabitants of these areas. This in turn creates the real risk of displacing the residents who should, in theory, benefit from such schemes, either because they lack the financial means to accede to this housing, or because they accept cash offers from wealthier individuals and families to move out. These

⁴⁴ It was reported that in 2006, the Government created a taskforce on evictions in the Ministry of Lands. The progress of this taskforce was seriously by the post-election crisis and its recommendations exist only in unofficial draft form.

offers may be attractive, but not necessarily sufficient to ensure a sustainable higher standard of living elsewhere.⁴⁵ This process ultimately leads to the creation of new slums.

On 16 March 2007, the Special Rapporteur on adequate housing addressed a letter to the Government of Kenya in which he recalled the commitment of the Government to addressing the growing slums in urban areas, particularly in Nairobi. The Special Rapporteur underlined that, “in order for slum upgrading to achieve its ends, it must be done within a city- or countrywide- strategy and action plan based on consultation and participation, in order to identify geographical housing alternatives that would enable those relocated to sustain their livelihoods.”⁴⁶ The principle that slum dwellers should be consulted about and participate in slum policy was unambiguously reiterated by the residents of informal settlements who took part in the KENGO/ICJ forum in Nairobi. They also called for upgrading initiatives to be accompanied by a mortgage process that enables the poor residents of areas earmarked for upgrading to afford the new units.

Poorly-targeted upgrading potentially leads to social conflict, in particular when there is little or no consultation with residents and adequate alternative housing solutions are not provided. Threatened by eviction, residents may react by engaging in protest activities. In turn, there is a serious risk that government authorities will react to this resistance with repressive measures.

There are currently two major slum upgrading initiatives underway in Kenya: the Kibera-Soweto pilot project in Nairobi, and the Kisumu project in the city of that name.

⁴⁵ Marie Huchzermeyer, *Slum upgrading initiatives in Kenya within the basic services and wider housing market: A housing rights concern*, Discussion Paper No.1/2006, COHRE Africa Programme.

⁴⁶ Adequate housing as a component of the right to an adequate standard of living Report by the Special Rapporteur, Miloon Kothari Addendum - Mission to Kenya (9-22 February 2004) E/CN.4/2005/48/Add.2, 17 December 2004, § 77
<http://daccessdds.un.org/doc/UNDOC/GEN/G04/168/86/PDF/G0416886.pdf?OpenElement>

7. Violence and the Human Rights of Women and Children

In many cases, the issues discussed in this report have a particularly severe impact upon Kenya's women and children, in particular those who come from the poorest and most marginalised communities. Where violence and insecurity prevail, women put themselves at risk every time they go to fetch firewood or water or, in poor urban areas, when they go out at night, even to use the common latrines. Children and young people are also at risk: during the preparatory mission, rural communities emphasised that many of their children fail to attend school because of the prevailing climate of violence due to tensions between neighbouring communities. Growing hardship as a result of cattle theft and prolonged drought also push children out of school in order to work to support their families. The current severe drought in northeast Kenya and the consequent reduction in pastures is pushing boys to leave school to migrate with livestock. In Mandera, on the border with Somalia and Ethiopia, where at least 35,000 people are facing extreme food and water shortage, it is reported that school dropout currently stands at 30 per cent.⁴⁷ In urban areas young people from poor communities and children living on the street may be drawn into gangs. As participants in the urban fora underlined, young people are also particularly vulnerable to harassment and abuse at the hands of the police, and in the case of young women, this abuse may well be sexual in nature. If detained, it is highly unlikely that a minor will enjoy his or her rights: to be treated with humanity and respect, and to be held in separate facilities from adults.⁴⁸

In addition to these issues, women and children face other specific challenges as a result of their status in Kenyan society. It is, however, encouraging to note that the 2007 National Land Policy document recognises “[t]he special problems that women in dry land areas face as they play their diverse roles.”⁴⁹

Women and the economic, social and cultural root causes of violence

Traditionally, women's societal status excludes them from economic decision-making within families and communities and leaves them vulnerable to violence and abuse. These traditional attitudes are weakening, in particular in urban areas where women are increasingly assuming roles of responsibility, however they continue to exert a significant influence over the lives of a large number of Kenyan women. Kenya's Constitution is far from clear on the legal status of women. Section 82 indicates that, “no law shall make any provision that is discriminatory either of itself or in its effect”, and makes specific reference to discrimination on the grounds of “sex”. The same Section goes on to state, however, that non-discrimination, “shall not apply to any law so far as that law makes provision [...] with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law [...] or] for the application in the case of members of a particular race or tribe of customary law [...]”.

Women's lack of empowerment stems to a large degree from their economic and legal status. Prior to marriage, a woman is dependent upon her family, while after marriage, she derives her legal status through her husband. In terms of property ownership, women are entitled under the law to buy property, including land, however they are frequently not regarded as “full” or “legitimate” owners. Furthermore, few women are able to negotiate their property

⁴⁷ IRIN, “KENYA: Thousands facing food and water crisis in the northeast”, Nairobi, 19 September 2008.

