

# TREATY BODY MONITOR

International Service for Human Rights



Human Rights Monitor Series

## COMMITTEE AGAINST TORTURE 41<sup>ST</sup> SESSION KENYA, 1<sup>ST</sup> REPORT 13-14 NOVEMBER 2008

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### Key facts<sup>1</sup>

Ratification	Reservations	Party to Optional Protocol?	Other core treaties ratified
1997	None	Yes	ICERD, ICESCR, CEDAW, CAT, CRC, CMW, CRPD

<sup>1</sup> The information in this table is sourced from the Office of the High Commissioner for Human Rights (OHCHR), and is available at [www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx](http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx).

## Information submitted to the Committee

### State report

Kenya submitted its 1<sup>st</sup> report to the Committee against Torture (the Committee) on 6 June 2007.<sup>2</sup> Kenya was due to submit a report in 1998. The State attributed the nine-year delay to the political, social, and economic instability of the post-independence era. The brief 22-page report confirms that ‘international treaties are not considered as part of the law of Kenya and cannot be directly applied by the courts, tribunals or administrative authorities in the absence of domestic legislation domesticating the same’. This gives the impression that the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention) is largely meaningless in Kenya. The report, however, was self-critical in parts. The State admits that the Constitution does not define torture and recognises the problems inherent in this. For example, in determining whether a particular case constitutes torture, judges are restricted without a definition to guide them. Another grave problem is that a person can only be charged with offences that are ‘duly defined and criminalised in a written law’, meaning that the practise of torture may go unpunished. To date, acts of torture may only be considered under assault, assault causing bodily harm, rape, sexual assault, murder, and attempted murder in the Penal Code, the Criminal Procedure Code, and the Police Act. The State confirms in its report that acts of mental and psychological torture cannot be punished under the current penal system. The report asserts that the Government has recommended to the Legislative Assembly that it formulate a definition of torture in accordance with that of the Convention.

The report demonstrates that steps have been taken to improve human rights in Kenya. It asserts that victims of torture may be awarded monetary compensation and are able to participate in rehabilitation programmes. Law enforcement and public officials are required to undergo training with an emphasis on human rights. The opening of the Nyayo House torture chambers to the public was a symbolic step taken by the Government to show its intolerance of torture. The report explains that the *Evidence Act*, Chapter 80, that previously allowed the use of confessions made to police officers, has since been repealed. The State has initiated radical reforms in the police and prison departments as regards their complaint procedure. As regards non-refoulement, the report stresses that Kenya does not extradite people if they will be in danger upon return to their country. The report confirms that Kenya has domesticated the Four *Geneva Conventions* and their two Additional Protocols of 1977.

The State used the opportunity to point out that it is a great ‘challenge to compile accurate statistics on the complaints against torture and ill-treatment due to the unavailability of automated and disaggregated data’ as little trust exists in the country, especially on the part of the people towards the Government and law enforcement agents. The State admits that there is a need for an independent oversight body to take on this mandate.

### List of issues

Since this was Kenya’s initial report, the Committee did not prepare a list of issues.

### NGO information

The national human rights institution, the Kenyan National Commission on Human Rights (KNCHR), one individual non-governmental organisation (NGO),<sup>3</sup> and two coalitions of NGOs<sup>4</sup> submitted **written reports**

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<sup>2</sup> CAT/C/KEN/1, available at [www2.ohchr.org/english/bodies/cat/cats41.htm](http://www2.ohchr.org/english/bodies/cat/cats41.htm).

<sup>3</sup> Human Rights Watch.

<sup>4</sup> Coalition 1: Independent Medico- Legal Unit in collaboration with several NGOs including inter alia Amnesty International Kenya, Coalition on Violence Against Women Kenya, and the Centre Against Torture. Coalition 2: World Organisation against Torture (OMCT), International Commission of Jurists Kenya, Independent Medico- Legal Unit.

