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

**An alternative report to the Committee against Torture
November 2008**

A report compiled by the World Organisation Against Torture,
in collaboration with
the International Commission of Jurists - Kenya and the Independent Medico-Legal Unit
In the context of the project
"Preventing torture and other forms of violence by acting on their economic, social and cultural root causes"



Independent Medico-Legal Unit



International Commission of Jurists-Kenya



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“How to prevent or reduce violence, including torture,
by acting on its root causes, often found in
violations of economic, social and cultural rights ...
goes to the very heart of human rights protection.”

Louise Arbour,
United Nations High Commissioner for Human Rights ¹

¹ OMCT, *Attacking the Root Causes of Torture: Poverty, Inequality and Violence – An Interdisciplinary Study*, Geneva, 2006, p.9. www.omct.org

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OMCT would like to thank its partners, the International Commission of Jurists (ICJ)-Kenya and the Independent Medico-Legal Unit (IMLU), without whose support and enthusiasm this report would not have been possible. OMCT is particularly grateful to Priscilla Nyokabi of ICJ for her invaluable role in conceptualizing and reviewing this report and to Alfred Itunga of IMLU for his precious contributions.

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- The Centre for Minority Rights Development (CEMIRIDE), for the part on violence in the context of land conflict;
- The Coalition on Violence Against Women (COVAW), for the part relating to violence against women and property rights;
- The Kenya Alliance for the Advancement of Children (KAACR), for the part relating to violence against children.

This report was prepared by Francesca Restifo, with inputs from Tom McCarthy and Michael Miller.

EXECUTIVE SUMMARY

The purpose of this report is to help eliminate torture and cruel, inhuman and degrading treatment and punishment in Kenya by making recommendations to address their economic, social and cultural root causes. OMCT has submitted another report addressing the same issues from a complementary perspective to the Committee on Economic, Social and Cultural Rights in order to enable that Committee and the Committee against Torture to adopt mutually reinforcing recommendations addressing the root causes of torture in Kenya.

The present report is based on documentation provided by national NGOs and on the information gathered during a preparatory mission that OMCT undertook in Kenya during the month of April 2008. The mission also included a number of fora, which gave local communities and victims of violence the opportunity to express their views on and experience of these issues for transmission to the Committee against Torture. These fora are referred to in text boxes in this report.

The report describes the extensive violence deriving from deep poverty and inequality that is taking place in Kenya. In this respect, the particular case of Westlands is examined. It provides information on how the poor, particularly those living in informal settlements, are regularly harassed, forced to pay bribes and arbitrarily arrested by the police. The report demonstrates that Kenyan prisons are predominantly populated by the poor, owing to the unaffordability and inaccessibility for them of justice, and analyses the impact of lack of financial means in terms of overcrowding and unhealthy and inhuman living conditions in Kenyan prisons. The report discusses land conflicts that generate violence and the Government's inadequate response to address inequitable land distribution. In this respect, the report draws attention to the recent allegations of torture in Mount Elgon District. The strong linkages between denials of access to land and violence exacerbate ethnic divisions by increasing tensions, insecurity, dissatisfaction, poverty and powerlessness. Furthermore, the persistence of certain cultural norms, stereotypes and traditions perpetuates discrimination and violence against women and girls in Kenya, and lack of economic and social empowerment prevents women from enjoying their civil and political rights, including access to justice in the case of violence. Poverty is the main cause of the high levels of trafficking in women and girls and sexual exploitation in the country.

The report concludes that the State is directly responsible for torture and ill-treatment committed against the poorest, for the economic, social and cultural policies that lead to such treatment and for violence against the poor by non-State actors in Kenya.

The report offers a set of recommendations addressing the various economic, social and cultural dimensions that underlie torture and other forms of violence in Kenya, including measures to help ensure the rights of the poor in relation to, inter alia, pre-trial detention, access to justice, arbitrary arrest, land conflict, and violence against women and children. Also proposed are concrete measures for implementing these recommendations, including specific programmes that focus on torture prevention activities and economic and social development actions, as well as the establishment of a permanent body to design and monitor these activities.

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A KEY TO READING THIS ALTERNATIVE REPORT

The effective elimination of torture and other forms of violence requires a multifaceted and integrated approach that incorporates respect for a wide range of human rights: civil and political as well as economic, social and cultural. To this end, OMCT is submitting the present alternative report that specifically focuses on how to fight torture in Kenya by addressing its economic, social and cultural root causes. In addition to submitting this report to the Committee against Torture at its forty-first session, OMCT has submitted to the Committee on Economic, Social and Cultural Rights a report on Kenya entitled *The Lie of the Land* that considers torture and other forms of violence from the perspective of the International Covenant on Economic, Social and Cultural Rights. By submitting these two alternative reports, OMCT would like to provide the Committees with a basis for adopting mutually reinforcing recommendations that address a wide range of causes of torture and cruel, inhuman or degrading treatment.

In order to be more effective, the present report does not follow the traditional division into articles of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but addresses torture on a topic-by-topic basis, providing facts and figures, data and case-studies.

The present analysis was conceived in the light of the principles of indivisibility and interrelation of human rights, to which OMCT attributes paramount importance. The purpose of this study is to elucidate the way in which, in Kenya, torture and other forms of violence are related to disrespect of economic, social and cultural rights. The report was prepared with the intention of providing guidance to the Committee against Torture, in particular in its consideration of possible conclusions and recommendations that could promote change in the country. This analysis tries to illustrate the diversified socio-economic dimensions of torture in Kenya by addressing the issue of both the State's direct involvement in perpetuating torture against the poorest and the State's responsibility for economic, social and cultural policies that lead to torture and ill-treatment. In particular, this latter aspect shows the extent to which, on many occasions, the Government of Kenya is accountable for cruel, inhuman or degrading treatment inflicted by actors other than the State.

OMCT firmly considers that, in order to ensure effective preventive actions, any strategy aimed at eradicating torture requires a comprehensive approach that looks into the root causes of the issue. If torture is to be eliminated, its root causes must first be understood and then effectively addressed. OMCT has conducted extensive research² on the link between violence and violations of economic, social and cultural rights. This research demonstrates that the majority of torture victims come from the most disadvantaged social classes. In particular:

- 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, as well as violence against women and children, because

² For more information, see the OMCT study *Attacking the Root Causes of Torture: Poverty, Inequality and Violence – An Interdisciplinary Study*. www.omct.org

of their vulnerability and because their poverty does not allow them to defend themselves and demand their rights.³

- Violence is inflicted on persons because they demand respect for economic, social or cultural rights. Trade unionists, workers, human rights defenders and citizens in general, in the exercise of their legitimate human right to demonstrate, strike or otherwise claim respect for basic economic, social or cultural rights, often are subject to violent attacks by official and private forces. If arrested, they also risk being subjected to cruel, inhuman and degrading treatment and even torture.⁴
- Denials of economic, social and cultural rights can be carried out so violently as to be considered ill-treatment under international treaties.⁵
- Policies and programmes of governments, private actors or development and financial institutions can increase poverty and inequalities that can lead to increased official violence, criminal violence and domestic violence.⁶

This report is based on the international legal obligations of Kenya under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” (art. 2, Para. 1) and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment” (art. 16, para. 1).

The Committee has been firm in describing the extent of State responsibility to take action to prevent torture and other cruel, inhuman and degrading treatment or punishment. With regard to non-State and private actors, the Committee has stated:

Where State authorities or others acting in official capacity ... know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility ... The Committee has applied this principle to

³ See, for example, the Argentine case study “The Village” in the OMCT study *Attacking the Root Causes of Torture: Poverty, Inequality and Violence – An Interdisciplinary Study*.

⁴ For a more detailed description, see the paper OMCT presented to the Committee against Torture, “Torture and violations of economic, social and cultural rights: appraisal of the link and relevance to the work of the United Nations Committee against Torture”, OMCT (Geneva, November 2001), in particular sections 2 and 3.

⁵ See Views of the Committee against Torture on Complaint No. 161/2000 against Yugoslavia, submitted by Hajrizi Dzemajl (CAT/C/29/D/161/2000).

⁶ The OMCT study *Attacking the Root Causes of Torture: Poverty, Inequality and Violence – An Interdisciplinary Study* contains examples of public policies in the economic and social fields that directly increased poverty and inequality in large sectors of a society, which, in turn, resulted in a very significant increase in violence, including ill-treatment and torture (see, in particular, the chapters and case studies relating to Argentina, Egypt, Nepal and Uzbekistan). Similar links have been reported by other sources, including the United Nations Special Rapporteur on the question of torture (see section 3 of the OMCT paper presented to the Committee against Torture, “Torture and violations of economic, social and cultural rights: appraisal of the link and relevance to the work of the United Nations Committee against Torture”, OMCT (Geneva, November 2001).

*States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.*⁷

Furthermore, the Committee has already established the link between violations of economic, social and cultural rights, in particular the right to adequate housing, and cruel, inhuman and degrading treatment in its views adopted in relation to communication No.61/2000 on Yugoslavia.⁸ In that case, the Committee found that the violent way in which Roma were evicted from their homes, and their dwellings destroyed and burned, in the former Yugoslavia constituted acts of cruel, inhuman or degrading treatment violating the Convention. Although the destruction was carried out by private individuals, because the authorities acquiesced in the destruction, the Committee found that the State party was responsible for the violations of the Convention.

Lastly, the specific vulnerability of the poor, excluded, marginalised and minority sectors of Kenyan society, as well as the vulnerability of women and children to torture and other forms of violence, is clearly described in the present report. Kenya, as a party to the Convention, has the specific responsibility to protect vulnerable groups. In the words of the Committee:

Protection for individuals and groups made vulnerable by discrimination or marginalization

*The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment... States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above.*⁹

⁷ General Comment No. 2: Implementation of article 2 by States parties (CAT/C/CG/2), para. 18.

⁸ CAT/C/29/D/161/2000.

⁹ General Comment No. 2: Implementation of article 2 by States parties (CAT/C/CG/2), para. 21.

METHODOLOGY OF THE REPORTING PROCESS

This alternative report has been developed by OMCT in Geneva in collaboration with the Kenya Section of ICJ and IMLU in Nairobi.