⁴⁸ A Government programme to identify and train an officer in every police station to address children's issues has been poorly implemented due to lack of resources.

⁴⁹ Ministry of Land, *National Land Policy*, May 2007, p.37

rights within marriage and very often a woman's property, if she has any, comes to be regarded as part of her husband's estate. Under the Matrimonial Property Bill as it currently stands, all property is automatically assumed to belong to the husband unless the wife can prove otherwise. The situation is complicated still more by the different regimes under which two people can marry: civil marriages must be registered, but there is currently no such requirement for customary marriages.⁵⁰ This raises important questions regarding inheritance rights, and in certain cases a widow risks being left destitute when in-laws lay claim to her husband's property on his death.

Acceptance still characterises attitudes toward domestic violence in Kenya. Indeed, this acceptance extends to many women themselves: UNICEF Childinfo data indicate that 68 per cent of girls and women in Kenya believe that a husband or partner is justified in hitting or beating his wife under certain circumstances.⁵¹ At the same time, it is unlikely that the police will intervene concerning what is generally perceived to be a "private" matter. Reporting violence is also a challenge for women: to file a complaint, three documents are required - a police abstract, a "P3" form (for which, it is reported, a woman may even be required to pay), and a medical report. In addition to this, they must overcome cultural prejudice and fear, a still greater obstacle given the lack of female police officers in Kenya. The positive initiative to set up "gender desks" in police stations has, like many policies, proved to be poorly implemented. In the case of marital rape, there is no specific legislation against this crime under Kenya's Sexual Offences Act 2006.

The economic dependence of women – and their children - also makes them particularly vulnerable to the impact of violence against their communities. This report opens with the words of a woman from the Ilchamus community in the Rift Valley, desperate not only because of the emotional impact of the ongoing killing of "husbands" and "elders" by militia, but also because of the socio-economic impact of this loss for the survival of her community: "[u]ntil the hope of the Ilchamus went down." While the Ilchamus suffer at the hands of non-State actors, Sabaot women and children in the Mount Elgon area have had their socio-economic wellbeing seriously jeopardised by the mass arrest, detention, torture and killing of men and boys from their community at the hands of the Kenyan military (see Box 4).

On many occasions in Kenya's recent history, violence has been such that it has led to internal population displacement. Uprooted from the protective environment of their community, forced to sleep in the open or in makeshift shelters, and sometimes separated from family members, the vulnerability of women – and their children – to violence is still greater. And IDP camps themselves present specific security problems associated with overcrowding, communal living, enforced inactivity and lack of privacy, in addition to abuse of power by informal camp guards and administrators.

Children and the economic, social and cultural root causes of violence

In many cases, and particularly in rural areas, the human rights of children – and women - are violated as a result of communities' adherence to certain traditional practices. Many of these practices are closely linked to concepts of property and ownership and are sanctioned by customary law. Thus, for example, children – and girls in particular – may be given in marriage at an early age, significantly below that of the minimum age of 16 years established under Kenyan law. Data for Kenya indicate that 25 per cent of women between the ages of 20

⁵⁰ In addition to civil and customary marriages, there are also Christian, Hindu and Muslim religious marriages in Kenya.

⁵¹ <http://www.childinfo.org/attitudes.html>. Respondents were between the ages of 15 and 49.

and 24 were married or in a union prior to the age of 18 – the same data also confirm that rates of child marriage in rural areas are significantly higher than in urban areas (27 and 19 per cent respectively).⁵²

Traditional marriages represent an economic contract, and the bride’s family receives a brideprice from the groom or his family in exchange for the young girl, effectively establishing her status as her future husband’s property. Among pastoralists, where girls often move in with their husband at puberty (although they may be married at an even earlier age), the brideprice commonly takes the form of cattle, and it is said that this is one of the incentives for young men in certain communities to engage in cattle rustling (see Box 6 on the Pokot). For a family facing economic difficulties, child marriage also represents a survival strategy, relieving them of an economic “burden”. For a girl, however, marriage represents the end of childhood and, in most cases, also marks the end of her education. Pressure from her husband and his family, the necessity to carry out domestic chores and, often, pregnancy, will eventually force a girl to drop out of school. Her young age and lack of education, together with traditional attitudes towards women that include the sanctioning of violence against “disobedient” wives and, in certain communities, the acceptability of polygamy, all contribute to her physical and psychological vulnerability to abuse. This is exacerbated by a wife’s economic dependence on her husband and the practical impossibility of her holding her own property.

Closely linked to the issue of marriage is that of female genital cutting (FGC). The latest Demographic and Health Survey (DHS) data from Kenya indicate that the prevalence of FGC in the country declined from 37.6 per cent of all women aged 15 to 49 in 1998 to 33.7 per cent in 2003.⁵³ It is important to note that these national figures in fact hide a high degree of variation within the country – some communities, such as the Luo and Turkana, do not practice any form of cutting, whereas among others, including the Maasai, it is commonplace and viewed as a fundamental element of a woman’s identity. In communities that practice some form of FGC, this extremely painful procedure – which carries with it a high degree of risk for the girls who must submit to it – is regarded as a necessity if a girl is to be able to take a husband. Hence FGC, as a prerequisite for marriage, is also intimately linked to the economic interests of families and communities.