to the Committee.<sup>5</sup> KNCHR was very critical of the State's 'slowness in the implementation of the provisions' of the Convention and the lack of political will to ratify the Optional Protocol to the Convention. KNCHR noted that the report lacks important statistical data regarding how many cases of torture have led to convictions and dismissals of perpetrators, and how many victims have been compensated. The report claims that Kenyan security forces used torture on numerous occasions following the elections in December 2007. There were also alleged instances in Nyanza province where the police used excessive force on the civil population. KNCHR was also concerned about the culture of impunity that persists in the case of torture. KNCHR recommends that the work of the police be harmonised with its own work; that regulations be reformed to ensure transparency in law enforcement agencies; that the Attorney General adopt a complaints procedure; that Kenya's judiciary, law enforcement agencies and the public be educated on the provisions of the Convention; and to provide counselling services for victims. The report submitted by OMCT concentrates on the economic, social and cultural root causes of torture, including what was dubbed the 'criminalisation of the poor' which regards the arbitrary arrest and police corruption in poor urban areas. The case of torture by security forces in Mount Elgon was mentioned by all NGOs, though Human Rights Watch focused its entire report on this issue. The report by the Independent Medical Legal Unit (IMLU) explains a failure to collect data on cases of torture, the culture of impunity that persists, the lack of definition of torture in the Constitution, and the lack of remedies for victims. It recommends that an effective independent oversight body be established for complaints, especially due to the limitations of the P3 Form which is meant to facilitate complaint-making. The mechanisms for addressing cases of torture in the military are such that civilians are not subject to the *Armed Forces Act*, and thus do not have *locus standi* to complain under this Act. This is very problematic especially in the context of the Mount Elgon violence, which was instigated by military personnel.

At the beginning of the session, four NGOs<sup>6</sup> gave **oral presentations** on the situation of human rights in the State. IMLU presented much of what was described in its written report. Redress, in collaboration with Reprieve and the Muslim Human Rights Forum focused on the failure of the Government to incorporate the principle of non-refoulement into domestic law. The case of Mohamed Abdulmalik, a man who was sent to Guantanamo Bay with the help of the Government of Kenya was a specific case that concerned these NGOs. The presentation also criticised the Government's failure to conduct investigations and provide effective remedies and reparations in cases of non-refoulement. The International Commission of Jurists - Kenya Section explained that the right to justice is 'expensive'. This has led to overcrowding and has exposed detainees to inhuman and degrading treatment in prison. Kenyans living in informal settlements are systematic victims of extortion, theft, destruction of property, and arbitrary arrest. The NGO recommended that the Committee call upon the Government to recognise torture is caused indirectly by poverty; to stop the systematic use of military to solve internal conflicts; to establish an office for public defenders; to provide compensation to victims of torture; to address violence from land conflict; and to approve and implement the draft Land Bill. The presentation by Coalition on Child Rights and Child Protection in Kenya focused on gender issues and the rights of the child. It described to the Committee the rampant sexual violence that took place in Mount Elgon and the lack of redress offered to victims. This Coalition also stated that corporal punishment, female genital mutilation (FGM), forced early marriage, child labour, and trafficking persist in Kenya.

## Themes and issues

The delegation of Kenya was led by Ms Martha Karua, Minister for Justice and Constitutional Affairs. She was supported by a high-level delegation consisting of representatives of the Ministry of Justice, the Police

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<sup>5</sup> The NGO reports are available at [www2.ohchr.org/english/bodies/cat/cats41.htm](http://www2.ohchr.org/english/bodies/cat/cats41.htm).

<sup>6</sup> Independent Medical Legal Unit (IMLU), Redress (in collaboration with Reprieve and the Muslim Human Rights Forum), International Commission of Jurists - Kenya Section, Coalition on Child Rights and Child Protection in Kenya.

and Prison Headquarters, the Ministry of Foreign Affairs, the Ministry of State, and the Permanent Mission in Geneva.<sup>7</sup>

Ms Karua opened with a brief 10-minute speech that provided a general overview of the situation in Kenya and the measures the Government has taken to improve the enjoyment of human rights since the democratic elections in 2002. Ms Karua spoke with regret about Kenya's previous one-party regime which was witness to regressive laws inherited from the colonial era where people were routinely killed, tortured, and exiled, and which economically destroyed the country. She stressed, however, that 'Kenya is a human rights respecting State', as has been demonstrated through the adoption of the *Human Rights Action Plan*, whose mandate it is to inform governmental stakeholders about the integration of human rights into the national planning process, and the *Justice, Law and Order Plan*, which facilitates the administration of justice. The Government consults all interested parties, including civil society, in the implementation of these programmes. In 2007, an Ombudsman office became operational and an independent civilian police oversight body was created to strengthen public complaint mechanisms against law enforcement agents. Ms Karua used the opportunity to acknowledge that many challenges continue to hinder the full enjoyment of human rights, including the non-domestication of the Convention, the lack of definition of torture, the politicisation of gangs and organised crime, and the proliferation of small arms.