With a view to submitting this report, OMCT carried out a preparatory mission to Kenya from 12 to 18 April 2008, organised by ICJ. This mission involved two OMCT staff and a number of Kenya-based organisations. The aim of the preparatory mission was twofold: firstly to consult representatives of the Government and civil society in Kenya on how violence is related to denials of economic, social and cultural rights in the country, and secondly to give voice to the people directly affected by torture and violence there, to record their experiences, to seek their inputs and recommendations, and to bring their voices to the Committee.

The mission also had a rural component, which was organised by the Centre for Minority Rights Development (CEMIRIDE) and which included visits, meetings and fora in rural areas. This part of the mission was aimed at collecting targeted information for the preparation of the alternative report *The Lie of the Land*, submitted to the Committee on Economic, Social and Cultural Affairs.¹⁰ The present report frequently refers to that report for detailed socio-economic analysis.

In the context of the preparatory mission to Kenya, ICJ organised meetings in Nairobi with national authorities and local NGOs that provided valuable information on specific issues¹¹ - in particular meetings with the following organisations and persons:

- Under-Secretary on Security, Office of the President of Kenya
- Kenya National Commission on Human Rights
- Coalition on Violence Against Women (COVAW)
- IMLU
- Kenyan Alliance for the Advancement of Children's Rights (KAACR)
- Kenyan Network of Grassroots Organisations (KENGO)
- Economic and Social Rights Centre
- Professor Mbote, Faculty of Law, University of Nairobi

In addition, ICJ set up three consultative fora with local communities in Nairobi. These fora addressed the challenges faced by informal settlement dwellers, informal sector workers, the landless, pastoralists and indigenous communities. Besides providing first-hand information, these fora also offered eloquent testimony to how these vulnerable groups are systematically exposed to violence and other forms of abuse. All forum meetings were held in formal or semi-formal settings and were both filmed and photographed, with the communities' approval. Participants spoke Kiswahili or English and interpretation was provided when necessary. Through the present alternative report, OMCT wishes to give voice to these marginalised groups, whose conditions frequently remain unheard and unacknowledged. Detailed information on these fora is included in text boxes in this report. These boxes offer a brief overview of the context of the meetings and provide rough estimates of the

¹⁰ For further information, see *The Lie of the Land*, alternative report submitted by OMCT to the the Committee on Economic, Social and Cultural Rights at its forty-first session. www.omct.org

¹¹ For further information, see the appendix

number, gender and age of participants. The boxes also summarize the main concerns discussed at the public debates held during the fora.

The preparatory mission was carried out by Michael Miller and Francesca Restifo, on behalf of OMCT.

This report is the product of the information collected thanks to the commitment of ICJ in conceiving and organising the preparatory mission. It is also the outcome of the valuable contribution of IMLU. In this respect, the analysis draws its data from a nation-wide survey on torture, *Understanding Torture in Kenya, an Empirical Assessment*, carried out by IMLU in 2007. The survey was aimed at gathering information from a representative sample of 980 selected respondents. The sampling process utilised the division of the country into eight provinces, from each of which two districts were selected. A questionnaire was administered to the 980 respondents. The information collected mainly focused on the perception of torture, the experience of suspects in informal and police custody, court processes and prison life. Qualitative techniques applied for the survey included in-depth interviews with key informants and targeted group discussions.

The survey's sample population had the following characteristics. Among the respondents, 76.2 per cent were men and 23.8 per cent women. The age-range was 18 to 77, with an average age of 32. The educational level was principally spread between primary (39.1%) and secondary (31.0%) education, followed by tertiary (12.8%) and by no education (17.1%). The survey also captured the occupation profiles of respondents: self-employment accounted for 56.3 per cent of the respondents, those employed comprised 19.6 per cent, farmers (smallholders) comprised 7.8 per cent and the rest (16.3%) were engaged in other livelihood activities.

INTRODUCTION

A socio-economic analysis of poverty, inequality and violence in Kenya

Torture and other forms of violence continue to increase in Kenya: every year more than 5,000 persons continue to be victims of torture and more than 10,000 are affected indirectly.

*This situation will recur year upon year, unless the Government takes concrete steps to eradicate torture by acting on its economic, social and cultural root causes.*¹²

Despite its prohibition under both international and national law,¹³ torture and other cruel, inhuman or degrading treatment and punishment still occur with frequency in Kenya. A report submitted to the Committee by the Kenya National Commission on Human Rights emphasises that the prime factor that determines the risk of exposure to torture is whether “one belongs to the most vulnerable groups, which include, among others, economically marginalized, illiterate, women, youth and children, refugees, persons with disabilities”.¹⁴ These data are confirmed by the recent survey carried out by IMLU of the prevalence of torture in Kenya.¹⁵ The survey’s findings indicate that the perpetrators of torture are mainly police officers, whereas their victims predominantly belong to the poorest segments of Kenyan society. The study further reveals that torture commonly takes place in informal settlements and/or in overcrowded prisons.

The State report¹⁶ itself indicates that “poverty remains the major impediment to both the fulfilment of basic needs and the realization of the full potential of many Kenyans, particularly women and children”.¹⁷ Recent statistics for Kenya show that the country’s wealthiest 10 per cent of households control 42 per cent of total income, while the bottom 10 per cent control less than 1 per cent of income.¹⁸ The disparity relates both to opportunities and to actual enjoyment of rights. Thus, differences between the poor and the rich are to be found in access to and enjoyment of opportunities, services and infrastructure. This entails discrimination in access to justice, education, health, land and livelihoods, as well as in the realization of civil and political rights. Uneven wealth distribution is also reflected geographically within and among the eight provinces into which Kenya is divided, where it is manifested in differences in life expectancy, wealth, access to basic requirements, access to justice, employment opportunities, educational levels and average incomes. For example, in 2000, the proportion of the population living below the poverty line in the North-Eastern Province amounted to 73.1 per cent, compared to 35.3 per cent in the same year in the Central Province. Significantly, similar discrepancies are found with regard to access to justice. The Central Province has the highest number of courts

¹² Statement by IMLU.

¹³ Constitution of Kenya, section 74, “Protection from inhuman treatment”:

No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

¹⁴ Kenya National Commission on Human Rights, paper submitted to the Committee against Torture at its forty-first session.

¹⁵ *Understanding Torture in Kenya: An Empirical Assessment*, IMLU, August 2007.

¹⁶ Initial periodic report of Kenya (CAT/C/KEN/1), submitted to the Committee against Torture for consideration at its forty-first session.

¹⁷ *Ibid*, para. 10.

¹⁸ *Pulling Apart: Facts and Figures on Inequality in Kenya*, Society for International Development, 2004.

(20) and the smallest number of people per court (186,208). Conversely, the North-Eastern Province has the smallest number of courts (2) and the highest number of people per court (481,072).¹⁹

In addition, the plethora of customary laws reflects the variety of cultures, religions, traditions and languages that characterise the different ethnic communities. Conflicting elements among different legal systems further challenge the enjoyment of rights and define the way people relate to institutions. Inequality and discrimination affect the principle of equal access to rights, as enshrined in the International Covenant on Civil and Political Rights.

While the data clearly show that in Kenya torture and other forms of violence are inflicted on the poor, in order to prevent torture and violence, it is necessary to go further and to take into account the context, reasons and circumstances under which torture takes place. The economic status of individuals also defines how often they are arbitrarily harassed by the police. Torture and other forms of violence can be inflicted because a person cannot afford to pay the bribes demanded; cruel or degrading treatment is systematic in prisons, due to over crowding together of suspects unable to afford bail and legal assistance; the police undertake arbitrary actions and other forms of abuse in poor areas; women are unable to address violence owing to their lack of financial means; torture is inflicted on street children and on children in conflict with the law; ill-treatment and violence are the consequences of land clashes; police react with excessive use of force to suppress demonstrations against injustices. Poverty has been recognised as the main cause of insecurity and crime in Kenya, including human trafficking, sexual exploitation and child exploitation, levels of which remain high in the country.

The combination of these factors means that the most common victims of torture in Kenya are persons belonging to economically disadvantaged sectors of society. An understanding of the root causes, as well as of the linkages between the different factors involved, is crucial to establishing a set of effective recommendations designed specifically to eradicate - or at least reduce - torture, ill-treatment and other forms of violence in Kenya.

¹⁹ Ibid.

1. Criminalisation of the poor: arbitrary arrests and police corruption

The right to liberty and security of a person is, in principle, guaranteed by the Constitution of Kenya,²⁰ de facto, however, it is systematically challenged by arbitrary police actions carried out in particular in overcrowded and poor urban neighbourhoods. It is reported that torture in Kenya takes place in secrecy, through a wide range of arbitrary police actions, including arbitrary arrests grounded on false charges.²¹

According to the above-mentioned IMLU survey, 71 per cent of respondents who had been held in informal custody had been invited to pay a bribe, either in the form of money or favours, in exchange for liberty.²² To engage in bribery in exchange for liberty implies escaping torture and harassment during detention, or simply avoiding the higher costs of legal assistance. Bribery occurs on the streets - upon being stopped by the police - or in police stations. In the latter case, bribes may be paid in order to be charged with a lesser offence, irrespective of whether the original charge was grounded or not, or to avoid being taken to court and then staying in remand at length.²³ Suspects who refuse to give bribes are subject to harassment, ill-treatment and other forms of physical and psychological violence. In addition, ICJ indicates that any attempt to complain to higher authorities is met with harsh reprisals against both complainants and their families, as a warning to the community. According to testimonies, the police also arrest young girls at dusk. These girls are locked in cells, removed in the middle of the night and, in exchange for forced sexual intercourse, set free the morning after. Some of them reported having been raped by male inmates in cells connected by the same corridor.

The connection between police violence and police corruption constitutes an emerging aspect of torture that was already dealt with in the 2005 OMCT report to the Human Rights Committee. The frequency with which this phenomenon is reported suggests that it is widespread, common and systematic. This is confirmed by the fact that police officers have set up extortion cartels to obtain money from the community.²⁴ In legal terms, this practice is made possible by a legislative framework that allows police to arrest upon mere suspicion.²⁵

Police corruption is more consistent in the poorest areas, where the police methodically undertake night rounds. In particular, it is a common practice for police officers to round up the poor, women, hawkers or street children and then to proceed with massive arrests on the most disparate charges, such as drunkenness, disorderliness, prostitution, vagrancy or simply the suspicion of being an illegal alien. Those arrested are subsequently held in police stations. Most of them are unable to

²⁰ Sections 70 and 72.