Although national prevalence of FGC is falling in Kenya, DHS data also reveal an alarming trend: the median age at which FGC is performed is declining, meaning that girls are undergoing this procedure at an increasingly early age. There are a number of hypotheses to explain this, among them that national legislation to prohibit FGC is encouraging the practice to be carried out at an earlier age, when it is easier to hide it from the authorities⁵⁴ (a reminder that laws alone are not enough to change cultural practices). It is also possible that economic hardship and drought are forcing families to have their daughters married, and consequently to undergo cutting, at an earlier age.

As regards responses to FGC, Kenya has been very much associated with “alternative rights of passage”. In short, this approach preserves the positive socio-cultural aspects of the ritual (including festivities, initiation, gift giving and the imparting of traditional knowledge), but

⁵² UNICEF, *State of the World’s Children 2008*.

⁵³ UNICEF, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, Innocenti Digest, UNICEF Innocenti Research Centre, Florence 2005, p.7

⁵⁴ UNICEF, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, Innocenti Digest, UNICEF Innocenti Research Centre, Florence 2005, p.7

does not require girls to undergo FGC. When they are accompanied by community awareness and discussion, such alternative ceremonies are well-received and contribute to a reduction in the incidence of FGC. In isolation, however, they have little impact since they fail to address the underlying values associated with the practice (cultural identity, community acceptance and marriage as an economic contract) and therefore provide little assurance that a girl will not be cut at a later date.⁵⁵

Harmful traditional practices are not the only factor to expose children to violence and abuse. In much of Sub-Saharan Africa, extended family and community structures have proven to be extremely resilient in the face of economic difficulties and the impact of HIV/AIDS. Today, however, these protective structures are increasingly breaking down, and this is accompanied by a concomitant rise in the number of orphaned or vulnerable children, child-headed households and children living on the street in Kenya.⁵⁶ Many of these children face serious prejudice and exclusion and their vulnerability, including to trafficking and exploitation, is particularly high. In order to meet their daily needs some may engage in theft, prostitution, forms of hazardous labour and activities such as begging. This in turn makes them vulnerable to violence and ill-treatment – including physical and sexual abuse - at the hands of the police and others.⁵⁷ Indeed, with respect to Kenya, the Committee on the Rights of the Child has explicitly recognised, “the large number of street children, the denial of their right to education and health care, and their vulnerability to various forms of violence, including sexual abuse and exploitation and arrests that are arbitrary and abusive.”⁵⁸

Furthermore, children affected by HIV/AIDS⁵⁹ live with stigma and discrimination that can result in their being excluded from school or dropping out due to lack of parental care or the need to provide for siblings. Discrimination against girls can be particularly severe, since loss of parents or neglect by caregivers together with school drop-out contribute to their vulnerability to sexual violence and exploitation.⁶⁰ It is worth noting that school drop-out may not only contribute to vulnerability to sexual violence and exploitation, it may also result from it.⁶¹ HIV/AIDS and exploitation are of course not the only factor keeping children out of school. For example, the Endorois in Arabal put it quite simply: their children are not attending school because they are starving.

⁵⁵ UNICEF, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, Innocenti Digest, UNICEF Innocenti Research Centre, Florence 2005, p.26

⁵⁶ “During the year the children's rights NGO ANPPCANN estimated that approximately 750,000 children lived on the streets.” Country Reports on Human Rights Practices, Kenya 2006 <http://www.state.gov/g/drl/rls/hrrpt/2006/78740.htm>

⁵⁷ “For example, in January street children who had allegedly stabbed a bus driver were beaten by residents in Eldoret who argued that the children posed a security threat in the community.”

Country Reports on Human Rights Practices, Kenya 2006 <http://www.state.gov/g/drl/rls/hrrpt/2006/78740.htm>

⁵⁸ Committee On The Rights Of The Child, Concluding observations: Kenya - CRC/C/KEN/CO/2, § 63 <http://daccessdds.un.org/doc/UNDOC/GEN/G07/425/08/PDF/G0742508.pdf?OpenElement>

⁵⁹ The term “children affected by HIV/AIDS” is used here to refer both to children who have been directly infected by the disease and to children whose lives have been impacted by the disease in some other way, such as the death of one or both parents.

⁶⁰ Human Rights Watch, “Letting Them Fail, Government Neglect and the Right to Education for Children Affected by AIDS”, October 2005, Volume 17, No. 13 (A)

<http://hrw.org/reports/2005/africa1005/africa1005.pdf>

⁶¹ Human Rights Watch, “Letting Them Fail, Government Neglect and the Right to Education for Children Affected by AIDS”, October 2005, Volume 17, No. 13 (A)

<http://hrw.org/reports/2005/africa1005/africa1005.pdf>

Kenya's Children's Act prohibits child labour. At the same time, however, under the country's Employment Act children aged 16 or older are entitled to work, with limitations - in theory at least - on the working hours and the type of work they do. Despite this legislation, the Committee on the Rights of the Child has noted the high number of children engaged in economic activities owing to poverty levels and the impact of HIV/AIDS⁶² (an estimated 27 per cent of boys and 25 per cent of girls between the ages of 5 and 14 are engaged in child labour⁶³). Moreover, much child labour takes place in the informal sector, which is particularly difficult to monitor and control. Furthermore, the age restriction on child work under Kenyan legislation does not apply to the agricultural sector. This makes children in rural areas vulnerable to being taken out of school to work on family plots or to care for livestock, especially in periods of economic difficulty.