Special rapporteur, Ms Nora Sveaass, opened by calling the delay of the submission of the report 'lamentable', yet she expressed her appreciation of the 'tone of openness' the delegation of Kenya was exercising. Her general recommendation was that Kenya strengthen its national legislation to combat the use of torture and other cruel and inhuman treatment. She was concerned at the lack of statistical data provided by the delegation as this is a very important element of the Committee's assessment process.

The formal dialogue between the Committee and the delegation focussed principally on the lack of definition of torture in Kenyan law, complaint procedures, prison conditions, post-election violence, and non-refoulement.

### **Lack of definition of torture**

There was sincere concern on the part of the Committee members that the Constitution and other laws such as the *Kenyan Parliament Act* and the *Children's Act* do not define torture. This 'lacuna' has led to interpretation problems and thus the continued use of torture and impunity. Ms Sveaass pointed out that the Penal Code, nor Criminal Procedure Code even mention the term 'torture'. She stated that under Article 1 of the Convention, States party to the Convention are obliged to provide a concise definition of torture, as well as cruel, inhuman and degrading treatment. The Government has to date not taken advantage of any opportunity to reform the domestic framework. She expressed hope that the *National Action Plan for Human Rights* and relevant legislation will soon include a very specific definition. The head of delegation, Ms Karua, assured the Committee that prosecutions do occur for the act of torture despite the lack of a precise definition, and that it is up to the presiding judge to decide which acts constitute torture in each case. Mr J Kihwaga of the Ministry of Foreign Affairs, however, admitted that an exclusion of a definition does indeed lead to discrepancies in the application of punishments. Ms Sveaass criticised the fact that mental and psychological torture cannot be punished according to present Penal Code, calling it 'problematic' and 'unacceptable'. No concrete plan to define torture was described by the delegation.

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<sup>7</sup> Ambassador Professor M Nzomo, Permanent Secretary Ms Amina C Mohamed, Deputy Permanent Representative Mr P.R. O. Owade, Principle Counsellor Ms Jean Kimani, ACP Police Headquarters Mr Eric Kiraithe, SDPC1 Prison Headquarters Mr George MacGoye, Deputy Secretary of the Ministry of State Mr Mutea Iringo, Senior State Counsel Attorney Ms Jeannette Mwangi, Head of the Ministry of Foreign Affairs Mr J Kihwaga, Deputy Chief Legal Officer of the Ministry of Justice Ms Maryann Njau-Kimani, First Secretary of the Ministry of Foreign Affairs Mr Jamleck Gicharu.

In its concluding observations, the Committee urges the State to include a definition of torture in its domestic legislation in accordance with Article 1 of the Convention without delay and ensure that all acts of torture are punishable.

### **Complaint procedures**

Mr Xuexian Wang criticised that there is no effective authoritative body to receive complaints in Kenya. He welcomed the new complaint body, yet wanted confirmation of its status. He requested specific details on remedies adopted by the Government to deal with complaints. The delegation explained that to make a complaint, complainants must fill out the P3 Form. This is available at police stations, hospitals, and online, free of charge. However, in most cases money is demanded by doctors to complete the form, which creates a problem for the poorer and more vulnerable populations. Complaints by prisoners can be made to judges and senior officials upon their visits to prisons. The effectiveness of these procedures, however, is questionable considering that 80 percent of the 54 recent complaints made by detainees in State prisons were dismissed. Committee members were critical of the fact that to make complaints against the Government, it is necessary for a complainant to go to Nairobi. This has meant that many poorer people who do not have the means to travel are unable to make complaints which may regard torture instigated by Government bodies. Ms Myrna Kleopas suggested that in the case of mere suspicion of torture, even when no formal complaint has been made, the State should still carry out an investigation.

In its concluding observations, the Committee recommends the State to ensure the facilitation of effective complaint mechanisms for victims of torture and ill-treatment and to ensure cases are ‘promptly and impartially examined by competent authorities’.

### **Prison conditions**

The Committee had received information that the most common use of torture and cruel treatment was committed while in confinement. Ms Felice Gaer stated specifically that 83 percent of prisoners were beaten during detainment.<sup>8</sup> The delegation confirmed that all reports of torture instigate internal investigations. If bodily harm occurs, this may be presented to a court. If it is an injury of a lesser nature, there is a prison court that deals with this. If a prisoner is in danger, he or she will be removed to another prison or another area within the prison. During follow-up comments, Ms Sveaass suggested internal investigations be more open so as to remind officers of their obligation to respect human rights. Mr Wang asked if training covers all persons who may come in contact with the detainees and if there is a code of conduct to regulate behaviour. Mr MacGoye of the Prison Headquarters confirmed that there is a code of conduct and assured the Committee that all law enforcement agents undergo extensive training with a focus on human rights, whose syllabi was established and is regularly revised in consultation with NGOs.