²¹ Source: IMLU.

²² *Understanding Torture in Kenya, an Empirical Assessment*, IMLU, August 2007.

²³ *State Violence in Kenya*, OMCT alternative report to the Human Rights Committee, 2005.

²⁴ *Ibid.*

²⁵ Constitution of Kenya, section 72 (1) (e):

(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:

...

(e) Upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law of Kenya.

access legal assistance because they lack the financial means and/or because they are unaware of their own rights.²⁶ IMLU research indicates that the police regularly beat suspects, particularly those who are unable to pay bribes or to lodge complaints against police misbehaviour. Maltreatment may only stop if suspects confess to the charges made, even when they are ungrounded. Testimonies indicated that police bribing methods have common characteristics. Allegedly, police officers generally stop persons individually with petty excuses, frequently at dusk on their way home. As the persons start enquiring about the reason for their being stopped or simply reply to the allegations, they are required to “speak adequately with the police”. This constitutes an indirect invitation to pay a bribe in order to avoid being apprehended and taken to a police station.

ICJ indicated that the systematic and recurrent nature of these arbitrary arrests may imply that not infrequently the same person ends up repeatedly being the victim of similar ill-treatment. Indeed, this extortion racket has heavy costs for young people, their families and communities. ICJ emphasised that, given that their meagre resources are routinely transferred to corrupt police officers, victims find themselves in a constant cycle of debt, accumulated to pay bribes. This cycle of debt exacerbates their already poor living conditions and may further mean that families are unable to meet daily subsistence expenses, or even that they are forced out of their rented premises and their household assets are confiscated to cover debts and recover unpaid rents. The resulting psychological impact particularly affects the younger generations, who, depending on their individual experiences, gradually lose trust and confidence in public institutions, engage in criminal activities and end up joining the corrupt system. In this respect, ICJ reported a victim admitting that, “sooner or later, as one becomes acquainted with hard-core criminals who are in the same cells as the innocent young men, one becomes easily recruited into the criminal life”.

1.2. Case study: police violence against the poor in Westlands

Striking examples of police violence against the poor emerged during the forum on youth, violence and socio-economic rights held in the Westlands constituency. Westlands is an area of Nairobi, with both low- and high-income neighbourhoods, that became notorious for the violent evictions carried out in 2005 in the informal settlement of Deep Sea. The case of Westlands, outlined below, illustrates how violence is systematically related to police corruption and is inflicted against the most marginalised. In particular, it clearly delineates the profile of the victims and contextualises the behaviour of the perpetrators.

²⁶ *Understanding Torture in Kenya, an Empirical Assessment*, IMLU, August 2007.

Box 1: Forum on Youth and Socio-Economic Rights

Nairobi, 16 April 2008

Number of participants: approximately 25

Age: 18 to 30 (but a few older than that)

Gender distribution: balanced

Low-income groups from the Westlands constituency

The aim of the forum consisted in collecting testimonies regarding arbitrary arrests and poverty; police corruption and bribery against the poor; violence and corruption in prisons; access to justice; hawking and the informal sector; evictions; and violence against women. The forum was also intended to collect, collate and record first-hand the experiences of victims from the most marginalised sectors whose voices would have otherwise remained unheard. The results of this workshop will be used as a tool to hold government to account and to provide a platform for dialogue on how to better the situation. The information will also be packaged and released to the general public through the media and civil society as a means to raise awareness of and encourage action against such abuses.

Public debate

The forum's participants reported that the Westlands constituency of Nairobi is the scene of consistent violations of human rights, including the right to liberty, carried out by the security system. Most affected are the economically disadvantaged inhabitants of the constituency, in particular youth. Reportedly, it is a common occurrence for any person on the streets after 6 p.m. to be arrested on false charges. On a regular basis, the police arbitrarily arrest young people, particularly in informal settlements and in the evening, based on insignificant suspicion or inexistent charges, and notwithstanding the absence of a curfew. These kinds of arrests are the grounds for police corruption, bribery and extortion. Indeed, the police offer immediate release in exchange for an amount of money or, in the case of women, in exchange for sexual intercourse. Those who cannot pay are taken to the police station and have to pay bail if they do not want to be taken to court. Findings indicate that such arrests constitute an extortion racket for the police to raise money and obtain valuables. Persons who have money or goods to hand over are immediately released; those who have not are taken to the police station. Families are then forced to pay bail for the release of a family member and to avoid trial and the costs of legal assistance. It was reported that young people who had been remanded for months without charge were exploited in police stations by being made to do manual and tedious jobs.

2. Denied access to justice and high costs of legal assistance

In Kenya, access to justice is seriously compromised by the extremely high costs of legal assistance, which remains largely inaccessible since, as the State report itself indicates, half of the Kenyan population lives below the poverty line. Consequently, besides being exposed to corruption and bribery, Kenyans are also prevented from enjoying their right to habeus corpus, because the necessary legal assistance is too costly. In this respect, OMCT already drew attention to the lack of legal aid administrated by the Government and called for the creation of an office of the public defender that would defend all persons against human rights violations, as proposed in the draft constitution. In practice, upon arrest and arraignment in court, most Kenyans are unable to meet the high costs of legal representation and therefore are unable to seek justice. Suspects end up sentenced to prison on false charges.²⁷

Data from the survey conducted by IMLU confirm that the majority of those serving prison sentences are more often the most economically disadvantaged and are, more commonly, individuals with lower levels of education, who are less aware of their

²⁷ *Understanding Torture in Kenya: An Empirical Assessment*, IMLU, August 2007.

rights.²⁸ Table 1 shows the relationship between different levels of economic resources and the ability to obtain legal services. The data refer to four categories: employed, self-employed, farmers and those with other sources of livelihood. These employment categories indirectly reflect the kind of economic resources available and thus financial ability to obtain legal services. The table clearly illustrates that the ability to obtain legal services is low for all categories.²⁹ Indeed, even among the employed, only 34.3 per cent are able to obtain legal assistance. This means that the cost of legal services is beyond the financial capability of ordinary Kenyans.

Table 1. Economic resources and ability to obtain legal services

<i>Employment categories</i>	<i>Ability to obtain legal services</i>
Employed	34.3%
Self-employed	21.8%
Farmers	10.3%
Other sources of livelihood	13.7%

Source: IMLU

3. Bail, remandees, prison overcrowding and torture

Torture is further related to lack of financial means in respect of requests for bail and conditions of pre-trial arrest. Those who cannot afford to pay bail are remanded in detention for a period reportedly beyond that foreseen by section 72 (3) of the Constitution.³⁰ Consequently, “remandees”, who de facto correspond to those who do not have financial means to pay bail for release from preventive incarceration, constitute the largest proportion of detainees. Remandees remain in prison as long as they are not able to pay, and are eventually found guilty on the basis of false charges.³¹

The ability to seek cash bail is also linked to the educational level of suspects. The IMLU survey assessed the relationship between those who seek to pay bail and educational levels. The data shown in table 2 reveal that as many as 77.6 per cent of detainees who fall into the category of “no education” do not seek cash bail, followed by 70.9 per cent of those with primary education, 66.4 per cent of those with secondary education and 63.6 per cent of those with tertiary education. These figures suggest that higher educational levels correspond to better opportunities to seek justice, and better awareness of personal rights.³² However, regrettably, irrespective

²⁸ Ibid.

²⁹ *State Violence in Kenya*, OMCT alternative report submitted to the Human Rights Committee, 2005.

³⁰ Constitution of Kenya, section 72 (3):

A person who is arrested or detained-

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

³¹ *Understanding Torture in Kenya: An Empirical Assessment*, IMLU, August 2007.

³² Ibid.

of educational level, those who seek cash bail represent a minority ranging from approximately one quarter to one third of detainees.

Table 2. Relationship between educational level and seeking bail

Education level	Not seeking cash bail
No education	77.6%
Primary	70.9%
Secondary	66.4%
Tertiary	63.6%

Source: IMLU

Frequently, courts set strict bail conditions that cannot be met by the accused person. Reportedly, the average bail is out of reach, given the average Kenyan salary. As a result, remandees, detained in pre-trial custody at length, further overcrowd the already congested Kenyan prisons.³³ In turn, prison overcrowding compromises decent living conditions for prisoners, including hygiene and health conditions. OMCT has already denounced the situation in Kenyan prisons and emphasised that the poor living conditions there amount to cruel, inhuman or degrading treatment. The episodes at Meru Prison concerning the death of five prisoners in September 2004 offer an eloquent example.³⁴ Inhuman conditions are also to be found in other places of custody, including police stations, where national NGOs report unhealthy congestion in cells. Suspects narrate that they have slept standing in overcrowded store rooms turned occasionally into cells. Such conditions facilitate the spread of airborne diseases, such as tuberculosis, and the transmission of HIV through sexual abuse. ICJ reported that, frequently, “suspects” leave the cells with diseases ranging from water-borne diseases to skin diseases.

4. Police violence in informal settlements

Kenyan informal settlements are notorious for their extremely poor living conditions, congestion and lack of basic services and infrastructure, as well as for police violence and arbitrary actions. These elements are further exacerbated by political unwillingness to address the situation and institutional indifference in this regard. The marginalisation experienced by residents of Kenya’s informal settlements is compounded by the lack of trustworthy police and of a fair and effective justice system, despite the fact that, as indicated by IMLU, the presence of the police is predominant in urban informal settlements.

In addition, people living in informal settlements are constantly at risk of eviction, displacement and the negative impact of upgrading projects.³⁵ On 16 March 2007, the Special Rapporteur on adequate housing addressed a letter to the Government of Kenya, focusing on the negative impact of forced evictions on the poorest and most marginalized groups in society. He also recalled the commitment made by the Government to addressing the increase of informal settlements in urban areas, particularly in Nairobi. The OMCT alternative report *The Lie of the Land* - submitted to the Committee on Economic, Social and Cultural Rights - points out that in Kenya urban evictions take place with improper legal procedures, lack of consultation and

³³ *State Violence in Kenya*, OMCT alternative report submitted to the Human Rights Committee, 2005.

³⁴ Ibid.

³⁵ For further information, see OMCT alternative report *The Lie of the Land*, submitted to the Committee on Economic, Social and Cultural Rights at its forty-first session. www.omct.org

the use of force by officials. An emblematic case is the eviction carried out in 2005 in the Deep Sea settlement, near Westlands, when Government-owned bulldozers were used to demolish the homes of 850 families, and armed police and city officials were involved in the brutal action.