Children's involvement in harmful or exploitative forms of labour has, in turn, serious implications for their enjoyment of their rights to the highest attainable standard of health, education and development. For example, according to UNICEF, approximately 30 per cent of girls living in coastal cities and aged between 12 and 18 are engaged either as part-time informal sex workers or in sex work as a full-time income generating activity.⁶⁴

Inheritance is also a crucial issue for children's material wellbeing, and one that has been brought to the fore by the HIV/AIDS epidemic. Many children who lose their parents - be it to AIDS, malaria, inter-community violence or some other cause - are also at risk of losing their inheritance, modest as this might be. In some cases, this happens because family members deny them their rightful property, while in others they may be unable to substantiate their inheritance claim due to lack of a birth certificate (birth registration rates are estimated to be 48 per cent). In yet others, it may be the recurrent problem of lack of title deeds to a piece of land that prevents a child from enjoying his or her property rights. Whatever the reason, the outcome is that children's material wellbeing is compromised and their vulnerability to exploitation and violence is increased.

⁶² Committee On The Rights Of The Child, Concluding observations: Kenya - CRC/C/KEN/CO/2 <http://daccessdds.un.org/doc/UNDOC/GEN/G07/425/08/PDF/G0742508.pdf?OpenElement>, § 61.

⁶³ UNICEF, *State of the World's Children 2008*. A child is considered to be involved in child labour under the following conditions: (a) children 5-11 years old who, during the week preceding the survey, did at least one hour of economic activity or at least 28 hours of domestic work, or (b) children 12-14 years old who, during the week preceding the survey, did at least 14 hours of economic activity or at least 28 hours of domestic work.

⁶⁴ Country Reports on Human Rights Practices, Kenya 2006 <http://www.state.gov/g/drl/rls/hrrpt/2006/78740.htm>

Conclusions

I will now, however, point out to you the lie of the land, and you will then perhaps believe me.
Homer, *The Odyssey*, Book XIII.

The pun in the title of this report is far from subtle, but it is no less apt for that. Kenya's land history is one of corruption, inefficiency, nepotism, false claims, broken promises and untruths, and the crushing implications of this history are bourn, above all, by the poorest and most marginalised of Kenya's citizens. The collective mindset cultivated over decades by the country's political elite – a mindset that inextricably links political patronage, ethnicity and land rights – is so engrained that even those communities too small to be relevant as a national voting block consider that the solution does not lie in changing the system, but rather in playing that system. Their situation, they believe, can only be improved if they succeed in obtaining their own political patron, even if this is achieved at the expense of their fellow Kenyans. This is, perhaps, the falsehood from which all others spring, for this formula only perpetuates Kenya's internal tensions, and with them the periodic episodes of devastating violence such as that witnessed in the early months of 2008.

A first and necessary step to dismantling this nexus of political power, ethnic allegiance and land interests is the establishment of a National Land Commission as proposed under the National Land Policy and a land titles tribunal together with a permanent and transparent system of land registration immune to the influence of those who hold economic and political influence. The second step is one that perhaps goes beyond the scope of this report: it involves working with Kenya's diverse communities to encourage them no longer to vote as Kikuyu, Luo, Kisii, Maasai and so on, but rather as Kenyans.

In addition to these important and far reaching changes, there are a number of concrete, practical measures that the Government of Kenya can be encouraged to take in order to both improve their citizens' enjoyment of their economic, social and cultural rights and, linked to that, reduce levels of violence in Kenyan society. In many cases, significant progress could be made simply by fully implementing policies and legislation that already exist.

The measures proposed by OMCT, ICJ and CEMIRIDE address the range of violent acts discussed in this report - from inter-community conflict, to police and army brutality and the pain inflicted on women and children in their homes and communities - and are listed in the recommendations that follow.

Recommendations

The following recommendations are specific to the link between the denial of economic, social and cultural rights and violence. They have been developed to reflect the ideas and suggestions that emerged during the expert meetings and community fora held during the preparatory mission for this report.

Key legal and administrative measures:

- Draft and agree upon a new Kenyan Constitution that adequately addresses issues of property and land rights, takes a clear position on customary law consistent with international human rights standards, and recognises the rights of minority and indigenous populations;
- Establish a Truth, Justice and Reconciliation Committee that will not only address Kenya's post-electoral violence, but also consider earlier episodes and the displacement, loss of livelihood and physical and psychological injuries associated with these events;
- Finalise and adopt the National Policy on Peacebuilding and Conflict Management of 2005-6, which will provide a framework for addressing security issues such as those in Mount Elgon and elsewhere, and end the reactive and crisis-driven approach to conflict management and resolution;
- Take firm and decisive steps to address and end corruption and associated crimes, including the system of political patronage that sees land and other resources allocated to individuals and communities in exchange for political support.

