



KENYA CIVIL SOCIETY ORGANISATION SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW 3RD CYCLE

**TORTURE, ENFORCED DISAPPEARANCES, EXTRA JUDICIAL
KILLINGS, ARBITRARY DETENTION, AND DEATH PENALTY
BY:**

INDEPENDENT MEDICO-LEGAL UNIT (IMLU)

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INTRODUCTION AND SUMMARY

1. The Independent Medico-Legal Unit (IMLU) is a governance, health and human rights nonprofit organization, whose vision is A World Free from Torture, Violence and discrimination. Our work is underpinned by a holistic approach involving litigation, medical and psychosocial rehabilitation of survivors of torture, monitoring government adherence to its human rights obligations and advocacy for policy, legal and institutional reforms.
2. This submission covers the period between 2015 and 2019 and addresses the status of torture, extra judicial killing, enforced disappearance and death penalty and its impact on the realization of the right not to be subjected to any of these human rights violations.
3. During the previous UPR cycle, the Government of Kenya was to take measures to prevent torture and extrajudicial killings and ensure accountability by perpetrators. These were reflected in recommendation 142.75; 142.88, 142.57; 142.99; 142.103;144.64;; 142.79; 142.82; 142.106 and 142.109. Specifically, the government was urged to enhance capacity of the military and police personnel on

human right principles, ensure greater accountability and transparency of police and security forces including investigating and prosecuting officers responsible for human rights violations; put in place legal reforms to ensure prevention of torture; and take measures to ensure that the penitentiary institutions are decongested by using alternative sentencing measures.

4. In 2016 IMLU commissioned a survey on the prevalence of torture in Kenya, 30.3% of the respondents indicated that they had undergone torture which is a rise from 23% in 2011 when the survey was last conducted. According to the survey, 63.9% of the victims reside in urban and peri-urban poor areas of the country with the main perpetrators being the regular police at 59.3 pc and the Administration Police at 18.5 %. The survey indicates that there is very low reporting on torture and ill treatment since majority say there was no action taken against the perpetrators.¹

THE NATIONAL REGULATORY FRAMEWORK

5. The Constitution of Kenya under Article 25 provides that the right to freedom from torture and cruel, inhuman or degrading treatment or punishment cannot be limited.
6. Article 26(1) of the Constitution of Kenya provides that: Every person has the right to life; Article 26(3) provides that: A person shall not be deprived of life intentionally, except to the extent authorized by this constitution or the written law.
7. Persons Deprived of Liberty Act 2014 establishes has strong provisions for securing the rights of persons deprived of liberty and monitoring compliance.
8. The Prevention of Torture Act 2017 provides for the prevention, prohibition and punishment of acts of torture and cruel, inhuman or degrading treatment or punishment, and reparations to victims of torture and cruel, inhuman or degrading treatment or punishment.
9. The National Coroner's Service Act 2017 provides for investigation of reportable deaths and the complementary role of forensic medical science services to the police.
10. Section 28 of the Police Act indicates clearly the instances a police officer is authorized to use his or her firearm.
11. Article 2 (6) of the Constitution of Kenya recognizes that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution". Kenya has ratified a number of human rights treaties including the Universal Declaration of Human Rights (UDR), United Nations Convention

¹ <http://www.imlu.org/index.php/shortcode/reports/typgraphy/send/3-reports/50-full-national-torture-prevalence-survey-2016>

on Torture (UNCAT), International Covenant on Civil and Political Rights (ICPR), African Charter on Human and Peoples' Rights (ACHPR), among others. All are legally binding on the State.

12. The Kenya Defence Forces Act 2012, National Police Service Act 2011, National Intelligence Service Act 2012, Children's Act 2012 contain provisions prohibiting torture and provides clear sanctions.

LACK OF IMPLEMENTATION & REVIEW OF EXISTING LEGISLATION FOR THE ADEQUATE PREVENTION AND RESPONSE ON TORTURE EXTRA JUDICIAL KILLINGS, DEATH PENALTY AND ARBITRARY DETENTION