Box 2: Forum on Informal Settlements

Nairobi, 17 April 2008

Number of participants: approximately 100

Age: all ranges

Gender distribution: balanced

Low-income groups, residents of informal settlements

The forum was organised with the aim of collecting first-hand information on: criminalization of the poor; police violence against the poor; access to justice and poverty; unemployment; arbitrary arrests; evictions; health

Public debate

The participants in the forum reported that dwellers in informal settlements are systematically harassed and asked for bribes by the police. In particular, police violence is inflicted on the poor, including poor children and poor women. Participants emphasised that they are the victims of arbitrary arrests. They also complained that access to justice is affected by bribery and corruption. Therefore, those who cannot afford bribes are more vulnerable to arbitrary arrest and other abuses. District chief administrators are unwilling to adequately address these human rights violations in informal settlements or to take preventive measures, including fighting impunity. On the contrary, residents of informal settlements are victims of extrajudicial structures. It was reported that in 2007 the police had killed many people (by summary shootings) and 75 women had been beaten. Informal settlement dwellers are also exposed to evictions and violence inflicted by city council officers. The police allegedly facilitate the evictions process and are even involved in the destruction of buildings. A witness reported that after having complained about brutal police action during evictions, he was arrested and detained for several hours.

Furthermore, participants reported that in police stations information is extracted under torture and ill-treatment by the police. Women and children are victims of sexual abuse and rape, both by the police and by members of their family. In the latter case, the police treat domestic violence as a private matter. Single mothers living in informal settlements with their children face particularly harsh conditions: the lack of shelters for victims of domestic violence and for single mothers exposes them to the risk of further violence, including sexual exploitation. In this respect, women complained that the Gender Desk programme had been poorly implemented, if at all. In many police stations, the programme is still unknown. A number of participants also denounced forced detentions in hospitals for inability to pay the bills. Allegedly, hospitals often detain people until they are able to pay the bills (this occurs in particular in Kenyatta Hospital). The longer persons are detained, the more they have to pay, since medical fees are set on a daily basis. New mothers and women victims of violence cannot see their children and family as long as they are unable to pay the bills.

5. Extrajudicial killings in poor areas: the case of the Mungiki

The Mungiki are a sect that has been described by the authorities as “a criminal gang” for its involvement in organised crime and a series of killings and murders. The sect was banned in 2002. The Mungiki are made up primarily of militants from Kenya's largest ethnic group, the Kikuyu.³⁶ The Mungiki leadership has openly claimed to have two million members around the country. Currently, their influence is principally manifested in poor urban areas and informal settlements, in particular Mathare, the second largest informal settlement in Nairobi. In informal settlements, they are entrenched in and mixed with the poorest segments of society, and there they

³⁶ BBC News, 17 September 2007. <http://news.bbc.co.uk/2/hi/africa/6998446.stm>

find fertile ground for corruption, bribery and other criminal activities. In this respect, the Mungiki are also allegedly connected with police corruption and extortion rackets. Mungiki members have also been involved in demanding protection levies from public transport operators and informal settlement dwellers in and around Nairobi.³⁷ In particular, residents of certain areas have had to pay a levy to the sect to be able to access communal latrines and for security at night.³⁸

In order to respond to and suppress the illegal activities of the Mungiki, the police have recently carried out a zero-tolerance policy against the sect, entailing extrajudicial killings and other arbitrary actions. A harsh illustration is provided by the police response to episodes of violence instigated by the Mungiki during 2000. On that occasion, the Rift Valley provincial commissioner, Peter Raburu, issued a shoot-on-sight order to the Kenyan police force and none of the government officials in charge of provincial administration or constitutional affairs opposed the order.³⁹ In 2002, more than 50 people died in clashes between members of the Mungiki and owners of *matatus* - local shared taxis. Similar clashes with owners of *matatus* occurred in 2007 and led to the intervention of the security forces. During the operation, one hundred people died as a result of the violence and excessive force employed.⁴⁰ In November 2007, a Kenyan human rights organisation, the Oscar Foundation Free Legal Aid Clinic-Kenya, claimed that the Kenyan police had killed as many as 8,040 people “by execution or torture during a crackdown on a banned sect”, adding that “a further 4,070 people had gone missing as security forces tried to wipe out the Mungiki sect”. The organisation emphasised that these deaths and disappearances had occurred over a period of five years up to August 2007.⁴¹

Informal settlement dwellers are therefore not only directly exploited and threatened by Mungiki criminality, but their lives are also seriously jeopardised by violent police reprisals against the Mungiki. A series of police shootings took place in 2007, when the Mathare informal settlement was closed off in a clampdown on the sect.

6. Police violence against informal sector workers

In Kenya, informal sector work, such as hawking, street trade and other casual labour, constitutes an important source of income that significantly influences the daily revenues of the poorest sectors of society. In urban areas especially, many Kenyans find their daily livelihoods and subsistence in a variety of informal activities. However, in Nairobi the needs of this unofficial sector are consistently challenged by corruption and harassment from the police and city council guards.

The Government has always minimised the importance of this informal sector and has failed to establish clear policies to regulate the situation of informal workers; workers on the margins of society are more vulnerable to arbitrary action and ill-treatment by local authorities. The Kenya National Commission on Human Rights reported that

³⁷ Ibid.

³⁸ For further information, see OMCT alternative report *The Lie of the Land*, submitted to the Committee on Economic, Social and Cultural Rights at its forty-first session. www.omct.org

³⁹ *State Violence in Kenya*, OMCT alternative report submitted to the Human Rights Committee, 2005.

⁴⁰ BBC News, 17 September 2007. <http://news.bbc.co.uk/2/hi/africa/6998446.stm>

⁴¹ BBC News, 25 November 2007. <http://news.bbc.co.uk/2/hi/africa/7112183.stm>

violence against informal sector workers is an unsolved issue that needs to be adequately addressed.⁴²

During the preparatory mission, OMCT collected testimonies in Nairobi on how informal workers are systematically at risk of abuse and arbitrary action on the part of city council guards (*askaris*). According to witnesses, hawkers pay a fee corresponding to 25 shillings per week; however, their activities are neither recognised nor regulated and no licence is provided. The lack of any recognition implies the absence of any right to association; consequently, any attempt to protest is met with violence and brutality.⁴³ Kiosk owners and hawkers also reported that they are frequent victims of unannounced clean-ups, often carried out early in the morning. Informal sector workers further claim to be harassed by the police and by city council *askaris*, who extort bribes, destroy their property, steal their goods or hold them in prison until they are able to buy their way out.⁴⁴

7. Violence related to land disputes

Historical injustices, marginalization and political manipulation are among the factors that contribute to inter-ethnic conflicts and violence rooted in the issue of land. This is further exacerbated by the manipulation of political power at local levels, the exclusion of and discrimination against certain groups, and the unwillingness of the police to intervene and adequately address violent clashes deriving from land disputes.

The issue of land conflict is also reflected in the consistent unwillingness of the Government to undertake land reform that would lead to a more equitable land distribution, or to resolve confusion over land titles. In addition, the Government has failed to implement the recommendations contained in the report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (known as the Ndungu Land Report).⁴⁵ The Ndungu Commission was set up in 2003 to investigate the irregular allocation of public land. The recommendations issued by the Commission highlighted, *inter alia*, the urgent need for establishing a land titles tribunal to deal with the rectification - on a case-by-case basis - of the illegal allocation of lands, with the development of a comprehensive land policy and with the establishment of an inventory of public land. The Centre for Minority Rights Development (CEMIRIDE) emphasised that the reluctance of the Government of Kenya to design a legal framework that could address historical injustices relating to land has resulted, over the years, in many families and communities being deprived of their basic requirements, evicted and even massacred.

⁴² OMCT preparatory mission to Kenya, Nairobi, 15 April 2008.

⁴³ Testimony from the Forum on Economic, Social and Cultural Rights.

⁴⁴ *Kenya: Unfinished Democracy*, Human Rights Watch.

⁴⁵ 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. The report of the Commission 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 with examining complaints and conflicts regarding land allocation. For further information, see OMCT alternative report *The Lie of the Land*, submitted to the Committee on Economic, Social and Cultural Rights at its forty-first session. www.omct.org.

The strong linkages between violence and access to land have particularly affected ethnic divisions by increasing tensions, insecurity, dissatisfaction, poverty and powerlessness. In turn, land clashes have exacerbated the already poor economic conditions of affected communities⁴⁶ and compromised the enjoyment of their basic rights.⁴⁷ This vicious cycle also has a devastating effect on children. In August 2007, it was reported that poverty and frequent clashes among pastoralist communities in northern Kenya had prevented thousands of children from enrolling in school and made them more likely to commit acts of violence. Children of school age had been involved in inter-community violence, and conflicts between the Pokot and Samburu communities were reported to have adversely affected education in the Samburu and Laikipia Districts over the previous two years.⁴⁸

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people points out that in Kenya “communities claim that the Government’s response to these situations has been inadequate and that in many instances it has led to human rights abuses by security forces. In most cases, these abuses have not been seriously investigated and the victims have found no redress, leading to a widespread sense that impunity prevails”.⁴⁹ The Special Rapporteur has further drawn attention to police abuses involving the ill-treatment and arrest of community members in relation to social protests associated with land rights claims. “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.”⁵⁰ In addition, on that occasion, a number of organizations active in denouncing abuses against indigenous communities were allegedly the subject of systematic harassment and intimidation by the authorities.⁵¹

⁴⁶ Minority Rights Groups International and CEMIRIDE, “Kenya: minorities, indigenous peoples and ethnic diversity”. <http://www.minorityrights.org/?lid=645>

⁴⁷ For further information, see OMCT alternative report *The Lie of the Land*, submitted to the Committee on Economic, Social and Cultural Rights. www.omct.org

⁴⁸ “Kenya: insecurity, conflict affect education in northern region”, IRIN, August 2007.

⁴⁹ 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, para. 55.

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

⁵⁰ *Ibid.*, para. 60.

⁵¹ Including the Kenya Land Alliance, Osiligi in Laikipia and Mainyoito Pastoralist Integrated Development (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, para. 61.