Regarding the land situation:

- Recognize that land issues are often at the root cause of community violence in Kenya and take concerted steps to reach fair and just resolutions to land disputes across the country, independent of political and ethnic interests;
- Properly implement section 75 of the Constitution dealing with land rights and, in particular, ensure that the notion of "public benefit" is not manipulated to serve personal and political interests;
- Initiate a process of land reform aimed at resolving the land issue in Kenya such as that contained in the National Land Policy drawn up by the Ministry of Lands in 2007. The process should address the highly fragmented pattern of land use, and involve consultation with representatives of all groups concerned and affected by land conflict. This reform should also foresee the possibility of establishing an independent inspectorate to monitor land use under the provisions included in the reform;
- Implement without delay the recommendations included in the Report issued by the Ndungu Commission, set up in 2003 to investigate the irregular allocation of public land and the measures included in the 2007 National Land Policy; in particular, implement the recommendations highlighting the urgent need for a National Land Commission and a Land Titles Tribunal that deals with the rectification of the illegal allocation of lands on a case by case basis, the development of a comprehensive land policy, and the establishment of an inventory of public land;
- Implement the recommendations to secure access to land and land-based resources for vulnerable groups enumerated in the National Land Policy document of 2007, specifically to: develop mechanisms for identifying, monitoring and assessing the vulnerable groups; put in place mechanisms for redistribution of land and resettlement; facilitate their participation in decision making over land and land based resources; and protect their land rights from unjust and illegal expropriation;

- Likewise implement the recommendations to protect and sustain the land rights of minority communities enumerated in the National Land Policy document of 2007, specifically to: undertake an inventory of the existing minority communities to obtain a clear assessment of their status and land rights; develop a legislative framework to secure their rights to individually or collectively access and use land and land based resources; provide legal and institutional frameworks for restitution in lieu of destroyed property and loss of cultural habitation; and facilitate their resource management systems to ensure sustainability of land and land base resources;
- Establish a transparent and clear system of registration of land titles in order to avoid further episodes of conflict deriving from uncertainty over land allocation.

Regarding forced evictions in both rural and urban areas:

- Include a provision in the Kenyan Constitution to ensure that evictions are only used as a last resort, and that they are carried out according to international human rights standards;
- Establish and implement clear and transparent guidelines to ensure that eviction processes respect human rights and human dignity (including full and meaningful participation in the process for those affected) and introduce a moratorium on evictions until such guidelines have been established;
- Ensure that all Kenyan citizens, including the poorest and most marginalised, have *de jure* and *de facto* access to remedial measures for illegal evictions.

For rural communities:

- Implement the recommendations to secure pastoralist livelihoods and tenure of land enumerated in the National Land Policy document of 2007.
- Provide forthwith adequate security to protect vulnerable communities and to deter attacks from militia, armed communities and cattle rustlers;
- Ensure disarmament of communities, including through carefully coordinated and managed livestock for guns initiatives;
- Review the provision of basic services such as schools and health services to guarantee that minority and indigenous communities are not excluded from these services;
- Encourage recruitment of local administrators and police from minority and indigenous communities;
- Provide common services and facilities for neighbouring communities, including schools and clinics (where language allows) as a means to defuse tensions;
- Encourage the development of alternative income sources, such as cash for work programmes. Also promote access to livestock markets for pastoralist communities.

In urban areas:

- Recognise the rights of residents of Kenya's informal settlements and take all possible steps to ensure that they have access to basic services, including water and sanitation, electricity and adequate health and education services;
- Introduce an independent watchdog mechanism, accessible to the public, to address the issue of corruption and violence within the police force. Ensure that full and appropriate disciplinary and legal measures are taken against police officers and other officials found guilty of abusing their position;
- Ensure that slum upgrading projects include a well-articulated social protection dimension, and that residents of these areas are fully consulted and informed. Develop

registries of residents to ensure that new housing is allocated in a fair and transparent manner.

As regards the situation of women and children:

- Ensure that the principle of non-discrimination on the basis of gender, enshrined under Section 82 of the current Kenyan Constitution is applied without exception, and that no form of personal or customary law compromises this principle in any way;
- Act upon the recommendation of the Committee on Elimination of Discrimination Against Women that the State should promote without delay the passage of the Family Protection Bill, the Matrimonial Property Bill and the Equal Opportunities Bill, which have been under preparation in different forms since 1999,⁶⁵ in addition to the Trafficking in Persons Bill and the Reproductive Health and Rights Bill;
- Raise awareness of women and children's human rights among the public at large, and in specific groups, including the police and judiciary. Advocate that violence against women and children is unacceptable;
- Work with communities to reinforce the positive dimensions of customary law, including as regards the care of children and, at the same time, to address violations of women and children's human rights inherent in customary law;
- Identify and address specific cultural values that compromise the human rights of women and children, including their rights to protection from all forms of violence and to own property, through community awareness raising and discussion;
- Promote creative measures to keep children - especially girls - in school, including school feeding programmes. Ensure that resources assigned to education are assigned equitably;
- Ensure that all births and marriages, including customary marriages, are registered. Further ensure that the minimum age of marriage under Kenyan law is respected in customary marriages;
- Introduce legislation to criminalise marital rape;
- Promote the recruitment of female police officers, and ensure the establishment of a Gender Desk in all police stations.

