



Kenya National Commission on Human Rights

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PRESENTATION TO THE COMMITTEE AGAINST TORTURE TO INFORM ITS REVIEW OF KENYA'S INITIAL COUNTRY REPORT ON THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING PUNISHMENT OR TREATMENT (CAT)

**PREPARED BY THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
(KNCHR)**

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Introduction

1. The Kenya National Commission on Human Rights (hereinafter 'KNCHR' or 'the Commission') is an independent National Human Rights Institution established by an Act of Parliament (Kenya National Commission on Human Rights Act 2002). The KNCHR is broadly mandated under section 16 of its constitutive statute to protect and promote human rights, through among other things, acting as the chief agent of the Government in ensuring compliance with the Government's obligations under international human rights treaties and conventions.
2. Kenya acceded to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (hereinafter 'CAT') on 21st February 1997 and submitted its first state report on 16th August 2007 to the Committee against Torture, following the drafting and validation of the same. As a National Human Rights Institution, the KNCHR participated in critiquing of the report on the basis that it was the duty of the state to write the report and that the Commission alongside other stakeholders could make comments on the veracity of the report without prejudicing their ability to provide information if and as necessary to the Committee Against Torture.
3. The KNCHR wishes to make the following comments on the Country Report that may assist the Committee when reviewing and preparing its concluding remarks on Kenya's Report.

Review of State Report

Part I

4. The KNCHR commends the Government for ratifying the core international and regional human rights instruments on protection against torture, including CAT itself. Most recently, the Government ratified the International Convention on the Rights of Persons with Disabilities, which also includes specific provisions protecting persons with disabilities from torture or cruel, inhuman or degrading treatment or punishment.
5. The KNCHR, however, decries the Government's slowness in the implementation of the provisions of CAT. The KNCHR also notes the reluctance by the Government to accede to or ratify the optional protocols to various conventions including the Optional Protocol on the Convention Against Torture, Cruel or Inhuman and Degrading Treatment or Punishment (OPCAT). In failing to ratify optional protocol such as OPCAT, the Government continues to restrict accountability mechanisms and limit access to detention centres by both local and international institutions.

6. The KNCHR also recognizes Kenya's dualist system which requires domestication of international instruments through acts of Parliament. While some aspects of CAT have been domesticated, for example, via amendments to Section 14 of the Police Act forbidding the Police from employing torture, the KNCHR notes that proper and effective domestication of CAT still needs to happen via amendment or repeal of legislation which undermines implementation of the Convention.
7. The Country Report states on page 7, that the Bill of Rights in the Constitution does not provide for economic, social and cultural rights and the KNCHR wishes to state further that as well as economic, social and cultural rights, the Constitution does not provide for group rights, nor does it cater for rights of vulnerable groups including disabled persons and other minorities.
8. The KNCHR reiterates the averments in paragraph 38 of the Country Report and notes the challenges in accessing credible information and statistical data, noting that as a result of the failure by the Government to collect and ensure storage of such data, the Country Report falls short of providing requisite data that would better illustrate certain information and give a better picture of the status of torture in Kenya, including among other issues:
 - a. The number of law enforcement officers who have been charged in courts for perpetrating crimes of torture;
 - b. The number of law enforcement officers who have been dismissed for perpetrating torture; and
 - c. The total number of cases where victims of torture have been compensated including the period of time between the decision of the case and the actual compensation.

Part II

Article 1

9. Despite being created by law and being empowered to monitor and investigate human rights abuses, the KNCHR has on many occasions been thwarted by Government agencies such as the Police Force from undertaking its monitoring and investigatory work. While the Government has made many statements about its commitment to protecting Kenyans against torture, these have in many instances not been backed by actions. While the KNCHR recognizes that its mandate to visit prisons has been used to good effect, the KNCHR notes the need for the government to open up places of detention to scrutiny by other institutions through among other ways, acceding to OPCAT. The KNCHR also appreciates the

need to harmonize the workings of the Police with those of the KNCHR to ensure that the two bodies work in harmony.