Overcrowding was another area of concern, for this in itself constitutes inhuman treatment. Ms Gaer pointed out that prisons were at 284 percent<sup>9</sup> capacity. Mr MacGoye later corrected that currently prisons are in fact at 265 percent capacity, contradictorily stating that prisons are not ‘overcrowded as such’. He insisted that there is space, yet the situation is dubbed overcrowded according to medical standards. He explained that such overcrowding is due to the number of convicts whose offences do not actually warrant being imprisoned, the very expensive bail that many detainees are unable to pay, and the gross failure to use alternative dispute resolution. Ms Karua assured the Committee members that programmes have been implemented to deal with overcrowding and to create a safe, secure, and humane environment in prisons. These include a legal aid scheme, the regular review of sentences, prisoner transfers, prison inspections, advising prisoners of their right to appeal, and the building of five new prisons and new cell blocks in existing prisons.

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<sup>8</sup> This figure appears in NGO-sponsored surveys, though Ms Felice Gaer herself did not cite any specific source.

<sup>9</sup> This figure was provided by the report submitted by IMLU, available at [www2.ohchr.org/english/bodies/cat/cats41.htm](http://www2.ohchr.org/english/bodies/cat/cats41.htm).

The delegation stated that officials of the judiciary may visit prisons to ensure there are no cases of torture or ill-treatment. Mr MacGoye admitted, however, that they do not exercise this function often. Co-rapporteur Mr Wang was concerned that organisations such as the KNCHR and Redress have been denied access to prisons to assess conditions. The delegation rejected this allegation, indicating that if this indeed has been the case, the organisation must not have been accredited. Mr Karua had stated in her opening remarks that prisons were open to public scrutiny. Mr Wang wanted to know if this was merely ‘theoretical’, or whether there are laws or regulations ensuring this.

The Committee also raised the issues of the death penalty, on which the Government has placed a *de facto* moratorium. In spite of this, prisoners remain on death row, and this, the Committee believes, constitutes psychological torture. Mr MacGoye did not directly respond to the Committee’s concerns. Instead, he assured the Committee that upon admission to a prison, a prisoner on death row is informed verbally and in writing of the moratorium, possibilities of appeal, and his or her rights.

Other related topics included inter-prisoner violence and rape, access to medical attention, and access to family members and lawyers of the detainee’s choice.

In its concluding observations, the Committee stresses that the State reduce overcrowding, increase efforts to reduce the violence inside prisons and ‘strengthen judicial supervision of conditions of detention’.

### **Post-election violence**

The Committee frequently raised the issue of the systematic post-election violence and sexual crimes perpetrated by the national police and military forces throughout the country. Mr Wang brought up the results from a study carried out by the KNCHR that the 500 disappearances that occurred in 2007 could have been extrajudicial killings. In response, the delegation stated that all claims against security forces were taken seriously by the State, yet most allegations were inaccurate. Mr Eric Kiraithe of the Police Headquarters assured the Committee that the police opened an inquiry, and stated that 500 was a very ‘misleading number’. Mr Wang pointed out that all allegations are worth investigating. The delegation had stated that the Commission of Inquiry has concluded its investigation on the post-election violence.<sup>10</sup> The Police Commissioner has also set up a task force to investigate sexual violence committed by security personnel during this time. This investigation is being carried out with the cooperation of the Nairobi Women’s Hospital and the Kenyan Women’s Lawyers Association. Mr Wang asked if the Government itself will carry out an investigation and whether the case of the 29 women in Kibara who were gang raped by police will be included in such an investigation. Ms Kleopas wanted to know what steps will be taken next. The delegation did not give information on sanctions for guilty security personnel nor dedicate more time to this issue.

In its concluding observations, the Committee urges the State to ‘take immediate action to ensure prompt, impartial and effective investigation of all allegations of excessive use of force and torture during this period, including sexual violence and gang rape, with the aim of prosecuting and punishing perpetrators’.