⁶⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, §17.

<http://daccessdds.un.org/doc/UNDOC/GEN/N07/459/89/PDF/N0745989.pdf?OpenElement>

Appendix 1



ICJ-KENYA



WORLD ORGANISATION AGAINST TORTURE



Centre for Minority Rights Development

Joint Preparatory Mission for an Alternative Report to CESCR on “Addressing the Economic, Social and Cultural Root Causes of Torture and other forms of Violence” Kenya, 12-18 April 2008

Sat. 12 am	Sun. 13 am	Mon. 14 am	Tue. 15 am	Wed. 16 am	Thur. 17 am	Fri. 18 am
	07.00: MM&Cemiride, depart for rural visit	06.30: FR arrives Nairobi MM&Cemiride, Mr. Kipruto Kimosop, Endorois Welfare Council MM&Cemiride, Visit to Division Office, Mochongoi MM&Cemiride, Chief Inspector Kiche, Mochongoi Police Station 12.00 FR at ICJ	08.30: MM&Cemiride, Mr Charles Kamuren, Chair of Endorois Welfare Council and Executive Secretary, Kenya NUT, Nakuru (Marigat) 10.30 – 13:30 FR&ICJ, Office of the President: Under Secretary/ Security: Mr Peter Were Okwanyo	08.30 FR&ICJ, Coalition on Violence Against Women 09.30 MM&Cemiride, Interview by Kass Community Radio Station, Nakuru 10.30: FR&ICJ, Independent Medico Legal Unit 10.30 MM&Cemiride, Mr. Zablon Kuria, Chair of Management Committee of IDP Camps, Nakuru and Ms. Nancy Kimemia, Committee member 12.30 FR&ICJ, Kenya Alliance for the Advancement of Children Rights	09.00-13.30 OMCT&ICJ, KENGO public forum, informal settlements (100 participants)	8.00-10.00 OMCT&ICJ, Mr Odindo Opiata, expert on evictions – Economic & Social Rights Centre 11.00-13.00 OMCT&ICJ, Prof. Mbote, Law Faculty, University of Nairobi (Women and Land Rights)

Sat. 12 pm	Sun. 13 pm	Mon. 14 pm	Tue. 15 pm	Wed. 16 pm	Thur. 17 pm	Fri. 18 pm
	<p>MM&Cemiride, Mr. John Letai, Pastoral Land Advocate, Nanyuki</p> <p>14.00 MM&Cemiride, Community meeting with Maasai, nr Nanyuki</p> <p>16.30 MM&Cemiride, Video interview with Mr. John Letai, Pastoral Land Advocate, Nanyuki</p>	<p>14.30-17.30 FR&ICJ, public forum on right to land (Stanley Hotel)</p> <p>12.30 MM&Cemiride, Community meeting with Endorois, Mochongoi - Arabal</p> <p>15.30 MM&Cemiride Community meeting with Illchamus</p>	<p>13.00 MM&Cemiride, Daniel M. Kobei, Executive Chairman, Ogiek Peoples’ Development Program, Nakuru</p> <p>14.30-17.30: FR&ICJ, Kenya National Commission on Human rights</p> <p>14.30 MM&Cemiride Video interview with Mr. Leonard Mindore, Field Officer OPDP, Mau Forest</p> <p>15.00: MM&Cemiride Community meeting with Ogiek, Mau Forest</p> <p>17.30 MM&Cemiride Mr Kimonjo Kiburi lawyer and IDP activist, Nakuru</p>	<p>14.30-19.30 OMCT&ICJ, Westlands Forum on youth and socio- economic rights (AACC House)</p>	<p>14.30-15.30: FR Finnish Embassy</p> <p>15.00-16.00 MM Swiss Embassy</p> <p>18.00: Meeting OMCT-ICJ-Cemiride</p>	<p>22.15 MM arrives Nairobi</p> <p>22.05: FR departs 22.50: MM departs</p>

Appendix 2



Addressing the economic, social and cultural root causes of torture

OMCT ACTION FILE: KEN040608.ESCR

KENYA: MILITARY ACTION AGAINST THE SABAOT LAND DEFENCE FORCE IN MOUNT ELGON INVOLVES SERIOUS HUMAN RIGHTS VIOLATIONS AGAINST CIVILIANS

The Kenyan army is responsible severe violations of human rights in the District of Mount Elgon

The International Secretariat of the World Organisation Against Torture (OMCT) has received information from the Kenyan Independent Medico-Legal Unit (IMLU) and the International Commission of Jurists (ICJ), Kenya, members of the SOS Torture Network, concerning ongoing torture and extrajudicial killings by the Kenyan Army and Police in the Mount Elgon District in the Western Province of the country.⁶⁶

It is reported that since the start of operations in March 2008, the military has been responsible for the execution of thousands of men and boys from the Sabaot community in Mt. Elgon District. It is believed that many have died while undergoing torture, and that others have subsequently died in prison due to injuries received during their interrogation. To date the Government of Kenya has taken no steps to halt this situation.