7.1. Torture allegations in the Mount Elgon District

On 4 June 2008, OMCT, IMLU and ICJ issued an urgent appeal concerning ongoing torture and extrajudicial killings by the Kenyan army and police in the Mount Elgon District in the Western Province of the country.⁵² These represent a concrete manifestation of the economic, social and cultural dimensions of torture related to land conflict. The fierce violence that continues in Mount Elgon has its roots in the issue of poor land allocation, forced evictions and the consequent impact on the livelihoods of local communities.

The Mount Elgon District has been 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 carry out evictions 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 owing to the activities of the SLDF. In March 2008, the Kenya 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. Between early March and June 2008, it resulted in mass arrests and the subsequent prosecution of over 1,200 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. According to media reports, army officers have also assaulted journalists who attempted to cover the operation. IMLU indicated that “the Government is undertaking massive infringements of fundamental rights of the civilian population in the Mount Elgon District and its surroundings” in its efforts to identify SLDF members. IMLU also indicated that there were reports of minors having been interrogated and subjected to torture. The IMLU findings from a medico-legal investigation into torture by the military in the Mount Elgon District indicate that police officers have carried out mass arrests – often at dawn - accompanied by acts of physical violence, in Sabaot communities. According to the Kenya National Commission on Human Rights report *The Mountain of Terror*,⁵³ 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 as a result of injuries received during interrogation. The bodies of those who die in the military camps are reportedly taken to Kamarang, a hill in a forest area in Mount Elgon District, where they are buried in unmarked graves. Other bodies are dumped on farmland, with attendant risks to public health.

⁵² The full text (OMCT Action File KEN040608.ESCR) is available at:
http://www.omct.org/pdf/ESCR/2008/ken060608_escr_en.pdf

⁵³ Released on 15 May 2008.

<http://www.humanrightshouse.org/assets/1000KNCHR%20report%20on%20the%20Mt%20Elgon%20violence.pdf>

7.2. Public forum on access to land

Box 3: Forum on Access to Land

Nairobi, 14 April 2008

Number of participants: approximately 70

Age groups: all ages

Gender distribution: predominantly men

All income groups

Public debate

The participants in the forum discussed the role of land in Kenyan society and the link between land and violence. They pointed out that the land issue should be considered from a more comprehensive perspective and it should be associated with the overall uneven distribution of wealth that creates conflict. Participants underlined that land is important and remains a crucial issue for Kenyans. The land issue is not only linked to the problem of denied access to property rights but also to the general uneven distribution of wealth. Participants highlighted that, since the end of colonialism, clashes over land have been predominantly a war among the poorest. They added that the Government of Kenya is unwilling to address the land issue adequately and undertake land reform that would reduce unequal land distribution. In this respect, denied access to ownership constitutes a political issue. Denied access to land perpetuates poverty, marginalisation and conflict for the majority of poor Kenyans, to the benefit of the most privileged. The participants also discussed the root causes of land-related violence and indicated that violence is due to confusion over land plots and to lack of legal certainty about ownership. Title deeds have been unevenly and selectively distributed since the start of the post-colonial period. The Government still has an inconsistent attitude, allocating lands and title deeds on a personal basis. The allocation of land plots has also been manipulated for political purposes. The Government is unwilling to change the status quo and to move towards a more equal distribution of lands. Participants emphasised that the land issue in Kenya is closely linked to other important issues, such as informal settlements, HIV/AIDS, child protection and internally displaced persons.

Participants also discussed feasible solutions that would address the land issue effectively, and highlighted the fact that section 75 of the Constitution of Kenya does not properly acknowledge land and ownership rights.

Participants suggested that the Government should undertake land reform and establish a “Land-Use Inspectorate Department” to monitor the optimal use of lands. Furthermore, all land grants should be revised, updated, redistributed and scrupulously registered for better use. Lastly, the Government should envisage a resettlement plan in those new areas that need very little investment in terms of infrastructure.

Participants concluded that, in order to prevent further violence and conflict, the issue of land should be persistently and regularly tackled in order to maintain systematic awareness and encourage concrete measures that could effectively address the issue.

8. Violence against women in the socio-economic context of Kenya

The persistence of certain cultural norms, practices and traditions, coupled with entrenched stereotypes regarding the roles of women, perpetuates discrimination against women and girls in Kenya. Women are still extremely dependent on men and face cultural, economic and social challenges to articulating themselves as individuals. This lack of social and economic empowerment of women is due to a variety of elements, including poverty, lack of education, unemployment and a patriarchal system that perpetuates dependence on men and prevents women from enjoying a wide range of opportunities for self-development.

Discrimination and violence against women will not decline so long as these elements remain unaddressed, institutionalised and publicly accepted. The legal framework itself institutionalises these stereotypes, as the Constitution permits the use of customary law to govern questions of personal law (such as marriage, divorce and devolution of property) and this compromises women's enjoyment of their human rights, which are central for their personal advancement and autonomy. The Kenyan criminal code does not contain any specific provision against domestic violence (sections 250 and 251 deal with the crime of assault), despite the fact that it remains a serious and widespread issue in Kenya. The police normally do not investigate cases of domestic violence because it is generally regarded as a private family matter. Many women end up suffering torture and other abuse silently, unaware of their rights. In this respect, the Committee on the Elimination of Discrimination against Women expressed concern that the "State party has not taken sustained and systematic action to modify or eliminate stereotypes and negative cultural values and practices".⁵⁴ A further challenge is presented by the multifold legal regime and the consequent coexistence of conflicting elements in formal and customary laws that create uncertainty regarding women's civil status, with a devastating effect on the full realisation of their rights.

8.1. Violence against women due to denials of their property rights

In Kenya, there is a plethora of customary laws, reflecting the country's ethnic diversity. In many cases, the conflict between customary and formal law can seriously compromise women's property rights, including the rights to inherit and to dispose of property. For example, the Kenyan legal framework in respect of the marriage system involves five different schemes: civil, customary, Christian, Islamic and Hindu. These systems are not coordinated and the legal regime does not provide for any common registry mechanism corresponding to a record of family property co-ownership. Whereas women are not prevented *de jure* from enjoying the right to own and dispose of property, in practice this right is compromised by a system that privileges the interests of men, coupled with discriminatory rules concerning control over property.⁵⁵ This economic limitation, in turn, prevents women from enjoying their

⁵⁴ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya (CEDAW/C/KEN/CO/6), para. 21.

⁵⁵ For further information, see Human Rights Watch, "Double standards, women's property rights violations in Kenya", 2003. <http://www.hrw.org/sites/default/files/reports/kenya0303.pdf>

civil and political rights also.⁵⁶ The decision of the Kenyan Court of Appeal in *Peter Mburu Echaria v Priscilla Njeri Echaria* constitutes an emblematic case of manifest gender discrimination. On that occasion, the Court ruled that neither their married status nor the performance of domestic duties would entitle women to a beneficial interest in matrimonial property upon the dissolution of a marriage.⁵⁷ Despite being the main food producers, women only hold 5 per cent of land titles in Kenya.⁵⁸ This situation causes the denial of basic requirements like food and shelter to single women, such as single mothers and widows.

The violations and denials of women's property rights are exacerbated by cultural practices and traditions. Many widows and abandoned wives are excluded from inheritance, thrown out of their homes and deprived of their belongings by their in-laws. They may have to resort to commercial sex work in order to make a living. This, in turn, exposes them to a high risk of HIV infection. Women and girls in this situation are also at a higher risk of being trafficked. In addition, under some customary laws, widows must submit to the practice of "wife inheritance" or ritual "cleansing". In this case, the widow becomes the property of her in-laws and this invariably also involves sexual intercourse with members of her late husband's family. Widows in this situation are subjected to violence and ill-treatment by relatives and communities. CEMIRIDE reported that widows are frequently denied livelihood, food and shelter and are forced to live in inhuman conditions. Widows who protest against their treatment are often subjected to further violence by their in-laws.

The Special Rapporteur on adequate housing has noted that women in urban informal settlements tend to live in poorer housing than men. As a consequence, in an attempt to secure adequate housing, single mothers may turn to unsafe or exploitative occupations, including commercial sex work. In addition, women are constantly exposed to the risk of sexual violence, especially after dark when they look for basic services, such as sanitation and water.⁵⁹ The Special Rapporteur also emphasised that violence against women and housing violations are "inextricably linked as causes and consequences of each other"; in fact, "inadequate housing in the slums leads to risk of violence, and a situation of domestic violence can lead to a woman being deprived of housing".⁶⁰

In rural areas, especially in situations of insecurity, women's property rights are still more at risk: their belongings are easily appropriated by others, and in some cases women may lose evidence of co-ownership with their husbands.⁶¹

⁵⁶ OMCT preparatory mission to Kenya; meeting with Prof. Mbote, University of Nairobi Law Faculty, Nairobi, 18 April 2008.

⁵⁷ Nairobi Civil Appeal No. 75 of 2001.

⁵⁸ "Kenya is a country of episodes", interview with Odenda Lumumba, Coordinator of Kenya Land Alliance, by Ian Gatere. <http://www.ms.dk/sw7766.asp>

⁵⁹ "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, para. 45.

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

⁶⁰ Ibid.

⁶¹ "Women's land and property rights in situations of conflict and reconstruction". http://www.unifem-easternafrika.org/global_inner.asp?pcat1=mediacentre&pcat=resources&cat=books&sid=

Vulnerability to any kind of abuse, disease and violence is a direct consequence of the violation of women's property rights and this, in turn, has a serious impact on Kenya's overall social development, including for future generations.

8.2. Denied access to justice for women due to lack of financial resources

In Kenya, the systematic denial of women's property rights also affects women's access to justice. Women's economic dependence on men prevents them from being able to afford a lawyer to protect their rights, denounce sexual violence, defend their property or initiate a divorce file in the case of domestic violence.⁶² This economic obstacle, accompanied by other social issues, often induces women victims of violence to remain with the perpetrator. Women have a clear disadvantage, in comparison to men, in seeking redress for torture, largely owing to their limited or inexistent financial capabilities. The IMLU survey indicates that the majority of women have limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

Reporting sexual or domestic violence is still a challenge in Kenya. Many women do not report violence because of fear of revenge, reprisals, social stigma and of losing custody of their children. Reporting violence is also a challenge in legal terms, since the procedure to file a complaint requires the submission of three documents: a police abstract, a "P3" form and a medical report. In addition, despite the fact that sections 250 and 251 of the criminal code provide for penalties in the case of "assault" - and as such, acts of domestic violence are supposed to be prosecuted under these provisions - law enforcement officers continue to treat domestic assault and battery as "private affairs".⁶³ The Government's positive initiative of setting up "gender desks" has so far been poorly implemented and police stations still lack female officers to handle cases of violence against women. These factors undeniably represent a further obstacle to women denouncing sexual and domestic violence.