13. In 2017 Kenya made a tremendous step in the enactment of the Prevention of Torture Act and the National Coroners Service Act which were to ensure that perpetrators of torture and extra judicial killings are held accountable.
14. However the two acts have not been fully implemented since their enactment. The lack of progress in implementing of the Acts increases the risk of human rights abuses and limits the preparedness of the state to handle such abuses in a fair and effective manner.
15. The state has not operationalized the National Coroner's Service Act 2017, with the National Coroner's Service not yet set up.
16. The Supreme Court led by Chief Justice David Maraga declared unconstitutional 'the mandatory nature of the death sentence as provided under section 204 of the Penal Code.' This ruling however, did not abolish the death penalty as stipulated in Article 26(3) of the Constitution nor did it mean it is the only sentence for the crime of murder². The Supreme Court of Kenya gave courts the discretion of sentencing similar cases on an individual basis. The death penalty still forms part of Kenya's punitive sentences.³
17. While the Kenyan Constitution and Persons Deprived of Liberty Act 2014 establish excellent bases for securing the rights of persons deprived of liberty and monitoring compliance, these rights are in practice still not enjoyed to much appreciable extent and compliance is not realized in practice.
18. The Persons Deprived of Liberty Act is still not being implemented fully, and lack of comprehensive data to the question of the extent of compliance with legal safeguards by security officials.
19. The key mechanisms and institutions established under the Persons Deprived of Liberty Act are still not being utilized. This is particularly the case in respect of the Consultative Committee on Persons Deprived of Liberty which although formally established has not been made operational to any appreciable extent, as well as the complaints and disciplinary procedure. KNCHR has not reported instances where this complaints procedure has been used.

² <https://www.statelaw.go.ke/wp-content/uploads/2018/03/Supreme-Court-Ruling-on-the-Death-Penalty-Murwatetu-case-14-Dec-2017.pdf>

³ <http://www.statelaw.go.ke/task-force-on-death-penalty-commences-assignment/>

RECOMMENDATIONS

20. Full implementation of the National Coroners Service Act 2017 and the Prevention of Torture Act 2017 and develop a monitoring and evaluation tool to assess the progress of implementation.
21. Parliament should amend all laws that currently permit the death penalty. These are Sections 204, 60, 40(3), 296(2) and 297(2) of the Penal Code, CAP 63 Laws of Kenya, the Criminal Procedure Code, CAP 75 Laws of Kenya, and other statutory provisions linked to the death penalty.
22. The state to invest in immediate capacity building for actors in the administration of justice sector, including security and law enforcement officials, Judicial officers, prison officials, prosecutors, among others.
23. The state should also carry out sensitization amongst the members of the public on an ongoing basis, to ensure that Kenyans understand the provisions of the Prevention of Torture Act 2017 and support its implementation.
24. The Persons Deprived of Liberty Act should be implemented fully, including through the *establishment and capacitation of the Consultative Committee on Persons Deprived of Liberty and the operationalization of the complaints and disciplinary procedure.*

LACK OF RATIFICATION OF INTERNATIONAL INSTRUMENTS THAT SPEAK TO THE RESPONSE AND PREVENTION OF TORTURE.

25. Kenya is yet to ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Ratification of the aforementioned protocol will lay the basis for establishment of a system of regular visits undertaken by independent international and national bodies to places in Kenya where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.
26. Kenya is also yet to ratify the International Convention for the Protection of All Persons from Enforced Disappearance and the Second Optional Protocol to the International Covenant on Civil and Political Rights.

RECOMMENDATIONS

27. Ratify of the Second Optional Protocol to the International Covenant on Civil and Political Rights.
28. Ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
29. Ratify the International Convention for the Protection of All Persons from Enforced Disappearance.

LACK OF ACCOUNTABILITY SECURITY AGENCIES IN INVESTIGATING AND PROSECUTION OF OFFICERS RESPONSIBLE FOR HUMAN RIGHTS VIOLATIONS.

30. Despite the comprehensive legislative framework, the rate of investigation of extrajudicial killings has been minimal hence entrenching a culture of impunity within the security agencies. Between 2015-2018 IPOA received 6632 complaints from the public, they investigated 3173, completed 610, forwarded 75 to the Office of the Director of Public Prosecution and have secured 3 convictions.⁴
31. During the reporting period IMLU documented 98 cases of extra judicial killings, 18 cases of enforced disappearances and 269 cases of torture with the highest perpetrators being the police officers.
32. Respect for human rights in Kenya remained precarious in the reporting period, with authorities failing to adequately investigate a range of abuses across the country and undermining basic rights to the right to life and not to be subjected to torture. In the reporting period IMLU has documented a total of 24 cases where there is clear evidence of torture but the state has been slow to complete investigations and press charges against the perpetrators.
33. We are also concerned that the absence of comprehensive data encourages the use of anecdotal evidence of violations. The lack of data collection by the State prevents external monitoring of the situation and is used by the state to argue that no violations are taking place.
34. We however take note that following investigations by the Independent Policing Oversight Authority, the Judiciary has sentenced several officers responsible for human rights violations, they include Titus Ngamau a.k.a. Katitu⁵, Constables Benjamin Kahindi Changawa, and Stanley Okoti,⁶ and Nahashon Mutua⁷. This shows some level of commitment by IPOA in safeguarding the rights of victims of police killings & torture including serving officers as was in the cases.