The human rights abuses by the police and army are carried out in the context of operations against the Sabaot Land Defence Force (SLDF), an organization that has itself been responsible for grave human rights abuses in the Mount Elgon area. At the root of this conflict lies the question of land ownership and competing claims over land title, particularly in the Chebyuk settlement area of Mount Elgon District. The deaths, injuries and displacement that are a direct result of the military operations also have a serious impact on the socio-economic wellbeing of the population of the affected areas.

OMCT joins with IMLU and ICJ Kenya in calling on the *Government of Kenya* to order an immediate suspension of the military operation in the Mount Elgon area and to establish an independent commission to ensure that all those responsible for human rights violations are brought to trial and that victims of torture and their families receive just and adequate reparation. OMCT, IMLU and ICJ Kenya also call on the Government to take concerted steps to reach fair and just resolutions to land disputes in Mount Elgon and elsewhere, independent of political and ethnic interests.

⁶⁶ Important additional information was provided by the Centre for Minority Rights Development (CEMIRIDE), Kenya.

The situation

The Mount Elgon District in the Western Province of Kenya is the scene of an extended violent conflict over land allocation involving the Sabaot Land Defence Force (SLDF), a guerrilla militia. The SLDF was formed in 2005 to resist government attempts to evict population in the Chebyuk area of Mt. Elgon as part of a resettlement programme. It has since been accused of killing more than 600 people, terrorizing local populations through physical assaults and threats and committing a variety of atrocities including torture, rape, and the theft and destruction of property. It is estimated that more than 66,000 people were displaced in an 18 month period due to the activities of the SLDF. In March 2008, the Kenyan Army was deployed in the Mount Elgon area to clamp down on the activities of the SLDF in an action called "Operation Okoa Maisha". This military operation has been conducted under a veil of secrecy. Since early March of this year, it has resulted in mass arrests and the subsequent prosecution of over 1200 persons.

IMLU and ICJ report that most of the persons arraigned in court as a result of Operation Okoa Maisha have complained that they were tortured by the Kenyan military and exhibited injuries that remain to be accounted for by the State. There have been several reports in the media accusing army officers of using torture and excessive force against civilians in a bid to recover illegal weapons used by the SLDF. According to media reports, army officers have also assaulted journalists who attempted to cover the operation. According to IMLU, "the Government is undertaking massive infringements of fundamental rights on the civilian population in the Mount Elgon District and its surroundings" in its efforts to identify SLDF members. IMLU also indicates that there are reports of minors who have been interrogated and subjected to torture.

IMLU's preliminary findings from a medico-legal investigation into torture by the military in the Mount Elgon District released on 27 April 2008 indicate that police officers have carried out mass arrests – often at dawn - accompanied by acts of physical violence in Sabaot communities. On arriving in a village, police officers typically separate the men and boys from the women and children, informing the former that they are being taken away in order to determine whether they have guns in their possession or if they are associated with the SLDF. The men and boys are then transported to bases set up by the military in the Kapkota, Saandet and Kaptama areas of Mount Elgon where they are stripped and subjected to systematic torture. Subsequently individuals suspected of being SLDF members are taken to police stations and arraigned in court on charges of promoting warlike activities. The high number of arrests and the consistent denial of bail have, in addition, led to the serious overcrowding of prisons around Mt. Elgon District.

According to the Kenya National Commission on Human Rights report '*The Mountain of Terror*'⁶⁷, the military is responsible for the execution of thousands of men and boys from the Sabaot community in Mount Elgon District. It is believed that many have died while undergoing torture, and that others have subsequently died in prison due to injuries received during their interrogation. The bodies of those who die in the military camps are reportedly taken to Kamarang, a hill in a forest area in Mt. Elgon District, where they are buried in unmarked graves. Other bodies are dumped on farmland, with attendant risks to public health.

The SLDF activities and the police and military operations that have followed in their wake not only violate the civil and political rights of the inhabitants of the area, but also

⁶⁷ Released 15 May, 2008

compromise their enjoyment of a range of economic, social and cultural rights. Military action is leading to the abandonment of farms, impeding food supply and access to markets and thus contributing to food insecurity. In addition to the question of land allocation, population displacement and the consequent implications for the possibility of earning a livelihood from traditional activities, the mass arrest, torture and killing of Sabaot men and youth in itself threatens the economic and social wellbeing of this community. The government sponsored operation is also causing women and children severe psychological distress as they have no way of learning of the fate of their male family members.

For its part, the Government has termed allegations of torture as “propaganda” and argued that no complaints have been lodged with relevant agencies.