8.3. Trafficking in women and children due to poverty

Poverty, illiteracy and the absence of viable economic opportunities, together with the geographic position of Kenya, encourage the use of the country as a transit hub for trafficking and sexual exploitation around the region. Kenya has been defined by the International Organization for Migration (IOM) as a country of origin, transit and destination for human trafficking. Women, men, girls and boys are trafficked in Kenya for domestic and agricultural labour and for sexual exploitation.⁶⁴ Persons are trafficked both internally and internationally. According to IOM estimates, internal trafficking runs from rural to urban areas. International trafficking is mainly for the purposes of sexual exploitation and includes destinations such as European Union countries (among others Germany, the Netherlands and the United Kingdom), the

"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, para. 46.

⁶³ *State Violence in Kenya*, OMCT alternative report submitted to the Human Rights Committee, 2005.

⁶⁴ <http://www.iom.int/jahia/Jahia/pid/380>

United States of America, the Arab Emirates and Saudi Arabia. Kenya is also a destination country for trafficking. Women from Rwanda, Uganda, Ethiopia, the Democratic Republic of the Congo and Burundi are trafficked to Kenya for sexual exploitation, while women from Tanzania are mainly trafficked for agricultural labour. IOM also indicates that Kenya is used as a transit country for trafficking victims from South-East Asia, Pakistan and Ethiopia bound for South Africa and Europe.⁶⁵

Despite the measures undertaken to combat trafficking of human beings, the problem persists and the Kenyan legal framework, especially the Children's Act, has failed to address the large range of reasons for which trafficking can occur.⁶⁶ This phenomenon is intimately linked to poverty and requires to be fought by the implementation of policies that ensure the respect of women's economic, social and cultural rights. As the Committee on the Elimination of Discrimination against Women has explicitly underlined: "trafficking and sexual exploitation affect women from the poorest and most disadvantaged backgrounds".⁶⁷

9. The socio-economic dimensions of violence against disadvantaged children

High levels of poverty and the fact that large numbers of children have been orphaned as a result of the HIV/AIDS pandemic mean that many children are left without protection and are therefore vulnerable to exploitation, including sexual exploitation and harmful forms of child labour. This, in turn, has implications for children's enjoyment of their rights to health, education and development. Children who drop out of school are often vulnerable to sexual exploitation.⁶⁸ According to UNICEF, 26 per cent of children in Kenya are involved in child labour activities and approximately 30 per cent of girls living in coastal cities and aged between 12 and 18 work as part-time informal sex workers or regard sex work as a full-time income-generating activity.

Harsh economic conditions and the spread of HIV/AIDS exacerbate the problem of child-headed households and homeless children living on the street.⁶⁹ In order to meet their daily needs, children affected by HIV/AIDS may engage in theft, prostitution, forms of hazardous labour and street activities such as begging. Street children are vulnerable to harassment, and physical and sexual abuse; they are seen as offenders, criminalised and frequently arbitrarily arrested, beaten and ill-treated by police

⁶⁵ Reported by the International Organisation for Migration.

<http://www.iom.int/jahia/Jahia/pbnAF/cache/offonce/lang/en?entryId=17760>

⁶⁶ It does not include, for example, all persons that may actually be involved in trafficking, especially transnational trafficking. *State Violence in Kenya*, OMCT alternative report submitted to the Human Rights Committee, 2005.

⁶⁷ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya (CEDAW/C/KEN/CO/6), para. 29.

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

⁶⁸ *State Violence in Kenya*, OMCT alternative report submitted to the Human Rights Committee, 2005.

⁶⁹ "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/2006/778740.htm>

officers.⁷⁰ Most of the children in conflict with the law belong to the poorest strata and cannot afford legal assistance. The remand homes are not adequate and, de facto, children end up remaining in remand for more than the three months provided for by the law, even for petty offences.⁷¹

Despite the positive measures undertaken by the Government, the issue of police violence against children is still a serious challenge. A recent programme undertaken by the Government has established the figure of “Child Officer” in police stations to deal with children’s issues. However, many police stations in poor neighbourhoods do not dispose of enough financial resources to establish this position.

9.1. Poverty, child exploitation and child labour

Poverty is recognised as the major factor contributing to child labour in Kenya. Frequently, extreme poverty leads parents to send their children to engage in agriculture, mining, domestic or manufacturing work in order to supplement the family income. In addition, despite the fact that under Kenyan law children under the age of 16 are prohibited from working, this restriction does not apply to the agricultural sector. This makes children vulnerable to being taken out of school to work on family plots, particularly in periods of economic difficulty. The high levels of illiteracy and lack of clear goals regarding education on the part of the parents is also a leading factor in child labour. Lack of government support systems force many children to turn to the streets to beg, or to work as domestic helpers or farmhands.⁷²

At other times, child labour is due to the fact that employers cannot afford to pay adult workers and therefore opt to employ children, as their remuneration will not be as high.⁷³ Also, as noted above, the HIV/AIDS pandemic has increased the number of child-headed families and that, in turn, has forced children to seek employment to be able to meet basic needs. Children affected by HIV/AIDS live with stigma and discrimination that can be manifested in physical and psychological violence. Discrimination against girls can be particularly severe and includes abandonment by caregivers and school drop-out, with consequent vulnerability to sexual violence and exploitation.

⁷⁰ “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>

⁷¹ *The CRADLE Annual Report 2003*, p. 26.

⁷² *State Violence in Kenya*, OMCT alternative report submitted to the Human Rights Committee, 2005.

⁷³ *Ibid.*

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

In Kenya, extreme poverty, inequality and discrimination are the grounds for systematic human rights violations, including the use of torture, the first victims of which are the poorest, the economic disadvantaged and the marginalised. Poverty has been recognised as the main cause of insecurity and crime in Kenya, as well as of human trafficking, sexual exploitation and child exploitation, the levels of which remain high in the country.

The present report illustrates the various socio-economic dimensions of torture in Kenya by describing, on the one hand, the State's direct involvement in perpetrating torture and other forms of violence and, on the other, the State's responsibility for economic, social and cultural policies that systematically lead to torture and other forms of ill-treatment.

The Government is both directly and indirectly responsible for the systematic use of torture and other forms of ill-treatment.⁷⁴ The Government is also accountable for the lack of commitment and the failure to take concrete measures to address violence and other abuses, in particular as far as the poorest strata of society are concerned. On many occasions, small focused changes may suffice to have a clear impact on levels of torture. Regrettably, the positive initiatives undertaken by the Government, especially with regard to women and children, have been poorly implemented so far. The Government has shown reluctance or unwillingness to implement policies aimed at ensuring the equal enjoyment of rights by everybody, be they civil and political or economic, social and cultural rights, nor has it taken adequate steps to address violations of the rights of the poorest, the excluded and marginalised sectors of society.

Irrespective of whether torture is the direct or indirect consequence of the State's misconduct, OMCT deems that the obligation to address torture also implies commitment to address its root causes. An understanding of the economic, social and cultural root causes of torture, as well as its other interrelationships, is crucial for establishing a set of effective recommendations designed to eradicate torture, ill-treatment and other forms of violence in Kenya.

⁷⁴ "Torture may in fact be of a systematic character without resulting from directed intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the Central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice." Committee against Torture, A/48/44/Add.1, para. 39 and A/56/44, para.163.

Multifaceted responses to human rights violations

The present report develops multifaceted recommendations for preventing torture and other forms of violence directed, in particular, against the most vulnerable people in Kenya. These recommendations are based on experience that shows the potential effectiveness of broad-based initiatives to protect human rights.

One such initiative was described in the OMCT interdisciplinary study *Attacking the Root Causes of Torture: Poverty, Inequality and Violence* in relation to a marginalised informal settlement in Buenos Aires.⁷⁵ That settlement, called “the Village” was the systematic target of official and private violence and the subject of a very violent forced eviction. The people returned to the settlement after the eviction and efforts were begun to address the wide range of human rights violations to which they were subjected.

Box 4: A marginalised informal settlement in Buenos Aires

The inhabitants of the Village, with the assistance of civil society organisations, contacted official organizations and authorities and slowly the existence of the Village began to be recognized and some assistance began to be provided. The Office of the Ombudsman of the City of Buenos Aires notified the relevant health authorities, organized meetings for representatives of the Village with health agencies and provided health-related information. The overall situation of the inhabitants of the Village improved somewhat. The most positive changes were the transformation of the relationship between the inhabitants and the security forces and the establishment of links with the local political authorities. These changes were the result of the interaction of diverse factors, among which the following stand out: the official acknowledgement of the existence of the Village, the capacity of the inhabitants to organize in pursuance of their common objective and the articulation of alliances with other social actors which helped to strengthen their negotiation capacity. The fact that the location acquired an official status - in 2001- forced the local authorities to recognise and act upon a series of responsibilities regarding the inhabitants of the Village.

Similarly, the Ad Hoc Working Group of Experts on Extreme Poverty of the Sub-Commission on the Promotion and Protection of Human Rights reported in 2004 on a coordinated effort in Pune, India to address a wide range of basic human rights of women living in informal settlements that had had a very positive effect on their situation and that of their families.⁷⁶

⁷⁵ See *Attacking the Root Causes of Torture: Poverty, Inequality and Violence – An Interdisciplinary Study*, chapter 4, “Argentina: country profile and case study”. www.omct.org

⁷⁶ See E/CN.4/Sub.2/2004/25, annex, paras. 14-18.

Box 5: Pune urban community

The Pune (India) urban community development programme was a government initiative targeting selected communities to alleviate poverty. The programme supported the establishment of women (only)-centred neighbourhood groups in all targeted urban informal settlements, each consisting of 50 members. Since the members came from the same community, the programme fostered close links, attachments and intimate knowledge about each family.