RECOMMENDATIONS

35. Ensure publication of outcomes of investigations to allow for public oversight and avoid impunity.
36. An official statutory database should be established and managed on behalf of relevant agencies, including the National Police Service (NPS), the Independent Police Oversight Authority (IPOA), the ODP, KNCHR, the National Crime Research Centre, and the Judiciary for synthesizing and administering investigation, prosecution and conviction data of persons including public officials

⁴ <http://www.ipoa.go.ke/wp-content/uploads/2018/05/IPOA-BOARD-END-TERM-REPORT-2012-2018-for-website.pdf>

⁵ <http://kenyalaw.org/caselaw/cases/view/149253/>

⁶ <http://kenyalaw.org/caselaw/cases/view/168360/>

⁷ <http://kenyalaw.org/caselaw/cases/view/169489/>

charged with serious crimes such as torture or ill-treatment.

LACK OF ADEQUATE REDRESS MECHANISMS FOR VICTIMS OF TORTURE, EXTRA JUDICIAL KILLINGS AND ENFORCED DISAPPEARANCE

37. The government is slow in complying with court orders requiring compensation of survivors of torture, EJE and Enforced Disappearance defeating the principle of access to justice⁸. IMLU has 9 cases where compensation amounting to approximately Kenya Shillings 19 million (USD 19,000.) was awarded to the victims as far back as 2011 but the government is yet to honor them.
38. The Presidential directive of 2015 established the Restorative Justice Fund. However, this has not been done to-date due to absence of a clear implementation regime. Only limited forms of assistance to victims, unaccompanied by any measure of accountability, truth seeking or acknowledgement that the recipients are victims of human rights violations, have been offered.
39. Court cases for victims of human rights violations tend to take up to 7 years or more in court. An estimated 45 per cent of the 327,928 backlog cases as at June 2018 had been before the courts for more than three years, with the Magistrate Court and High Court registering the highest overall backlog.⁹
40. The government is also not offering rehabilitative services including medical and physiological services to victims of torture, extra judicial killings and enforced disappearance and most victims are forced to either pay for private services or depend on civil society.
41. The government has failed to ensure adequate budget allocations for the payment of judgements entered against it for compensation and provision of rehabilitative services to the victims/survivors of human rights violations.
42. Despite the enactment of the Victim Protection Act (No 17 of 2014) and of the Victim Protection Trust Fund, the infrastructure to support the Victim Protection Trust Fund is not fully formed, and while the Fund's Board is in place, a secretariat has not been established and the Fund has also not been resourced.
43. The courts have however begun holding the individual perpetrators liable for their actions including payment of compensation. The High Court of Kenya in 2019 ordered six police officers to pay Sh4 million to a lawyer they had arrested and detained illegally. The officers were also ordered to pay KSh 3.8 million to 19 other people they had arrested and locked in a cell at the Ongata Rongai police station. Each of the 19 complainants was to get Sh200, 000.¹⁰

⁸ <https://www.nation.co.ke/business/Taxpayers-risk-Sh770bn-bill-for-suits-against-State/996-4607218-w60xc9/index.html>

⁹ <https://www.businessdailyafrica.com/datahub/Agony-as-half-of-lawsuits-in-Kenya-drag-on-past-three-years/3815418-5030218-ut4l8iz/index.html>

¹⁰ <https://icj-kenya.org/news/latest-news/229-cops-ordered-to-pay-sh7-8m-to-victims-of-arbitrary-arrest>

RECOMMENDATIONS

44. Appropriate budget allocation to ensure that the government can provide redress to victims of torture, extra judicial killings and enforced disappearance.
45. Prompt and effective disbursement of the compensation funds to the survivors of torture, extra judicial killings and enforced disappearance.
46. The speedy development of regulations under the Prevention of Torture Act 2017 using a consultative process, to ensure that the victims of torture and ill treatment can access rehabilitation services at no cost as the costs will be charged to the victim protection fund.
47. The government to come up with a clear guideline on how the Restorative Justice Fund will be accessed by victims in a timely and effective manner.