The Root Causes of the Violence in Mount Elgon District

The extreme violence currently being carried out in Mount Elgon, together with the violence perpetuated by the SLDF, has its roots in the issue of land allocation and forced evictions and their consequent impact on the livelihood of local communities. The Mount Elgon District, with an estimated population of 135 033, is predominantly occupied by the Sabaot, Iteso and Bukusu communities. The Sabaot, who are indigenous to Mount Elgon, are divided into the Soy and Mosop⁶⁸ clans.

Various communities have laid claim to land in Mount Elgon and have lobbied political representative to have their claims recognized. IMLU reports that the contested land was first occupied by the Mosop community: in 1971 some 109 Mosop families were moved off their land to the Chebyuk settlement scheme, however the scheme was never degazetted from its status as forest land, effectively rendering the community landless. In 1979, proposals were made for the formalization of the scheme, however by this time the number of Mosop families had increased to over 2000 and they had been joined by members of the Soy community and the exercise was abandoned. In 1989 the government again tried to complete the resettlement but the process was marred by political interference, nepotism and corruption.

Further efforts initiated in 1990 were abandoned in 1992 due to the land clashes that affected large parts of the Rift Valley. These clashes resulted in an influx of displaced persons to Mount Elgon, most of whom were not original inhabitants of the area. There was also an attempt at resettlement in 1997 but this was also abandoned due to a lack of political will.

The most recent attempt at resettlement was started in 2000 and, despite tensions between the Soy and Mosop clans over allocation, and the political instrumentalisation of the issue during the 2002 elections, the land survey for phases I and II began in 2003 and identified a total of 2166 5-acre plots. To date a total of 2157 plots have been allocated to the registered beneficiaries. The third phase of the resettlement has, however, been particularly contentious, and both the Soy and Mosop clans lay claim to the land in question. In particular, the Soy clan expresses its dissatisfaction at having been allocated only 40% of land in the first two phases of resettlement. It was during the contentious discussions on land allocation under Phase III that the SLDF, founded in 2005, began its violent campaign, ostensibly to defend Soy land under the Chebyuk allocation scheme. It engaged in executions of civilians, rape, mutilation, theft and a range of criminal activities including extortion. Interventions by the police, the Kenyan Rapid Deployment Unit and the provincial administration all proved ineffective in preventing this violence. Initially, the arrival of the military in March 2008 was widely

⁶⁸ The Mosop are the Ogiek people of Mount Elgon. They are also referred to as the “Ndorobo”, a derogatory term meaning “the poor ones” in Maasai.

welcomed by the population of Mount Elgon, however military atrocities soon replaced those of the SDLF.

Requested Actions

While unconditionally condemning the strategy of violence employed by the SLDF, OMCT, IMLU and ICJ Kenya join in stating that torture is a wholly unacceptable response to the human rights violations perpetuated by groups such as this.

*Please write to the **Government of Kenya** asking it to:*

- **Respect** its obligations under the international human rights instruments it has ratified, including the Convention Against Torture;
- **Suspend** forthwith Operation Okoa Maisha in Mount Elgon District;
- **Establish** an independent commission to ensure that all those responsible for human rights violations, including army officials, are brought to trial;
- **Take** all necessary steps to ensure that victims of torture and their families receive just and adequate reparation and are given all necessary support for their reintegration into their communities;
- **Begin** immediate documentation of all those who have died or been injured as a result of the Okoa Maisha Operation and notify family members regarding the whereabouts and status of their next of kin;
- **Use** non-violent investigative methods to identify members of the SLDF responsible for human rights abuses and other crimes;

*Please also call on the **Government of Kenya** to:*

- **Finalise and adopt** the National Policy on Peacebuilding and Conflict Management of 2005-6, which will provide a framework for addressing security issues in Mount Elgon and elsewhere and end the reactive and crisis-driven approach to conflict management and resolution;
- **Recognize** that land issues are often the root cause of community violence in Kenya and take concerted steps to reach fair and just resolutions to land disputes in Mount Elgon and elsewhere, independent of political and ethnic interests;
- **Properly** implement section 75 of the Constitution dealing with property and land rights;
- **Initiate** a process of land reform aimed at resolving the land issue in Kenya. The process should involve the consultation of representatives of all groups concerned and affected by land conflict. This reform should also foresee the possibility of establishing an independent inspectorate to monitor land use under the provisions included in the reform;
- **Implement** without delay the recommendations included in the Report issued by the Ndungu Commission, set up in 2003 to investigate the irregular allocation of public land; in particular, implement the recommendation highlighting the urgent need for a Land Titles Tribunal that deals with the rectification of the illegal allocation of lands on a case by case basis;
- **Establish** a transparent and clear system of registration of land titles in order to avoid further episodes of conflict deriving from uncertainty over land allocation.

Addresses

Write to the addresses below and copy in this write-up.

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Major General Hussein Ali
Commissioner of Police
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Nairobi 00200,
Kenya

Information on action taken and follow-up

OMCT would appreciate receiving information on any action taken in relation to the matters dealt with in this Action File so that it might be shared with OMCT's network and others interested in this issue. Please quote the code of this appeal on the cover page in contacting us (KEN040608.ESCR).

Geneva, 4 June, 2008

World Organisation Against Torture

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