During a visit to one of these areas, members of the Sub-Commission met with over 100 women of the neighbourhood group. Several women related their experiences as a result of the project. The study visits showed how women's groups that began as savings associations could raise the social status of women, including through literacy training that enabled them to conduct business with local government and extend their activities to income generation, cultural activities, and health and neighbourhood improvement. The women were able to negotiate with the authorities themselves instead of going through intermediaries to obtain electricity connection, for example, and they knew their rights. They now had the courage to leave their homes because they were literate and could read the bus numbers and road names, etc.

Recommendations

Based on this experience, OMCT wishes to suggest that the Committee consider adopting the following recommendations for the Government of Kenya.

Preventive measures

- *Fighting poverty and inequality.* Acknowledge that inequality and poverty are frequently the prime cause of many human rights violations. Promote better and more equitable allocation of natural and financial resources. Establish an employment-generating programme to provide employment opportunities and training for residents of poor areas.
- *Preventive action.* Protect vulnerable and marginalised groups from violence, through human rights education and awareness-rising. Ensure fair and just application of the law, based on the principle of non-discrimination. Train police officers on human rights, encourage sensitization on torture and ensure that cases of torture are legally brought forward and publicly condemned, and that perpetrators are duly prosecuted. Ensure that the principle of non-discrimination as enshrined in section 82 of the Constitution is properly applied.
- *Improving the legal framework.* 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.
- *Preventing torture.* Ratify without delay the Optional Protocol to the Convention against Torture.
- *On human rights in general.* Agree on a blueprint document on the National Policy and Action Plan for the Promotion and Protection of Human Rights in Kenya that is consistent with international human rights standards.

Specific issues

- *On arbitrary arrests.* Address allegations of arbitrary actions against the poor, with particular emphasis on the situation in informal settlements and poor areas. Revise section 72 (1) (e) of the Constitution of Kenya, which currently allows arrest upon mere suspicion.⁷⁷
- *On corruption and bribery.* Take concrete steps to eradicate institutional corruption and bribery. Ensure that corrupt police officers and any other public officials are duly prosecuted and that the poor are no longer affected by extortion rackets. Introduce national and local watchdog mechanisms that monitor corruption, bribery and rackets in specific areas, in particular in informal and poor settlements.
- *On access to justice.* Establish a system of State-administrated legal aid, through the creation of an office of public defender that, first and foremost, serves the poorest.
- *On pre-trial detention.* Persons awaiting trial should not, as a general rule, be detained in custody.⁷⁸ Ensure the proper implementation of section 72 (3) of the Constitution, providing time-frames and conditions for pre-trial detention.
- *On bail.* Bail should be required for release from pre-trial detention only in exceptional cases. In cases in which bail is required for release, clear criteria should be set concerning reasonable and affordable bail that refer to specific offences and better reflect the average income of Kenyans. Take seriously into account the fact that setting more affordable bail implies an immediate decrease in the number of persons on remand in prisons. This measure would lead to an effective reduction of overcrowding in prisons and thus would specifically reduce the risk of cruel, inhuman or degrading treatment in prisons.
- *On torture in custody.* Establish an independent body that monitors the situation in all detention facilities and that reports any act of violence against detainees. Ensure that threats of torture are not used as a means of obtaining bribes.
- *On impunity.* Take concrete measures to address the climate of distrust towards the legal and justice system, and to address impunity for violence inflicted by public enforcement officials.
- *On violent evictions.* Ensure that evictions are carried out as the last possible resort and are conducted in full respect of international human rights standards.
- *On the Mungiki and other criminal organisations.* Stop any shoot-on-sight order and any other act of arbitrary and summary execution. Ensure that Mungiki members involved in violence and other criminal activities are duly prosecuted, without the involvement of innocent persons.
- *On informal sector workers.* Acknowledge the importance of the informal sector for the national economy. Set standards in order to regularise informal

⁷⁷ Constitution of Kenya section 72 (1) (e):

(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following circumstances:

...

(e) Upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law of Kenya.

⁷⁸ International Covenant on Civil and Political Rights, art. 9, para. 3.

trade with minimal cost for the poor. Recognise the right to assembly. Stop and prosecute any intimidation or harassment.

- *On Mount Elgon*. Stop immediately torture and other forms of violence in Mount Elgon. Set up a committee of inquiry that assesses responsibilities. Finalise and adopt the National Policy on Peacebuilding and Conflict Management of 2005-06, 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.

Violence related to land conflict

- Recognize that land issues are often at the root of community violence in Kenya and take concerted steps to reach fair and just resolution of land disputes, independent of political and ethnic interests.
- Implement properly 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. The process should address the highly fragmented pattern of land use and involve consultation with representatives of all groups concerned and affected by conflict over land. 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 recommendations 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, the development of a comprehensive land policy and the establishment of an inventory of public land.
- 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.

Violence against women and children

- Ensure that the principle of non-discrimination enshrined under section 82 of the current Kenyan Constitution is applied without exception, including as regards sex or gender, and that no form of personal or customary law compromises this principle in any way;
- Undertake a general revision – including, when necessary, abolition – of all legal provisions that have a negative impact on women’s enjoyment of their rights. Introduce legislation to criminalise marital rape and domestic violence.
- 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.
- Raise awareness of women’s and children’s human rights among the public at large and among specific groups, including the police and the judiciary. Advocate that violence against women and children is unacceptable.

- Undertake a strategy of confidence-building aimed at encouraging women to denounce violence. Improve the implementation of the gender desk programme in every police station, including through the presence of a policewoman in charge of the gender desk.
- 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.
- Work with communities to reinforce the positive dimensions of customary law, including with regard to the care of children, and, at the same time, to address violations of women's and children's human rights inherent in customary law.
- Promote creative measures to keep children - especially girls - in school, including school feeding programmes. Ensure that resources assigned to education are assigned equitably.
- Undertake training to sensitize police officers to violence against children. Increase the number and capacity of police "child officers" and ensure their presence in every district police station.

Measures of implementation

- A concerted multidimensional effort is needed to deal with poverty, inequality and violence in the urban and rural areas of Kenya. The vast majority of the victims of torture and other forms of violence, in particular victims of violence by State officials, can be identified in terms of their economic, social and cultural situations and in particular their place of residence.
- The Committee may thus wish to recommend to the State party that it undertake preventive measures to protect those groups by identifying the areas where persons are at risk of violence and establishing programmes aimed at economic development and poverty reduction (employment creation, education initiatives, health services, programmes to enhance the status of women, etc.) and respect for the rule of law (strengthening and training the judiciary, and training on human rights for the police and local administrators, as well as for military units and personnel). A permanent monitoring function should be established in those areas to ensure official compliance with legal standards and good practice.
- The elements of the programmes should be designed and implemented with the participation of representatives of the various communities concerned and the programmes should each be directed by an independent body composed of government officials, representatives of the communities that are directly concerned and civil society. Regular public reports should be issued on the progress made and obstacles encountered.
- The Committee may wish to suggest to the State party that it seek assistance from the advisory services and technical cooperation programme of the Office of the United Nations High Commissioner for Human Rights and consider requesting the advice and assistance of relevant United Nations human rights experts.

Appendix

Schedule for the joint preparatory mission for alternative reports to CESCR and CAT on “Addressing the Economic, Social and Cultural Root Causes of Torture and Other Forms of Violence”, Kenya, 12-18 April 2008

Sunday 13 April

- OMCT & CEMIRIDE, Mr. John Letai, Pastoral Land Advocate, Nanyuki
- OMCT & CEMIRIDE, Community meeting with Maasai, near Nanyuki
- OMCT & CEMIRIDE, Video interview with John Letai

Monday 14 April

- OMCT & CEMIRIDE, Mr. Kipruto Kimosop, Endorois Welfare Council
- OMCT & CEMIRIDE, Visit to Division Office, Mochongoi
- OMCT & CEMIRIDE, Chief Inspector Kiche, Mochongoi Police
- OMCT & CEMIRIDE, Community meeting with Endorois, Arabal, Mochongoi
- OMCT & CEMIRIDE, Community meeting with Ilchamus, Marigate Division
- OMCT & ICJ, Public forum on right to land, Nairobi

Tuesday 15 April

- OMCT & CEMIRIDE, Mr. Charles Kamuren, Chair of Endorois Welfare Council and Executive Secretary, Kenya National Union of Teachers, Nakuru
- OMCT & CEMIRIDE, Mr. Daniel M. Kobei, Executive Chairman, Ogiek People’s Development Program (OPDP), Nakuru
- OMCT & CEMIRIDE, Video interview with Mr. Leonard Mindore, Field Officer OPDP, Mau Forest
- OMCT & CEMIRIDE, Community meeting with Ogiek, Mau Forest
- OMCT & CEMIRIDE, Mr. Kimonjo Kiburi, lawyer and IDP activist, Nakuru
- OMCT & ICJ, Office of the President: Under Secretary/ Security, Mr. Peter Were Okwanyo, Nairobi
- OMCT & ICJ, Kenya National Commission on Human Rights, Nairobi

Wednesday 16 April

- OMCT & CEMIRIDE, Interview by Kass Community Radio Station, Nakuru
- OMCT & CEMIRIDE, Mr. Zablun Kuria, Chair, Management Committee of IDP Camps, Nakuru and Ms. Nancy Kimemia, Committee member
- OMCT & ICJ, Coalition on Violence Against Women, Nairobi
- OMCT & ICJ, Independent Medico-Legal Unit, Nairobi
- OMCT & ICJ, Kenya Alliance for the Advancement of Children’s Rights, Nairobi
- OMCT & ICJ, Westlands forum on youth and socioeconomic rights, AACC House, Nairobi

Thursday 17 April

- OMCT & ICJ, KENGO public forum, informal settlements, Nairobi (100 participants)

Friday 18 April

- OMCT & ICJ, Mr. Odindo Opiata, expert on evictions, Economic and Social Rights Centre, Nairobi
- OMCT & ICJ, Prof. Mbote, Law Faculty, University of Nairobi (women and land rights), Nairobi

UNITED NATIONS
**Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
or Punishment**

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COMMITTEE AGAINST TORTURE
Forty-first session, 3-21 November 2008

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 19 OF THE CONVENTION**
Concluding observations of the Committee against Torture

KENYA

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

A. Introduction

2. The Committee welcomes the submission of the initial report of Kenya, which is in conformity with the Committee's guidelines for the preparation of initial reports, but regrets that the report was submitted nine years late.