Article 2(1)

10. The KNCHR commends the government for opening up the Nyayo Torture Chambers to the public; however the KNCHR notes that this is not enough. The Government should institute cases against perpetrators of the crime of torture and provide redress to the victims of the Torture Chambers. This will curb the culture of impunity existent in Kenya which promotes instances of torture, particularly during arrest, search and seizure as well as when suspects are in remand in police stations and prisons. The KNCHR, therefore, recommends that the Government should ensure that all instances of torture are promptly and independently investigated in a thorough manner.
11. The KNCHR recognizes the existence of the Constitutional office of the Attorney General, mandated under section 26 of the Constitution to institute and undertake criminal proceedings as well as to task the Commissioner of Police to investigate alleged offences. There is need for the Attorney General to take up complaints on allegations of torture by victims of torture as well as by institutions mandated with the investigatory role, such as the KNCHR, or Non-Governmental Organizations that engage in investigations into incidences of torture including the Institute of Medical Legal Unit.
12. The KNCHR further notes that despite the Government's reluctance to ratify OPCAT, it has deployed two frameworks which allow for independent visitation to places of detention as stipulated by the Prisons Act as well as the constitutive act of the KNCHR. The provisions empower the District Commissioner, Resident Magistrate, Judges and all administrative officers to be Visiting Justices of prisons; as well, officials of the KNCHR visit prisons. Despite the existence of such frameworks, there are various shortcomings, including that:
 - a. The provisions have for a long time largely remained dormant. The prevalent culture in Government was to deny the existence of torture in prisons and the national psyche has been that prisoners have no rights. Further, many of the appointments of Visiting Justices were not backed with appropriate resources and capacities. As such many of the Justices have either no capacity to carry out the task or have not taken the exercise seriously.
 - b. There is no mandatory obligation on the Visiting Justices to visit prisons.
 - c. There are no provisions requiring Visiting Justices either to publicise or follow up on their recommendations.
 - d. There are also no obligations on the prisons authorities to comply with the recommendations.

Article 2(2)

13. The KNCHR notes that although section 83 of the Constitution provides that the prohibition of torture is one of the rights that are non-derogable even in times of war, there were numerous instances during the post-election violence when members of the public were subjected to torture by security personnel as well as in Mount Elgon, where torture was used by the Kenya Armed Forces to quell violence. Such instances highlight the Government's continued failure to prevent use of torture against members of the public.
14. Following its investigations into the post election violence, the Commission, in its report, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post Election Violence," reported widespread instances of use of excess force by members of the Kenya Police particularly in Nyanza province.
15. In another report highlighting instances of extrajudicial killings, titled 'Cry of Blood', the Commission highlighted instances of disappearances including from police custody and deaths of mainly young men suspected of belonging to a gang known as 'Mungiki'. According to post mortem reports, over 500 young men of Kikuyu origin are alleged to have died of gun shot and other wounds, with some having been shot in the back of their head.
16. In the Mount Elgon operations by the Kenyan Army and Police, there were complaints by some members of the public and human rights institutions of excessive use of force, indiscriminate burning of houses and food stores, rape of women and young girls and killings of innocent people. The Commission draws particular attention to its report titled 'Mountain of Terror' of May 2008. In that report the Commission noted that security forces deployed by the Government to Mount Elgon in the Rift Valley Province to combat the insecurity caused by the Sabaot Land Defence Forces (a militia) and recover illegal arms, used torture as a tool to obtain confessions from members of the Sabaot community concerning membership of the militia and illegal arms. Despite members of the public having suffered violations of human rights, and in particular, torture, during the military operations, in their rebuttal the Armed Forces were adamant that the use of force was coincidental to their duty during the operations.

Article 7

17. The KNCHR further notes that although section 72 of the Constitution provides that persons who are arrested for criminal offences shall be produced in court within a reasonable time, ranging from 24 hours to 14

days after arrest, the unavailability of Legal Aid particularly for persons charged with serious crimes, means that such persons do not have representation. Further, although the prisoners may be presented to court within the requisite time, they may be required to represent themselves thereby being denied of 'fair treatment'. In certain cases, some prisoners are kept in custody for more than the 14 days for capital offenders and 24 hours for other offenders, which amounts to cruel and inhuman treatment. It should be noted, however, that recent court decisions have been firmer to protect accused persons where they have been held for more than the constitutionally provided time.