### **Non-refoulement**

Non-refoulement was an issue repeatedly mentioned by Committee members, with emphasis placed on the case of a Kenyan national detained in Guantanamo Bay.<sup>11</sup> They criticised the fact that Kenya has not

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<sup>10</sup> The Commission of Inquiry confirmed approximately 1500 deaths, 405 of which were due to gunshots

<sup>11</sup> Committee members alleged that Mr Mohamed Abdulmalik was moved to Guantanamo Bay with the consent of the Government of Kenya and was refused a lawyer for more than one year. His family presented a Kenyan court a *habeas corpus*, only to have this denied. The reason given for this was that there was no proof that he was indeed Kenyan and in fact the Government continues to deny that Mr Abdulmalik is a Kenyan national, in spite of reports to the contrary. The Committee requested information on what the Government is currently doing to protect Mr Abdulmalik. The delegation’s response was unclear, as it said that no one has been punished in this case.

implemented the principle of non-refoulement into its domestic legislation, despite the *Refugee Law* which was passed in 2006 which covers non-refoulement. Ms Sveaass was critical that individuals are not guaranteed protection from torture with this law, and wanted to learn about the legal framework that Kenya uses to assess whether an individual should be extradited. Mr Fernando Mariño Menendez stated that the law is more restrictive than general asylum protection and suggested that the Government extend its coverage. Ms Jeannette Mwangi of the Attorney General's Chambers confirmed that refugees have all the rights accorded to them in international conventions. No person is refused entry, expelled, or extradited if the result is that the person is subject to torture or cruel treatment upon return to the original country. The Committee wanted to know which countries Kenya has extradition agreements with. Mr Wang asked how risk assessments are conducted and what happens in the case where the Ministry of Justice chooses to extradite a person who is a threat to national security. These questions remained unanswered.

In its concluding observations, the Committee stresses that Kenya should make sure that its procedures and practices regarding expulsion and refoulement are in accordance with Article 3 of the Convention.

### Other issues

Ms Sveaass had received information that **human rights defenders** continue to experience difficulties while carrying out their work. The Committee requested information on two particular cases, that of Wafula Buke and Okoiti Omtata. In the first former case, the delegation explained, Mr Buke was detained for organising a protest without permission. In the latter case, Mr Omtata had chained himself to a police fence in protest, thus considered to be disturbing the peace. Neither had made claims of police abuse. In reply, the delegation merely stressed that the Government supports the work of human rights defenders.

In response to questions regarding **sanctions given to law enforcement agents accused of committing torture or cruel treatment**, the delegation explained that a law enforcement agent under investigation is temporarily suspended from work and their salary is cut by half. To date, punishments handed down to convicted law enforcement agents include fines, reductions in rank, reprimands, and dismissals. The Committee again urged Kenya to provide statistical data on how many law enforcement agents have been sanctioned and for what crimes.

The Committee expressed concern about the **reform of the law prohibiting police taking confessions**. The law is now less strict and therefore problematic as it may persuade the use of torture to obtain confessions. The delegation explained that the law was reformed as many difficulties had arisen due to the distance between police stations and courts, and the lack of magistrates. Confessions may now be made to a police officer in the presence of a third party. The delegation was keen to stress that very few cases of torture to obtain confessions have been reported, since confessions do not add value to a case.

Committee members questioned the **independence of judiciary**, especially due to the regulation that judges can only be removed via a presidential order. The delegation stated that a reform of the judicial system is under consideration due to the high level of mistrust of the judicial system. The reform is not negotiable.

Ms Karua admitted that **harmful traditional practises** such as female genital mutilation (FGM) and early marriage persist despite prohibitions against them. She stressed that the Ministry of Gender, Sports and Culture is implementing the *National Action Plan for FGM*. Moreover, since the report was submitted, corporal punishment has been abolished.

The Committee was shocked by the confirmation that the **age of responsibility** is eight years old, meaning eight-year-olds may be tried as adults. The delegation assured the Committee that this is currently under review.

Other issues discussed included domestic violence, trafficking, refugee camps, and violent ethnic land disputes.

### Conclusion and next steps

Ms Sveaass noted that the Government of Kenya has demonstrated political will to engage in proper reforms to improve the enjoyment of rights by Kenyans and to combat torture, and other cruel, inhuman or degrading treatment or punishment. She stressed the importance of informing the public of their rights, or else they will claim them. Ms Sveaass requested information on the timeframe the Government has given itself to domesticate the Convention. She, echoed by other members, reiterated the need for disaggregated statistics regarding complaints, arrests, and sanctions. The delegation closed by expressing its hope that the domestication process of the Convention will be concluded by its next appearance before the Committee.

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