3. The Committee notes with satisfaction the frankness with which the State party acknowledged the gaps in its legislation relating to the elimination and prevention of torture. The Committee also appreciates the constructive and open dialogue that was conducted with the high-level delegation from the State party, as well as the replies to the questions raised during the dialogue.

B. Positive aspects

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

(a) The ratification by the State party of most of the core international human rights treaties;

(b) The ratification by the State party, on 15 March 2005, of the Rome Statute of the International Criminal Court;

(c) The enactment of the Community Service Order Act in 1998, which establishes the option of community services projects as an alternative to custodial sentences;

(d) The enactment of the Children Act in 2002;

(e) The enactment of the Witness Protection Act in 2006;

(f) The closing down of the infamous Nyayo House torture chambers;

(g) The establishment of the Kenya National Commission on Human Rights in 2003;

(h) The launch of the Governance, Justice, Law and Order Programme intended to reform the legal and justice sector;

(i) Recent establishment of the civilian independent Police Oversight Board;

5. The Committee also welcomes the information provided by the delegation about the National

Human Rights Policy and Plan of Action currently under development aimed at integrating human rights in the national planning process.

6. The Committee notes with satisfaction that relevant reports were submitted to the Committee by the Kenyan National Commission on Human Rights and that representatives from the

Commission attended the meetings of the Committee and provided valuable information.

7. The Committee also welcomes the efforts made by the State party to cooperate with nongovernmental organizations, particularly national and local organizations, which have provided the Committee with valuable contributions to the review process of the initial report. The Committee encourages the State party to strengthen its cooperation with such organizations with regard to the implementation of the provisions of the Convention.

C. Subjects of concern and recommendations

Definition of torture and appropriate penalties for acts of torture

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

The State party should ensure the incorporation of the Convention into its legal framework. Furthermore, the State party should, without delay, include a definition of torture in its penal legislation in full conformity with article 1 of the Convention and ensure that all acts of torture are punishable by appropriate penalties which take into account their grave nature as laid out in article 4, paragraph 2, of the Convention. The Committee urges the State party to seize the Kenya Law Reform Commission of this deficiency with a view to remedy it.

Access to justice

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

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

10. While the Committee acknowledges the recent establishment of a national legal aid scheme and an awareness programme, it remains concerned about the persistent

problem of access to justice, particularly by those without economic resources. (art. 2)

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

Age of criminal responsibility

11. The Committee is deeply concerned that the age of criminal responsibility in the State party is still set at 8 years of age despite the recommendations made by the Human Rights Committee in 2005 (CCPR/CO/83/KEN) and by the Committee on the Rights of the Child in 2007 (CRC/C/KEN/2). (art. 2)

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

Arbitrary arrest and police corruption

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

The Committee urges the State party to address the problem of arbitrary police actions, including unlawful and arbitrary arrest and widespread police corruption, particularly in slums and poor urban neighbourhoods, through clear messages of zero-tolerance to corruption from superiors, the imposition of appropriate penalties and adequate training. Arbitrary police actions must be promptly and impartially investigated and those found responsible punished. The State party should also reform the bail system currently in place with a view to ensuring that it is more reasonable and affordable.

Torture and ill-treatment and safeguards while in custody

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

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

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

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

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

Conditions of detention

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

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

(a) Reduce overcrowding in prisons, in particular the high number of persons in pre-trial detention, by inter alia enforcing the relevant provisions which provide for alternative non-custodial measures for minor offences and by reforming the abusive bail system currently in place;

(b) Ensure that adequate health services are available in all prisons by increasing the number of medical practitioners working for the penitentiary system;

(c) Take the appropriate measures to reduce the high level of violence inside prisons, including inter-prisoners violence, and punish those responsible;

(d) Strengthen judicial supervision of conditions of detention foreseen in the Prison Act.

Non-refoulement and renditions

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

The State party should adopt the necessary measures to bring current expulsion and refoulement procedures and practices fully in line with article 3 of the Convention. In particular, expulsion and refoulement of individuals should be

decided after careful assessment of the risk of being tortured in each case and should be subject to appeal with suspensive effect. The Committee urges the State Party to fulfil all its obligations under article 3 of the Convention thereby guaranteeing the absolute principle of non-refoulement.

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

The Committee urges the State party to ensure that any measure taken to combat terrorism is in accordance with Security Council resolutions 1373 (2001) and 1566 (2004), which require that anti-terrorist measures be carried out with full respect for, inter alia, international human rights law, including the Convention. The Committee calls upon the State party to investigate these allegations in order to establish responsibilities and ensure compensation to victims.

Human rights training of law enforcement personnel

18. While acknowledging the existing training programmes on human rights for law enforcement personnel, the Committee remains concerned that such trainings do not include the prohibition of torture as specific crime of grave nature and do not reach all relevant personnel who are in direct contact with detainees, including police officers, prison staff, judges and, including the military and health personnel. (art. 10) **The State party should reinforce and expand the human rights training programmes with the objective of bringing about a change in attitudes and behaviour. Training should include the prohibition of torture as specific crime of grave nature and should be made available to all law enforcement personnel enumerated in article 10 of the Convention, at all levels, including to the military and health personnel who are in direct contact with persons deprived of their liberty.**

Use of force by police during post-election violence

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

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

Extra-judicial killings and enforced disappearances

20. The Committee is disturbed to learn about consistent allegations of ongoing extrajudicial killings and enforced disappearances by law enforcement personnel, particularly during special security operations, such as the “Chunga Mpaka” Operation in the Mandera district in September 2008, and operations against criminal bands, such as the “Mathare Operation” in June 2007. The Committee is further concerned about the lack of investigation and legal sanctions in connection with such allegations, as well as about information regarding impediments that non-governmental organizations face in their attempts to document cases of disappearance and death. (arts. 2, 11 and 12)

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

Violence by State agents and access to land

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

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

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

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

Impunity

23. The Committee is concerned about the absence of a specific legal framework to ensure prompt and impartial investigations into acts of torture and other cruel, inhuman and degrading treatment or punishment committed by law enforcement personnel. The Committee is further concerned that acts of torture and ill-treatment are seldom investigated and prosecuted and that perpetrators are either rarely

convicted or are sentenced to lenient penalties not in accordance with the grave nature of their crimes. In this connection, the Committee expresses its concern over the culture of impunity for perpetrators of acts of torture and ill-treatment throughout the country. (arts. 2, 4 and 12)

The State party should take vigorous steps, including the setting up of a specific legal framework, to eliminate impunity for perpetrators of acts of torture and ill-treatment by ensuring that all allegations are investigated promptly, effectively and impartially, that perpetrators are prosecuted and convicted in accordance with the gravity of the acts, and that victims are adequately compensated, as required by the Convention. In this connection, the Committee welcomes the assurances provided by the delegation that information will be submitted regarding the status of individual cases of torture pending in court as well as torture related deaths without inquest listed in the annexes of one of the alternative reports submitted by a coalition of national non-governmental organizations.

Lack of accessible complaints mechanism

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

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

Redress and compensation

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

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

Violence against women and children

26. While noting the enactment of the Sexual offences Act in 2006, the Committee notes with concern the persistence of widespread violence against women and children in Kenyan society, including sexual exploitation and trafficking, as well as

the high levels of impunity for such crimes. The Committee is particularly concerned about the difficulties that women face when accessing the justice system to denounce cases of sexual violence due inter alia to the existing provisions in section 38 of the Sexual Offences Act. The Committee is further concerned about the delays in enacting the relevant legislation intended to protect women, including Domestic Violence (Family Protection) Bill, the Anti-trafficking in Persons Bill, the Equal opportunities Bill and the Matrimonial Property Bill. The committee notes with satisfaction the development of reference manual as the basis for training of law enforcement personnel at different levels, which addresses violence against women, but it remains concerned that not enough attention has been paid to the training of personnel who are in direct contact with victims. (arts. 12 and 16)

The State party should, as a matter of urgency, take all necessary legal and administrative measures to protect women and children from all forms of violence. In particular, the Committee encourages the State party to facilitate the access to justice for women, including, inter alia, through the revision of section 38 of the Sexual Offences Act. The State party should also ensure the speedy enactment of the relevant legislation, including the Domestic Violence (Family Protection) Bill, the Anti-Trafficking in Persons Bill, the Equal Opportunities Bill and the Matrimonial Property Bill. The State party should provide the necessary specific training to all law enforcement personnel, particularly to the personnel who are in direct contact with women victims of violence.

Female genital mutilation

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

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

Human rights defenders

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

The State party should take effective steps to ensure that all persons reporting on acts of torture and ill-treatment are protected from intimidation and from any form of reprisal as a result of their activities. The Committee encourages the State party to seek closer cooperation with civil society in preventing torture, in particular in the ongoing process of investigating and holding persons accountable for the postelection violence.

Death penalty

29. While acknowledging that the death penalty has not been applied in the State party since 1987 as well as taking note of the practice of the President of the Republic to commute death sentences, as well as the existence of a de facto moratorium of the death penalty, the Committee remains concerned, however, about the situation of

uncertainty of those who serve on death row, which could amount to ill-treatment. (art. 16)

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

Data collection

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

The Committee welcomes the additional information provided by the delegation after the consideration but it nevertheless requests the State party to provide in its next periodic report further information, including disaggregated data on the number of people held in custody, including remandees and prisoners, and length of sentences. The State party should also provide detailed statistical data, disaggregated by crime, ethnicity and gender, on complaints relating to torture and ill-treatment allegedly committed by law enforcement officials, as well as on the related investigations, prosecutions and criminal and disciplinary sanctions.

31. The Committee encourages the State party to consider making the declaration under article 22 of the Convention, thereby recognizing the competence of the Committee to receive and consider individual communications.

32. The Committee encourages the State party to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as soon as possible.

33. The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet a party, namely the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the International Convention for the Protection of All Persons from Enforced Disappearance.

34. The Committee invites the State party to submit its core document in accordance with the requirements of the Common Core Document in the Harmonized Guidelines on Reporting, as approved by the international human rights treaty bodies and contained in document HRI/GEN/2/Rev.5.

35. The State party is encouraged to disseminate widely the reports submitted by the State party to the Committee and the latter's concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.

36. The Committee requests the State party to provide, within one year, information on measures taken in response to the Committee's recommendations, as contained in paragraphs 8, 11, 12, 19, 21 and 25 above.

37. The State party is invited to submit its next report, which will be considered as its second periodic report, by 21 November 2012.