Article 12

18. The KNCHR notes the need for reforms of the police force. Currently, police officers who are accused of perpetrating torture are investigated by fellow police officers. With the increase in incidences of torture particularly within the Police Force, the KNCHR calls on the Government to undertake reforms to create transparency and ensure victims seeking redress are guaranteed the requisite redress. In relation to the post-elections violence, for example, the KNCHR proposed that where the Police Force is accused of perpetrating violence against civilians, the Government should appoint a Special Investigator and Special Prosecutor to investigate and prosecute arising cases.

Article 14

19. The KNCHR notes that while limitations exist with regards to the amount of time which a complainant has to institute a legal suit for compensation, the same limitation does not exist as to the period for consideration of any case. Section 72 of the Constitution provides that, where a person is arrested or detained they should be tried within a reasonable time. Notably, the Constitution does not define reasonable time. The Country Report also notes that a victim of torture can obtain monetary compensation from the Government upon institution of a claim in a civil court. The KNCHR notes that while this is true, monetary compensation of victims is in various instances slowed because of the delays in conclusion of cases and in certain cases, victims have died prior to receipt of their compensation. Although the family may institute a legal suit to claim compensation on behalf of their deceased family member, the KNCHR notes the need for redress to be guaranteed upon the victim as a priority.

Article 16

20. The Country Report notes that children are not held in the same enclosures as adults. While this is true, the KNCHR has established isolated cases in various prisons including Industrial Area, Kamiti, Kericho and Bungoma prisons where children were held in the same enclosures as adults. In other institutions such as police stations the KNCHR has also encountered incidences where children have been detained with adults - more so 'hard core' criminals. The onus is on the Government to ensure that where children are with their parents in detention centres, they are not subjected to degrading treatment.

Conclusions and Recommendations

21. The KNCHR appreciates the efforts of the Government in the promotion and protection of its citizens against torture. The KNCHR recommends that the Government should domesticate CAT. Domestication will at least in part guarantee its implementation.
22. Kenya's Judiciary should be educated and encouraged to enforce constitutional provisions against torture innovatively even where substantive domestication is still being awaited. A tribunal of the KNCHR in 2006 made a specific ruling providing monetary redress for a journalist who proved his case to the effect that Kenyan Police had tortured him contrary to Section 73 of the Constitution (the Makori Case).
23. The KNCHR further notes the need to sensitize the public on the existence of the Convention and particularly its provisions. The KNCHR is playing a key role in educating law enforcement officers as well as prisoners on their rights by among other things putting information education and communication (IEC) materials in prisons. The Commission has for a number of years now been negotiating with the Police Force so that billboards setting out the rights of arrested persons may be erected within police stations. Such activities will help to curb practices of torture and the culture of impunity. Sensitization will also educate the public on the various aspects of torture including mental torture.
24. The KNCHR also notes the need to build capacities for specialized institutions to provide counselling services to victims of torture including victims of the Nyayo Torture Chambers.
25. The KNCHR notes that under Kenyan law, the offences of murder, treason and robbery with violence carry a mandatory death sentence. Kenya has not executed any convict since 1987, and therefore while Kenya has not *de jure* abolished capital punishment, practice *de facto* testifies to the

presence of an unofficial moratorium on enforcement of the death sentence. The non-enforcement of the death penalty leaves persons on death row with great anxiety on account of the reality of death hanging on them from the moment of sentencing, and this amounts to cruel, inhuman and degrading treatment.

26. The KNCHR notes that a couple of new innovations have been established legislatively or administratively by the Government with the aim of preventing or investigating torture. These include passage of the Witness Protection Act of 2006 and the administrative establishment in September 2008 of the Police Oversight Board with mandates to investigate police abuses (including torture). Unfortunately, this Board does not have a statutory basis, and its ability to operate independently will thereby be greatly undermined.
27. Finally, the KNCHR notes that combating terrorism has also resulted in accusations that agencies of the state or even agents of foreign states have participated in acts against Kenyan citizens or residents which may amount to torture. Claims involving the rendition of Kenyans to Ethiopia and even Guantanamo Bay have been recorded; and the Kenyan state has not given satisfactory explanations on these cases. Again, however, the courts have on occasion passed firm judgement where violations of the Constitution have happened with regard to persons charged with terrorism related offenses.

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